IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re: J.C. PENNEY DIRECT MARKETING SERVICES, LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 20-20184 (CML) (Jointly Administered) (Formerly Jointly Administered under J.C. Penney Company, Inc., 20-20182)

WIND-DOWN DEBTORS' OBJECTION TO ERIC L. MOORE'S MOTION TO ENFORCE THE SALE ORDER, SETTLEMENT AGREEMENT, ASSET PURCHASE AGREEMENT, AND MOTION FOR TURNOVER AND DISTRIBUTION OF FUNDS AND/OR PROPERTY EXCEEDING THE $1 BILLION CREDIT BID AMOUNT; AND EQUITABLE SUBORDINATION OF THE DIP HOLDERS' 1ST AND 2ND LIEN DEBT AND UNSECURED NOTES
[Re: Docket No. 1533]

The above-captioned debtors (collectively, the "Debtors" or the "Wind-Down Debtors," as applicable) file this objection (the "Objection") to *Eric L. Moore's Motion to Enforce the Sale Order, Settlement Agreement, Asset Purchase Agreement, and Motion for Turnover and Distribution of Funds and/or Property Exceeding the $1 Billion Credit Bid Amount; and Equitable Subordination of the DIP Holders' 1st and 2nd Lien Debt and Secured Notes* [Docket No. 1533] (the "Motion"), and respectfully state as follows:

Preliminary Statement

1. Movant's requested relief is wholly inappropriate and impossible. He seeks turnover of property that is not in the Wind-Down Debtors' possession, and, despite his insistence that he is seeking to "enforce" the Sale Order[2] and Confirmation Order, he is actually seeking untimely reconsideration and/or vacation of those orders in clear breach of the Settlement

[1] A complete list of each of the Wind-Down Debtors in these chapter 11 cases may be obtained on the website of the Wind-Down Debtors' claims and noticing agent at http://cases.ra.kroll.com/JCPenney.

[2] Capitalized terms used in the Preliminary Statement have the meanings provided in the remainder of the Objection.

Agreement. Movant was not a party in interest at the time the Sale was approved or the Plan was confirmed and therefore lacks standing to challenge the Sale and Confirmation Orders. Further, the Sale and Confirmation Orders became final long ago. Nevertheless, the Wind-Down Debtors file this Objection to provide the Court with additional documents and details further establishing that even if Movant had standing to proceed, the requested relied should be denied because (1) the Movant is estopped from challenging the Sale by the terms of the Settlement Agreement executed by Movant's predecessor-in-interest, which fully and finally resolved the issues identified in the Movant's pleadings, as well as the binding terms of the Plan and Confirmation Order; (2) the Court previously overruled similar (though timely) objections to the Sale and Plan raised by the Equity Committee; and (3) Movant misinterprets the terms of the Sale Order and Plan documents as well as the consideration for the Sale and sources and uses of the Sale proceeds. The Court should deny the Motion.

Objection

A. Movant Lacks Standing to Raise the Issues in his Motion.

1. As set forth in more detail below, Movant's allegations in his Motion are neither accurate nor timely, but even if they were, the Movant lacks standing to raise them because he was not a party in interest at the time of the Sale[3] or at the time of Plan[4] confirmation.[5] Movant

[3] "Sale" means the sale of substantially all of the Debtors' assets pursuant the combined Asset Purchase Agreement (the "Asset Purchase Agreement" or "APA") with Copper Retail JV LLC (the "OpCo Purchaser", a Simon/Brookfield special purpose entity) and Copper Bidco LLC (the "PropCo Purchaser" and together with the OpCo Purchaser, the "Purchasers") for the sale of substantially all of the Debtors' assets, which was approved by the Court on November 9, 2020 pursuant to the *Order (I) Authorizing (A) Entry Into and Performance Under the Asset Purchase Agreement and (B) the Sale of the OpCo Acquired Assets and the PropCo Acquired Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, and (C) Assumption and Assignment of Executory Contracts and Unexpired Leases and (II) Granting Related Relief* [Docket No. 1814] (the "Sale Order").

[4] "Plan" means the confirmed *Amended Joint Chapter 11 Plan of Reorganization of J.C. Penney Company, Inc. and Its Debtor Affiliates* [Case No. 20- 20182, Docket No. 2162].

[5] *See, e.g.*, *Cajun Elec. Power Coop. v. Central La. Elec. Co. (In re Cajun Elec. Power Coop.)*, 69 F.3d 746, 749 (5th Cir. 1995) (explaining a party must show it was directly and adversely affected pecuniarily by a bankruptcy court order to have standing to appeal it); *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 207 (5th Cir.

purchased his interest in the first lien debt *after* the Sale Order was entered, *after* confirmation of the Plan and, *after* the Minority Group received initial and interim distributions on their allowed claims. The Sale Order and Confirmation Order[6] were public and final at the time Movant decided to purchase his interest, and he is therefore charged with the knowledge therein.

B. The Settlement Agreement Binds Movant.

2. To understand the frivolous nature of Movant's arguments, it is important to delve into events that led up to the Court's approval of the Sale and Plan. Movant acquired his interest in the first lien debt from Cetus Capital ("Cetus") in 2023, well after the Sale Order and Confirmation Order were entered and became final and non-appealable. *See* **Exhibit A** p. 4–5 (reflecting Movant's purchase of first lien notes from Cetus). Cetus was a member of the minority group of first lien lenders represented in these Chapter 11 Cases by Akin Grump Strauss Hauer & Feld LLP (the "Minority Group").[7]

3. The Minority Group was no stranger to the Sale approval process. In fact, they were initially extremely displeased with the Debtors' proposed Sale and filed an objection to the Sale (the "Minority Group Objection")[8] in which they (i) advocated for a more "bifurcated" sale of OpCo and PropCo, (proposing that only the sale of the OpCo should proceed in November 2020 with further pursuit of a later "value maximizing" PropCo transaction to be considered at

1994) (holding debtor lacked standing to appeal priority order where it was not a claimant to the funds and was only indirectly affected by the order).

[6] "Confirmation Order" means the final *Amended Order Approving the Disclosure Statement For, and Confirming, the Amended Joint Chapter 11 Plan of Reorganization of J.C. Penney Company, Inc. and Its Debtor Affiliates* [Case No. 20-20182, Docket No. 2190].

[7] *See Notices of Appearance of John F. Higgins* [Docket No. 76 & 356], *Motion to Appear by Dennis F. Dunne and Andrew M. Leblanc* [Docket Nos. 79& 80], *Orders granting same* [Docket Nos. 84 & 85].

[8] The "Minority Group Objection" means the *Statement of the First Lien Minority Group Regarding the Debtors' Sale Motion and Limited Objection to Approval of the Disclosure Statement* [Docket No. 1621].

confirmation);[9] and (ii) alleged the Sale proposed by the Debtors was a bad faith transaction resulting in a windfall recovery for the DIP Lenders.[10] The Minority Group also submitted (and publicized) a competing offer in the amount of $750 million for the PropCo portion of the Debtors' assets.[11] At the October 26, 2020 status conference on the Minority Group Objection, the Minority Group alleged that the Debtors and DIP Lenders "insulate[d]" the "transaction from competition and scrutiny to allow the DIP lender group to steal value" with an "artificially low $1 billion bid."[12]

4. Despite their initial disagreements regarding the proposed Sale, the Debtors, DIP Lenders, and Minority Group ultimately engaged in successful mediation before Judge Isgur and reached a global settlement of issues regarding the Sale. As a result of this successful mediation, the Minority Group **withdrew its competing bid, withdrew the Minority Group Objection, filed a statement in support of the Sale,[13] and entered into a comprehensive Settlement Agreement[14] with the Debtors and DIP Lenders**. The Settlement Agreement included a payment of $46 million from the DIP Lenders to the Minority Group – $40 million in cash in settlement and resolution of all disputes and $6 million toward the Minority Group's professional fees.[15] The

[9] *See* Minority Group Objection ¶¶ 7–10 (arguing the integrated transaction of PropCo and OpCo together was designed as a "poison pill" to prevent any other party from bidding on the PropCo assets and if the sales were bifurcated the Debtors could close on the OpCo sale and use the proceeds to pay down the DIP to prevent the DIP Lenders' use of the credit bid as a "sword").

[10] *See id.* ¶¶ 1, 6–7. "DIP Lenders" refers to that ad hoc group of lenders under the Debtors' debtor-in-possession financing facility (the "DIP Facility") and First Lien Creditors represented by Milbank LLP. The DIP Lenders held approximately 94% of the outstanding amount of DIP Loans and approximately 75% of the existing First Lien Debt. *See Verified Statement of Ad Hoc Group of First Lienholders Pursuant to Bankruptcy Rule 2019* [Docket No. 1293].

of Ad Hoc Group of First Lienholders Pursuant to Bankruptcy Rule 2019 [Docket No. 1293].

[11] *See id.* at ¶ 3. The Minority Group's offer for the PropCo assets was no secret and was referenced in public filings and during multiple hearings. *See also* Oct. 26 Hr'g. Tr. 28:23–17; Nov. 9 Hr'g Tr. 177:14–179:20 & 258:22–260:2.

[12] Oct. 26, 2020 Hr'g. Tr. 24:6–11; 25:1–5.

[13] *See Statement of the First Lien Minority Group in Support of the Debtors' Sale Motion* [Docket No. 1775].

[14] "Settlement Agreement" means the Settlement Agreement dated as of November 5, 2020, executed by the Ad Hoc Group of First Lienholders on behalf of itself and each of its members, by and through its counsel Milbank LLP, the Minority Group, and the Debtors, approved by the Court as Exhibit B to the Sale Order.

[15] Settlement Agreement at ¶¶ 4–7.

Settlement Agreement was approved at the Sale hearing and is attached to the Sale Order as Exhibit B, which is attached hereto as **Exhibit B**.

5. Upon the resolution of the Minority Group Objection as set forth in the Settlement Agreement, the Minority Group supported the Sale, and counsel for the Minority Group explained to the Court that the parties had reached a "fair settlement."[16] The Settlement Agreement provided that the Minority Group withdraw "any allegations or implications of misconduct by the members of the DIP Lender Group made in connection with the two Emergency Motions filed…and any statements made on the record of the October 26, 2020 hearing." Settlement Agreement ¶ 4. Further, the Minority Group expressed support for the Sale, APA, Credit Bid, and Sale Order and agreed "**to raise no objection to, not delay or impede, and not support or encourage any party in objecting**." *Id.* ¶ 8 (emphasis added).

6. Finally, the Minority Group provided a broad release to the Debtors and DIP Lenders, including a release of all claims of the Minority Group *and its successors and assigns*. *Id.* ¶ 9 (emphasis added). The only exception to this broad release was the Minority Group's right to receive the consideration set forth in the Settlement Agreement, which included the $40 million Supplemental Distribution[17] and ratable distributions from the Sale. *Id.* The Settlement Agreement expressly provides the Minority Group's ratable distributions were to be "calculated and distributed on the basis of a $1 billion Credit Bid and the Current Credit Bid Allocation." *Id.* ¶ 6.

7. The Settlement Agreement is expressly binding on all successors and assigns to the parties thereto. As an assignee of Cetus, a party to the Settlement Agreement,[18] Movant is

[16] *See* Sale Hr'g. Tr. at 13:24-14:1-8 (Debtors' counsel explaining Minority Group's support for the Sale) and 33:4–10.

[17] As defined in the Settlement Agreement.

[18] Movant acknowledges that he is a party to the Settlement Agreement. Movant was not a part of the Minority Group until after the Court approved the Sale and entered the Sale Order and Confirmation Order; however, the Wind-Down Debtors agree with Movant that the Settlement Agreement is binding on him – not as an original party – but as an assignee of Cetus.

contractually barred, precluded,[19] and estopped[20] from raising the arguments contained in his Motion and Answer. In fact, Movant's filing of the Motion and Answer breach the terms of the Settlement Agreement, including the broad releases contained therein.[21]

C. Movant's Requested Relief is Barred and Moot.

8. Even if the Settlement Agreement did not completely preclude Movant from prosecuting his requested relief, he is still barred from raising his objections to the Sale and Plan. All objections to the Sale were due prior to the Sale hearing on November 9, 2020 and were either resolved by the parties or overruled by the Court. The Plan confirmation objection deadline was November 21, 2020, at 12:00 pm prevailing Central Time.[22] The Sale Order and Confirmation Order were entered and became final and non-appealable over three years ago, and the deadline

[19] *See, e.g.*, *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989) (holding that a party can use issue preclusion against a plaintiff who was not a party to the first suit so long as the plaintiff was in privity with that party).

[20] The Court can determine that either equitable or judicial estoppel applies here, or both. *See In re World Health Jets LLC*, 610 B.R. 118, 151 (Bankr. S.D. Miss. 2019). A court has discretion to apply judicial estoppel when (1) the party has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently. Whereas judicial estoppel is "intended to protect the judicial system[ ] rather than the litigants," equitable estoppel focuses on the relationship between the parties and applies where one of the parties has relied detrimentally upon the position taken by the other party. *Id.* (citing *In re Coastal Plains, Inc*., 179 F.3d 197, 205 (5th Cir. 1999); *Texaco Inc. v. Duhe*, 274 F.3d 911, 923 n.16 (5th Cir. 2001)). Movant is taking legal positions inconsistent with the Minority Group that the Court accepted at the Sale hearing and approved in the Settlement Agreement. Cetus as Movant's predecessor did not act inadvertently, and neither is Movant. Moreover, the Debtors and DIP Lenders relied on the Minority Group's positions at the Sale hearing and the terms of the Settlement Agreement in issuing the bargained for distributions to the Minority Group. *See id.* at 151–52 (explaining that, like issue preclusion, the first element of judicial estoppel can be met when a party is not a party to the first suit but was in privity with that party).

[21] The Wind-Down Debtors reserve all rights to pursue claims against and seek damages from Movant in connection with his violations of the binding terms of the Settlement Agreement, the Sale Order, the Confirmation Order, and applicable law.

[22] *See Order (I) Scheduling a Combined Disclosure Statement Approval and Plan Confirmation Hearing, (II) Conditionally Approving the Disclosure Statement, (III) Establishing Plan and Disclosure Statement Objection and Related Procedures, (IV) Approving the Solicitation Procedures, and (V) Approving the Confirmation Hearing Notice* [Docket No. 1655]. All objections to confirmation were filed by November 24, 2020 and summarized by the Debtors at Docket No. 2026.

for requests to revoke confirmation or appeal the orders has long passed. Movant's arguments are clearly barred by *res judicata*.[23]

9. Any motion seeking reconsideration of the Sale Order would be governed by Bankruptcy Rule 9024 (applying Federal Rule of Civil Procedure 60), and Movant has not timely pled or established any of the requirements for such relief. Movant has also not pled or established any of the requirements to revoke the Confirmation Order pursuant to 11 U.S.C. § 1144, and even if he had such a request would be untimely by years. *See In re Apex Long Term Acute Care – Katy, K.P.*, 599 B.R. 314, 320–22 (Bankr. S.D. Tex. 2019) (holding claimants' relief challenging the substance of the confirmation order was barred under section 1144).

10. Movant is a Releasing Party[24] under the Plan, which means that, as of the Effective Date,[25] any Cause of Action[26] he may have been legally entitled to assert against the Released Parties was irrevocably released, discharged, and waived.[27] Movant argues that he is not attempting to unwind the Sale Order, Confirmation Order, or Settlement Agreement, yet the relief he seeks—turnover of property not in the possession of the Wind-Down Debtors, redistribution of that property, and "equitable subordination" of the DIP Lenders claims—would (i) completely undo the Sale and related transactions that form the basis of the Plan and (ii) contradict the clear

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[23] *See In re Howe*, 913 F.2d 1138, 1143 (5th Cir. 1990) (stating that it is "well settled that a plan is binding upon all parties once it is confirmed and that all questions that could have been raised pertaining to such plan are *res judicata*"); *Miller v. Meinhard-Com. Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (holding that "any attempt by the parties **or those in privity with them to relitigate any of the matters that were raised** or could have been raised therein is barred…")(emphasis added).

[24] The Plan defines "Releasing Party" as, *inter alia*, "(u) the Minority First Lien Group and its members; (v) with respect to each of the foregoing parties in clauses (a) through (u), each of such party's…successors, assigns…" Art.I.A.

[25] "Effective Date" means the date the Plan went effective, January 30, 2021. *See Notice of (I) Propco Closing and (II) Occurrence of Effective Date* [Case No. 20-20182, Docket No. 2508].

[26] The Plan defines "Cause of Action" as, *inter alia*, "any Claims, interests, damages, remedies, causes of action, demands, rights, actions, suits…existing or hereinafter arising…" Art.I.A.

[27] Plan, Art.X.D.

language of the Sale Order, Plan, and Confirmation Order.[28] Such relief is impossible to grant and is moot.

11. While equitable mootness[29] is normally considered in the context of appellate review of a chapter 11 plan, it may also "appl[y] to a bankruptcy court's consideration of a motion to revoke a plan confirmation order."[30] Here, there is no question that the equitable mootness requirements are met. Movant did not obtain a stay of the Confirmation Order in order to seek appellate review of the Plan, and the Plan has been substantially consummated.[31] The Wind-Down Debtors are attempting to wrap up the few remaining issues precluding them from closing these Chapter 11 Cases, and both the success of the Plan and the rights of other parties not before the Court would be adversely affected by granting the untimely and unsupported relief that Movant seeks.

D. Timely Objections to the Sale and Plan Raising the Same Issues as Movant Were Already Litigated and Overruled.

12. In addition to the undeniable finality of the Sale Order and Confirmation Order, the issues raised by Movant were already raised in the sale and confirmation objections filed and prosecuted by the Ad Hoc Equity Committee in these Chapter 11 Cases (the "Equity Committee

[28] *See In re Apex Long Term Acute Care – Katy, K.P.*, 599 B.R. at 320. "Creditors cannot attack confirmation orders by simply characterizing the attempt as an independent cause of action rather than a motion to revoke the order," and "[a] claim is not independent where it is simply **an attempt to redivide the pie** by a disgruntled participant." *Id.* (internal citations and quotations omitted) (emphasis added).

[29] The Fifth Circuit considers three factors in determining whether a bankruptcy appeal is equitably moot—(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan. *Nancy Sue Davis Tr. v. Davis Petroleum Corp.*, 402 B.R. 203, 207 (S.D. Tex. 2009) (internal citations omitted).

[30] *In re Renaissance Radio, Inc.*, No. 03-33479-BJH, 2019 WL 1503787, at *8 (Bankr. N.D. Tex. Apr. 4, 2019).

[31] While the Motion is not a true or timely "appeal" of the Sale Order, the Movant is essentially appealing the Sale, or, at the very least, challenging disbursements made as a result of the Sale. Thus, to the extent this Court can apply the concept of statutory mootness, Movant's issues raised in his Motion are statutorily moot. The Sale was not stayed pending appeal, and the Court determined the Sale was to a good faith purchaser. *See Matter of Sneed Shipbuilding, Inc.*, 916 F.3d 405, 409–10 (5th Cir. 2019).

Objections")[32] that were overruled at the Sale and confirmation hearings. The Equity Committee objected to the Sale on the basis that, *inter alia*, the transaction would confer significantly more value upon the DIP Lenders than the amount of their credit bid.

i. The Equity Committee Sale Objection

13. The Equity Committee Sale Objection, similar to Movant's Motion and prior pleadings, alleged there was an "absurd disparity between the value of the assets to be sold and the value of the credit bid" that would "leave any reviewing court questioning" the Debtors' business judgment as to whether the Sale, as compared to all available alternatives, was in the best interests of the estates and creditors.[33] The Equity Committee, like Movant, further alleged that the Sale did not meet the requirements of Section 363(m) of the Bankruptcy Code based on a lack of good faith and purported collusion amongst the Debtors and DIP Lenders.[34]

14. The consideration for the Sale set forth in Section 2.1 of the APA is comprised of the following elements (collectively, the "Purchase Price"):

- $900MM Credit Bid, plus
- $692MM in cash, plus
- The ABL Payoff Amount (Approx $1.3B), plus
- The OpCo Assumed Liabilities and PropCo Assumed Liabilities

[32] *See Ad Hoc Equity Committee's Objection to the Debtor's Emergency Motion for Entry of an Order (I) Authorizing (A) Entry into and Performance Under the Asset Purchase Agreement, (B) the Sale of the OpCo Acquired Assets and the PropCo Acquired Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, and (C) Assumption and Assignment of Executory Contracts and Unexpired Leases and (II) Granting Related Relief* [Docket No. 1715] (the "Equity Committee Sale Objection") and *Ad Hoc Equity Committee's Objection to Confirmation of Amended Joint Chapter 11 Plan of Reorganization of J. C. Penney Company, Inc. and Its Debtor Affiliates* [Docket No. 1980] (the "Equity Committee Confirmation Objection").

[33] *Compare* Equity Committee Sale Objection ¶¶ 1, 15 (asserting the Sale provided the DIP Lenders far more than the value of their claims); *with* Motion ¶¶ 4–5, 11 & 36 (asserting DIP Lenders received $.5 billion against their $900 million debt as a gift to themselves) & Docket No. 1436 (the "Moore Answer") ¶¶ 1, 41–43 (alleging the DIP Lenders received billions more than their claims were worth).

[34] Equity Committee Sale Objection ¶¶ 1, 3, 4–5, 90–92 (asserting the DIP Lenders controlled the process and the Sale failed to meet the requirements of § 363(m); Moore Answer ¶¶ 1, 17–26, 44-54 (alleging the Debtors and DIP Lenders colluded and mislead the Court and parties in interest); Motion ¶¶ 11, 14 & 36 (asserting the Debtors and DIP Lenders concealed distributions, mislead creditors, and violated the Court's prior orders).

In total, the Purchase Price amounts to at least $2.89B in credit bid plus cash purchase price consideration.

15. At the Sale hearing on November 9, 2020, the Equity Committee questioned the Debtors' investment banker, David Kurtz of Lazard Frères and Co. LLC ("Lazard"), on the marketing process, valuation, and Purchase Price.

16. The Debtors' evidence made clear that there was no superior offer for the Debtors' assets.

> Q: Was it your view that the bid that ultimately won and is before the Court today, that this sale transaction was the highest and best bid available to the company?
>
> A: And that was my – that is my thinking, yes.
>
> Q: And why is that your thinking? What led to that?
>
> A: We ran a five-month marketing process. We presented the company to over 100 potential acquirers, and this was the highest and best value that arose from that.
>
> Q: Do you believe that it's in the company's best interest to go forward with the sale transaction today?
>
> A: I do.
>
> Q: Why do you think so?
>
> A: For a number of reasons. I believe it's in the best interest of our associates, of our vendors, of our landlords and our creditors to move forward with the process today. Because I believe it maximizes the most value and it also capitalizes on the opportunity to be out in front of the holiday season.

Nov. 9, 2020 Hr'g Tr. 257:1–16.[35]

[35] The November 9, 2020 Sale Hearing Transcript is attached hereto as **Exhibit C**.

17. The evidence reflected that the Debtors did not prepare a valuation of their assets at the time of the Sale. Rather, the Debtors, with Lazard's assistance, subjected their assets to a market-based test by conducting a thorough and very public sales and marketing process. At the end of that process, the DIP Lenders' $1 billion bid plus the additional Purchase Price consideration was the highest and best offer for the Debtors' assets.

> Q: So when you advised the board to accept this deal in their business judgment, you didn't even have the ability to tell them what the deal was worth.
>
> A: Well, we told them that nobody had bid more than the first lien, that these were the only bidders. And we told them that we, Lazard, because we're not real estate appraisers, had not done an analysis of the value of the real estate in the hands of the institutions that will control the PropCo. They understood.
>
> Q: Right.
>
> A: They were not looking to Lazard to do that, because that is not within our area of expertise.
>
> Q: And are you aware of anybody having put a dollar value on this overall sale?
>
> A: I am not.

Id. at 206:12–207:1.

18. The witness for the Equity Committee, William Snyder of CR3 Partners, also testified that the DIP Lenders' and OpCo Purchaser's offer was the market price for the Debtors' assets, and that the proceeds of the Sale were insufficient to pay off the first-lien debt.

> Q: But nevertheless, you agree that the bid actually made by Simon and Brookfield and the majority lenders is a market price today, right?
>
> A (Mr. Snyder): For today. Yes.
>
> Q: And the market price for J.C. Penney today is significantly below [sic] the first-lien debt, right?

> A: Correct.

Id. at 326:10–16.

19. The only alternative to the Sale presented by the Equity Committee was its request that the Court vacate the DIP Order,[36] particularly with respect to the rollup,[37] so the Debtors could abandon the proposed Sale and attempt to confirm a likely contested plan of reorganization. *See id.* at 180–84 & 257–58.[38] The evidence at the Sale hearing reflected that none of the major constituents, including the ABL Lenders and Minority Group, supported this proposal. Rather, had the Debtors refused to accept the DIP Lenders' offer and consummate the Sale transaction, liquidation would result.

> Q: Your opinion, Mr. Kurtz, what would happen to the company if they did not sell to Simon, Brookfield, and the lenders under the terms of the current (indiscernible)?
>
> A: I believe the overwhelming probability is that the company would liquidate.

Id. at 184:9–13; *see also Id.* at 97:18–23 (testimony of Mr. James Mesterharm of AlixPartners explaining the "high likelihood" of liquidation if the Debtors abandoned the proposed Sale under the ABL and pursued the Equity Committee's option of unwinding the rollup and seeking to reorganize).

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[36] "DIP Order" means the Court's *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to the Prepetition Secured Parties, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 566].

[37] *See Emergency Motion to Vacate Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to the Prepetition Secured Parties, (III) Modifying the Automatic Stay and (IV) Granting Related Relief Filed by Stockholder Ad Hoc Committee of Equity Interest Holders* [Docket No. 1573].

[38] *See also Declaration of William K. Snyder in Support of the Ad Hoc Equity Committee's Objection to Debtors' Emergency Motion for Entry of an Order (I) Authorizing (A) Entry Into and Performance Under the Asset Purchase Agreement, (B) the Sale of the OpCo Acquired Assets and the PropCo Acquired Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, and (C) Assumption and Assignment of Executory Contracts and Unexpired Leases and (II) Granting Related Relief* [Docket No. 1692].

20. At the end of the multi-hour Sale hearing, the Court approved the Sale and overruled the Equity Committee's Sale Objection and request to vacate the DIP Order. *Id.* at 391:1–397:10. While the Court expressed a great deal of respect for the Equity Committee's professionals, the Court recognized the shortcomings in the Equity Committee's calculations and refused to "gambl[e] with 60,000 jobs" instead of approving a heavily negotiated transaction "that involves people who are adequately capitalized and who have all the proper incentives to make this work." *Id.* at 395:7–22. As reflected in the Sale Order, the Court concluded the requirements of Section 363 of the Bankruptcy Code were met, including Sections 363(f), (k), and (m). Sale Order ¶¶ L, M, V, & 36.

21. Certain members of the Equity Committee appealed the Court's decision to the District Court for the Southern District of Texas, Corpus Christi Division, which Judge Ramos dismissed on January 13, 2021 based on mootness and lack of standing.[39] One shareholder then appealed Judge Ramos' dismissal to the United States Court of Appeals for the Fifth Circuit, which the Fifth Circuit dismissed on February 17, 2021.[40] There were no further timely appeals. Thus, the Sale Order is final and non-appealable.

ii. The Equity Committee Confirmation Objection

22. This case did not involve a structured dismissal or a settlement agreement that upset the Code-mandated priority scheme, making the cases repeatedly cited by Movant to support his argument that the absolutely priority rule was violated completely inapplicable.[41] Rather, the

[39] *See* Order dismissing appeal, Civil Action No. 2:20-CV-280 [District Court Docket No. 63], attached hereto as **Exhibit D.**

[40] *See Li Li v. J.C. Penney Co., Inc. (In re J.C. Penney Co., Inc.)*, No. 21-40046, *Order granting opposed motion of appellee to dismiss for lack of jurisdiction* [Fifth Circuit Document No. 00515775024], attached hereto as **Exhibit E.**

[41] *See, e.g.*, Motion at ¶¶ 18–19, 22, 71–72 (citing *Cyzewski v. Jevic*, 580 U.S. 451 (2017) ("*Jevic*"); *In re AWECO*, 725 F.2d 293 (5th Cir. 1984) ("*AWECO*"). Jevic involved a settlement agreement that required a structured dismissal of the applicable Chapter 11 case that did not comply with the absolute priority rule. AWECO involved a settlement agreement with an unsecured creditor that provided for a significant distribution to the creditor ahead of the

components of the Sale were implemented into the Debtors' Plan, which the Equity Committee also objected to.

23. The Equity Committee Confirmation Objection included (among other arguments) a *timely* argument that the Plan failed to satisfy the absolute priority rule and an objection to the Plan release provisions.[42] Based upon the Court's independent analysis of the Plan and the evidence before it, the Court confirmed the Plan.[43] The Court specifically found that all of the applicable requirements under § 1129 of the Bankruptcy Code were met, including § 1129(b).[44] This finding was correct because the Plan does not contemplate, and there have not been, any distributions to creditors in classes junior to Class 4 (the class in which Movant asserts an interest). *See Claims Administration Status Final Report and Notice of No Distribution to Holders of General Unsecured Claims* [Docket No. 1245] (the "Status Report") [Docket No. 1245]. Therefore, in addition to Movant's Plan challenges being untimely by a matter of years, Movant's repeated citations to *Jevic* and his arguments related to any violations of the absolute priority rule are inapposite and without merit.

E. Movant Misconstrues the Sale Process, Including the Consideration and Cash Available for Distributions.

24. Even if (i) Movant's challenges to the Sale and/or Plan were valid and timely, (ii) if he somehow had standing and was not barred by the binding Settlement Agreement and Plan terms,

---

government's priority claim. Movant's citation to the authorities applying the absolute priority rule belies his statement that he is not collaterally attacking the Plan.

[42] *Amended Order Approving the Disclosure Statement For, and Confirming, the Amended Joint Chapter 11 Plan of Reorganization of J.C. Penney Company, Inc. and Its Debtor Affiliates* [Docket No. 2190, Case No. 20-20182] (the "Confirmation Order"). The Confirmation Order has been final and non-appealable for over three years. Even if an objection to the Plan terms was not time barred, the Wind-Down Debtors submit that there is no basis for, and the Movant has not asserted, a challenge pursuant to Section 1144 of the Bankruptcy Code; *See also* Equity Committee Confirmation Objection.

[43] Nov. 24, 2020 Hrg. Tr. 33:17–34:8. The confirmation hearing transcript is attached hereto as **Exhibit F.**

[44] *Id.* at 34:4–8.

and (iii) if the Court had not already approved the Sale and confirmed the Plan years ago, Movant's allegations in his Motion are still highly inaccurate.

25. As Mr. Kurtz with Lazard testified at the Sale hearing, there was no formal valuation of the PropCo assets. Nov. 9, 2020 Hr'g Tr. 206:12-207:1. The Debtors conducted a full and comprehensive marketing process for all assets, and the highest and best offer was the Purchase Price for both the PropCo and OpCo assets by the DIP Lenders and OpCo Purchaser with a master lease to OpCo to continue using the real estate for essential operations. *Id.* at 160:3-174:22.

26. Mr. Kurtz further testified there was no collusion, as the Debtors retained their option to pursue an alternative transaction if a higher or otherwise better transaction became available during the marketing process.[45] The OpCo/PropCo combined Sale "was not something that the company was wedded to" and the PropCo assets were marketed, including to 25 institutions that "specifically were candidates for the PropCo." *Id.* 161:2–162:12. Aside from the Minority Group's withdrawn PropCo bid, "there were only three bids submitted. All three were for the opco." *Id.* at 161:15–16. Of those bids, the Purchase Price offered by the DIP Lenders' and OpCo Purchaser was the highest and best offer.

27. Mr. Kurtz further testified that the Sale for the Purchase Price would result in (i) a payoff of the Debtors' ABL (of approximately $1.3B), (ii) new FILO exit financing, and (iii) a $692 million target cash amount, which was the only amount to be left in the estate after the payoff of the ABL and expenses:

> Q: So they're not credit bidding $1 billion?
>
> A: Oh, if that was your question, the answer is yes.

[45] Sale Motion, ¶ 22, APA § 8.1(o).

> Q: Okay. And they are writing an equity check for -- I don't
> have the number in front of me, 600-something million dollars?
>
> A: Who is "they"? Sorry. This is confusing.
>
> Q: The entity that's buying the OpCo.
>
> A: Okay. The entity that is buying OpCo is doing a number of
> different things. Number one, Simon and Brookfield are writing a check for $300 million.
>
> Q: Okay.
>
> A: Number two, and this is what I think you're getting at, there is a target cash amount that has been agreed to under the transaction. $692 million. I hope that's what you were referring to, because that actually ties out -- that is the
> number that will -- left in the estate after giving effect to the paydown of the ABL and all of the ABL expenses. And so when the dust settles, $1.300 [b]illion check is written, new FILO has been implemented, and new ABL is on the books. The old ABL is paid off. The deal -- the agreement under the deal is that there will be $692 million in cash left in the estate as a result of this transaction.

Id. at 208:10-209:8.

28. Movant further misinterprets and misapplies the Sale Order and Disclosure Statement in his Motion by alleging that the Debtors and DIP Lenders violated the Court's prior orders requiring that "fair market value" *be paid* for the Debtors' assets. Motion ¶¶ 9, 22, 40–46. For this argument, Movant relies on language in the Sale Order and Disclosure Statement that states:

> PropCo Trust will, **for tax reporting purposes**, report PropCo as owning the assets it acquires at their fair market value at the time of the PropCo Closing (and the face amount underlying the Credit Bid Amount shall not be determinative of fair market value) and such fair market value shall be used by PropCo Trust and the Debtors for purposes of determining the aggregate value used for the PropCo Allocation as such term is used in Section 9.2 of the Asset Purchase Agreement…

Id. (quoting Sale Order ¶ 49) (emphasis added).

29. The language cited by Movant clearly deals only with the *tax treatment* of the Sale. For purposes of *approving the Sale*, the relevant figure was the highest and best price an able buyer was willing to pay at the time of the Sale, which was the Purchase Price. The Court never required anything more than the Purchase Price be paid for the Debtors' assets. The Court did not impose any requirement or implement any mechanism for a post-closing valuation or purchase price adjustment based on later value determinations.[46] Implementing a retroactive purchase price adjustment based on later determinations of hypothetical market value (or even actual market value) without the agreement of the Purchasers would cause immeasurable harm to the section 363 sale process.

30. The Debtors filed these Chapter 11 Cases in the middle of 2020 during a global, unprecedented pandemic that devastated the retail industry with lasting negative effects on commercial real estate. At the Sale hearing, the Court determined that the "process had been fair…the highest and best offer has been accepted by the debtors" and "the debtors have exercised prudent business judgment." Nov. 9, 2020 Hr'g Tr. at 394:13–18. Subsequent determinations of value are simply irrelevant to the propriety of the Sale.

31. In addition to mischaracterizing the Purchase Price for the Debtors' assets and misunderstanding the tax reporting provisions in the transaction documents and Sale Order, Movant misunderstands the sources and uses of the Sale proceeds. He completely ignores the aggregate Purchase Price consideration aside from the $1 billion credit bid. Moreover, Movant

[46] Section 2.9 of the APA is the only provision that contemplated any type of post-closing price adjustments resulting solely from any dispute between the OpCo and PropCo Purchaser regarding required Closing Statements to be delivered by the OpCo Purchaser to the PropCo Purchaser to accurately measure October EBITDA, Closing Cash, November Non-Operating Costs, Inventory Amounts, and Actual Inventory Shrink Factors, not post-closing market valuations.

repeatedly insists that the DIP Lenders received "at least $3.5 billion in cash, cash equivalents, and credit bid distributions,"[47] which is wholly inaccurate. The following demonstrates the sources and uses of the Sale proceeds:

JC Penney
Sources & Uses - Consolidated
($'s in Millions)

Gross Consolidated Sources & Uses

Equity	$ 300	(a)	Payoff of ABL	$ 1,287	
Exit FILO	300	(b)	Payoff of SWAP	78	
Exit ABL	471	(d)	Transfer Taxes*	2	(c)
Debtors Cash	1,210	(g)	Take Back Debt	520	
Take Back Debt	520		New OpCo Exit STI Cash	50	
			New OpCo Exit Op. Cash	159	(g)
			Debtors' Exit Cash	692	(f)
			New OpCo Rent to PropCo	6	
			New OpCo Professional Fee	6	
Sources	$ 2,801		*Uses*	$ 2,801	

32. Despite Movant's assertions to the contrary, the Debtors' estate and the Wind-Down Debtors received exactly what was contemplated pursuant to the Court-approved Sale. After the Purchasers paid the $1.3 billion owed on the ABL and Secured Swap Claims with interest – a key piece of consideration for the Sale that the Movant repeatedly ignores – plus the necessary adjustments, payment of professional fees and other estate obligations pursuant to the APA, and payment of the distributions to the DIP Lenders and Minority Group,[48] the remaining cash in the estate funded the Wind-Down Reserve.[49] *See Notice of Filing of Agreed Form of Wind-Down Budget* [Docket No. 3117].[50]

33. The Wind-Down Debtors have complied with the Court's orders and diligently administered the amount established for the Wind-Down Reserve according to the terms of the

[47] *See, e.g.*, Motion ¶¶ 5, 11, 17 & 20.

[48] Payments to the DIP Lenders included the $225 million borrowed under the DIP loan, plus earned interest. Nov. 9 Hr'g. Tr. 219:1–5.

[49] *See* Plan, Art. VIII.C.

[50] *See also* Nov. 9 Hr'g. Tr. 211:1–13 & 212:13–15.

Plan. The Plan provides the following treatment for Class 4 Claims, the class Movant's First Lien Claim is in:

> *Treatment:* On the Effective Date, each holder of an Allowed First Lien Claim shall receive, ***subject to the terms of the Minority First Lien Group Settlement***: (a) **pursuant to the Sale Transaction, on account of the Aggregate Credit Bid, its Credit Bid Pro Rata share of the Credit Bid Distributions subject to distribution under the Plan** and (b) its Pro Rata share of any Cash remaining in the Wind-Down Reserve, Professional Fee Escrow, Administrative / Priority Claims

Plan, Art. III.B.4(b). Additionally, Class 3 is comprised of the ABL and Secured Swap Claims, which the Plan (and Bankruptcy Code) required be paid off before the First Lien Claims in Class 4. *Id.* Art. III.B.3(b). Movant completely ignores the fact that approximately $1.3B in Purchase Price consideration for the Debtors' assets was required to pay the ABL and Secured Swap Claims in full.

34. The Debtors' Status Report reflects the distributions made to date, including distributions to the Minority Group pursuant to the Settlement Agreement and Plan.[51] Cetus, Movant's predecessor-in-interest, received the distributions made on account of those interests. Response ¶ 9 & Ex. B. It is expected that additional distributions will be forthcoming following the completion of the wind down and claim reconciliation process resulting in a return of cash collateral held by insurers.[52] Movant's assertions and unsubstantiated calculations in his pleadings are misguided, and his Motion should be denied.

Conclusion

35. The Settlement Agreement fully resolved all issues of the Minority Group, which include Movant's predecessor-in-interest. Movant has acknowledged that he is bound by the

[51] Status Report [Docket No. 1245].

[52] *See* Plan, Art. III.A.4–6 (providing the First Lien Claim and Second Lien Notes Claims shall be paid their Pro rata share of any Cash remaining in the Wind-Down Reserve once all Allowed Claim entitled to payment therefrom have been satisfied.)

Settlement Agreement, and pursuit of Movant's requested relief is a breach of the Settlement Agreement. The Wind-Down Debtors reserve all rights to pursue claims against and seek damages from Movant in connection with his violations of the binding terms of the Settlement Agreement, the Sale Order, the Confirmation Order, and applicable law. The timely and proper objections to the Sale and Plan (many of which are now echoed by Movant) were already either resolved by the parties or fully litigated and overruled by the Court. Any failure on Movant's part to exercise diligence before acquiring his position from Cetus or to understand his rights as a successor to a member of the Minority Group is not an appropriate burden on the resources of the Wind-Down Debtors or the Court. WHEREFORE, the Wind-Down Debtors respectfully request that this Court deny the Motion.

RESPECTFULLY SUBMITTED this 22nd day of August 2024

By: */s/ Jordan E. Chavez*
Ian T. Peck, State Bar No. 24013306
Eli O. Columbus, State Bar No. 24028062
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CO-COUNSEL FOR THE WIND-DOWN DEBTORS

Certificate of Service

I certify that on August 22, 2024, a true and correct copy of the foregoing document was served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas and will be served as set forth in the Affidavit of Service to be filed by the Wind-Down Debtors' claims, noticing, and solicitation agent.

/s/ *Jordan E. Chavez*

NEW TERM LOAN ELECTION FORM

To: Beneficial Holders of 5.875% Senior Secured Notes due 2023 (CUSIP: 708160CB0 and CUSIP: U7083NAB7 (REG S)) (the "First Lien Notes")

Pursuant to the proposed *Order (i) Authorizing (A) Entry Into And Performance Under The Asset Purchase Agreement And (B) The Sale Of The Opco Acquired Assets And The Propco Acquired Assets Free And Clear Of Liens, Claims, Encumbrances, And Interests, And (C) Assumption And Assignment Of Executory Contracts And Unexpired Leases And (II) Granting Related Relief* (as the same may be amended, modified, supplemented or amended the "Sale Order") [Docket No. 1592] and the Asset Purchase Agreement (as defined in the Sale Order), each holder of an Allowed First Lien Claim is entitled to receive its ratable interest in the Term Loan B (as defined in the Sale Order). Please consult the Sale Order and the Asst Purchase Agreement (each as filed with the Bankruptcy Court) for additional information. All defined terms used but not defined herein shall have the meaning ascribed to them in the Sale Order.

CAREFULLY READ AND STRICTLY FOLLOW THE ENCLOSED INSTRUCTIONS BEFORE COMPLETING THIS NEW TERM LOAN ELECTION FORM

ALL HOLDERS OF ALLOWED FIRST LIEN NOTES CLAIMS SHOULD COMPLETE THE FORMS AND OTHERWISE FOLLOW THE INSTRUCTIONS THEREIN TO EXERCISE THEIR ELECTION RIGHTS.

THIS NEW TERM LOAN ELECTION FORM MUST BE COMPLETED IN ORDER FOR YOU TO RECEIVE YOUR DISTRIBUTION OF NEW TERM LOANS.

Please follow the below instructions to receive your distribution of New Term Loans:

Step 1: Provide the contact information requested in Section 1 below and complete and enclose the appropriate tax form as requested at the end of Section 1.

Step 2: As described in Section 2 below ("ATOP Confirmation Number"), instruct your Nominee to deliver your First Lien Notes electronically into the appropriate Contra CUSIP established on DTC's ATOP platform and provide the necessary information to complete the chart included in Section 2. (Both "Nominee" and "ATOP" are defined in Section 2.) **Please note that if your First Lien Notes are delivered to the Contra CUSIP you will not be able to sell or transfer such notes for so long as they are held in the Contra CUSIP.**

Step 3: Review the certifications contained in Section 3 below ("Certification"), provide the information requested in Section 3, and execute this Term Loan Election Form on the "Signature" line in Section 3.

Step 4: Provide the "know-your-client" or "KYC" information requested by the Administrative Agent in the "administrative detail" form attached as Exhibit A.

Step 5: Return this completed Term Loan Election Form, including the applicable tax form as provided in Section 1 below, to Prime Clerk either (a) at the address indicated below via overnight mail or personal delivery or (b) at the email address indicated below.

Holders who properly tender their First Lien Notes into ATOP and complete and return all such items by no later than ***November 12, 2020 at 5:00 p.m. (prevailing Eastern Time)*** will have New Term Loans issued in their names on the loan register maintained by GLAS USA LLC, the administrative agent for the New Term Loan (the "Administrative Agent") on the Effective Date or as soon as practicable thereafter (the "Distribution Date").

After the Distribution Date, the Administrative Agent will establish a reserve consisting of the remaining New Term Loans to be issued to those Holders who complete the post-Effective Date registration process prior to May 6, 2021.

The risk of non-delivery or any irregularity of any documents sent to Prime Clerk in connection with the exercise of the Election Rights or otherwise lies solely with the Election Participants exercising such Election Rights, and not the Debtors or any of their respective officers, directors, managers, members, employees, agents, or advisors.

IF YOU FAIL TO TIMELY RETURN A PROPERLY COMPLETED TERM LOAN ELECTION FORM IN ACCORDANCE WITH THE POST-EFFECTIVE DATE REGISTRATION PROCESS, INCLUDING THE APPLICABLE TAX FORM, ON OR BEFORE MAY 6, 2021, YOUR DISTRIBUTION IS SUBJECT TO FORFEITURE, AND YOU WILL BE DEEMED TO WAIVE ANY RIGHT TO ANY DISTRIBUTION OF NEW TERM LOANS IN ACCORDANCE WITH THE TERMS OF THE PLAN.

Return completed documents to:
J. C. Penney Company, Inc. New Term Loan Processing
c/o Prime Clerk LLC
One Grand Central Place
60 East 42nd Street, Suite 1440
New York, NY 10165
Email: jcpenneyregistration@primeclerk.com

If you have any questions regarding the Term Loan Election procedures or need additional copies of the Term Loan Election Form or other related materials, please contact Prime Clerk by (a) emailing jcpenneyregistration@primeclerk.com, (b) calling Prime Clerk at (877) 720-6576 (Domestic) or (646) 979-4417 (International), or (c) writing to the address indicated above.

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Section 1. Contact Information

The New Term Loans will be issued in book-entry form and registered directly on the loan register maintained by the Administrative Agent. Therefore, in the lines below, please provide the name and address in which your New Term Loans should be registered (the "Registered Holder"). In addition, please provide the Registered Holder's telephone number, and e-mail address, and (if applicable) U.S. Tax Identification Number. We strongly recommend that you type the information that you provide below to ensure legibility.

Barnett U.S. Equity fund LP

Registered Holder Name: _____

Address 1: [redacted] _____

Address 2: _____

City, State, and Zip Code: [redacted] _____

Foreign Country Name: N/A _____

Telephone Number: [redacted] _____

E-Mail Address: [redacted] _____

Social Security Number: _____

U.S. Tax Identification Number: [redacted] _____

Check here if non-US (no TIN) ☐

Tax Form: Please also enclose an appropriate U.S. tax form (available at http://www.irs.gov) (Form W-9 for U.S. payees, or an originally executed Form W-8 (Form W-8BEN, Form W-BEN-E, Form W-8ECI, Form W-8EXP, or Form W-8IMY, as applicable), for foreign payees).

For Trusts only:

Name of Trustee: _____

Date of Formation of Trust: _____

If a Registered Holder already possesses a "Markit Entity Identifier" please provide below:

MEI: _____

Section 2. ATOP Confirmation Number

In order to receive your New Term Loans, you must also instruct the bank, broker, or other financial institution holding your First Lien Notes in "street name" (your "Nominee") with DTC to electronically deliver your First Lien Notes into the appropriate Contra CUSIP established on DTC's "automated tender offer program" ("ATOP").

Following the successful submission through ATOP, your Nominee will receive a unique "voluntary offer instruction" or "VOI" generated by ATOP. Please provide such VOI number below in addition to the principal amount of First Lien Notes tendered into ATOP. You may need to coordinate with your Nominee to obtain your VOI number or have your Nominee complete this section for you. If you hold separate blocks of First Lien Notes at separate Nominees, please complete a separate form for each such block.

To Be Completed by Nominee Only **(Evidence of electronic delivery of First Lien Notes via ATOP held through DTC)**			
CUSIP / ISIN	**Principal Amount of Notes Tendered into ATOP**	**Name and DTC Number of Nominee Holding Position at DTC**	**DTC ATOP Confirmation Number (VOI)**
CUSIP: 708160CB0 ISIN: US708160CB09	$	N/A	N/A
CUSIP: U7083NAB7 ISIN: USU7083NAB74	$ 20,000,000 Facevlaue From Cetus Capital	Charles Schwab DTC 0164	

If you are a registered holder of First Lien Notes and hold your First Lien Notes directly, please indicate the number of shares you hold directly on the line below:

_____.

Section 3. Certification

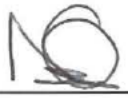
By signing this Term Loan Election Form, the undersigned certifies that:

(a) the information provided in Sections 1 and 2 above is accurate and should be used for purposes of the distribution of New Term Loans that the undersigned is entitled to receive pursuant to the Plan;

(b) it has received a copy of the Term Loan Election Form and understands that failure to properly complete and promptly return this Term Loan Election Form on or before the date set forth in the Plan may result in your New Term Loans, as applicable, being forfeited in accordance with the Plan; and

(c) the undersigned has the full power and authority to complete and execute this Term Loan Election Form.

First Lien Noteholder Name: Barnett U.S. Equity fund LP

Signature: 

Name of Signatory: Andrew E. Carrillo

Address 1: [redacted]

Address 2:

City, State, and Zip Code: [redacted]

Telephone Number: [redacted]

E-mail Address: [redacted]

Date Completed: 10/18/2023

PLEASE REMEMBER TO SUBMIT THE APPROPRIATE TAX FORM (W-9 OR APPLICABLE W-8).

If you have any questions regarding the information requested above, please contact Prime Clerk by (a) emailing jcpenneyregistration@primeclerk.com, (b) calling Prime Clerk at (877) 720-6576 (Domestic) or (646) 979-4417 (International), or (c) writing to the address indicated above.

Andrew E. Carrillo CFP®, AWMA®, CRPC®
CERTIFIED FINANCIAL PLANNER™
professional

[redacted]
Office
Cell [redacted]
[redacted]

BARNETT
CAPITAL ADVISORS

Barnett U.S. Equity fund LP Form Submissions for Propco and 1st lien Loan

I, Andrew Carrillo, hereby certify these $20,000,000 in Facevalue of JCP 1st lien 2023 bonds cusip U7083NAB7 were purchased from Cetus Capital LLC, an Original owner of the bonds prior to bankrupcy and part of Minority Bondholder Group as evidenced in document 1814 Page 88 of settlement agreement.

X _____

Andrew Carrillo

State of Florida County of Miami-Dade
Sworn to (or affirmed) and subscribed before me via ☒ physical presence OR ☐ online notarizations
this 16 day of October, 2022.
By Andrew Carrillo
Personally known X OR produced identification X
Typy of identification produced DL

JUAN HENRIQUE SOTILLO
Notary Public - State of Florica
Commission # HH 112793
My Comm. Expires Jul 30, 2025
Bonded through National Notary Assr.

THIS NOTICE IS FOR THE PROPCO TRUST INTERESTS DUE HOLDERS UNDER THE J.C. PENNEY PLAN. IF YOUR BENEFICIAL HOLDER STILL WISHES TO PARTICIPATE IN THE TERM LOAN B OR EARNOUT TRUST INTERESTS PLEASE CONTACT PRIME CLERK AT JCPENNEYBALLOTS@PRIMECLERK.COM

PROPCO TRUST INTERESTS DISTRIBUTION FORM

To: Beneficial Holders of 5.875% Senior Secured Notes due 2023 (CUSIP: 708160CB0, CUSIP: U7083NAB7 (REG S), and CUSIP 708160CF1) (the "First Lien Notes") Entitled to receive PropCo Trust Interests under the Chapter 11 Plan.

Pursuant to the *Amended Joint Chapter 11 Plan of Reorganization of J. C. Penney Company, Inc. and its Debtor Affiliates* [Docket No. 2190] (including the Plan Supplement and all exhibits hereto and thereto, and as the same may be amended, modified, supplemented or amended and restated from time to time, the "Plan"), for which the Effective Date occurred on January 30, 2021, each holder of an Allowed First Lien Claim shall receive certain distributions of PropCo Trust Interests in addition to prior distributions of, inter alia, Term Loan B and Earnout Trust Interests. Please consult the Plan for additional information. All defined terms used but not defined herein shall have the meaning ascribed to them in the Plan.

CAREFULLY READ AND STRICTLY FOLLOW THE ENCLOSED INSTRUCTIONS BEFORE COMPLETING THIS PROPCO TRUST INTERESTS DISTRIBUTION FORM

ALL HOLDERS OF ALLOWED FIRST LIEN NOTES CLAIMS SHOULD COMPLETE THE FORMS AND OTHERWISE FOLLOW THE INSTRUCTIONS THEREIN.

Please follow the below instructions to receive your distribution of PropCo Trust Interests:

Step 1: Provide the contact information requested in Section 1 below.

Step 2: As described in Section 2 below instruct your Nominee to confirm your First Lien Notes and provide the necessary information to complete the chart included in Section 2.

Step 3: Review the certifications contained in Section 3 below ("Certification"), provide the information requested in Section 3, and execute this form on the "Signature" line in Section 3.

Step 4: Return this completed form to either (a) at the address indicated below via overnight mail or personal delivery or (b) at the email address indicated below.

THIS NOTICE IS FOR THE PROPCO TRUST INTERESTS DUE HOLDERS UNDER THE J.C. PENNEY PLAN. IF YOUR BENEFICIAL HOLDER STILL WISHES TO PARTICIPATE IN THE TERM LOAN B OR EARNOUT TRUST INTERESTS PLEASE CONTACT PRIME CLERK AT JCPENNEYBALLOTS@PRIMECLERK.COM

The risk of non-delivery or any irregularity of any documents delivered in connection with the distribution of the PropCo Trust Interests lies solely with the holder and not the Debtors or any of their respective officers, directors, managers, members, employees, agents, or advisors.

IF YOU FAIL TO TIMELY RETURN A PROPERLY COMPLETED FORM IN ACCORDANCE WITH THE POST-EFFECTIVE DATE REGISTRATION PROCESS, WITHIN ONE (1) YEAR FROM THE EFFECTIVE DATE OF THE PLAN IN ACCORDANCE WITH THE UNCLAIMED PROPERTY DEADLINES SET BY THE PLAN, YOUR DISTRIBUTION IS SUBJECT TO FORFEITURE, AND YOU WILL BE DEEMED TO WAIVE ANY RIGHT TO ANY DISTRIBUTION IN ACCORDANCE WITH THE TERMS OF THE PLAN.

Return completed documents to:
Milbank LLP
Attn: Alexander Gefter
Alexandra Singer
55 Hudson Yards
New York, NY 10001
Email: Alexander Gefter: agefter@milbank.com; Alexandra Singer: asinger@milbank.com

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THIS NOTICE IS FOR THE PROPCO TRUST INTERESTS DUE HOLDERS UNDER THE J.C. PENNEY PLAN. IF YOUR BENEFICIAL HOLDER STILL WISHES TO PARTICIPATE IN THE TERM LOAN B OR EARNOUT TRUST INTERESTS PLEASE CONTACT PRIME CLERK AT JCPENNEYBALLOTS@PRIMECLERK.COM

Section 1. DWAC Information

The PropCo Trust Interests will be issued via DTC through their DWAC system (by GLAS Trust Company LLC, as trustee). Therefore, in the lines below, please provide your DWAC information. We strongly recommend that you type the information that you provide below to ensure legibility.

Beneficial Holder Name: Barnett U.S. Equity fund LP

Beneficial Holder Telephone Number: [redacted]

Beneficial Holder E-Mail Address: [redacted]

DTC Participant Name: Charles Schwab

DTC Participant Number: 0164

DTC Participant Contact Name: Schwab Prime broker/ Trade away services

DTC Participant Contact Telephone Number: 1-800-404-6996

DTC Participant Contact Email: midofficetas@schwab.com [redacted]

THIS NOTICE IS FOR THE PROPCO TRUST INTERESTS DUE HOLDERS UNDER THE J.C. PENNEY PLAN. IF YOUR BENEFICIAL HOLDER STILL WISHES TO PARTICIPATE IN THE TERM LOAN B OR EARNOUT TRUST INTERESTS PLEASE CONTACT PRIME CLERK AT JCPENNEYBALLOTS@PRIMECLERK.COM

Section 2. First Lien Notes Position Confirmation

In order to receive your PropCo Trust Interests you must also instruct the bank, broker, or other financial institution holding your First Lien Notes in "street name" (your "Nominee") with DTC to confirm your position as of January 29, 2021. Please confirm the position using a Medallion Stamp or other evidence which certifies your position as of January 29, 2021.

To Be Completed by Nominee Only (Evidence of position held as of January 29, 2021)			
CUSIP / ISIN:	**Principal Amount of Notes held as of January 29, 2021**	**Name and DTC Number of Nominee Holding Position at DTC**	**Medallion Stamp or other Certification**
CUSIP: 708160CB0 ISIN: US708160CB09	$		
CUSIP: U7083NAB7 ISIN: USU7083NAB74	$20,000,000 Facevalue from Cetus Capital		
CUSIP: 708160CF1	$		

THIS NOTICE IS FOR THE PROPCO TRUST INTERESTS DUE HOLDERS UNDER THE J.C. PENNEY PLAN. IF YOUR BENEFICIAL HOLDER STILL WISHES TO PARTICIPATE IN THE TERM LOAN B OR EARNOUT TRUST INTERESTS PLEASE CONTACT PRIME CLERK AT JCPENNEYBALLOTS@PRIMECLERK.COM

Section 3. Certification

By signing this Election Form, the undersigned certifies that:

(a) the information provided in Sections 1 and 2 above is accurate and should be used for purposes of the distribution of PropCo Trust Interests that the undersigned is entitled to receive pursuant to the Plan;

(b) the undersigned has the full power and authority to complete and execute this form.

First Lien Noteholder Name: Barnett U.S. Equity Fund L.P.

Signature: [redacted]

Name of Signatory: Andrew Carrillo

Address 1: [redacted]

Address 2: [redacted]

City, State, and Zip Code: [redacted]

Telephone Number: [redacted]

E-mail Address: [redacted]

Date Completed: 10/18/2023

I, Andrew Carrillo, hereby certify these $20,000,000 in Facevalue of JCP 1st lien 2023 bonds cusip U7083NAB7 were purchased from Cetus Capital LLC, an Original owner of the bonds prior to bankrupcy and part of Minority Bondholder Group as evidenced in document 1814 Page 88 of settlement agreement.

State of Florida County of Miami-Dade
Sworn to (or affirmed) and subscribed before me via ☑ physical presence OR ☐ online notarizations this 18 day of October, 2023.
By Andrew Carrillo
Personally known ☒ OR produced identification ☒
Typy of identification produced D.L.

JUAN HENRIQUE SOTILLO
Notary Public - State of Florida
Commission # HH 112793
My Comm. Expires Jul 30, 2025
Bonded through National Notary Assn.

THIS NOTICE IS FOR THE PROPCO TRUST INTERESTS DUE HOLDERS UNDER THE J.C. PENNEY PLAN. IF YOUR BENEFICIAL HOLDER STILL WISHES TO PARTICIPATE IN THE TERM LOAN B OR EARNOUT TRUST INTERESTS PLEASE CONTACT PRIME CLERK AT JCPENNEYBALLOTS@PRIMECLERK.COM

Section 3. Certification

By signing this Election Form, the undersigned certifies that:

(a) the information provided in Sections 1 and 2 above is accurate and should be used for purposes of the distribution of PropCo Trust Interests that the undersigned is entitled to receive pursuant to the Plan;

(b) the undersigned has the full power and authority to complete and execute this form.

First Lien Noteholder Name: Barnett U.S. Equity Fund L.P.

Signature: [redacted]

Name of Signatory: Andrew Carrillo

Address 1: [redacted]

Address 2: [redacted]

City, State, and Zip Code: [redacted]

Telephone Number: [redacted]

E-mail Address: Andrew.Carrillo@BarnettCapitalAdvisors.com

Date Completed: 10/18/23

I, Andrew Carrillo, hereby certify these $20,000,000 in Facevalue of JCP 1st lien 2023 bonds cusip U7083NAB7 were purchased from Cetus Capital LLC, an Original owner of the bonds prior to bankrupcy and part of Minority Bondholder Group as evidenced in document 1814 Page 88 of settlement agreement. I have an agreement to purchase the remaining 9 million in 1st lien notes and 1.4 million in term loan from Cetus Capital LLC

State of Florida County of Miami-Dade
Sworn to (or affirmed) and subscribed before me via ☐ physical presence OR ☐ online notarizations this 18 day of October, 2023.
By Andrew Carrillo
Personally known ✓ OR produced identification ___
Typy of identification produced DL

JUAN HENRIQUE SOTILLO
Notary Public - State of Florida
Commission # HH 112793
My Comm. Expires Jul 30, 2025
Bonded through National Notary Assn.

United States Bankruptcy Court Southern - Texas
ENTERED
11/10/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re:	)	Chapter 11
J. C. PENNEY COMPANY, INC., *et al.*,[1]	)	Case No. 20-20182 (DRJ)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 1592, 1685**

ORDER (I) AUTHORIZING (A) ENTRY INTO AND PERFORMANCE UNDER THE ASSET PURCHASE AGREEMENT AND (B) THE SALE OF THE OPCO ACQUIRED ASSETS AND THE PROPCO ACQUIRED ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS, AND (C) ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND (II) GRANTING RELATED RELIEF

Upon the motion (the "Motion")[2] of the above-captioned debtors and debtors in possession (collectively, the "Debtors") for entry of an order (this "Order"): (i) authorizing and approving the sale of the OpCo Acquired Assets free and clear of liens, claims, encumbrances, and interests to Copper Retail JV LLC (the "OpCo Purchaser") (such sale as defined in the Asset Purchase Agreement, the "OpCo Sale"); (ii) authorizing and approving the sale of the PropCo Acquired Assets free and clear of liens, claims, encumbrances, and interests to Copper BidCo LLC (the "PropCo Purchaser" and together with OpCo Purchaser, the "Purchasers") through the issuance of trust certificates representing 100% of the beneficial interests in PropCo Trust (such sale as defined in the Asset Purchase Agreement, the "PropCo Sale" and, together with the OpCo

[1] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at http://cases.primeclerk.com/JCPenney. The location of Debtor J. C. Penney Company, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 6501 Legacy Drive, Plano, Texas 75024.

[2] Unless otherwise defined herein, capitalized terms shall have the meanings given to them in the Motion or the Asset Purchase Agreement, as applicable.

Sale, the "Transaction"), each on the terms set forth in the Asset Purchase Agreement, as amended, supplemented, or modified from time to time prior to entry of this Order, and which for purposes of this Order shall include all exhibits, schedules, and ancillary documents related thereto, including the Ancillary Agreements; (iii) confirming the OpCo Purchaser's and PropCo Purchaser's credit bid rights and approving and ratifying the execution of the Asset Purchase Agreement and the transaction thereunder; (iv) authorizing and approving the OpCo Purchaser to deliver to the collateral agent under the Term Loan B Credit Agreement (the "Term Loan B Collateral Agent") mortgages, deeds of trust, or deeds to secure debt (as applicable) over each ground-leased property constituting an OpCo Acquired Asset and to recognize the Term Loan B Collateral Agent as a qualified mortgagee under each such ground lease (irrespective of any restriction or landlord consent requirement pertaining to leasehold mortgages and irrespective of whether or not the Term Loan B Collateral Agent so qualifies as a leasehold mortgagee under such ground lease), and granting the Term Loan B Collateral Agent any and all rights and remedies available to a mortgagee under such ground lease (including providing the Term Loan B Collateral Agent with notice of defaults and a reasonable opportunity to cure any defaults by OpCo Purchaser); (v) authorizing and approving the Debtors to make Payment in Full of the ABL Obligations in accordance with Section 2.1(e) of the Asset Purchase Agreement; (vi) authorizing and approving the assumption and assignment procedures and designation rights with respect to the Debtors' executory contracts and unexpired leases set forth in **Exhibit A** attached hereto (the "Assignment Procedures"); (vii) authorizing and approving the global settlement by and among the First Lien Ad Hoc Group, the First Lien Minority Group,[3] and the Debtors on the terms set

[3] The "First Lien Minority Group" means an ad hoc group of unaffiliated holders of (i) Term Loans and First Lien Notes and (ii) Second Lien Notes, as set forth in the *Verified Statement of the First Lien Minority Group Pursuant to Bankruptcy Rule 2019* [Docket No. 1515] represented by Akin Gump Strauss Hauer & Feld LLP.

forth in the agreement attached hereto as **Exhibit B** (the "Settlement Agreement"); (viii) approving the form and manner of the Sale Notice; and (ix) granting related relief, all as more fully set forth in the Motion; the Kurtz Declaration [Docket No. 1681-24]; and the Mesterharm Declaration [Docket No. 1681-25]; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor:

IT IS HEREBY FOUND AND DETERMINED THAT:[4]

A. **Jurisdiction and Venue**. This Court has jurisdiction over the Motion and the Transaction pursuant to 28 U.S.C. §§ 157 and 1334 and may enter a final order on the Motion

[4] The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such. Furthermore, any findings of fact or conclusions of law made by the Court on the record at the close of the Hearing are incorporated herein pursuant to Fed. R. Bank. P. 7052.

consistent with Article III of the United States Constitution. This is a core proceeding under 28 U.S.C. § 157(b). Venue in this district is proper under 28 U.S.C. §§ 1408 and 1409.

B. **Statutory Predicates**. The legal predicates for the relief requested in the Motion are sections 105(a), 363, 365, and 503 of the Bankruptcy Code. Such relief is also warranted pursuant to Bankruptcy Rules 2002, 6004, 6006, 9006, 9007, 9014, and 9019.

C. **Opportunity to Object**. A reasonable opportunity under the circumstances to object or to be heard regarding the requested relief has been afforded to all interested parties and entities.

D. On October 28, 2020, the Debtors and the Purchasers entered into an asset purchase agreement (such agreement, together with all schedules and exhibits attached thereto and the Ancillary Agreements, the "Asset Purchase Agreement").

E. As demonstrated by the evidence adduced at the Hearing, the Debtors have adequately marketed the Acquired Assets under the facts and circumstances of these chapter 11 cases and conducted the Market Test in a non-collusive, fair, and good-faith manner.

F. **Extensive Efforts by Debtors**. For more than five (5) months following the Petition Date, the Debtors, with the assistance of their counsel, investment banker, and other advisors, evaluated strategic alternatives that included extensive marketing efforts for the sale of all or substantially all of the Assets. The Debtors have presented credible evidence that they explored various alternatives for the Debtors' businesses over an extended period of time and communicated with numerous parties regarding, among other potential transactions, a sale of all or substantially all of the Assets. The Transaction is the result of the Debtors' extensive efforts in seeking to maximize recoveries to the Debtors' estates for the benefit of creditors.

G. **Business Justification**. The Debtors have articulated good and sufficient business reasons for the Court to authorize (i) the sale of the Acquired Assets to the Purchasers, (ii) entry into the Asset Purchase Agreement, and, subject to the terms of this Order, consummation of the Transaction including the sale of the OpCo Acquired Assets to the OpCo Purchaser and the sale of the PropCo Acquired Assets to the PropCo Purchaser, pursuant to the terms of the Asset Purchase Agreement, (iii) the assumption of the Assumed Liabilities as set forth in the Asset Purchase Agreement, (iv) the Purchasers' designation rights as set forth in the Asset Purchase Agreement, including the designation rights set forth in Section 1.7 thereof with respect to the OpCo Available Contracts and PropCo Available Contracts, (v) the assumption and assignment to the Purchasers of the OpCo Assigned Contracts and PropCo Assigned Contracts in accordance with the Assignment Procedures set forth in **Exhibit A** attached hereto, and (vi) the Debtors' agreement to pay any Expense Reimbursement Amount and Break-Up Fee and the protections afforded to any Expense Reimbursement Amount and Break-Up Fee pursuant to the terms of the Asset Purchase Agreement and the Bankruptcy Code. Entry into the Asset Purchase Agreement and consummation of the Transaction are sound exercises of the Debtors' business judgment, and such acts are in the best interests of the Debtors, their estates and creditors, and all parties in interest.

H. Additionally: (i) the Debtors conducted a robust marketing process to sell the Acquired Assets; (ii) the Asset Purchase Agreement and the closing of the Transaction present the best opportunity to realize the highest and best value for the Acquired Assets; (iii) there is risk of deterioration of the value of the Acquired Assets if entry into the Asset Purchase Agreement is not authorized and the Transaction is not consummated as soon as reasonably practicable in accordance with the terms of the Asset Purchase Agreement and this Order; and (iv) the Asset

Purchase Agreement and the sale of the Acquired Assets to the Purchasers provides greater value to the Debtors' estates than would be provided by any other presently available alternative. Good and sufficient reasons for approval of the Asset Purchase Agreement and the Transaction have been articulated by the Debtors. The Debtors have demonstrated compelling circumstances and a good, sufficient, and sound business purpose for (a) the sale of the Acquired Assets outside of the ordinary course of business pursuant to section 363(b) of the Bankruptcy Code; and (b) following such time this Order becomes a Final Order, a restriction on the Debtors' ability to terminate the Asset Purchase Agreement if the board of directors of the Company determines that proceeding with the transactions contemplated by the Asset Purchase Agreement or failing to terminate the Asset Purchase Agreement would be inconsistent with the Company's fiduciary duties. To maximize the value of the Acquired Assets and preserve the viability of the operations to which the Acquired Assets relate, it is essential that the Transaction occurs within the time constraints set forth in the Asset Purchase Agreement and this Order and that the Purchasers be protected against any further offers for the Acquired Assets after this Order becomes a Final Order. The Debtors have demonstrated that the Break-Up Fee and Expense Reimbursement Amount are actual and necessary costs and expenses of preserving the Debtors' estates, within the meaning of section 503(b) of the Bankruptcy Code, and of substantial benefit to the Debtors' estates.

I. The Purchasers' designation rights with respect to the OpCo Available Contracts and PropCo Available Contracts are integral to the Asset Purchase Agreement, are in the best interests of the Debtors and their estates, and represent the reasonable exercise of the Debtors' sound business judgment. Specifically, the designation rights (i) are necessary to sell the OpCo Acquired Assets to the OpCo Purchaser and the PropCo Acquired Assets to the PropCo Purchaser, (ii) limit the losses suffered by counterparties to the Assigned Contracts, and (iii) maximize the

recoveries to creditors of the Debtors by limiting the number and amount of claims against the Debtors' estates by avoiding the rejection of the Assigned Contracts.

J. **Notice**. As evidenced by the affidavits of service [Docket No. 1664-2] and publication [Docket No. 1649] previously filed with the Court, and based on the representations of counsel at the Hearing, (i) proper, timely, adequate, and sufficient notice of the Motion, the Hearing, the Transaction, the potential assumption and assignment of the Potentially Assigned Contracts, the applicable Cure Costs, and the deadline for counterparties to Potentially Assigned Contracts to assert any objection to assignment, including proposed Cure Costs, has been provided in compliance with sections 102(1), 363, and 365 of the Bankruptcy Code and Bankruptcy Rules 2002, 4001, 6004, 6006, 9006, 9007 and 9014, (ii) such notice was good and sufficient and appropriate under the particular circumstances, and (iii) no other or further notice of the Motion, the Hearing, the Transaction, the potential assumption and assignment of the Assigned Contracts, or the Cure Costs is or shall be required (other than as provided in the Assignment Procedures). With respect to entities whose identities were not reasonably ascertained by the Debtors, publication of the Sale Notice was made in the *New York Times* on October 26, 2020. Such notice was sufficient and reasonably calculated under the circumstances to reach all known and unknown holders of claims and interests and non-Debtor counterparties to executory contracts and unexpired leases.

K. **Private Sale is Appropriate**. The sale of the Acquired Assets to the Purchasers pursuant to a private sale is authorized pursuant to section 363(b)(1) of the Bankruptcy Code and Bankruptcy Rule 6004(f). A private sale of the Acquired Assets to the Purchasers represents the sound business judgment of the Debtors and is appropriate in light of the facts and circumstances surrounding the Transaction and the Debtors' chapter 11 cases because (i) it provides fair and

reasonable value for the Acquired Assets for the benefit of the Debtors' estates, (ii) it avoids the cost and delay associated with conducting a public auction, and (iii) the Debtors reasonably determined that a higher and better bid could not be obtained by an auction in light of the robust pre- and postpetition marketing processes and the other facts and circumstances of these chapter 11 cases. Notwithstanding that the Transaction provides fair and reasonable value for the Acquired Assets, the face amount underlying the Credit Bid Amount does not control the value of the Acquired Assets for tax reporting purposes, which shall be determined pursuant to paragraph 49 of this Order.

L. **Credit Bid**. Subject to the Prepetition ABL Liens and the ABL Adequate Protection Liens with respect to the ABL Priority Collateral (as each such term is defined in the Financing Order),[5] (i) the DIP Agent, on behalf of the DIP Secured Parties, holds valid, binding, enforceable, and perfected first priority priming liens and security interests in, on, and against the Debtors, their estates, and property of the estates arising in connection with the DIP Facility, and (ii) the Term Loan/First Lien Notes Collateral Agent, on behalf of the Term Loan/First Lien Notes Secured Parties, holds valid, binding, enforceable, and perfected liens and security interests in, on, and against the Debtors, their estates, and property of the estates arising in connection with the Term Loan Obligations and First Lien Notes Obligations. The Financing Order authorizes the DIP Agent and the Term Loan/First Lien Notes Collateral Agent to credit bid for the Acquired Assets. No cause exists to limit the right of the DIP Agent and the Term Loan/First Lien Notes Collateral Agent to credit bid for the Acquired Assets, and none of the DIP Secured Parties or the Term Loan/First Lien Notes Secured Parties bears any legal, equitable, or contractual obligation or duty

[5] As used herein, the "Financing Order" means the *Final Order (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Utilize Cash Collateral, (II) Granting Adequate Protection to the Prepetition Secured Parties, (III) Modifying the Automatic Stay, and (IV) Granting Related Relief* [Docket No. 566].

to credit bid for the Acquired Assets in a different amount than the Credit Bid Amount. Pursuant to the Asset Purchase Agreement and the Instruction Letters, and consistent with the Term Loan Credit Documents, the First Lien Notes Documents, and the DIP Credit Documents, each of the Requisite Lenders (as defined in the Term Loan Credit Agreement), certain holders of First Lien Notes under the First Lien Indenture, the Term Loan Administrative Agent, the Term Loan/First Lien Notes Collateral Agent, the Requisite Lenders (as defined in the DIP Credit Agreement), the DIP Administrative Agent, and the DIP Collateral Agent have authorized and directed that PropCo Purchaser credit bid the Credit Bid Amount, on account of $900 million of DIP Obligations and an aggregate $100 million of Term Loan Obligations and First Lien Obligations, allocated ratably based on outstanding Term Loan Obligations and First Lien Obligations, which obligations are not subject to avoidance, reduction, disallowance, impairment, or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law. The Transaction is one single integrated transaction and the various components thereof are nonseverable.

M. **Good Faith**. The Asset Purchase Agreement and the Settlement Agreement were negotiated and undertaken by the Debtors and the Purchasers at arm's-length, without collusion or fraud, and in good faith within the meaning of section 363(m) of the Bankruptcy Code. None of the Purchasers are "insiders" or "affiliates" of any of the Debtors as those terms are defined by the Bankruptcy Code, and no common identity of incorporators, directors, or controlling stockholders exists between the Debtors and the Purchasers. The Purchasers recognized that the Debtors were free to deal with any other party interested in acquiring the Acquired Assets. All releases and payments to be made by the Purchaser Group and other agreements or arrangements entered into by the Purchaser Group in connection with the Transaction have been disclosed. The Purchasers have not violated section 363(n) of the Bankruptcy Code by any action or inaction on their part.

As a result of the foregoing, the Purchasers are entitled to the protections of section 363(m) of the Bankruptcy Code, including in the event this Order or any portion thereof is reversed or modified on appeal, and otherwise have proceeded in good faith in all respects in connection with these cases.

N. **ABL Secured Parties**. The ABL Secured Parties (as defined in the Financing Order) have acted in good faith and have provided substantial and necessary contributions to the Debtors, the Purchasers, and the Transaction, including among other things (i) consenting to the Debtors' use of cash collateral throughout these chapter 11 cases, (ii) consenting to extensions of the Milestones as defined in and set forth in the Financing Order, and (iii) subject to certain terms and conditions, committing to provide a $2.0 billion senior secured revolving loan facility to enable Purchasers to consummate the Transaction (the "ABL OpCo Financing"), which financing is an integral part of the Transaction. The ABL OpCo Financing was negotiated and undertaken by and among the Debtors, the Purchasers and the ABL Secured Parties (in their capacity as such and in their capacity as agents and lenders party to the ABL OpCo Financing) at arm's-length, without collusion or fraud, and in good faith within the meaning of section 363(m) of the Bankruptcy Code. None of the ABL Secured Parties are "insiders" or "affiliates" of any of the Debtors as those terms are defined by Bankruptcy Code, and no common identity of incorporators, directors, or controlling stockholders exists between the Debtors and the ABL Secured Parties. The Debtors and Purchasers were free to deal with any other party interested in financing the OpCo Purchaser and the Transaction. All releases and payments to be made in favor of the ABL Secured Parties and other agreements or arrangements entered into by the ABL Secured Parties in connection with the Transaction have been disclosed. As a result of the foregoing, the ABL Secured Parties are entitled to the protections of section 363(m) of the Bankruptcy Code, including

in the event this Order or any portion thereof is reversed or modified on appeal, and otherwise have proceeded in good faith in all respects in connection with these cases.

O. **Title to Acquired Assets**. The Acquired Assets sought to be transferred and/or assigned, as applicable, by the Debtors to the Purchasers pursuant to the Asset Purchase Agreement are property of the Debtors' estates and good title thereto is presently vested in the Debtors' estates within the meaning of section 541(a) of the Bankruptcy Code. Except as otherwise provided in the Asset Purchase Agreement, the Debtors are the sole and rightful owners of the Acquired Assets with all rights, title, and interests in or to the Acquired Assets, and no other person has any ownership right, title, or interest therein.

P. **Authority**. The Debtors (i) have full power and authority to execute and enter into the Asset Purchase Agreement and all other documents contemplated thereby, (ii) have all of the power and authority necessary to consummate the Transaction contemplated by the Asset Purchase Agreement subject to the terms of this Order, and (iii) have taken all corporate action necessary to authorize, approve, and enter into the Asset Purchase Agreement, the sale of the Acquired Assets, and all other actions required to be performed by the Debtors in order to consummate the Transaction contemplated in the Asset Purchase Agreement. No consents or approvals, other than those already obtained or expressly provided for in the Asset Purchase Agreement or this Order, are required for the Debtors to consummate the Transaction.

Q. **Necessity of Order; Free and Clear**. The Purchasers would not have entered into the Asset Purchase Agreement and would not consummate the Transaction without all of the relief provided for in this Order, including (i) if the Transaction was not free and clear, pursuant to Section 363(f) of the Bankruptcy Code, of all liens, claims (including those that constitute a "claim" as defined in section 101(5) of the Bankruptcy Code), rights, liabilities, mortgages, deeds

of trust, pledges, charges, security interests, of whatever kind or nature, rights of first refusal, rights of offset or recoupment, royalties, conditional sales or title retention agreements, hypothecations, preferences, debts, easements, suits, licenses, options, rights-of recovery, judgments, orders and decrees of any court or foreign domestic governmental entity, taxes (including foreign, state, and local taxes), covenants, restrictions, indentures, instruments, leases, options, off-sets, recoupments, claims for reimbursement or subrogation, contribution, indemnity or exoneration, encumbrances and other interests of any kind or nature whatsoever against the Sellers (as defined in the Asset Purchase Agreement), or any of the Acquired Assets, including, without limitation, any debts arising under or out of, in connection with, or in any way relating to, any acts or omissions, obligations, demands, guaranties, rights, contractual commitments, restrictions, product liability claims, environmental liabilities, employment or labor law claims or liabilities, employee pension or benefit plan claims, multiemployer benefit plan claims, retiree healthcare or life insurance claims or claims for taxes of or against any of the Sellers, claims arising under state or federal antitrust laws, claims or liabilities relating to any act or omission of any originator, holder or servicer of mortgage loans prior to the applicable Closing Date, any indemnification claims or liabilities relating to any act or omission of the Sellers or any other person prior to the applicable Closing Date or any Excluded Liabilities, any derivative, vicarious, transferee or successor liability claims, alter ego claims, de facto merger claims, rights or causes of action (whether in law or in equity, under any law, statute, rule or regulation of the United States, any state, territory, or possession thereof or the District of Columbia), whether arising prior to or subsequent to the commencement of these chapter 11 cases, whether known or unknown, contingent or matured, liquidated or unliquidated, choate or inchoate, filed or unfiled, scheduled or unscheduled, perfected or unperfected, liquidated or unliquidated, noticed or unnoticed, recorded or unrecorded,

contingent or non-contingent, material or non-material, statutory or non-statutory, legal or equitable, and whether imposed by agreement, understanding, law, equity, or otherwise arising under or out of, in connection with, or in any way related to any of the Sellers, any of the Sellers' interests in the Acquired Assets, or the operation of any of the Debtors' businesses before the applicable Closing Date (collectively, the "Claims") except as otherwise expressly provided for in the Asset Purchase Agreement, or (ii) if the Purchasers would, or in the future could, be liable for any such Claims.

R. Except as expressly provided otherwise in the Asset Purchase Agreement or this Order, neither the Purchasers nor any of the Purchasers' Affiliates (including any subsidiary of the Purchasers, any person or entity that could be treated as a single employer with the Purchasers pursuant to Section 4001(b) the Employee Retirement Income Security Act of 1974, as amended ("ERISA") or Section 414(b), (c), (m) or (o) of the Internal Revenue Code of 1986, as amended ("IRC")), and any of their respective managed funds or accounts, any of their respective lenders or investors, and, in each case of the foregoing, each of their respective former, current, or future, shareholders, equity holders, owners, members, managers, employees, representatives, officers, limited or general partners, directors, agents, professionals, successors, affiliates, or permitted assignees, (collectively with the Purchasers, the "Purchaser Group") shall be responsible for any Claims, including in respect of, based on, relating to, and/or arising under, without limitation, the following: (i) any labor, collective bargaining, or employment agreements; (ii) any mortgages, deeds of trust, or security interests; (iii) any intercompany loans and receivables between one or more of the Sellers and any Debtor; (iv) any pension, multiemployer (as such term is defined in Section 3(37) or Section 4001(a)(3) of ERISA), health or welfare plan participation or benefit trust, compensation or other employee benefit plans, agreements, practices and programs (including any

Employee Benefit Plan) of or related to any of the Debtors or any of the Debtors' Affiliates or predecessors or any current or former employees of any of the foregoing, including, without limitation, any pension plan of any of the Debtors or any multiemployer plan to which the Debtors have at any time contributed to or had any liability or potential liability; (v) the Debtors' business operations or cessation thereof; (vi) any litigation involving one or more of the Debtors; (vii) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to (a) ERISA, (b) the Fair Labor Standards Act, (c) Title VII of the Civil Rights Act of 1964, (d) the Federal Rehabilitation Act of 1973, (e) the Multi-Employer Pension Plan Amendments Act of 1980, including all amendments thereto, (f) the Worker Adjustment and Retraining Notification Act of 1988 or any similar state or local law ("WARN"), (g) the Americans with Disabilities Act of 1990, (h) the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, including, without limitation, the requirements of Part 6 of Subtitle B of Title I of ERISA and Section 4980B of the IRC and of any similar state law (collectively, "COBRA"), (i) the National Labor Relations Act, (j) the Age Discrimination and Employment Act of 1967 and Age Discrimination in Employment Act, as amended, (k) state harassment, discrimination, or retaliation laws, (l) state unemployment compensation laws or any other similar state laws, or (m) any other state or federal benefits or claims relating to any employment with the Debtors or any of their predecessors; (viii) or relating to wages, benefits, employment, or termination of employment with any or all Debtors or any of their predecessors; (ix) any liabilities arising under any Environmental Laws with respect to any assets owned or operated by any of the Debtors or any corporate predecessor of any of the Debtors at any time prior to the applicable Closing Date; (x) any product liability law; (xi) any antitrust laws; (xii) any bulk sales or similar law; (xiii) any

tax statutes or ordinances, including, without limitation, the IRC; and (xiv) any Excluded Liabilities. For the avoidance of doubt, Purchasers shall not have any liability with respect to any defined benefit pension plan.

S. The transfer of the Acquired Assets shall be considered an integral part of the Debtors' plan of reorganization and, as such, the Acquired Assets shall be transferred subject to the special tax provisions set forth in section 1146 of the Bankruptcy Code.

T. **Satisfaction of 363(f) Standards**. The Debtors may sell the Acquired Assets free and clear of all Claims (other than Assumed Liabilities and the Permitted Post-Closing Encumbrances) because, with respect to each creditor asserting a Claim, one or more of the standards set forth in sections 363(f)(1)-(5) of the Bankruptcy Code have been satisfied. Those holders of Claims that did not object to or that withdrew their objections to the Transaction or the Motion, are deemed to have consented to the Motion and the Transaction pursuant to section 363(f)(2) of the Bankruptcy Code. Those holders of Claims that did object fall within one or more of the other subsections of section 363(f) of the Bankruptcy Code or (in the case of Assumed Liabilities and Permitted Post-Closing Encumbrances) are adequately protected.

U. Neither the Debtors nor the Purchasers engaged in any conduct that would cause or permit the Asset Purchase Agreement or the consummation of the Transaction to be avoided, or costs or damages to be imposed, under section 363(n) of the Bankruptcy Code or under any other law of the United States, any state, territory, possession thereof, the District of Columbia, or any other applicable law.

V. **Valid and Binding Contract**. The Asset Purchase Agreement is a valid and binding contract between the Debtors and the Purchasers and shall be enforceable pursuant to its terms. The Asset Purchase Agreement and the consideration offered by the Purchasers pursuant

to the Asset Purchase Agreement constitute reasonably equivalent value and fair consideration. The Asset Purchase Agreement was not entered into, and the Transaction was not contemplated, for the purpose of hindering, delaying, or defrauding the Debtors' creditors under the Bankruptcy Code or under any other law of the United States, any state, territory, possession thereof, or the District of Columbia, or any other applicable law. Neither the Debtors nor the Purchasers have entered into the Asset Purchase Agreement or are seeking to consummate the Transaction through collusion or for any fraudulent or otherwise improper purpose.

W. **No Successor Liability**. Upon the applicable Closing, no member of the Purchaser Group shall, or shall be deemed to, (i) be the successor of or successor employer to any of the Sellers or Debtors, including without limitation, with respect to any collective bargaining agreement, works council agreement, union agreement, area labor agreement, multiemployer agreement, project labor agreement, construction agreement, contractor agreement, building agreement, regional agreement, work standards agreement, or other labor Contract (collectively, a "Collective Bargaining Agreement"), any employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary), any defined benefit pension plan, or any multiemployer plans, and the Purchasers and/or their Affiliates, as applicable, shall instead be, and be deemed to be, a new employer, including with respect to, among other things, any and all federal or state unemployment laws, including any unemployment compensation or tax laws, or any other similar federal or state laws (provided that the Purchasers shall pay employee-related liabilities solely to the extent included in the Assumed Liabilities), including any labor laws; (ii) have any common law successorship liability in relation to any Collective Bargaining Agreement, union, multiemployer organization, employee benefit plan (other than an Acquired Seller Plan or any stand-alone welfare benefit plans of any Acquired Subsidiary), or multiemployer plan, including

with respect to withdrawal liability or contribution obligations; (iii) have, *de facto*, or otherwise, merged or consolidated with or into Sellers or Debtors; (iv) be the successor of or successor employer (as defined under COBRA and applicable regulations thereunder) to the Debtors; (v) be a mere continuation or substantial continuation of Sellers or the enterprise(s) of Sellers or Debtors; or (vi) be liable for any acts or omissions of Sellers or Debtors in connection with any Collective Bargaining Agreement, the conduct of the business, or the operation, funding or administration of the employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary) or multiemployer plans or arising under or related to the Acquired Assets other than as expressly set forth in the Asset Purchase Agreement. Without limiting the generality of the foregoing, and except as otherwise expressly provided in the Asset Purchase Agreement or this Order, the parties intend, and the Court hereby finds, that the Purchasers shall not be liable for any Encumbrance or Liability (other than Assumed Liabilities and Permitted Post-Closing Encumbrances) against any Seller or Debtors, or any of its predecessors or Affiliates, and the Purchaser Group shall have no successor or vicarious liability of any kind or character whether known or unknown as of the applicable Closing Date, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the business, any Collective Bargaining Agreement, the operation, funding, or administration of the employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary) or multiemployer plans, the Acquired Assets or any Liabilities of any Seller. The Purchasers would not acquire the Acquired Assets but for the foregoing protections against potential claims based upon "successor liability," *de facto* merger, or theories of similar effect.

X. **Adequate Assurance**. The Assignment Procedures provide adequate assurance of future performance under each Assigned Contract within the meaning of sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code.

Y. **Injunction**. An injunction against creditors and third parties pursuing Claims against, and liens, interests and encumbrances on, the Acquired Assets is necessary to induce the Purchasers to close the Transaction, and the issuance of such injunctive relief is therefore necessary to avoid irreparable injury to the Debtors' estates and will benefit the Debtors' creditors.

Z. **No *Sub Rosa* Plan**. The Transaction does not constitute a *sub rosa* chapter 11 plan. The Transaction neither impermissibly restructures the rights of the Debtors' creditors nor impermissibly dictates a chapter 11 plan for any of the Debtors.

AA. **Final Order**. This Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding Bankruptcy Rules 6004(h), 6006(d), and 7062, the Court expressly finds that there is no just reason for delay in the implementation of this Order, and, sufficient cause having been shown, waives any such stay, and expressly directs entry of judgment as set forth herein. The Debtors have demonstrated compelling circumstances and a good, sufficient, and sound business purpose and justification for the immediate approval and consummation of the Transaction as contemplated by the Asset Purchase Agreement. The Purchasers, being good faith purchasers under section 363(m) of the Bankruptcy Code, may close the Transaction subject to the terms of this Order immediately following entry of this Order.

BB. **Best Interests**. The relief granted herein is in the best interests of the Debtors, their estates and creditors, and other parties in interest.

CC. **Time Is of the Essence**. Time is of the essence in consummating the Transaction. To maximize the value of the Acquired Assets, it is essential that the Transaction and assumption

and assignment of the OpCo Assigned Contracts to OpCo Purchaser and PropCo Assigned Contracts to PropCo Purchaser occur within the time constraints set forth in the Asset Purchase Agreement. Specifically, the Asset Purchase Agreement and the Transaction must be approved immediately and the Transaction consummated promptly pursuant to the entry of this Order and, where applicable, the Confirmation Order, in order to preserve the viability of the businesses as a going concern, and to maximize the value to the Debtors, their estates, their creditors, and all other parties in interest.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. **Relief Granted**. The Motion is **GRANTED**, to the extent set forth herein.

2. **Objections Overruled**. Any objections to the Motion or any other relief granted in this Order (other than Assignment Objections, as hereinafter defined, which are to be considered at a later date), to the extent not resolved, adjourned for hearing on a later date, waived or withdrawn, or previously overruled, and all reservations of rights included therein, are hereby **OVERRULED** and **DENIED** on the merits.

3. **Approval of Asset Purchase Agreement and Transaction**. Pursuant to sections 105, 363, 364, 365 and 503 of the Bankruptcy Code and the Asset Purchase Agreement, the Transaction is hereby approved and the Debtors are authorized to enter into and perform under the Asset Purchase Agreement. Pursuant to sections 105, 363, 364, 365 and 503 of the Bankruptcy Code, each of the Debtors and the Purchasers are hereby authorized and directed to take any and all actions necessary or appropriate to: (a) consummate the Transaction and the applicable Closing in accordance with the Asset Purchase Agreement and this Order; (b) assume and assign (i) the OpCo Assigned Contracts and (ii) the PropCo Assigned Contracts in accordance with the Assignment Procedures, including pursuant to and in accordance with the Plan where applicable;

(c) provide for the assumption of the Assumed Liabilities; and (d) perform, consummate, implement, and close fully the transactions contemplated by the Asset Purchase Agreement together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Transaction pursuant to the Asset Purchase Agreement. The Debtors and each other party to the Asset Purchase Agreement are hereby authorized and directed to perform each of their covenants and undertakings as provided in the Asset Purchase Agreement, prior to, on, or after the applicable Closing Date without further order of the Court. The Purchasers and the Debtors shall have no obligation to close the Transaction except as is contemplated and provided for in the Asset Purchase Agreement and this Order.

4. **Approval of Settlement Agreement**. Pursuant to sections 105, 363, 364, and 503 of the Bankruptcy Code and Bankruptcy Rule 9019, the Settlement Agreement is hereby approved and the Debtors are authorized to enter into and perform under the Settlement Agreement. The terms of the Settlement Agreement are incorporated herein by reference.

5. Notwithstanding anything to the contrary in the *Order (I) Authorizing the Employment and Retention of Lazard Freres & Co. LLC as Investment Banker to the Debtors and Debtors in Possession, Effective as of the Petition Date, (II) Approving the Terms of the Lazard Agreement, (III) Modifying Certain Time-Keeping Requirements, and (IV) Granting Related Relief* [Docket No. 956] (the "Lazard Retention Order") or the *Order (I) Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals, and (II) Granting Related Relief* [Docket No. 995] (the "Interim Compensation Order"), the Sale Transaction Fee (as defined in the engagement letter attached as Exhibit 1 to the Lazard Retention Order) payable to Lazard Frères & Co. LLC ("Lazard") on account of the Transaction pursuant to the Lazard Retention Order is hereby approved and allowed on a final basis as an administrative expense

pursuant to sections 330 and 503(b) of the Bankruptcy Code and shall be due and payable to Lazard upon closing of the OpCo Sale; *provided, however*, that Lazard shall file an Interim Fee Application (as defined in the Interim Compensation Order) seeking approval of such Sale Transaction Fee and such Sale Transaction Fee shall be subject to disgorgement with respect to that portion of the Sale Transaction Fee, if any, that is not approved by the Court.

6. **Master Lease Agreement and Distribution Centers Lease Agreement**. The Debtors shall, and shall be authorized to, enter into, and perform under, the Master Lease Agreement and the Distribution Centers Lease Agreement with the OpCo Purchaser on the OpCo Closing Date. The Debtors (and, if applicable, the Trustee (as defined below)) shall comply with the terms and conditions of the Master Lease Agreement and the Distribution Centers Lease Agreement and shall respond in a timely manner to requests made by the OpCo Purchaser under the Master Lease Agreement and Distribution Centers Lease Agreement (including, without limitation, requests for consents thereunder). Upon entry into the Master Lease Agreement and the Distribution Centers Lease Agreement, the Debtors shall appoint a representative of Hilco Real Estate, LLC, acting at the direction of PropCo Purchaser, to carry out the Debtors' obligations under the Master Lease Agreement and the Distribution Centers Lease Agreement. The Debtors (and, if applicable, the Trustee) shall not be permitted to terminate or reject the Master Lease Agreement or Distribution Centers Lease Agreement. All properties subject to the Master Lease Agreement and Distribution Centers Lease Agreement shall only be transferred pursuant to and subject to the terms of the Master Lease Agreement and Distribution Centers Lease Agreement, as applicable. Upon the PropCo Closing Date, the Debtors shall assign the Master Lease Agreement and the Distribution Centers Lease Agreement to the PropCo Subsidiaries without the need to obtain any consents.

7. Any sublease of any PropCo Acquired Leases to OpCo Purchaser pursuant to the Master Lease Agreement or the Distribution Centers Lease Agreement, and any sub-subleases of PropCo Acquired Leases and subleases of OpCo Acquired Leases within the Purchaser Group, are approved pursuant to section 365 of the Bankruptcy Code.

8. In the event of a breach of the Master Lease Agreement or the Distribution Centers Lease Agreement, the Debtors acknowledge, and the Court hereby finds, that specific performance by the Debtors is an appropriate remedy thereunder (and such acknowledgement shall be binding on the Trustee, if applicable). To the extent the Debtors breach the Master Lease Agreement or the Distribution Centers Lease Agreement or any amounts are otherwise payable by the Debtors thereunder, any claims by OpCo Purchaser for such breach(es) or other amounts owing to OpCo Purchaser shall (a) be deemed allowed superpriority administrative expense claims pursuant to sections 105(a), 503(b), and 507(a)(2) of the Bankruptcy Code with priority over all other administrative expenses of the kind specified in section 503(b) of the Bankruptcy Code and such allowed superpriority administrative expense claims shall be superior in priority to all other similarly situated claims asserted or allowed in the Bankruptcy Case and (b) be carved out from and not be subject to the liens and claims granted in connection with the DIP Obligations, Term Loan Obligations, First Lien Note Obligations, or Second Lien Note Obligations pursuant to the DIP Credit Agreement and the other DIP Documents (including the Financing Order), the Term Loan Agreement and the other Term Loan Credit Documents, the First Lien Notes Indenture and the other First Lien Notes Documents, and the Second Lien Notes Indenture and the other Second Lien Notes Documents.

9. The Debtors (and, if applicable, the Trustee) shall perform under, and not be permitted to terminate or reject, any ground leases to which the PropCo Acquired Assets are

subject and shall take all actions necessary to keep such ground leases in effect, including, without limitation, paying rent thereunder, in each case except as otherwise approved by OpCo Purchaser and PropCo Purchaser.

10. **Assumption and Assignment**. The Assignment Procedures attached hereto as **Exhibit A** and the contract and lease designation rights set forth in Section 1.7 of the Asset Purchase Agreement are approved and incorporated herein by reference. For the avoidance of doubt, and notwithstanding anything to the contrary in this Order, the Assignment Procedures, or the Asset Purchase Agreement, the rights of all counterparties to executory contracts or unexpired leases under section 365 of the Bankruptcy Code as they relate to the assumption, assumption and assignment, assignment, or rejection or cure of any such agreements are reserved and any disputes with respect thereto (including, but not limited to, any objections to the assumption and assignment of an executory contract or unexpired lease, including to (a) the terms and conditions of the proposed assumption and assignment, (b) adequate assurance of future performance, and (c) the proposed Cure Cost and/or payment of all amounts due and owing and performance of all other obligations under an executory contract or unexpired lease (any such objection or dispute that is timely and properly brought pursuant to the Assignment Procedures, an "Assignment Objection")) shall be resolved in accordance with the Assignment Procedures. No finding of fact or conclusion of law set forth in this Order concerning the assumption and assignment of any executory contract or unexpired lease shall apply, be binding upon, be law of the case, or operate to collaterally estop any argument in connection with the resolution of an Assignment Objection. Any executory contract or unexpired lease subject to a pending Assignment Objection (each, a "Disputed Contract"), shall not be assigned to OpCo or PropCo, as applicable, until such Assignment Objection is resolved unless the Assignment Objection solely relates to the appropriate Cure Cost

and the undisputed portion of the Cure Cost is paid and the disputed portion of the Cure Cost will be reserved and segregated such that such funds will be available to pay the full amount of the disputed portion of the Cure Cost upon resolution or adjudication of the disputed Cure Cost; *provided* that if the resolution of the Assignment Objection provides for the Disputed Contract to be assigned to OpCo or PropCo, as applicable, such assignment shall be effective as of the OpCo Closing or PropCo Closing, as applicable. For the avoidance of doubt, (i) the OpCo Purchaser will be responsible for payment of liabilities and performance of obligations of the Debtors under Disputed Contracts that are OpCo Available Contracts solely to the extent set forth in Section 1.7(f) of the Asset Purchase Agreement, (ii) the Debtors shall remain liable to the counterparties to all OpCo Available Contracts that are nonresidential real property leases for all such obligations in accordance with section 365(d)(3) of the Bankruptcy Code and the OpCo Available Contracts, and (iii) the counterparties to all OpCo Available Contracts may enforce the terms of all OpCo Available Contracts directly against the Debtors, in each case until a Cure Cost is paid in the full allowed amount and assignment is effective with respect to the applicable OpCo Available Contract (or such OpCo Available Contract is rejected). Nothing in this paragraph 10 shall impact or otherwise affect the OpCo Designation Rights Period or the PropCo Designation Rights Period set forth in the Asset Purchase Agreement and the Assignment Procedures.

11. Confirmation of the Plan shall not in any way impair, modify or otherwise affect the OpCo Purchaser's rights set forth in Section 1.7 of the Asset Purchase Agreement to designate Unexpired Leases that are Available OpCo Contracts for assignment through and until the deadline of December 11, 2020, pursuant to section 365(d)(4)(A)(i) of the Bankruptcy Code. To ensure that is the case, the Debtors shall only request entry of the Confirmation Order on December 12, 2020, at the earliest, and no other party in interest shall request entry of the Confirmation Order

any earlier; *provided, however*, nothing herein shall impair, modify, or otherwise affect the Debtors' ability to seek confirmation of the Plan on November 24, 2020 (or any date thereafter) or the Court's ability to orally confirm such Plan (with such other modifications the Court deems appropriate based on the record presented at such hearing). For the avoidance of doubt, the OpCo Purchaser shall make a final and timely designation with respect to Unexpired Leases that are Available OpCo Contracts by the deadline of December 11, 2020, pursuant to section 365(d)(4)(A)(i) of the Bankruptcy Code.

12. The Debtors are hereby authorized and directed, in accordance with sections 105(a), 363, and 365 of the Bankruptcy Code, to (a) assume and assign to OpCo Purchaser the OpCo Assigned Contracts and assume and assign to PropCo Purchaser the PropCo Assigned Contracts, in each case in accordance with the terms of the Asset Purchase Agreement, free and clear of all Liens, Claims, and other interests of any kind or nature whatsoever (other than the Permitted Obligations) and (b) execute and deliver to the applicable Purchaser such documents or other instruments as such Purchaser deems may be necessary to assign and transfer the Assigned Contracts to the applicable Purchaser. Except to the extent permitted by the Bankruptcy Code, nothing in this Order or in the Asset Purchase Agreement or in any ancillary documents executed in connection with this Order or the Asset Purchase Agreement shall authorize, absent further order of the Court or agreement among the Debtors or the Purchasers, on the one hand, and the applicable non-Debtor counterparty, on the other hand, the sale of any real estate property owned by any of the Debtors (such property, in this context, the "Owned Encumbered Property") or assignment of any nonresidential real property lease free and clear of (and shall not extinguish or otherwise diminish) any interests, covenants, or rights applicable to such real estate assets that limit or condition the permitted use of the property such as easements, reciprocal easement agreements,

construction operating and reciprocal easement agreements, operating or redevelopment agreements, covenants, licenses, or permits (collectively, "Restrictive Covenants") unless such provisions, or any relevant portions thereof, are found to be solely executory in nature. Any amounts due and owing or that become due and owing in the ordinary course of business on account of any reciprocal easement agreements, construction operating and reciprocal easement agreements or operating or redevelopment agreements related to the Opco Acquired Assets or the PropCo Acquired Assets shall be paid by the Debtors, OpCo Purchaser, or PropCo Purchaser, as applicable, in the ordinary course. To the extent that any Debtor or any other party seeks to assume and assign any real estate leases to which a Debtor is a party, or transfer ownership or interest in the Owned Encumbered Property, free and clear of any Restrictive Covenant, such Debtor or such party shall file a notice that describes the Restrictive Covenant that the Debtor or other party is seeking to extinguish or otherwise diminish and any non-Debtor counterparty to a Restrictive Covenant will have fourteen (14) calendar days from the filing and service of notice of such requested relief (unless otherwise agreed to in writing by the Debtors' counsel) to file and serve an objection thereto; any such objection shall be determined by the Court or otherwise resolved consensually prior to the effectiveness of the transfer of the Owned Encumbered Property or assignment of any related unexpired lease, and all rights, remedies, and positions of all parties with respect to any such relief are preserved. Nothing in this Order, the Asset Purchase Agreement, or any other related agreements, documents, or other instruments shall be deemed to amend, modify, or otherwise affect the rights and obligations of (i) any party to an unexpired lease of nonresidential real property under such lease or (ii) any party with a real property interest, except, in each case, to permit the consummation of the transactions expressly provided for in this Order (including the

Transaction and the assignment of the Assigned Contracts, and sale of Owned Encumbered Property, to the OpCo Purchaser or PropCo Purchaser, as applicable).

13. With respect to the Assigned Contracts, and in accordance with the Assignment Procedures and Section 1.7 of the Asset Purchase Agreement: (a) the Debtors may assume each of the Assigned Contracts in accordance with section 365 of the Bankruptcy Code; (b) the Debtors may assign each Assigned Contract in accordance with sections 363 and 365 of the Bankruptcy Code, and any provisions in any Assigned Contract that prohibit or condition the assignment of such Assigned Contract or allow the non-Debtor party to such Assigned Contract to terminate, recapture, impose any penalty, condition renewal or extension, or modify any term or condition upon the assignment of such contract, constitute unenforceable anti-assignment provisions which are of no force and effect solely in connection with assignments pursuant to the Transaction to the fullest extent under section 365 of the Bankruptcy Code; (c) all other requirements and conditions under sections 363 and 365 of the Bankruptcy Code for the assumption by the Debtors and assignment to the applicable Purchaser (or its Designee(s)) of each Assigned Contract have been satisfied or provision has been made for the satisfaction of same; and (d) the Assigned Contracts shall be transferred and assigned to, and following the Closing of the applicable Transaction remain in full force and effect for the benefit of, OpCo Purchaser (or its Designee(s)) or PropCo Purchaser (or its Designee(s)), as applicable, notwithstanding any provision in any such Assigned Contract (including those of the type described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer, and subject to the provisions of this Order, the OpCo Purchaser (or its Designee(s)) or the PropCo Purchaser (or its Designee(s)), as applicable, shall succeed to the entirety of Debtors' rights, title, interests in, and obligations under, the Assigned Contracts, and, pursuant to section 365(k) of the Bankruptcy Code,

the Debtors shall be relieved from any further liability with respect to the Assigned Contracts after such assumption and assignment to OpCo Purchaser (or its Designee(s)) or PropCo Purchaser (or its Designee(s)), as applicable, other than as provided in the Asset Purchase Agreement.

14. Each counterparty to an Assigned Contract shall be deemed to have consented to assumption and assignment, and the Purchasers shall be deemed to have demonstrated adequate assurance of future performance with respect to such Assigned Contract pursuant to sections 365(b)(1)(C) and 365(f)(2)(B) of the Bankruptcy Code, unless such counterparty timely files an Assignment Objection in accordance with the Assignment Procedures.

15. To the extent the Debtors seek to assume and assign a Potentially Assigned Contract, the Debtors will, at the request of the Potentially Assigned Contract counterparty, provide to such counterparty the OpCo Purchaser's or PropCo Purchaser's, or its respective Designee(s), as applicable, evidence of adequate assurance of future performance consistent with section 365 of the Bankruptcy Code (the "Adequate Assurance Information").

16. Upon the Debtors' assignment of the Assigned Contracts to the Purchasers under the provisions of this Order, any additional orders of this Court, and Debtors' or PropCo Purchaser's, as applicable, payment of any Cure Costs pursuant to the Assignment Procedures and the Asset Purchase Agreement, no default shall exist under any Assigned Contract, and no counterparty to any Assigned Contract shall be permitted (a) to declare a default by the applicable Purchaser under such Assigned Contract or (b) to otherwise take action against the applicable Purchaser as a result of any Debtor's financial condition, bankruptcy, failure to perform any of its obligations under the relevant Assigned Contract, or the assignment of the relevant Assigned Contract. Each non-Debtor party to an Assigned Contract shall also be forever barred, estopped, and permanently enjoined from (i) asserting against the Debtors, OpCo Purchaser, or PropCo

Purchaser, or the property of any of them, any default or Claim arising out of any indemnity obligation or warranty for acts or occurrences arising prior to or existing as of the applicable Closing, or, against OpCo Purchaser or PropCo Purchaser, any counterclaim, defense, setoff, or any other Claim asserted or assertable against the Debtors and (ii) imposing or charging against such Purchaser or its Affiliates any rent accelerations, assignment fees, increases, or any other fees as a result of the Debtors' assumption and assignment to OpCo Purchaser of the OpCo Assigned Contracts or to PropCo Purchaser of the PropCo Assigned Contracts.

17. To the extent OpCo Purchaser or PropCo Purchaser, as applicable, proposes to sell or abandon any property that may contain "personally identifiable information," as that term is defined in section 101(41A) of the Bankruptcy Code, or other personal and/or confidential information about the Debtors' employees and/or customers, or any other individual (the "Confidential Information"), the applicable Purchaser shall destroy or otherwise remove the Confidential Information from such property before such sale or abandonment.

18. **Cure Costs**. All defaults (monetary and non-monetary) under the OpCo Assigned Contracts through the OpCo Closing shall be deemed cured and satisfied through the payment of the Cure Cost by the Debtors in accordance with the Assignment Procedures and Section 1.7 of the Asset Purchase Agreement. No other amounts will be owed by the Debtors, their estates, or the OpCo Purchaser with respect to amounts first arising or accruing during, or attributable or related to, the period before OpCo Closing with respect to the OpCo Assigned Contracts. Any and all persons or entities shall be forever barred and estopped from asserting a claim against the Debtors, their estates, or the OpCo Purchaser that any additional amounts are due or defaults exist under the OpCo Assigned Contracts that arose or accrued, or relate to or are attributable to, the period before the OpCo Closing, including defaults of provisions restricting change in control or

ownership interest composition or other bankruptcy-related defaults, arising under any OpCo Assigned Contracts at any time on or prior to the OpCo Closing Date, unless preserved by a timely filed Assignment Objection in accordance with the Assignment Procedures. Subject to an Assignment Objection, assignment by the Debtors of any OpCo Assigned Contracts to the OpCo Purchaser or its Designee shall relieve the Debtors and their estates from any liability for any breach of such OpCo Assigned Contracts occurring after such assignment.

19. All defaults (monetary and non-monetary) under the PropCo Assigned Contracts through the PropCo Closing shall be deemed cured and satisfied through the payment of the Cure Cost by the Debtors in accordance with the Assignment Procedures and Section 1.7 of the Asset Purchase Agreement. No other amounts will be owed by the Debtors, their estates, or the PropCo Purchaser with respect to amounts first arising or accruing during, or attributable or related to, the period before PropCo Closing with respect to the PropCo Assigned Contracts. Any and all persons or entities shall be forever barred and estopped from asserting a claim against the Debtors, their estates, or the PropCo Purchaser that any additional amounts are due or defaults exist under the PropCo Assigned Contracts that arose or accrued, or relate to or are attributable to, the period before the PropCo Closing, including defaults of provisions restricting change in control or ownership interest composition or other bankruptcy-related defaults, arising under any PropCo Assigned Contracts at any time on or prior to the PropCo Closing Date, unless preserved by a timely filed Assignment Objection in accordance with the Assignment Procedures. Subject to an Assignment Objection, assignment by the Debtors of any PropCo Assigned Contracts to the PropCo Purchaser or its Designee shall relieve the Debtors and their estates from any liability for any breach of such PropCo Assigned Contracts occurring after such assignment.

20. Notwithstanding anything to the contrary in this Order or a chapter 11 plan, but subject to the reservations of counterparties' rights in paragraph 10, with respect to any assumed and assigned unexpired lease of nonresidential real property, the Debtors, the Wind-Down Debtors, OpCo Purchaser, or PropCo Purchaser (as applicable in accordance with the Asset Purchase Agreement) shall be liable for: (a) amounts owed under the assumed and assigned unexpired lease of nonresidential real property that are unbilled or not yet due as of the effective date of the assignment, regardless of when such amounts accrued, such as common area maintenance, insurance, taxes, and similar charges; (b) any regular or periodic adjustment or reconciliation of charges under the assumed and assigned unexpired lease of nonresidential real property that are not due or have not been determined as of the effective date of the assignment; (c) any percentage rent that may come due under the assumed and assigned unexpired lease of nonresidential real property; (d) indemnification obligations, if any, up to the effective date of the assignment; and (e) any unpaid Cure Costs under the assumed and assigned unexpired lease of nonresidential real property, calculated in accordance with the terms of any applicable amendment to such unexpired lease of nonresidential real property.

21. **Avoidance Actions**. Neither OpCo Purchaser nor any Person claiming by, through, or on behalf of the OpCo Purchaser (including by operation of law, sale, assignment, conveyance or otherwise), shall pursue, prosecute, litigate, institute or commence an action based on, assert, sell, convey, assign, or file any claim that relates to the Avoidance Actions, designated as an OpCo Acquired Asset pursuant to Section 1.1(t) of the Asset Purchase Agreement, or assert or use any such Avoidance Actions for defensive purposes. Nothing in this Order shall grant OpCo Purchaser standing to bring any Avoidance Actions. This Order is a complete defense to any effort to pursue, litigate, institute, or commence an action based on, assert, sell, convey, assign, or file any claim that

relates to an Avoidance Action and neither the Debtors, the OpCo Purchaser, nor any other party have standing to bring any Avoidance Actions.

22. **WARN Act Liability**. Notwithstanding anything to the contrary in the Asset Purchase Agreement or this Order, the Wind-Down Budget to be proposed by the Sellers, as contemplated pursuant to Section 2.1(f)(i) of the Asset Purchase Agreement, shall include a reserve for any estimated WARN Act liability, if any, that the Sellers may incur with respect to Sellers' termination of employment of Sellers' or any of their respective Subsidiaries' or Affiliates' employees on or prior to the Closings, as applicable, to the extent such Liabilities are designated an "Excluded Liability" pursuant to Section 1.6(e) of the Asset Purchase Agreement.

23. **Synchrony Program Agreement**. Synchrony Bank ("Synchrony") and J. C. Penney Corporation are parties to an Amended and Restated Credit Card Program Agreement, dated as of October 5, 2018 (as amended from time to time, the "Synchrony Program Agreement"). The Debtors, OpCo Purchaser, and Synchrony agree that (a) the Synchrony Program Agreement will be an OpCo Assigned Contract under Section 1.7 of the Asset Purchase Agreement and that no monetary cure amount is required to be paid, (b) the Synchrony Program Agreement will be deemed assumed by J. C. Penney Corporation and assigned to and performed by OpCo Purchaser effective as of the OpCo Closing Date (and will not thereafter be designated as an OpCo Non-Assigned Contract), (c) no provision in the Asset Purchase Agreement, this Order, the Plan, or otherwise shall be deemed to amend, modify or otherwise affect the rights and obligations of OpCo Purchaser and Synchrony under the Synchrony Program Agreement, and (d) any amounts payable by Synchrony under the Synchrony Program Agreement after the OpCo Closing Date will be paid to OpCo Purchaser and not the Debtors.

24. **Cigna**. Notwithstanding anything in this Order, the Asset Purchase Agreement, or any notice related thereto to the contrary, unless Cigna Health and Life Insurance Company ("Cigna") and the Debtors agree otherwise, not later than the earlier of (a) December 31, 2020 or (b) ten (10) business days prior to the termination of the Benefits TSA, the Debtors shall provide to Cigna, through its counsel, written notice of the Debtors' irrevocable (subject to the OpCo Closing) decision as to whether or not it proposes to assume and assign any or all of the Cigna Employee Benefits Agreements[6] to OpCo Purchaser as part of the Transaction.

25. **Oracle**. Notwithstanding anything to the contrary in this Order, the Asset Purchase Agreement, the Transition Services Agreement, the RemainCo TSA, or any transitional use agreement between and/or among the Debtors and any party ("TSA Documents"), neither this Order, the Asset Purchase Agreement, nor the TSA Documents shall authorize: (a) the transfer, assumption, or assignment to any third party, of any contract between the Debtors and Oracle Credit Corp. and/or Oracle America, Inc., successor in interest to NetSuite, Inc., Siebel Systems, Sleepycat, Sun Microsystems, Inc., Hyperion Systems Solutions, PeopleSoft, Inc., Retek, GoldenGate Software, and Sunopsis (jointly herein "Oracle"); or (b) use of any Oracle license agreement in any way that is inconsistent with the relevant license grant, including, but not limited to, exceeding the number of authorized users, and permitting shared use or license splitting, absent further order of the court or Oracle's express prior written consent.

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[6] As used herein, "Cigna Employee Benefits Agreements" shall mean the following agreements: Administrative Services Only Agreement – Account No. 3339076; Group Medical, Dental, Prescription Drug, Vision and Emergency Evacuation Policy – Account No. 00416D; Medical Benefits Abroad Policy – Account No. 00416E; Voluntary LTD - Policy No. FLK0980224; Statutory STD w/Paid Leave Policy – Policy No. NYD0075459; Statutory STD – Policy No. SDJ0980113; Statutory STD – Policy No. PRD0980022; Employer Paid STD – Policy No. LK0100125; Basic/Voluntary Life – Policy No. FLX0980453; Voluntary ADD – Policy No. OK0980468; Business Travel Accident – Policy No. ABL0980114.

26. **Insurance Proceeds**. Notwithstanding anything to the contrary herein or in the Asset Purchase Agreement, subject to applicable law, personal injury claims against insurance proceeds arising prior to the assignment of any insurance policies to OpCo Purchaser shall be preserved to the full extent such claims are valid and exist under applicable law. All parties' rights to object to the validity, amount, and extent of such claims arising prior to any assignment are fully preserved.

27. **Valid Transfer**. Upon the applicable Closing: (a) the Debtors are hereby authorized to consummate, and shall be deemed for all purposes to have consummated, the sale, transfer, and assignment of all of the Debtors' rights, title, and interest in the Acquired Assets to the Purchasers free and clear of all Claims pursuant to the Asset Purchase Agreement (other than the Assumed Liabilities and the Permitted Post-Closing Encumbrances); and (b) except as otherwise expressly provided in the Asset Purchase Agreement or this Order, all encumbrances and Liabilities (other than the Assumed Liabilities and the Permitted Post-Closing Encumbrances) shall not be enforceable as against any member of the Purchaser Group or the Acquired Assets. In furtherance of the foregoing, the Debtors are authorized to transfer and assign all of the Debtors' rights, title, and interests in certain OpCo Acquired Assets to an entity formed, or to be formed, pursuant to Section 1.9 of the Asset Purchase Agreement, with any such transfer and assignment of OpCo Acquired Assets (and of the equity interests of any such entity to OpCo Purchaser following such transfer and assignment) being consummated free and clear of all Claims, encumbrances and Liabilities (other than the Assumed Liabilities and the Permitted Post-Closing Encumbrances). Unless otherwise expressly included in the Assumed Liabilities and the Permitted Post-Closing Encumbrances, or as otherwise expressly provided by this Order, no member of the Purchaser Group shall be responsible for any Claims, liens, liabilities, obligations, interests, or

encumbrances, including in respect of the following: (a) any Collective Bargaining Agreement, labor, or employment agreements or any severance or separation pay arrangements; (b) any mortgages, deeds of trust and security interests; (c) any intercompany loans and receivables between one or more of the Sellers and any Debtor; (d) any pension, multiemployer plan (as such term is defined in Section 3(37) or Section 4001(a)(3) of ERISA), health or welfare, compensation or other employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary), agreements, practices and programs, including, without limitation, any pension plan of any of the Debtors or any multiemployer plan to which the Debtors have at any time contributed to or had any liability or potential liability; (e) any other employee, worker's compensation, occupational disease or unemployment or temporary disability related claim, including, without limitation, claims that might otherwise arise under or pursuant to (i) ERISA, (ii) the Fair Labor Standards Act, (iii) Title VII of the Civil Rights Act of 1964, (iv) the Federal Rehabilitation Act of 1973, (v) the National Labor Relations Act, (vi) the Age Discrimination and Employment Act of 1967 and Age Discrimination in Employment Act, as amended, (vii) the Americans with Disabilities Act of 1990, (viii) COBRA, (ix) WARN, (x) state harassment, discrimination, or retaliation laws, (xi) state unemployment compensation laws or any other similar state laws, or (xii) any other state or federal benefits or claims relating to any employment with the Debtors or any of their predecessors; (f) any liabilities arising under any Environmental Laws with respect to any assets owned or operated by any of the Debtors or any corporate predecessor of any of the Debtors at any time prior to the applicable Closing Date; (g) any product liability law; (h) any antitrust laws; (i) any bulk sales or similar law; (j) any tax statutes or ordinances, including, without limitation, the IRC, as amended; and (k) any Excluded Liabilities. A certified copy of this Order may be filed with the appropriate clerk and/or recorder

to act to cancel any such lien, Claim, liability, obligation, interest, or encumbrance of record. To the extent any Assumed Liabilities may constitute administrative claims, such claims shall be subject to the administrative claims bar date process set forth in the Plan, including any bar dates established pursuant thereto.

28. To the greatest extent available under applicable law, the Purchasers shall be authorized, as of the applicable Closing Date, to operate under any license, permit, registration, consent, and governmental authorization or any other approval of the Debtors with respect to the Acquired Assets to the extent transferred pursuant to the Asset Purchase Agreement, and all such licenses, permits, registrations, and governmental authorizations and approvals are deemed to have been transferred to OpCo Purchaser as of the OpCo Closing Date and to PropCo Purchaser as of the PropCo Closing Date. All existing licenses or permits applicable to the business shall remain in place for Purchasers' benefit until either new licenses and permits are obtained or existing licenses and permits are transferred in accordance with applicable administrative procedures.

29. The transfer to the Purchasers of the Debtors' rights, title, and interests in the Acquired Assets pursuant to the Asset Purchase Agreement shall be, and hereby is deemed to be, a legal, valid and effective transfer of the Debtors' rights, title, and interests in the Acquired Assets, notwithstanding any requirement for approval or consent by any person, and vests with or will vest in the applicable Purchaser all rights, title, and interests of the Debtors in the Acquired Assets, free and clear of all Claims of any kind or nature whatsoever (other than the Assumed Liabilities and the Permitted Post-Closing Encumbrances), with any such Claims attaching to the net available proceeds with the same validity, extent, and priority as immediately prior to the sale of the Acquired Assets, subject to the provisions of the Asset Purchase Agreement and this Order, and

any rights, claims, and defenses of the Debtors and other parties in interest with respect to the attachment of such Claims to the net available proceeds.

30. Notwithstanding anything herein to the contrary or in the Asset Purchase Agreement, any right of setoff or recoupment is preserved against the Debtors, the OpCo Purchaser, PropCo Purchaser, and any of their affiliates and successors to the extent such right(s) exist under applicable law and subject to the Debtors', OpCo Purchaser's, PropCo Purchaser's and any of their affiliates' and successors', as applicable, right to contest any such right(s) of setoff or recoupment; provided that any rights of setoff or recoupment with respect to pre-Closing administrative claims shall only be asserted against the Debtors, subject to the reservation of counterparties' rights in paragraph 10 of this Order.

31. **Pension Plan**. The Debtors are either the contributing sponsor or a member of the contributing sponsor's controlled group, as defined by ERISA, with respect to the J. C. Penney Corporation Inc. Pension Plan (the "Pension Plan"). All documents and records of the Pension Plan (the "Pension Plan Documents") shall be stored and preserved by the Debtors until the Pension Benefit Guaranty Corporation ("PBGC") has completed its investigation regarding the Pension Plan. If any Pension Plan Documents are transferred to OpCo Purchaser or PropCo Purchaser, the Debtors shall retain copies to comply with this provision of this Order. Pension Plan Documents may be in hard copy or electronic form and may include, but are not limited to, any Pension Plan governing documents, actuarial documents, records and statements of the Pension Plan's assets, board resolutions relating to the Pension Plan, and employee and personnel records of the employees who participate in the Pension Plan. The Debtors shall not abandon or destroy any Pension Plan Documents and shall make the Pension Plan Documents available to PBGC for inspection and copying.

32. Notwithstanding anything to the contrary, no provision contained in the Asset Purchase Agreement or this Order shall alter any rights or obligations of the PBGC or the Pension Plan under applicable law or regulatory provision with respect to the Pension Plan by, among other things, discharging, releasing, exculpating or relieving any individuals who were employees, directors, officers, or shareholders of the Debtors prior to the Closing from any liability with respect to the Pension Plan (collectively, the "Pension Liabilities"). PBGC and the Pension Plan shall not be enjoined or precluded from enforcing the Pension Liabilities against any such Person, other than, for the avoidance of doubt, OpCo Purchaser, and their Affiliates existing before the Closing, and PropCo Purchaser, and their Affiliates existing before the Closing and its and each of their respective successors and assigns. Furthermore, notwithstanding anything to the contrary in the Asset Purchase Agreement or this Order, to the maximum extent permitted by law, the acquisition of any stock or equity interests or any assets of any Acquired Subsidiary shall be free and clear of the Pension Liabilities.

33. **Satisfaction of Compensation Requirements**. The occurrence of the OpCo Closing shall be deemed to satisfy any requirement set forth in any prepetition compensation program regarding the Debtors' consummation of a restructuring transaction.

34. **No Liability**. None of the members of the Purchaser Group shall have or incur any liability to, or be subject to any action by any of the Debtors or any of their estates, predecessors, successors, or assigns, arising out of the negotiation, investigation, preparation, execution, or delivery of the Asset Purchase Agreement and the entry into and consummation of the sale of the Acquired Assets and the Transaction, except as expressly provided in, or to enforce the terms of, the Asset Purchase Agreement and this Order.

35. **Injunction**. Except as expressly provided in the Asset Purchase Agreement or by this Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, quasi-governmental, tax and regulatory authorities, lenders, vendors, suppliers, employees, trade creditors, litigation claimants, and other persons, holding Claims of any kind or nature whatsoever against or in the Debtors or the Debtors' interests in the Acquired Assets (whether known or unknown, legal or equitable, matured or unmatured, contingent or noncontingent, liquidated, or unliquidated, asserted or unasserted, whether arising prior to or subsequent to the commencement of these chapter 11 cases, whether imposed by agreement, understanding, law, equity, or otherwise), including, without limitation, the non-Debtor party or parties to each Assigned Contract, arising under or out of, in connection with, or in any way relating to, the Acquired Assets or the transfer of the Debtors' interests in the Acquired Assets to the Purchasers shall be and hereby are forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing Claims against any member of the Purchaser Group, the Acquired Assets, or the interests of the Debtors or the Purchasers in such Acquired Assets (other than Assumed Liabilities and the Permitted Post-Closing Encumbrances). Following the applicable Closing, no holder of a Claim against the Debtors (other than Assumed Liabilities and the Permitted Post-Closing Encumbrances) shall interfere with the Purchasers' title to or use and enjoyment of the Debtors' interests in the Acquired Assets based on or related to such Claim, and, except as otherwise expressly provided in the Asset Purchase Agreement or this Order, all such Claims, if any, shall be, and hereby are transferred and will attach to the net available proceeds from the sale of the Acquired Assets in the order of their priority, with the same validity, force, and effect which they have against such Acquired Assets as of the applicable Closing, subject to any rights, claims and defenses that the Debtors' estates and the Debtors, as applicable, may

possess with respect thereto. All persons are hereby enjoined from taking action that would interfere with or adversely affect the ability of the Debtors to transfer the Acquired Assets in accordance with the terms of the Asset Purchase Agreement and this Order.

36. **Good Faith**. The Asset Purchase Agreement has been entered into by the Purchasers in good faith and the Purchasers are good faith purchasers of the Acquired Assets as that term is used in section 363(m) of the Bankruptcy Code. The Purchasers are entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code, and, accordingly, the reversal or modification on appeal of the authorization of the Transaction provided herein shall neither affect the validity of the Transaction nor the transfer of the Acquired Assets to the Purchasers free and clear of Claims, unless such authorization is duly stayed before the applicable Closing pending such appeal.

37. **No Bulk Sales**. No bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the Transaction. Except as otherwise expressly provided in the Asset Purchase Agreement, no obligation or liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payment is due to any person in connection with the Asset Purchase Agreement or the transactions contemplated hereby or thereby for which the Purchasers are or will become liable.

38. **Consideration**. The consideration provided by the Purchasers (including the Credit Bid Amount) for the Acquired Assets under the Asset Purchase Agreement shall be deemed for all purposes to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and any other applicable law, and the sale of the Acquired Assets may not be avoided, or costs, fees, expenses, or damages imposed or awarded under section 363(n) of the Bankruptcy Code or any other provision of the Bankruptcy Code, the Uniform Voidable

Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, or any other similar federal or state law.

39. For the avoidance of doubt, the OpCo Assumed Liabilities as set forth on Schedule 1.4(g) of the Asset Purchase Agreement commits the OpCo Purchaser, as of the OpCo Closing, to assume certain of Sellers' current liabilities, including, without limitation, all unpaid post-petition merchandise accounts payable.

40. For the further avoidance of doubt, Section 2.1(f)(iii) of the Asset Purchase Agreement provides a mechanism for the Sellers to ensure that sufficient funds will be available in the Reserved Claims Budget to cover any and all allowed claims asserted against the Sellers and their estates pursuant to section 503 of the Bankruptcy Code, and that any dispute between the Sellers and PropCo Purchaser as to the necessary amount of the Reserved Claims Budget shall be resolved by mediation conducted by the Bankruptcy Court as set forth in the Asset Purchase Agreement.

41. **Section 363(n) of Bankruptcy Code**. Neither the Debtors nor the Purchasers engaged in any conduct that would cause or permit the Asset Purchase Agreement or the consummation of the Transaction to be avoided, or costs, fees, expenses, or damages to be imposed, under section 363(n) of the Bankruptcy Code or under any other law of the United States, any state, territory, possession thereof, the District of Columbia, or any other applicable law. The joint bid by the OpCo Purchaser and the PropCo Purchaser is appropriate under the circumstances and has neither the purpose nor the effect of controlling the sale price of the Transaction. Accordingly, the Asset Purchase Agreement and the Transaction shall not be avoidable under section 363(n) or chapter 5 of the Bankruptcy Code, and no party shall be entitled to any damages

or other recovery pursuant to section 363(n) of the Bankruptcy Code in respect of the Asset Purchase Agreement or the Transaction.

42. **Closing**. On the applicable Closing Date, this Order shall be construed and shall constitute for any and all purposes a full and complete general assignment, conveyance, and transfer of all of the Debtors' rights, title, and interests in the Acquired Assets or a bill of sale transferring good and marketable title in such Acquired Assets to the applicable Purchaser on the applicable Closing Date pursuant to the terms of the Asset Purchase Agreement, free and clear of all Claims (other than Assumed Liabilities and the Permitted Post-Closing Encumbrances).

43. Upon the applicable Closing, no member of the Purchaser Group shall, or shall be deemed to: (a) be the successor of or successor employer to any of the Sellers or Debtors, including without limitation, with respect to any Collective Bargaining Agreement, any employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary), or any single or multiemployer pension or other plans, and the Purchasers and/or its Affiliates, as applicable, shall instead be, and be deemed to be, a new employer, including with respect to, among other things, any and all federal or state unemployment laws, including any unemployment compensation or tax laws, or any other similar federal or state laws, including any labor laws; (b) have any common law successorship liability in relation to any Collective Bargaining Agreement, union, multiemployer organization, employee benefit plan (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary) or any single or multiemployer pension or other plans, including with respect to withdrawal liability or contribution obligations; (c) have, *de facto*, or otherwise, merged or consolidated with or into Sellers or Debtors; (d) be a mere continuation or substantial continuation of Sellers or the enterprise(s) of Sellers or Debtors; or (e) be liable for any acts or omissions of Sellers or Debtors in connection with any

Collective Bargaining Agreement, the conduct of the business, or the operation, funding, or administration of the employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary) or any single or multiemployer pension or other plans or arising under or related to the Acquired Assets, except as expressly provided in the Asset Purchase Agreement. Without limiting the generality of the foregoing, and except as otherwise expressly provided in the Asset Purchase Agreement, the parties intend and the Court hereby orders that no member of the Purchaser Group shall be liable for any encumbrance, Claim, or Liability (other than Assumed Liabilities and the Permitted Post-Closing Encumbrances) against any Seller, or any of its predecessors or Affiliates, and no member of the Purchaser Group shall have successor or vicarious liability of any kind or character whether known or unknown as of the applicable Closing Date, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the business, any Collective Bargaining Agreement, the operation, funding, or administration of the employee benefit plans (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary) or any single or multiemployer pension or other plans, the Acquired Assets, or any Claims against or Liabilities (other than the Acquired Seller Plans or any stand-alone welfare benefit plans of any Acquired Subsidiary) of any Seller.

44. The DIP Secured Parties and the Term Loan/First Lien Notes Secured Parties are deemed to have approved and taken all actions necessary to receive distributions pursuant to the Asset Purchase Agreement and this Order, including establishment of the PropCo Trust and the PropCo Subsidiaries, the Credit Bid by PropCo Purchaser on behalf of the DIP Secured Parties and the Term Loan/First Lien Notes Secured Parties, and entry into the OpCo Term Loan B Credit Agreement. The DIP Administrative Agent, the DIP Collateral Agent, the Term Loan

Administrative Agent, and the Term Loan/First Lien Notes Collateral Agent are authorized and directed, pursuant to the Instruction Letter and this Order, to effectuate the Credit Bid in accordance with the Asset Purchase Agreement and this Order, and any assignee of the Credit Bid, if applicable, is bound by the terms and provisions of the Instruction Letter and any related direction to the Term Loan/First Lien Notes Collateral Agent (which direction is ratified), the terms of this Order, and the Asset Purchase Agreement. The DIP Secured Parties and the Term Loan/First Lien Notes Secured Parties are deemed to have executed and delivered the OpCo Term Loan B Credit Agreement and GLAS USA LLC, as Administrative Agent under the OpCo Term Loan B Credit Agreement, is hereby authorized, directed and instructed to execute the OpCo Term Loan B Credit Agreement on behalf of the DIP Secured Parties and the Term Loan/First Lien Notes Secured Parties.

45. **Free and Clear**. Other than the Purchasers' assumption of the Assumed Liabilities and the Purchasers' obligations under the Asset Purchase Agreement, the Purchaser Group shall have no obligations with respect to any Claims, and, upon consummation of the Transaction in accordance with the Asset Purchase Agreement, the Debtors and their estates are deemed to release and forever discharge the Purchaser Group from any and all Claims of any kind, character, or nature whatsoever, known or unknown, fixed or contingent, relating to the sale of the Acquired Assets or assignments of the Assigned Contracts. This Order: (a) is and shall be effective as a determination that other than Assumed Liabilities and the Permitted Post-Closing Encumbrances, upon the applicable Closing in accordance with the Asset Purchase Agreement, all Claims of any kind or nature whatsoever existing as to Acquired Assets, including all Claims as to all Indebtedness (as defined in the Asset Purchase Agreement) and any tax liability, prior to the applicable Closing have been unconditionally released, discharged, and terminated, and that the

conveyances described herein have been effected, with such Claims and liens attaching in order of priority to the proceeds of the Transaction, and (b) is and shall be binding upon and shall authorize all entities, including, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies or units, governmental departments or units, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the Acquired Assets conveyed to the Purchasers. Other than liens and security interests constituting Permitted Post-Closing Encumbrances, all recorded Claims against the Acquired Assets from their records, official and otherwise, shall be deemed stricken upon the applicable Closing in accordance with the Asset Purchase Agreement and the terms of this Order.

46. If any person or entity which has filed statements or other documents or agreements evidencing Claims against or interests in, the Acquired Assets shall not have delivered to the Debtors before the applicable Closing, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of liens and easements, and any other documents necessary for the purpose of documenting the release of all Claims (other than liens and security interests constituting Permitted Post-Closing Encumbrances) which the person or entity has or may assert with respect to the Acquired Assets, (a) the Debtors and/or the Purchasers are hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of such person or entity with respect to the Acquired Assets and (b) the Purchasers are hereby authorized to file, register, or otherwise record a certified copy of this Order, which, once filed, registered or otherwise recorded, will constitute conclusive evidence of the

release of all Interests or Claims in the Assets of any kind or nature (except as otherwise assumed in, or permitted by, the Asset Purchase Agreement); *provided that*, notwithstanding anything in this Order or the Asset Purchase Agreement to the contrary, the provisions of this Order will be self-executing, and neither the Debtors nor Purchasers will be required to execute or file releases, termination statements, assignments, consents, or other instruments in order to effectuate, consummate, and implement the provisions of this Order. For the avoidance of doubt, upon consummation of the Transaction, the Purchasers are authorized to file termination statements, lien terminations, or other amendments in any required jurisdiction to remove and record, notice filings or financing statements recorded to attach, perfect, or otherwise notice any lien or encumbrance that is extinguished or otherwise released pursuant to this Order under section 363 of the Bankruptcy Code and the related provisions of the Bankruptcy Code.

47. To the maximum extent permitted under applicable law, including section 1146 of the Bankruptcy Code, the sale of the Acquired Assets and the transactions contemplated thereby shall be exempt from any sales, use, purchase, transfer, franchise, deed, fixed asset, stamp, documentary stamp, use, or similar fees for Taxes, governmental charges, and recording charges (including any interest and penalty thereon), which may be payable by reason of the sale of the Acquired Assets or the transactions contemplated thereby, given that the transfer of the Acquired Assets shall be considered an integral part of the Debtors' plan of reorganization.

48. To the extent permitted under applicable law, including section 1405(b)(8) of N.Y. Tax Law, the sale of the Acquired Assets and the transactions contemplated thereby shall be exempt from any transfer tax which may be payable by reason of the sale of the Acquired Assets or the transactions contemplated thereby.

49. PropCo Trust will, for tax reporting purposes, report PropCo as owning the assets it acquires at their fair market value at the time of the PropCo Closing (and the face amount underlying the Credit Bid Amount shall not be determinative of fair market value) and such fair market value shall be used by PropCo Trust and the Debtors for purposes of determining the aggregate value used for the PropCo Allocation as such term is used in Section 9.2 of the Asset Purchase Agreement, provided that the Debtors shall not be required to report on such basis if the Debtors determine, based on advice of tax advisors, that there is no reasonable position under applicable tax law to report on such basis.

50. Notwithstanding the sale of the PropCo Acquired Assets and the OpCo Acquired Assets, the PropCo Purchaser and OpCo Purchaser, as applicable, shall pay property taxes as they become due and owing in the ordinary course pursuant to applicable property tax laws; *provided* that nothing in this Order shall relieve the Debtors of any liability to the OpCo Purchaser or the PropCo Purchaser under the Asset Purchase Agreement that may arise from the OpCo Purchaser's or PropCo Purchaser's payment of any property tax that is not an Assumed Liability.

51. Notwithstanding anything to the contrary contained herein, the sale of the OpCo Acquired Assets and PropCo Acquired Assets shall not be sold free and clear of any valid, perfected, and unavoidable statutory liens (if any) held by the Orange County Florida, Tax Collector and the Texas Taxing Authorities[7] (the "Tax Collectors") for real property and tangible

[7] As used herein, the "Texas Taxing Authorities" shall mean, collectively, Angelina County, Bexar County, Cameron County, Cypress-Fairbanks ISD, Dallas County, City of Del Rio, City of Eagle Pass, Eagle Pass ISD, Ector CAD, City of El Paso, Ellis County, Fort Bend County, City of Frisco, Galveston County, Grayson County, Gregg County, City of Harlingen, Harlingen CISD, Harris County, Hidalgo County, Hunt County, Jefferson County, Lamar County and CAD, Lewisville ISD, City of McAllen, McLennan County, Montgomery County, Northwest ISD, Nueces County, Parker CAD, San Marcos CISD, Tarrant County, Tom Green CAD, Val Verde County, Victoria County, Pasadena Independent School District, Brazoria County Tax Office, Channelview Independent School District, City of Houston, City of Rosenberg, Clear Creek Independent School District, Conroe Municipal Utility District #1, Fort Bend County Independent School District, Fort Bend County Levee Improvement District #2, Fort Bend County Municipal Utility District #167, Galena Park Independent School District, Harris County Municipal Management District #1, Harris County Municipal Utility District #285, Humble

personal property taxes (the "Tax Liens"), to the extent that the Tax Collectors are entitled to such liens in accordance with applicable state law. Nothing in this Order shall be deemed as an admission as to the validity of any lien or claim asserted by the Tax Collectors and all parties' rights to object to the priority, validity, amount, and extent of the claims and liens asserted by the Tax Collectors are fully preserved.

52. **Texas Comptroller**. The assets sold pursuant to this Order and the terms of the Asset Purchase Agreements shall not include unclaimed property held in trust by the Seller, as defined pursuant to state unclaimed property laws including Texas Property Code, Title 6, Chapter 72-76, and other applicable Texas laws.

53. **Surety Bonds**. Notwithstanding anything to the contrary in this Order, with respect to existing surety bonds being transferred to OpCo pursuant to the Asset Purchase Agreement: (a) the Debtors shall be liable for any premiums and other amounts due, including loss adjustment expenses, on existing surety bonds that become due or payable prior to the OpCo Closing Date; *provided* that, after the OpCo Closing Date, OpCo Purchaser shall be obligated for any premiums and other amounts due on existing surety bonds that become due and payable after the OpCo Closing Date; (b) if an existing surety bond is released after the OpCo Closing Date and OpCo Purchaser or the Debtors, as applicable, have paid a premium, the applicable surety provider shall (i) to the extent the payment was made by the Debtors, apply any premium ***first*** to satisfy any of the Debtors' then-unpaid obligation for premiums owed to such surety provider and ***second*** as a

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Independent School District, Maverick County Tax Office, Spring Branch Independent School District, Willis Independent School District, Woodlands Metro Center Municipal Utility District #1, Woodlands Road Utility District #1, Walker County Appraisal District, Tyler Independent School District, City of Greenville, City of Weslaco, Weslaco Independent School District, Potter County, Randall County, Arlington Independent School District, City of Burleson, Burleson Independent School District, Frisco Independent School District, Lubbock Central Appraisal District, Midland County, Williamson County, Hays County, Bell County TAD, Comal County, City of Waco., *et al.,* Brazos County, Denton County, Midland CAD, Anderson County, and Taylor County CAD.

refund to the Debtors and (ii) to the extent the payment was made by the OpCo Purchaser, refund such payment to the OpCo Purchaser; and (c) after the OpCo Closing, OpCo Purchaser shall be authorized to enter into new surety bond agreements and related indemnification and collateral agreements, or to modify any existing surety bonds. For the avoidance of doubt, OpCo Purchaser shall be obligated with respect to any replacement surety bond.

54. Notwithstanding anything to the contrary in this Order, with respect to existing surety bonds being transferred to PropCo pursuant to the Asset Purchase Agreement: (a) the Debtors shall be liable for any premiums and other amounts due, including loss adjustment expenses, on existing surety bonds that become due or payable prior to the PropCo Closing Date; *provided* that, after the PropCo Closing Date, PropCo shall be obligated for any premiums and other amounts due on existing surety bonds that become due and payable after the PropCo Closing Date; (b) if an existing surety bond is released after the PropCo Closing and PropCo or the Debtors, as applicable, have paid a premium, the applicable surety provider shall (i) to the extent the payment was made by the Debtors, apply any premium ***first*** to satisfy any of the Debtors' then-unpaid obligation for premiums owed to such surety provider and ***second*** as a refund to the Debtors and (ii) to the extent the payment was made by the PropCo, refund such payment to the PropCo; and (c) after the PropCo Closing, PropCo shall be authorized to enter into new surety bond agreements and related indemnification and collateral agreements, or to modify any existing surety bonds. For the avoidance of doubt, PropCo shall be obligated with respect to any replacement surety bond.

55. Until an existing surety bond is replaced and the obligee under such bond being replaced has returned such existing surety bond to the surety provider, the discharge or release of any Claim in the Asset Purchase Agreement and this Order shall not release, discharge, preclude,

or enjoin any obligation of the Debtors to the surety provider under such surety bond, related indemnity agreement, or the common law of suretyship, with respect to such existing surety bonds.

56. **Tempur Sealy International, Inc.** Notwithstanding any other provision of this Order or the Asset Purchase Agreement to the contrary, to the extent the transfer of the OpCo Acquired Assets to Opco Purchaser includes any assets related to Tempur Sealy International, Inc., such transfer shall not be free and clear of, and shall not impair in any respect, any contractual or statutory rights of setoff or recoupment or other affirmative defenses to payment held by Tempur Sealy International, Inc.

57. **Interchange Fee Litigation**. For the avoidance of doubt, nothing contained herein shall be construed to affect or impair any attorneys' charging lien (if any) resulting from professional services rendered in connection with *Target Corp., et al. v. Visa Inc., et al.*, Case No. 13-cv-3477 (S.D.N.Y.); *Target Corp., et al. v. Visa Inc., et al.*, Case No. 13-cv-05745 (E.D.N.Y.) (MKB) (JO); and *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, Case No. 05-MD-01720 (E.D.N.Y.) (MKB) (JO), irrespective of whether the contract(s) regarding such professional services are OpCo Assigned Contracts or PropCo Assigned Contracts.

58. **Consigned Merchandise**. Notwithstanding anything to the contrary contained in the Asset Purchase Agreement or this Order, the Debtors shall not transfer, assign, convey or deliver to OpCo Purchaser, Debtors' right, title and/or interest in merchandise which was consigned and delivered by the Select Consignors[8] to the Debtors prior to the OpCo Closing on a

[8] As used herein, the "Select Consignors" shall mean, collectively, J.D.M. Import Co., Inc. a/k/a JDM Import Co. Inc. d/b/a Instock Programs; Rosy Blue Jewelry, Inc.; Lumos Scintillation, Inc.; Envisions LLC; DDLNYC LLC a/k/a DDLNY f/k/a Diamond Direct LLC; Richline Group, Inc.; Allure Gems, LLC; B.H. Multi Com Corp.; B. H. Multi Color Corp.; Renaissance Jewelry New York, Inc.; Jay Gems, Inc.; SHR Jewelry Group, LLC; Goldiam USA, Inc.; Frederick Goldman, Inc.; Le Vian Corp.; Unique Designs, Inc.; Sandeep Diamond Corporation; and any other consignor who becomes a Select Consignor by following the procedures described herein.

consignment basis pursuant to an invoice, memo, or similar document indicating that the merchandise identified therein was provided "on consignment," "on memo," or words of similar import, or pursuant to an express contractual consignment agreement between the Consignor and one or more of the Debtors (each a "Consignment Agreement"), whether prior to the Petition Date or thereafter ("Consigned Merchandise")[9] without the written consent of the Select Consignor (which consent may be evidenced by email).

59. To the extent such consent is given by a Select Consignor, such Consignor is and shall remain the owner of the Consigned Merchandise transferred, assigned, conveyed or delivered by the Debtors to OpCo Purchaser ("Assigned Consigned Merchandise"), retaining full title to each item of Assigned Consigned Merchandise until its sale by OpCo Purchaser in the ordinary course of its business. Each Select Consignor shall continue to have fully and properly perfected consignment interests and purchase money security interests, with priority over any liens, claims, or encumbrances within the meaning of the applicable sections of the Uniform Commercial Code ("UCC"), with respect to any and all Assigned Consigned Merchandise (but, for the avoidance of doubt, not in any sale proceeds thereof), without the need to file UCC Financing Statements or serve any notices of consignment. Notwithstanding the foregoing, this Order shall be deemed consent and authorization for Select Consignors to file UCC Financing Statements with respect to the Assigned Consigned Merchandise and any subsequently consigned merchandise, against OpCo Purchaser and any subsidiaries of, or affiliates controlled by, the OpCo Purchaser in possession of the Assigned Consigned Merchandise or subsequently consigned merchandise, and send any notices of consignment to additionally perfect their rights in the Assigned Consigned Merchandise and subsequently consigned merchandise. For the avoidance of doubt, except as set forth herein

[9] For the avoidance of doubt, Consigned Merchandise includes samples provided by a Consignor to the Debtors.

or in accordance with a side letter executed by a Select Consignor and the ABL Agent to OpCo Purchaser, which side letter shall have the same force and effect as this Order to the extent this Order relates to the priority of secured interests in the consigned merchandise, Select Consignors shall be required to comply with the requirements of the UCC, or other applicable law, with respect to perfection of their consignment interests in merchandise consigned to OpCo Purchaser after the OpCo Closing.

60. With respect to any Assigned Consigned Merchandise, or to the extent that OpCo Purchaser receives Consigned Merchandise from a Select Consignor after the OpCo Closing pursuant to open orders or memos existing as of the date of the OpCo Closing, OpCo Purchaser shall fully comply with the terms and conditions of any existing Consignment Agreement by and between Debtors and any Select Consignor, including, without limitation, all reporting and payment obligations, until such time as OpCo Purchaser enters into a new Consignment Agreement with such Consignor. Notwithstanding the foregoing, such requirement shall not be deemed an assumption or assignment of any Consignment Agreement by the Debtors to OpCo Purchaser.

61. Any merchandise held by the Debtors provided by a consignor who is not a Select Consignor shall be transferred subject to the same security interests of such consignors which existed immediately prior to the OpCo Closing and any ongoing transactions between the consignor and OpCo Purchaser will be subject to the terms and conditions of any existing consignment agreement between such consignor and the Debtors and shall remain in full force and effect unless and until such consignor notifies OpCo Purchaser of its desire to be considered a Select Consignor.[10]

[10] To the extent a consignor is not considered a "Select Consignor" at the time of entry of this order, a consignor must notify the Debtors and the OpCo Purchasers of such election by sending an email with "JCP - SELECT

62. Without limiting the foregoing, each such consignor shall continue to have fully and properly perfected consignment interests and purchase money security interests, with priority over any liens, claims, or encumbrances within the meaning of the applicable sections of the UCC, with respect to any such consigned merchandise (but, for the avoidance of doubt, not in any sale proceeds thereof), without the need to file UCC Financing Statements against OpCo Purchaser and its affiliates and subsidiaries or serve any notices of consignment. Notwithstanding the foregoing, this Order shall be deemed consent and authorization for any such consignors to file UCC Financing Statements with respect to such consignment merchandise and any subsequently consigned merchandise, against OpCo Purchaser and any subsidiaries of, or affiliates controlled by, the OpCo Purchaser in possession of such merchandise or subsequently consigned merchandise, and send any notices of consignment to additionally perfect their rights in their consigned merchandise and subsequently consigned merchandise. With respect to any consigned merchandise, and to the extent that OpCo Purchaser receives consigned merchandise from such consignor after the OpCo Closing pursuant to open orders or memos existing as of the date of the OpCo Closing, OpCo Purchaser shall fully comply with the terms and conditions of any existing consignment agreement by and between Debtors and any such consignor, including, without limitation, all reporting and payment obligations, until such time as OpCo Purchaser enters into a new Consignment Agreement with such Consignor. Notwithstanding the foregoing, such requirement shall not be deemed an assumption or assignment of any Consignment Agreement by the Debtors to OpCo Purchaser. For the avoidance of doubt, except as set forth herein or in accordance with a side letter executed by a Consignor and the ABL Agent to OpCo Purchaser,

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CONSIGNOR ELECTION" in the subject line to sharnett@paulweiss.com, xpang@paulweiss.com, jake.gordon@kirkland.com, and prentis.robinson@kirkland.com, on or before the OpCo Closing Date.

which side letter shall have the same force and effect as this Order to the extent this Order relates to the priority of secured interests in the consigned merchandise, Consignors shall be required to comply with the requirements of the UCC, or other applicable law, with respect to perfection of their consignment interests in merchandise consigned to OpCo Purchaser after the OpCo Closing.

63. Nothing herein shall effect the rights of any Valid Consignor (as defined in the Financing Order) under the Financing Order.

64. **Direction to Counterparties**. All counterparties to the Assigned Contracts shall cooperate and expeditiously execute and deliver, upon the reasonable requests of the OpCo Purchaser or PropCo Purchaser, as applicable, and shall not charge the Debtors or the Purchasers for any instruments, applications, consents or other documents that may be required or requested by any public or other party or entity to effectuate the applicable transfers in connection with the sale of the Acquired Assets.

65. **Direction to Government Agencies**. Each and every federal, state and governmental agency or department, and any other person or entity, is hereby authorized to accept any and all documents and instruments in connection with or necessary to consummate the Transaction contemplated by the Asset Purchase Agreement.

66. Nothing in this Order or the Asset Purchase Agreement releases, nullifies, precludes, or enjoins the enforcement of any police or regulatory power of a governmental unit that any entity would be subject to as the owner or operator of property after the applicable Closing Date.

67. Without limiting the provisions of paragraph 65 above, but subject to section 525(a) of the Bankruptcy Code, no governmental unit may deny, revoke, suspend or fail to provide any right, permit, charter, franchise, license, trademark or other grant or permission relating to the use of the Acquired Assets sold, transferred, or conveyed to the Purchasers on

account of the filing or pendency of these chapter 11 cases or the consummation of the sale of the Acquired Assets.

68. **Break-Up Fee and Expense Reimbursement Amount**. Pursuant to sections 105, 363, 364, 503, and 507 of the Bankruptcy Code, the Debtors are hereby authorized and directed, subject to the terms and conditions of the Asset Purchase Agreement, to pay the Break-Up Fee and Expense Reimbursement Amount without further order of this Court in accordance with the terms of the Asset Purchase Agreement. The Break-Up Fee and the Expense Reimbursement Amount shall (a) constitute allowed superpriority administrative expense claims pursuant to sections 105(a), 503(b), and 507(a)(2) of the Bankruptcy Code with priority over all other administrative expenses of the kind specified in section 503(b) of the Bankruptcy Code and such allowed superpriority administrative expense claim shall be superior in priority to all other similarly situated claims asserted or allowed in the Bankruptcy Case and (b) be carved out from and not be subject to the liens and claims granted in connection with the DIP Obligations, Term Loan Obligations, First Lien Notes Obligations, or Second Lien Notes Obligations pursuant to the DIP Credit Agreement and the other DIP Documents (including the Financing Order), the Term Loan Agreement and the other Term Loan Credit Documents, the First Lien Notes Indenture and the other First Lien Notes Documents, and the Second Lien Notes Indenture and the other Second Lien Notes Documents.

69. **Releases**. Except to the extent expressly preserved pursuant to the Asset Purchase Agreement and/or this Order, upon the applicable Closing Date, each of (a) the Debtors, (b) the Purchasers, (c) the DIP Administrative Agent; (d) the DIP Collateral Agent, (e) the Term Loan Administrative Agent, and (f) the Term Loan/First Lien Notes Collateral Agent (each a "Releasing Party"), to the fullest extent permissible under applicable law, mutually releases and discharges

each other Releasing Party and such Releasing Parties' respective current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), assigns, subsidiaries, direct and indirect equity holders, funds, portfolio companies, management companies, current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, advisory board members, investment advisors, and other professionals, each in their capacity as such (collectively, in such capacity, the "Released Parties" and each a "Released Party"), from any and all Claims, Interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, including any derivative claims that such Releasing Party (or someone on its behalf) would have been legally entitled to assert, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in Law, equity, or otherwise, that such Releasing Party would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of a holder of any claim against a Releasing Party, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any claim, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the Transaction, entry into the Asset Purchase Agreement, the Instruction Letters, the Credit Bid, the non-binding letter of intent attached as an exhibit to the *Notice of Filing of Letter of Intent* [Docket No. 1489], the chapter 11 cases, the formulation, preparation, dissemination, negotiation, filing, or consummation of the RSA, the Transaction, the Asset Purchase Agreement, the Instruction Letters, or any restructuring transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the RSA, the filing of these chapter 11 cases, the pursuit of the

Transaction, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the applicable Closing Date related or relating to the foregoing; *provided* that this paragraph 69 shall not (a) affect the liability of any Releasing Party for claims or liabilities arising out of or relating to any act or omission of a Releasing Party that constitutes actual fraud, willful misconduct, or gross negligence, each solely to the extent as determined by a final order of a court of competent jurisdiction, or (b) relieve any Released Party from any liabilities or obligations related to the Asset Purchase Agreement, any related documents or documents entered into in connection with transactions contemplated thereby, including, without limitation, the Master Lease Agreement and the Distribution Centers Lease Agreement, and/or this Order.

70. To the fullest extent permissible under applicable law, except as otherwise expressly provided in the Asset Purchase Agreement and/or this Order, upon the applicable Closing Date, none of the Released Parties shall have or incur any liability to, or be subject to any right of action by, any holder of a Claim against, or equity interest in, any of the Debtors or any other party in interest, or any of their respective employees, representatives, financial advisors, attorneys, or agents, acting in such capacity, or any of their successors and assigns, for any act or omission in connection with, related to or arising out of, the chapter 11 cases, the operation of the Debtors' businesses during the chapter 11 cases, the investigation, formulation, preparation, negotiation, execution, delivery, implementation, or consummation of the transactions contemplated by the Asset Purchase Agreement, including, without limitation, the Transaction, the assumption and assignment of the OpCo Assigned Contracts, or any other contract, instrument, release, agreement, settlement, or document created, modified, amended, terminated, or entered into in connection with the Asset Purchase Agreement, or any other act or omission in connection

with the Debtors' chapter 11 cases; *provided* that this paragraph 70 shall not (a) affect the liability of any entity for any act or omission that is determined by a final, nonappealable order by the Court or another court with jurisdiction to have constituted actual fraud, gross negligence, or willful misconduct by such entity, or (b) relieve any Released Party from any obligations under, or otherwise affect the terms and conditions of, the Asset Purchase Agreement and/or this Order.

71. The mutual releases set forth in paragraphs 9 and 10 of the Settlement Agreement are approved.

72. **Term Loan B Credit Agreement Mortgages and Related Documents**. The OpCo Purchaser is hereby authorized and approved to deliver to the Term Loan B Collateral Agent mortgages, deeds of trust, or deeds to secure debt (as applicable) over each ground-leased property constituting an OpCo Acquired Asset and the Term Loan B Collateral Agent is hereby recognized as a qualified mortgagee under each such ground lease (irrespective of any restriction or landlord consent requirement pertaining to leasehold mortgages and irrespective of whether or not the Term Loan B Collateral Agent so qualifies as a leasehold mortgagee under such ground lease). The Term Loan B Collateral Agent is granted any and all rights and remedies available to a mortgagee under such ground lease (including providing the Term Loan B Collateral Agent with notice of defaults and a reasonable opportunity to cure any defaults by OpCo Purchaser).

73. **ABL Facility**. The Debtors shall, and are authorized to, make Payment in Full of the ABL Obligations (as defined in the Financing Order) owing by Debtors on the OpCo Closing Date in accordance with the Financing Order, the Asset Purchase Agreement, the Payoff Letter (as defined in the Asset Purchase Agreement) and the terms of this Order. Notwithstanding anything to the contrary contained herein or otherwise, upon closing of the Transaction, the applicable Purchasers shall assume all obligations of the Debtors in connection with outstanding letters of

credit issued under the ABL Facility (as defined in the Financing Order) in accordance with the terms of the Payoff Letter and the ABL OpCo Financing, which letters of credit shall be deemed to have been issued under, and pursuant to the terms of, the ABL OpCo Financing upon closing of the Transaction. The term "Payment in Full" or "Paid in Full" means the indefeasible repayment in full of all Obligations (as defined in the ABL Credit Agreement) (including principal, interest, fees, expenses and indemnities, other than contingent indemnification and reimbursement obligations for which no claim has been asserted), the cash collateralization of all treasury and cash management obligations, hedging obligations and bank product obligations, and the cancelation, replacement (including by "rolling" any such letter of credit into a new credit facility via deemed issuance under such new credit facility), backing or cash collateralization of letters of credit under the ABL Credit Agreement.

74. Except to the extent expressly preserved pursuant to the Asset Purchase Agreement and/or this Order, upon the applicable Closing Date, each of the Debtors (each an "ABL Releasing Party"), to the fullest extent permissible under applicable law, releases and discharges each ABL Secured Party and such ABL Secured Parties' respective current and former predecessors, successors, Affiliates (regardless of whether such interests are held directly or indirectly), assigns, subsidiaries, direct and indirect equity holders, funds, portfolio companies, management companies, current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, professionals, consultants, financial advisors, attorneys, accountants, investment bankers, advisory board members, investment advisors, and other professionals, each in their capacity as such (collectively, in such capacity, the "ABL Released Parties" and each a "ABL Released Party"), from any and all Claims, Interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever,

including any derivative claims that such ABL Releasing Party (or someone on its behalf) would have been legally entitled to assert, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in Law, equity, or otherwise, that such ABL Releasing Party would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of a holder of any claim against a Releasing Party, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors, the subject matter of, or the transactions or events giving rise to, any claim, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the Transaction, entry into the Asset Purchase Agreement, the chapter 11 cases, the formulation, preparation, dissemination, negotiation, filing, or consummation of the RSA, the Transaction, the Asset Purchase Agreement, or any restructuring transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the RSA, the filing of these chapter 11 cases, the pursuit of the Transaction, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the applicable Closing Date related or relating to the foregoing (the "Release"); *provided* that this paragraph 74 shall not (a) affect the liability of any ABL Secured Party for claims or liabilities arising out of or relating to (i) any facts or circumstances not in existence on or prior to the date hereof or (ii) any act or omission of any ABL Released Party that constitutes actual fraud, bad faith, willful misconduct, or gross negligence, each solely to the extent as determined by a final order of a court of competent jurisdiction, or (b) relieve any ABL Released Party from any liabilities or obligations related to the Asset Purchase Agreement and/or this Order.

75. **Governing Terms**. To the extent this Order is inconsistent with any prior order or pleading filed in these chapter 11 cases, the terms of this Order shall govern. To the extent there

is any inconsistency between the terms of this Order and the terms of the Asset Purchase Agreement, the terms of this Order shall govern.

76. **Surrender of Possession**. All entities (other than holders of Assumed Liabilities and the Permitted Post-Closing Encumbrances) that are presently, or on the applicable Closing Date may be, in possession of some or all of the Acquired Assets are hereby directed to surrender possession of the Acquired Assets to the Purchasers as of the applicable Closing Date. The Debtors shall use commercially reasonable efforts to assure that all persons that are presently, or on the applicable Closing Date may be, in possession of some or all of the Acquired Assets surrender possession of the Acquired Assets to either (a) the Debtors before the applicable Closing Date or (b) the Purchasers (or their designee) on or after the applicable Closing Date.

77. **Binding on Creditors and Interest Holders**. This Order and the Asset Purchase Agreement shall be binding in all respects upon all creditors and interest holders of the Debtors, all non-debtor parties to the Assigned Contracts, all successors and assigns of the Debtors and their Affiliates and subsidiaries, and any trustees, examiners, "responsible persons" or other fiduciaries appointed in the chapter 11 cases or upon a conversion of the Debtors' cases to cases under chapter 7 of the Bankruptcy Code, including a chapter 7 trustee (collectively, the "Trustee"), and the Asset Purchase Agreement, including the Assigned Contracts (other than in accordance with Section 1.7 of the Asset Purchase Agreement), shall not be subject to rejection or avoidance under any circumstances. If any order under section 1112 of the Bankruptcy Code is entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that this Order and the rights granted to the Purchasers hereunder shall remain effective and, notwithstanding such dismissal or conversion, shall remain binding on all parties in interest.

78. To the fullest extent permissible under applicable law, except as otherwise expressly provided in the Asset Purchase Agreement and/or this Order, upon the applicable Closing Date, none of the ABL Secured Parties or any of their respective employees, representatives, financial advisors, attorneys, or agents, acting in such capacity, or any of their successors and assigns, shall have or incur any liability to, or be subject to any right of action by, any holder of a Claim against, or equity interest in, any of the Debtors or any other party in interest, or any of their respective employees, representatives, financial advisors, attorneys, or agents, acting in such capacity, or any of their successors and assigns, for any act or omission in connection with, related to or arising out of, the chapter 11 cases, the operation of the Debtors' businesses during the chapter 11 cases, the investigation, formulation, preparation, negotiation, execution, delivery, implementation, or consummation of the transactions contemplated by the Asset Purchase Agreement, or any other act or omission in connection with the Debtors' chapter 11 cases; *provided* that this paragraph 78 shall not (a) affect the liability of any entity for any act or omission that is determined by a final, nonappealable order by the Court or another court with jurisdiction to have constituted actual fraud, bad faith, gross negligence, or willful misconduct by such entity, or (b) relieve any ABL Secured Party from any obligations under, or otherwise affect the terms and conditions of, the Asset Purchase Agreement and/or this Order.

79. **No Modification by Plan; Incorporation into Confirmation Order**. Except as expressly provided herein or in the Asset Purchase Agreement, neither this Order, the Asset Purchase Agreement nor any of its respective provisions shall be modified by any chapter 11 plan of any of the Debtors confirmed in these chapter 11 cases.

80. **Retention of Jurisdiction**. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation of this Order, including, without

limitation, the authority to: (a) interpret, implement and enforce the terms and provisions of this Order (including the injunctive relief provided in this Order), the terms of the Asset Purchase Agreement, all amendments thereto and any waivers and consents thereunder, the Transition Services Agreement, the Benefits TSA, the RemainCo TSA, and, until the PropCo Closing, the Master Lease Agreement and Distribution Centers Lease Agreement; (b) protect the Purchasers, or the Acquired Assets, from and against any of the Claims (other than Assumed Liabilities and the Permitted Post-Closing Encumbrances); (c) compel delivery of all Acquired Assets to the Purchasers in accordance with this Order and otherwise facilitate Purchasers' pursuit and acquisition of the Acquired Assets; (d) compel the Purchasers to perform all of their obligations under the Asset Purchase Agreement and this Order; and (e) resolve any disputes arising under or related to the Asset Purchase Agreement or the purchase and sale of the Acquired Assets.

81. **Amendments**. The Asset Purchase Agreement or any related agreements, documents, or other instruments may be modified, amended, or supplemented through a written document signed by the parties thereto in accordance with the terms thereof without further order of this Court; *provided* that any such modification, amendment, or supplement is not material or does not materially change the economic substance of the transactions contemplated hereby.

82. **Conditions Precedent**. Neither the Purchasers nor the Debtors shall have an obligation to close the Transaction until all conditions precedent in the Asset Purchase Agreement to each of their respective obligations to close the Transaction have been met, satisfied, or waived in accordance with the terms of the Asset Purchase Agreement.

83. **Final Order**. This Order constitutes a final order within the meaning of 28 U.S.C. § 158(a). Notwithstanding any provision in the Bankruptcy Rules to the contrary, including but not limited to Bankruptcy Rules 6004(h), 6006(d) and 7062, the Court expressly finds there is no

reason for delay in the implementation of this Order and, accordingly: (a) the terms of this Order shall be immediately effective and enforceable upon its entry; (b) the Debtors are not subject to any stay of this Order or in the implementation, enforcement, or realization of the relief granted in this Order; and (c) the Debtors may, in their discretion and without further delay, take any action and perform any act authorized under this Order. For the avoidance of doubt, the foregoing waiver of Bankruptcy Rules 6004(h) and 6006(d) shall not apply to any Assignment Objections that are not otherwise resolved by the parties, without prejudice to Debtors' right to request (or the counterparties to the applicable Assigned Contracts to agree to) such waiver as part of any separate court order resolving any such Assignment Objection pursuant to the Assignment Procedures.

84. **Nonseverable**. The provisions of this Order are nonseverable and mutually dependent.

85. The failure specifically to include or make reference to any particular provisions of the Asset Purchase Agreement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the provisions of the Asset Purchase Agreement are authorized and approved in their entirety.

Signed: November 09, 2020.

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

Assignment Procedures

Assignment Procedures

1. Potentially Assigned Contracts Lists. On October 27, 2020, the Debtors filed with the Court (a) a list of executory contracts and unexpired leases that may be assumed and assigned to OpCo Purchaser in connection with the OpCo Sale (such contracts and leases, the "Potentially Assigned OpCo Contracts") and proposed Cure Costs related thereto (such list, the "Potential OpCo Contracts List") and (b) a list of executory contracts and unexpired leases that may be assumed and assigned to PropCo Purchaser in connection with the PropCo Sale (such contracts and leases, the "Potentially Assigned PropCo Contracts" and, together with the Potentially Assigned OpCo Contracts, the "Potentially Assigned Contracts") and proposed Cure Costs related thereto (such list, the "Potential PropCo Contracts List" and, together with the Potential OpCo Contracts List, the "Potentially Assigned Contracts Lists"). The Potentially Assigned Contracts Lists may be updated from time to time to add or remove any executory contracts or unexpired leases inadvertently included or excluded from such lists or to update any Cure Costs set forth in such lists in accordance with Section 1.7 of the APA.

2. Potential Assignment Notice. On or before October 28, 2020, the Debtors served on each non-Debtor counterparty to a Potentially Assigned Contract (each, a "Potential Assignment Counterparty") a customized notice substantially in the form attached to the Sale Order as Exhibit 1 (the "Potential Assignment Notice"), notifying such counterparty that the Potentially Assigned Contract may be assumed and assigned to OpCo Purchaser or PropCo Purchaser, as applicable, the proposed Cure Cost associated with such Potentially Assigned Contract, and information regarding adequate assurance of future performance. The Debtors will serve the Potential Assignment Notice on any non-Debtor counterparty to an executory contract or unexpired lease subsequently added to a Potentially Assigned Contracts List as soon as reasonably practicable after such revised Potentially Assigned Contracts List is filed.

3. Objections to Assumption and Assignment. Objections to the proposed assumption and assignment of a Potentially Assigned Contract, the proposed Cure Cost, or adequate assurance of OpCo Purchaser's or PropCo Purchaser's, as applicable, ability to perform (an "Assignment Objection"), must (a) be in writing, (b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Bankruptcy Rules, (c) state, with specificity, the legal and factual bases thereof, including the Cure Cost that the Potential Assignment Counterparty believes is required to cure defaults under the relevant Potentially Assigned Contract if different from the Cure Cost set forth in the Potential Assignment Notice, and (d) be filed with the Court (contemporaneously with a proof of service) by no later than the objection deadline set forth in the Potential Assignment Notice (which shall be no less than 21 days after the date of the Potential Assignment Notice).

4. Failure to File Timely Assignment Objection. If a Potential Assignment Counterparty fails to properly and timely file and serve an Assignment Objection in accordance with these Assumption and Assignment Procedures, the Potential Assignment Counterparty shall be forever barred from asserting any objection with regard to the assumption or assignment of its Potentially Assigned Contract and, notwithstanding anything to the contrary in the Potentially Assigned Contract or any other document, the Cure Costs set forth in the Potential Assignment Notice shall be the only amount necessary to cure outstanding defaults under the applicable Potentially Assigned Contract under section 365(b) of the Bankruptcy Code arising out of or

related to any events occurring prior to the closing of the Transactions, whether known or unknown, due or to become due, accrued, absolute, contingent or otherwise, and the Potential Assignment Counterparty shall be forever barred from asserting any additional cure or other amounts with respect to such Potentially Assigned Contract against the Debtors, OpCo Purchaser, PropCo Purchaser, or the property of any of the foregoing. In addition, to the maximum extent permitted by law, to the extent any provision in any Potentially Assigned Contract restricts or prevents, or purports to restrict or prevent, or is breached or deemed breached by, the assumption and assignment of such Potentially Assigned Contract (including any "change of control" provision), then such provision shall be deemed modified such that the transactions contemplated by the Asset Purchase Agreement and Sale Order shall not entitle the Potential Assignment Counterparty thereto to terminate such Potentially Assigned Contract or to exercise any other default-related rights with respect thereto, unless such Potential Assignment Counterparty properly and timely files and serves an Assignment Objection and such Assignment Objection is not overruled, withdrawn or otherwise resolved.

5. Resolution of Assignment Objections. Properly and timely filed Assignment Objections that cannot be resolved by the parties will be heard at a hearing to be requested by the Debtors to be scheduled by the Court on no less than 14 days' notice unless the Debtors and the objecting parties agree to a different time, in each case subject to Court availability. The Debtors reserve the right to reject, and not assume and assign, any executory contract or unexpired lease as a result of the ultimate resolution of any Assignment Objection.

6. Designation of Assigned Contracts. On or before the deadline to file the Plan Supplement, the Debtors shall file and serve (x) a notice identifying the Potentially Assigned OpCo Contracts that the Debtors intend to assume and assign to OpCo Purchaser or its Designee(s) pursuant to the Sale Order (the "OpCo Assigned Contracts List") and (y) a schedule identifying the Potentially Assigned PropCo Contracts that the Debtors intend to assume and assign to PropCo Purchaser or its Designee(s) pursuant to the Plan (which schedule may be included in the Plan Supplement) (the "PropCo Assigned Contracts List").

   (a) At any time until the earlier of (i) 90 days following the OpCo Closing, (ii) February 28, 2021, and (iii) solely with respect to unexpired Leases for nonresidential real property, the deadline set forth in section 365(d)(4) of the Bankruptcy Code (the "OpCo Designation Rights Period"), the Debtors shall have the right to amend the OpCo Assigned Contracts List to remove any contract or lease listed therein or add any Potentially Assigned OpCo Contracts, subject to and in accordance with Section 1.7 of the APA; *provided* that a contract or lease may not be removed from the OpCo Assigned Contracts List if the Cure Cost associated with such contract or lease has been satisfied (or, if the Cure Cost has been waived, a notice of deemed satisfaction of the Cure Cost has been served on the applicable counterparty).

   (b) At any time until the earlier of (i) the Plan Effective Date, (ii) PropCo Closing, and (iii) solely with respect to unexpired Leases for nonresidential real property, the deadline set forth in section 365(d)(4) of the Bankruptcy Code (the "PropCo Designation Rights Period"), the Debtors shall have the right to amend the PropCo Assigned Contracts List to remove any contract or lease listed therein or add any Potentially Assigned PropCo Contracts, subject to and in accordance with Section 1.7 of the APA.

7. Effectiveness of Assignment. Each executory Contract and unexpired Lease listed on the OpCo Assigned Contracts List, unless previously assigned to the OpCo Purchaser, as of the expiration of the OpCo Designation Rights Period shall be (and shall be deemed as) assumed by the Debtors and assigned to OpCo Purchaser or its Designee(s) pursuant to the Sale Order, effective on and as of the OpCo Closing, unless otherwise provided in an order of the Bankruptcy Court or a written agreement between the Debtors, OpCo Purchaser, and the applicable counterparty to an executory Contract or unexpired Lease. Each executory Contract and unexpired Lease listed on the PropCo Assigned Contracts List as of the expiration of the PropCo Designation Rights Period shall be (and shall be deemed as) assumed by the Debtors and assigned to PropCo Purchaser or its Designee(s) pursuant to the Plan, effective on and as of the PropCo Closing, unless otherwise provided in an order of the Bankruptcy Court or a written agreement between the Debtors, PropCo Purchaser, and the applicable counterparty to an executory Contract or unexpired Lease. Only those contracts and leases included on the most recently filed OpCo Assigned Contracts List as of the expiration of the OpCo Designation Rights Period or the most recently filed PropCo Assigned Contracts List as of the expiration of the PropCo Designation Rights Period will be assumed and assigned.

8. Payment of Cure Costs. Any Cure Cost associated with an executory Contract or unexpired Lease listed on the OpCo Assigned Contracts List as of the expiration of the OpCo Designation Rights Period not already paid in accordance with Section 1.7(c) of the APA shall be paid no later than on or as soon as reasonably practicable after the later of (a) the expiration of the OpCo Designation Rights Period and (b) the resolution between the Debtors and the applicable counterparty of a dispute regarding the amount of such Cure Cost. Any Cure Cost associated with an executory Contract or unexpired Lease listed on the PropCo Assigned Contracts List as of the expiration of the PropCo Designation Rights Period shall be paid by PropCo Purchaser no later than on or as soon as reasonably practicable after the later of (a) the expiration of the PropCo Designation Rights Period and (b) the resolution between the Debtors or PropCo Purchaser, as applicable, and the applicable counterparty of a dispute regarding the amount of such Cure Cost.

9. Reservation of Rights. The inclusion of a Potentially Assigned Contract, or Cure Cost with respect thereto, on a Potential Assignment Notice or the Potentially Assigned Contracts Lists shall not constitute or be deemed a determination or admission by the Debtors, OpCo Purchaser, PropCo Purchaser, or any other party in interest that such contract or lease is an executory contract or unexpired lease within the meaning of the Bankruptcy Code. The Debtors reserve all of their rights, claims, and causes of action with respect to each Potentially Assigned Contract listed on the Potential Assignment Notice and Potentially Assigned Contracts Lists. The Debtors' inclusion of any Potentially Assigned Contract on the Potential Assignment Notice and Potentially Assigned Contracts Lists shall not be a guarantee that such Potentially Assigned Contract ultimately will be assumed or assumed and assigned nor create an obligation of the Debtors to assume and assign any contract or lease listed therein.

Exhibit 1 to Exhibit A

Proposed Potential Assignment Notice

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re:	)	Chapter 11
J. C. PENNEY COMPANY, INC., *et al.*,[11]	)	Case No. 20-20182 (DRJ)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket No. 1592**

NOTICE OF POTENTIAL ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS OR UNEXPIRED LEASES AND CURE COSTS

PLEASE TAKE NOTICE that the above-captioned debtors and debtors in possession (collectively, the "Debtors") each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas (the "Court") on May 15, 2020 (the "Petition Date").

PLEASE TAKE FURTHER NOTICE that, on October 20, 2020 the Debtors filed the Sale Motion[12] with the Court seeking entry of an order (the "Sale Order"), among other things, (a) approving the sale of substantially all of the Debtors' assets (the "Sale") and (b) procedures for the assumption and assignment of contracts and leases in connection with the Sale (the "Proposed Assignment Procedures"), attached hereto as **Exhibit A**.

PLEASE TAKE FURTHER NOTICE that a hearing (the "Sale Hearing") to consider the proposed Sale will be held before the Court on November 2, 2020, at 1:00 p.m. (prevailing Central Time), or such other date as determined by the Court. Instructions to access the Sale Hearing are set forth in the Sale Motion.

PLEASE TAKE FURTHER NOTICE that schedules of executory contracts and unexpired leases that may be assumed and assigned to (a) the OpCo Purchaser or its Designee(s) in connection with the Sale pursuant to the Proposed Assignment Procedures are attached hereto as **Exhibit B** (the "Potentially Assigned OpCo Contracts List") or (b) the PropCo Purchaser or its

[11] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at http://cases.primeclerk.com/JCPenney. The location of Debtor J. C. Penney Company, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 6501 Legacy Drive, Plano, Texas 75024.

[12] The *Debtors' Emergency Motion for Entry of an Order (I) Authorizing (A) Entry into and Performance Under the Asset Purchase Agreement, (B) the Sale of the OpCo Acquired Assets and the PropCo Acquired Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, and (C) Assumption and Assignment of Executory Contracts and Unexpired Leases and (II) Granting Related Relief* [Docket No. 1592] (the "Sale Motion") was filed on October 20, 2020. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion.

Designee(s), in connection with the Sale pursuant to the Proposed Assignment Procedures are attached hereto as **Exhibit C** (the "Potentially Assigned PropCo Contracts List" and collectively with the Potentially Assigned OpCo Contracts List, the "Potentially Assigned Contracts Lists") and may also be accessed free of charge on the Debtors' case website, located at https://cases.primeclerk.com/JCPenney.

PLEASE TAKE FURTHER NOTICE that the "Cure Cost," if any, necessary for the assumption and assignment of each Potentially Assigned Contract is set forth on the Potentially Assigned Contracts Lists. **Each Cure Cost listed on the Potentially Assigned Contracts Lists represents all monetary defaults of any nature that the Debtors believe are or may be outstanding under a Potentially Assigned Contract prior to the closing of the Sale. If you believe your Cure Cost is listed with an incorrect amount on the Potentially Assigned Contracts Lists, you must object in accordance with the procedures described in this notice by no later than the Assignment Objection Deadline set forth below under the heading "Important Dates and Deadlines."** Notwithstanding anything to the contrary in the Sale Order, or Plan, but subject to the reservations of counterparties' rights in paragraph 10 of the Sale Order, with respect to any assumed and assigned Unexpired Lease of nonresidential real property, the Debtors, the Wind-Down Debtors, OpCo Purchaser, or PropCo Purchaser (as applicable) shall remain liable for: (1) amounts owed under the assumed and assigned Unexpired Lease of nonresidential real property that are unbilled or not yet due as of the effective date of the assignment, regardless of when such amounts accrued, such as common area maintenance, insurance, taxes, and similar charges; (2) any regular or periodic adjustment or reconciliation of charges under the assumed and assigned Unexpired Lease of nonresidential real property that are not due or have not been determined as of the date of the effective date of the assignment; (3) any percentage rent that may come due under the assumed and assigned Unexpired Lease of nonresidential real property; (4) indemnification obligations, if any, up to the date of the effective date of the assignment; and (5) any unpaid Cure Costs under the assumed and assigned Unexpired Lease of nonresidential real property, each calculated in accordance with the terms of any applicable amendment to such Unexpired Lease of nonresidential real property.

PLEASE TAKE FURTHER NOTICE that, to the maximum extent permitted by law, to the extent any provision in any Executory Contract or Unexpired Lease assumed or assumed and assigned pursuant to the Asset Purchase Agreement restricts or prevents, or purports to restrict or prevent, or is breached or deemed breached by, the assumption or assumption and assignment of such Executory Contract or Unexpired Lease (including any "change in control" provision), then such provision shall be deemed modified such that the transactions contemplated by the Asset Purchase Agreement and Sale Order shall not entitle the non-Debtor party thereto to terminate such Executory Contract or Unexpired Lease or to exercise any other default-related rights with respect thereto, unless such non-Debtor party thereto properly and timely files and serves an Assignment Objection and such Assignment Objection is not overruled, withdrawn or otherwise resolved.

YOU ARE RECEIVING THIS NOTICE BECAUSE YOU HAVE BEEN IDENTIFIED AS A POTENTIAL COUNTERPARTY TO A POTENTIALLY ASSIGNED CONTRACT. You will receive a further notice if the Potentially Assigned Contract to which you have been identified as a potential counterparty is in fact designated for assignment to OpCo or PropCo during the OpCo Designation Rights Period or the PropCo Designation Rights Period, as

applicable, or if the proposed Cure Cost is modified, in accordance with the Assignment Procedures. **You are encouraged to read the Assignment Procedures attached hereto carefully. The assumption and assignment of the contracts and leases included on the Potentially Assigned Contracts Lists is not guaranteed and is subject to approval by the Court and the Debtors' or the Purchasers' right to not designate a contract or lease on the Potentially Assigned Contracts Lists as an OpCo Assigned Contract or PropCo Assigned Contract.**

Obtaining Additional Information

Copies of the Sale Motion and the Asset Purchase Agreement, as well as all related exhibits, including all other documents filed with the Court, are available free of charge on the Debtors' case website, located at https://cases.primeclerk.com/JCPenney.

Upon request by a counterparty under any Potentially Assigned Contract to Rebecca Chaikin (rebecca.chaikin@kirkland.com), Allyson Smith Weinhouse (allyson.smith@kirkland.com), and Nick Krislov (nick.krislov@kirkland.com), counsel to the Debtors shall provide, by electronic mail, Adequate Assurance Information (as defined in the Sale Order) for the OpCo Purchaser or PropCo Purchaser, as applicable.

Important Dates and Deadlines[13]

1. **Assignment Objection Deadline**. Objections to the proposed assumption and assignment of a Potentially Assigned Contract, the proposed Cure Cost, or adequate assurance of OpCo Purchaser's or PropCo Purchaser's, as applicable, ability to perform (an "Assignment Objection"), if any, must (a) be in writing, (b) comply with the Bankruptcy Code, Bankruptcy Rules, and Local Bankruptcy Rules, (c) state, with specificity, the legal and factual bases thereof, including the Cure Cost that the Potential Assignment Counterparty believes is required to cure defaults under the relevant Potentially Assigned Contract if different from the Cure Cost set forth in the Potential Assignment Notice, and (d) be filed with the Court (contemporaneously with a proof of service) by no later than **November 18, 2020 at 4:00 p.m.** (prevailing Central Time) (the "Assignment Objection Deadline").

2. **Sale Objections Deadline**. Objections to the proposed Sale (a "Sale Objection") if any, must (a) be in writing, (b) state, with specificity, the legal and factual bases thereof, (c) be filed with the Court by no later than **November 2, 2020, at 1:00 p.m.** (prevailing Central Time) and (d) be served on: (i) counsel to the Debtors, Kirkland & Ellis LLP, 601 Lexington Avenue, New York, NY 10022, Attn: Aparna Yenamandra (aparna.yenamandra@kirkland.com), Rebecca Blake Chaikin (rebecca.chaikin@kirkland.com), and Jake William Gordon (jake.gordon@kirkland.com); (ii) co-counsel to the Debtors, Jackson Walker L.L.P., 1401 McKinney Street, Suite 1900, Attn: Matthew D. Cavenaugh (mcavenaugh@jw.com), Jennifer F. Wertz (jwertz@jw.com), Kristhy M. Peguero (kpeguero@jw.com), and Veronica A. Polnick

[13] The following dates and deadlines may be extended by the Debtors or the Court pursuant to the terms of the Sale Order.

(vpolnick@jw.com); (iii) counsel to the OpCo Purchaser, Paul, Weiss, Rifkin, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019, Attn: Brian S. Hermann (bhermann@paulweiss.com), Andrew M. Parlen (aparlen@paulweiss.com) and Sarah Harnett (sharnett@paulweiss.com); (iv) the United States Trustee, Attn: Stephen Statham, Esq. (stephen.statham@usdoj.gov) and Hector Duran, Esq. (hector.duran.jr@usdoj.gov); (v) counsel to the administrative agent for the Debtors' prepetition revolving credit facility, Otterbourg P.C., 230 Park Avenue, 30th Floor, New York, New York 10169, Attn: Daniel F. Fiorillo, Esq. (dfiorillo@otterbourg.com), and Chad B. Simon, Esq. (csimon@otterbourg.com); (vi) counsel to the First Lien Group of certain first lien creditors, Milbank LLP, 55 Hudson Yards, New York, New York 10001, Attn: Dennis F. Dunne (ddunne@milbank.com), Brian Kinney (bkinney@milbank.com), and Spencer Pepper (spepper@milbank.com); and (vii) co-counsel to the Committee, Cooley LLP, 55 Hudson Yards, New York, New York 10001, Attn: Cathy Hershcopf (chershcopf@cooley.com), Summer M. McKee, and (smckee@cooley.com), Lauren A. Reichardt (lreichardt@cooley.com) and Cole Schotz P.C., 1325 Avenue of the Americas, 19th Floor, New York, New York 10019, Attn: Seth Van Aalten (svanaalten@coleschotz.com) and Sarah A. Carnes (scarnes@coleschotz.com); and (viii) any other party that has requested notice pursuant to Bankruptcy Rule 2002.

3. **Sale Hearing**. The Sale Hearing will be held on **November 2, 2020, at 1:00 p.m. (prevailing Central Time)**, or such other date as determined by the Court, before the Honorable David R. Jones, in the United States Bankruptcy Court for the Southern District of Texas, located at Courtroom 400, 4th Floor, 515 Rusk Avenue, Houston, Texas 77002.

CONSEQUENCES OF FAILING TO TIMELY ASSERT AN OBJECTION

Absent order of the Court to the contrary, any counterparty to a Potentially Assigned Contract who fails to properly and timely file and serve an Assignment Objection in accordance with the Assumption and Assignment Procedures shall be forever barred from asserting any objection with regard to the assumption or assignment of its Potentially Assigned Contract and, notwithstanding anything to the contrary in the Potentially Assigned Contract or any other document, the Cure Costs set forth in the Potentially Assigned Contracts Lists attached hereto shall be the only amount necessary to cure outstanding defaults under the applicable Potentially Assigned Contract under section 365(b) of the Bankruptcy Code arising out of or related to any events occurring prior to the closing of the Sale, whether known or unknown, due or to become due, accrued, absolute, contingent or otherwise, and such counterparty to a Potentially Assigned Contract shall be forever barred from asserting any additional cure or other amounts with respect to such Potentially Assigned Contract against the Debtors, OpCo Purchaser, PropCo Purchaser, or the property of any of the foregoing.

October 27, 2020

/s/ Matthew D. Cavenaugh

JACKSON WALKER L.L.P.
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Co-Counsel to the Debtors and Debtors in Possession

Exhibit B

Settlement Agreement

EXECUTION VERSION

SETTLEMENT AGREEMENT

This Settlement Agreement, dated as of November 5, 2020 (this "Settlement Agreement" or "Settlement"), is entered into by (i) the Ad Hoc Group of First Lienholders (the "Majority Group"), on behalf of itself and each of its members, by and through its counsel, Milbank LLP, (ii) the First Lien Minority Group (the "Minority Group"), on behalf of itself and each of its members, by and through its counsel, Akin Gump Strauss Hauer & Feld LLP and (iii) J.C. Penney Company Inc. and its debtor affiliates (collectively the "Debtors"), by and through their counsel, Kirkland & Ellis LLP, in connection with the chapter 11 cases (the "Cases") commenced by the Debtors pending before the United States Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court"). The Majority Group, Minority Group and the Debtors are collectively referred to herein as the "Parties," or, as to each, a "Party."

RECITALS

WHEREAS, the members of the Majority Group and Minority Group are (i) lenders under that certain Amended and Restated Credit and Guaranty Agreement, dated as of June 23, 2016 (as amended, restated, modified, or supplemented from time to time, the "Term Loan"), by and among, inter alios, J. C. Penney Corporation, Inc. as borrower, GLAS USA LLC as successor Administrative Agent (the "Term Agent") and the Lenders thereunder, (ii) holders of 5.875% senior secured notes (the "Notes" and together with the Term Loan, the "1L Debt") due July 2023 issued by J. C. Penney Corp. on June 23, 2016 pursuant to an indenture between J. C. Penney Corp. and Wilmington Trust, National Association as Indenture Trustee (the "Indenture Trustee"), and (iii) lenders under that certain Superpriority Senior Secured Debtor-in-Possession Credit and Guaranty Agreement (the "DIP Agreement"), dated as of June 8, 2020 among the

Debtors, the Lenders party thereto (the "DIP Lenders") and GLAS USA LLC as Administrative Agent (the "DIP Agent"); and

WHEREAS, on October 28, 2020 the members of the Majority Group gave a written instruction (the "Direction Letter") to, the DIP Agent, the Term Agent, and the Indenture Trustee (together with the respective collateral agents, the "Agents") in connection with a "credit bid" (the "Credit Bid") of an aggregate of $900 million of obligations under the DIP Agreement (the "DIP Debt") and an aggregate $100 million of the 1L Debt; and

WHEREAS the Credit Bid and Direction Letter provide for the consideration to be provided to the beneficiaries of the Credit Bid to be allocated based on the ratable amount of DIP Debt and the 1L Debt being contributed to the Credit Bid (i.e., 90% of the consideration being allocated to the DIP Loan Lenders on account of the DIP Debt and 10% of the consideration being allocated to the holders of 1L Debt) (the "Current Credit Bid Allocation"); and

WHEREAS, the Credit Bid is a component of an integrated transaction (the "Transaction") for the sale of substantially all of the Debtors' assets, to be implemented through a sale of the Debtors' operating and certain real property assets (collectively "OpCo") and their remaining 166 real property assets (collectively, "PropCo"); and

WHEREAS, subject to the approval of the Bankruptcy Court, the Transaction will be implemented through an Asset Purchase Agreement (the "APA") to be approved pursuant to an order under section 363 and 365 of the Bankruptcy Code (the "Sale Order") and partially implemented through a chapter 11 plan of reorganization (the "Plan") as contemplated by the APA filed by the Debtors with the Bankruptcy Court on October 28, 2020; and

WHEREAS, the Minority Group filed: (i) an Objection To Approval Of Debtors' Emergency Motion For Entry Of An Order (I) Scheduling Hearings And Deadlines With Respect To The Restructuring Transactions And (II) Granting Related Relief (Docket No. 1532, the "Scheduling Objection"); (ii) a Statement Regarding The Debtors' Sale Motion And Limited Objection To Approval Of The Disclosure Statement (Docket No. 1621, the "Statement"); and (iii) two Emergency Motions to compel discovery (Docket Nos. 1633 and 1634, collectively, the "Motions to Compel," and together with the Scheduling Objection and the Statement, the "Minority Pleadings"); and

WHEREAS, the Parties wish to fully and finally resolve any and all disputes, controversies, or causes of action between the Parties related to the Credit Bid, the Transaction, the Plan, the APA, the Sale Order, and the Cases, in each case pursuant to the terms and conditions set forth in this Settlement Agreement.

SETTLEMENT AGREEMENT

NOW, THEREFORE, in consideration of the above recitals and the promises and mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Subject only to the occurrence of the Settlement Execution Date, the Minority Group will file a pleading with the Bankruptcy Court in the form attached hereto Exhibit A (with any alterations thereto subject to the consent of the Majority Group, the "Minority Settlement Pleading").

2. The Debtors shall seek approval of this Settlement Agreement pursuant to the Sale Order.

3. This Settlement Agreement shall become binding on the date (the "Settlement Execution Date") on which counsel to all of the Parties have executed and delivered to counsel to the other Parties a countersigned signature page of this Settlement Agreement, subject to the filing of the Minority Settlement Pleading and entry of the Sale Order, including approval of this Settlement Agreement (the "Settlement Effective Date"). If the Bankruptcy Court denies approval of the terms of this Settlement, it shall be of no further force and effect.

4. Subject to the occurrence of the Settlement Effective Date, the Debtors shall pay to the members of the Minority Group a supplemental distribution in the amount of $40 million in cash in settlement and resolution of all disputes with respect to the Transaction, the Credit Bid, the APA, the Cases, the Sale Order, and the Plan (the "Supplemental Distribution"). The Supplemental Distribution shall be paid out of (and contemporaneously with) the First Interim Distribution (as defined in the APA). The Supplemental Distribution will be structured such that it does not dilute the distribution that the members of the Minority Group would have otherwise received from the First Interim Distribution (i.e., the members of the Minority Group shall receive, in the aggregate, their ratable distribution of the First Interim Distribution (calculated as though there was no Supplemental Distribution) plus their ratable distribution of the Supplemental Distribution (based on the percentage of 1L Debt held by each member of the Minority Group as of November 1, 2020 as compared to the total 1L Debt held by all members of the Minority Group as of November 1, 2020).[1] The Parties will cooperate to minimize any withholding or deductions with respect to the Supplemental Distribution; provided that if the Debtors reasonably determine that any withholdings or deductions are required with respect to the Supplemental Distribution, such withholdings or deductions shall be permitted and the Supplemental Distribution shall be made

[1] The 1L Debt and DIP Debt holdings of each member of the Minority Group as of November 1, 2020 is set forth on Annex 1.

net of any such amounts; provided, that in the case of any portion of the Supplemental Distribution that can reliably be associated with a valid IRS Form W-9, the Debtors covenant and agree (i) that they will not make any U.S. federal tax withholding (other than backup withholding, in the case of a payee subject to backup withholding) on such portion of the Supplemental Distribution and (ii) to the extent required to take a position, will treat such portion of the Supplemental Distribution as having been paid with respect to the 1L Debt for applicable tax information reporting purposes.

5. The Majority Group will request that the DIP Agent rescind the Election Notice that was posted to the DIP Lenders and the Parties agree that the members of the Minority Group will not be cashed out of the DIP Loan pursuant to the terms of such Election Notice regardless of whether the Election Notice is so rescinded.

6. The Parties agree that all distributions that the members of the Minority Group are entitled to receive in connection with the Transaction,[2] whether under the Plan, the APA or otherwise, (except for the Supplemental Distribution as described in paragraph 4 above), on account of their holdings of DIP Debt and 1L Debt as of November 1, 2020, will be calculated and distributed on the basis of a $1 billion Credit Bid and the Current Credit Bid Allocation. The Parties agree that even if the value of the Credit Bid is changed and a different amount of 1L Debt is credit bid (whether higher or lower), the distributions to the members of the Minority Group on account of their holdings of DIP Debt and 1L Debt as of November 1, 2020 shall remain calculated based on the Current Credit Bid Allocation. Neither the Debtors nor the Majority Group shall amend, modify, create, file, or execute any document or agreement related to the Transaction, APA, or the Plan that targets or disproportionately adversely impacts a member of the Minority Group as

[2] Such distributions include their ratable share of all consideration being provided to PropCo Purchaser, BidCo and Earnout Co. under the terms of the APA and the Plan, including without limitation the OpCo Term Loan B, securities in PropCo and Earnout Co, the First Interim Distribution and the Second Interim Distribution (as such terms are defined in the APA).

compared to another holder of the DIP Debt and the 1L Debt that holds an entitlement to an equal amount or percentage of credit bid consideration; provided, that the Parties agree that nothing in the versions of the APA or the Plan filed as of November 1, 2020 (including any exhibits thereto that have been filed as of November 1, 2020) targets or adversely impacts any member of the Minority Group; provided, further that the Parties agree that to the extent any holder of an equity security of PropCo Purchaser, PropCo Trust or Earnout Co. is provided, within two years of the date on which the securities of such entity are distributed to holders in connection with the Transaction, with the opportunity to participate in a primary financing transaction with respect to such entity (whether equity or debt), then each member of the Minority Group that is an equity holder of any such entity at the applicable time shall be provided with the opportunity to participate in such primary financing on the same terms and conditions on a pro rata basis, subject to compliance with applicable securities laws.

7. The Debtors and the Majority Group agree that the fees and expenses of the legal and the financial advisors to the Minority Group, incurred on or prior to the Settlement Effective Date in the aggregate amount of $6 million, shall be payable by the Debtors and the Debtors shall pay such fees and expenses within seven business days of the submission of invoices thereof, subject to entry of the Sale Approval Order.

8. The Minority Group and each of its members agrees to support, raise no objection to, not delay or impede, and not support or encourage any other party in objecting to, delaying, or impeding the consummation of the Transaction, confirmation of the Plan, the APA, the Credit Bid, and the Sale Order in each case so long as they are consistent with the agreements contained herein and agrees to instruct their legal and financial advisors to do the same. The Minority Group agrees and acknowledges that the Majority Group, its members, the Agents, the Debtors and the other

parties to the Transaction may amend the Transaction, the Plan, the APA, the Credit Bid, the Sale Order and all related documentation and they agree to raise no objection to, and support such amendments so long as any such amendment does not alter any of the terms agreed to by the Parties in this Settlement Agreement or otherwise contravene the terms of this Settlement Agreement. The members of the Minority Group agree to vote to accept the Plan and to elect to give releases in connection therewith, provided, that the Plan is consistent with the terms of this Settlement Agreement.

9. Minority Group Release. Upon, and subject to the occurrence of, the Settlement Effective Date, the Minority Group and each member thereof, on behalf of themselves, their affiliates and their respective successor and assigns, shall be deemed to irrevocably and unconditionally waive, release, and forever discharge any claims they may have arising under or in connection with the Transaction, the Plan, the APA, the Credit Bid, the Sale Order, the DIP Loan, the 1L Debt, the Debtors, or the Cases against the Majority Group, its members, the Agents, the Debtors, the Debtors' estates, and their respective predecessors, successors, and assigns, and each of their respective parents, subsidiaries, affiliates, managers, present and future partners, officers, directors, employees, professionals, and agents, including any and all demands, obligations, actions, causes of action, suits, damages, accounts, judgments, liens, bonds, bills, covenants, contracts, controversies, agreements, promises, variances, costs, losses, debts, expenses and liabilities of any kind, whether known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, apparent or concealed, from the beginning of time through the Settlement Effective Date, other that the right of the members of the Minority Group to receive the consideration set forth in this Settlement Agreement, including receiving their ratable

distributions (as expressly modified by this Settlement Agreement) as DIP Lenders and holders of 1L Debt.

10. Majority Group Release. Upon, and subject to the occurrence of, the Settlement Effective Date, the Majority Group and each member thereof, on behalf of themselves, their affiliates and their respective successor and assigns, shall be deemed to irrevocably and unconditionally waive, release, and forever discharge any claims they may have arising under or in connection with the Transaction, the Plan, the APA, the Credit Bid, the Sale Order, the DIP Loan, the 1L Debt, the Debtors, the Cases, or the Minority Pleadings against the Minority Group, its members, and their respective predecessors, successors, and assigns, and each of their respective parents, subsidiaries, affiliates, present and future officers, directors, employees, professionals, and agents, including any and all demands, obligations, actions, causes of action, suits, damages, accounts, judgments, liens, bonds, bills, covenants, contracts, controversies, agreements, promises, variances, costs, losses, debts, expenses and liabilities of any kind, whether known or unknown, suspected or unsuspected, asserted or unasserted, fixed or contingent, apparent or concealed, from the beginning of time through the Settlement Effective Date.

11. The Debtors shall amend the Plan promptly after the Settlement Effective Date to provide that the members of the Minority Group and its professionals are "Releasing Parties" and "Released Parties" thereunder (as such terms are defined in the Plan).

12. The Bankruptcy Court shall have jurisdiction to interpret, enforce, and resolve any disputes arising under or related to the Settlement. Any motion or application brought before the Bankruptcy Court to resolve any dispute arising under or related to the Settlement shall be brought on proper notice (unless otherwise ordered by the Court) in accordance with the relevant Bankruptcy Rules.

13. This Settlement may be executed in any number of counterparts, each of which shall be deemed an original instrument, but all of which together shall constitute one and the same instrument.

14. This Settlement shall be binding upon and inure to the benefit of Parties hereto and each and all of their respective successors, assigns, heirs and personal representatives. The agreements of the Minority Group, the Majority Group and their respective members in this Settlement shall be binding on the transferee of any debt under the DIP Credit Agreement or 1L Debt held by a member of the Majority Group and/or the Minority Group as of the Settlement Execution Date. For the avoidance of doubt, each member of the Minority Group that is a not a "United States Person" as defined in Section 7701(a)(30) of the United States Internal Revenue Code of 1986, as amended, shall have the right to assign its entitlement to a portion of the Supplemental Distribution hereunder to any affiliate that is a United States Person.

15. The undersigned hereby represent and warrant that they are authorized to execute this Settlement.

EXECUTION VERSION

IN WITNESS WHEREOF, the parties hereto have executed this Settlement Agreement on the Settlement Execution Date.

Dated: November 5, 2020

PORTER HEDGES LLP

John F. Higgins (TX 09597500)
M. Shane Johnson (TX 24083263)
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Dated: November 5, 2020

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Co-Counsel to the Debtors

EXECUTION VERSION

Annex 1

Annex 1

Name[1]	Aggregate Principal Amount of Term Loan	Aggregate Principal Amount of Notes	Aggregate Principal Amount of DIP Debt
Aurelius Capital Management, LP	$45,384,990.00	$8,000,000.00	$12,021,949.00
Avenue Europe International Management, L.P.		$8,616,000.00	$1,646,000.00
Bank of America, N.A.	$3,080,460.00		
BofA Securities, Inc.		$12,562,000.00	
Canaras Capital Management, LLC	$3,957,971.74		
Carlson Capital, L.P.	$20,901,587.84	$5,000,000.00	$4,952,741.94
Cetus Capital LLC	$7,924,326.10	$28,962,000.00	$5,538,000.00
Credit Suisse Loan Funding LLC	$3,924,276.67	$8,000,000.00	$4,375,607.74
D.E. Shaw Galvanic Portfolios, L.L.C.	$11,591,451.36	$24,346,000.00	$2,014,174.66
First Pacific Advisors, LP	$30,894,957.47		$6,939,939.08
FS Global Advisor, LLC	$6,338,421.00	$2,000,000.00	$1,596,006.00
GoldenTree Asset Management LP	$6,621,309.00		$1,265,978.00
LMR Partners LLC		$35,057,000.00	$2,576,000.00
MFP Partners, L.P.	$4,197,456.70		$802,543.30
MSD Partners, L.P.	$12,617,809.46	$5,851,000.00	$7,031,190.54
Par Four Investment Management LLC	$4,583,143.84		
Shelton Capital Management		$2,000,000.00	

[1] The members of the Minority Group are listed here either (i) as entities that hold 1L Debt or DIP Debt directly or (ii) on behalf of certain of their affiliates or affiliated investment funds or investment funds, accounts, vehicles or other entities that hold 1L Debt or DIP Debt that are managed, advised or sub-advised by the members of the Minority Group.

EXECUTION VERSION

Exhibit A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

In re:	)	Chapter 11
J. C. PENNEY COMPANY, INC., *et al.*,[1]	)	Case No. 20-20182 (DRJ)
Debtors.	)	(Jointly Administered)

STATEMENT OF THE FIRST LIEN MINORITY GROUP IN SUPPORT OF THE DEBTORS' SALE MOTION

The First Lien Minority Group,[2] by and through its undersigned counsel, submits this statement in support of the *Emergency Motion for Entry of an Order (I) Authorizing (A) Entry Into and Performance Under the Asset Purchase Agreement, (B) The Sale of the Opco Acquired Assets and the Propco Acquired Assets Free and Clear of Liens, Claims, Encumbrances, and Interests, and (C) Assumption and Assignment of Executory Contracts and Unexpired Leases and (II) Granting Related Relief* [Docket No. 1592] (the "Sale Motion").[3] The First Lien Minority Group states as follows:

[1] A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at http://cases.primeclerk.com/JCPenney. The location of Debtor J. C. Penney Company, Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 6501 Legacy Drive, Plano, Texas 75024.

[2] The "First Lien Minority Group" comprises an ad hoc group of unaffiliated holders of (i) term loans and first lien notes (collectively, the "First Lien Debt" and the holders of First Lien Debt, the "First Lien Creditors") and (ii) second lien notes, as set forth in the *Verified Statement of the First Lien Minority Group Pursuant to Bankruptcy Rule 2019* [Docket No. 1515], as may be amended from time to time (the "First Lien Minority Group 2019 Statement").

[3] Capitalized terms used but not defined herein have the meaning ascribed to such terms in the Sale Motion.

STATEMENT

1. The First Lien Minority Group supports approval of the Sale Motion and the Sale Transactions as a result of the settlement reached among the First Lien Minority Group, the DIP Lender Group[4] and the Debtors.

2. Since September 9, 2020, when the Debtors announced the agreement in principle to sell substantially all of their assets to, on the one hand, Brookfield Property Group and Simon Property Group and, on the other hand, the DIP Lender Group (such sales, the "Sale Transactions"), the First Lien Minority Group has sought to resolve its concerns with the Sale Transactions and ensure equitable treatment for First Lien Creditors in these cases.

3. In this respect, on September 14, 2020, the Court entered an order directing the Debtors, the DIP Lender Group and the First Lien Minority Group to engage in a settlement conference under the supervision of Judge Marvin Isgur. *See Order Directing Settlement* [Docket No. 1408]. With the tremendous assistance and tireless efforts of Judge Isgur, on October 31, 2020, the First Lien Minority Group reached an agreement in principle with the DIP Lender Group (the "Settlement"). The Settlement, the final terms of which are reflected in a Settlement Agreement dated November [ ], 2020, to be approved pursuant to the proposed Sale Order, resolves all outstanding disputes between the First Lien Minority Group and the DIP Lender Group in these chapter 11 cases, including with respect to the Sale Motion and the *Joint Chapter 11 Plan of Reorganization of J.C. Penney Company, Inc. and Its Debtor Affiliates* [Docket No. 1646) (as may be amended, the "Plan").

[4] The "DIP Lender Group" refers to the ad hoc group of First Lien Creditors and DIP lenders represented by Milbank LLP.

4. As part of the Settlement, the members of the First Lien Minority Group, as set forth on the First Lien Minority Group 2019 Statement, hereby represent as follows:

> To the best of the members of the First Lien Minority Group's knowledge, information and belief, the members of the DIP Lender Group (including, but not limited to, H/2 Capital Partners LLC and Brigade Capital Management, LP), acted appropriately and in good faith in connection with the Sale Transactions and related matters during these chapter 11 cases.
>
> Further, the First Lien Minority Group withdraws any allegations or implications of misconduct by the members of the DIP Lender Group made in connection with the two Emergency Motions filed by the First Lien Minority Group to compel discovery, at Docket No. 1633 and Docket No. 1634, including any statements made on the record of the October 26, 2020 hearing.

5. For the avoidance of doubt, the First Lien Minority Group withdraws any objections to the Debtors' Sale Motion.

[*Remainder of page left blank intentionally*.]

WHEREFORE, for the foregoing reasons, the First Lien Minority Group respectfully requests that the Court enter the Sale Order (as modified to incorporate the Settlement) and grant such further relief as may be just, proper and equitable.

Dated: November [__], 2020
Houston, Texas

AKIN GUMP STRAUSS HAUER & FELD LLP

/s/ Draft

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Counsel for the First Lien Minority Group

CERTIFICATE OF SERVICE

I hereby certify that, on [__], 2020, a true and correct copy of the foregoing document was served via email through the Bankruptcy Court's Electronic Case Filing System on the parties that have consented to such service.

/s/ Marty L. Brimmage, Jr.
Marty L. Brimmage, Jr.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (HOUSTON)

IN RE:	.	Case No. 20-20182
	.	Chapter 11
	.	
	.	(Jointly administered)
J.C. PENNEY COMPANY, INC., et al,	.	
	.	
	.	515 Rusk Street
Debtors.	.	Houston, TX 77002
	.	
	.	Monday, November 9, 2020
. . . . .	.	10:30 a.m.

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE THE HONORABLE DAVID R. JONES (VIA VIDEOCONFERENCE)
UNITED STATES BANKRUPTCY COURT JUDGE

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Exhibit C

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For Kimco Realty Corporation:	Singer & Levick PC By: MICHELLE E. SHRIRO, ESQ. 16200 Addison Road, #140 Addison, TX 75001 (972) 380-5533
ALSO PRESENT:	JILL SOLTAU, JC PENNEY CEO CHRISTIE RHOADES JUSTYCE BROWN DAVID SCHEER DONALD ANNIS ANINA ZURCHER GEORGE IRVINE MICHELLE WLAZLO MIKE ROACH PAUL DAVID POLLARD DENNIS MARTIN

I N D E X
11/9/20

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
FOR THE DEBTORS:				
Jim Mesterharm	77	99	151	--
David Kurtz	154	185	--	--
Bill Wafford	245	258	--	--
FOR THE COMMITTEE:				
William Snyder	265	321	--	--

EXHIBIT	ADMITTED
DEBTORS' EXHIBITS:	
1681-1	77
1681-16	77
1681-17	77
1681-37	77
1681-38	77
1681-39	77
1790-1	77
1798	77
COMMITTEE'S EXHIBITS:	
1757-55	106
1800-0	109
1757-6	114
1800-1	143
1762-1	239
1762-5	239
1800-4	240
1757-65	284
1757-7	361
1757-61	361
1757-63	361
1771-0	361
1787-6	361

(Proceedings commence at 10:30 a.m.)

THE COURT: All right. Good morning again, everyone. This is Judge Jones. The time is 10:30. Today is November the 9th, 2020. This is the docket for Houston, Texas. Next on this morning's docket, we have the jointly administered cases under Case Number 20-20182, J.C. Penney Company, Inc.

Folks, please make sure that you record your electronic appearance this morning. If you've forgotten how to accomplish that, it's a very quick trip to the website, two clicks and you're done. The first time that you speak this morning, if you would, please state your name and who you represent, that will give us a good voice print.

Also, a large number of people raised their hands to be unmuted, which I've gone ahead and done, but the price for doing that is, please mute your phone or make sure that it is quiet in the background. I'm hearing an awful lot of noise. If I figure out who it is, then I will mute you.

We are recording this afternoon -- or this morning using CourtSpeak. We will get the audio file up on the docket shortly after the conclusion of the hearing.

All right. Mr. Sussberg, are you taking the lead this morning?

MR. SUSSBERG: I am, Your Honor.

THE COURT: All right. Thank you. Do you want to just give me a brief status report?

MR. SUSSBERG: I do, Your Honor. And if you may share -- allow me to share my screen, I think I can give the status report through a few slides.

THE COURT: Certainly.

MR. SUSSBERG: Your Honor, if I may ask you to adjust it to the Josh Sussberg presenter screen?

THE COURT: Got it. Okay. My apologies. Let me see. Josh Sussberg.

THE COURT: Mr. Sussberg, was that the correct one?

MR. SUSSBERG: I think it's okay, Your Honor. One of my colleagues has it up.

THE COURT: All right. Great, thank you.

MR. SUSSBERG: We'll take it from there. Your Honor, for the record, Joshua Sussberg from Kirkland & Ellis on behalf of J.C. Penney and its affiliated debtors and debtors-in-possession.

We're here today, Your Honor, on the debtors' motion to sell substantially all of its assets, and we will get into the specifics about that bid. But, Your Honor, these cases were filed back on May 15th, and I'm sure you'll remember we had an historic first day hearing on Saturday, May 16th, for what is a 118-year-old icon. And we have been nothing but consistent since the very first day of the case and all 178 days that have followed to today.

And that is our singular focus and goal was making

sure that J.C. Penney survived, and it survived as a going concern. And it was our job, and we endeavored to do exactly that to maximize the value of this enterprise for the benefit of its stakeholders, and that includes lenders, unsecured creditors, employees, trade vendors, and, of course, we have many longstanding equity holders at this company. And if there was a way in which an economic substantive value could be provided to the shareholders, it was our job to run a process to determine just that. And we started these cases with this very slide indicating it was our plan for a project renewal, the J.C. Penney business plan, so that this company could continue for many years to come.

And, Your Honor, on the next slide I put this up at the first-day hearing. It's a picture of Energy Stadium just miles away from the courthouse with 72,000 in capacity seating. And I put this slide up, Your Honor, to demonstrate that our focus on a going concern would inure to the benefit of thousands of employees at J.C. Penney.

And these cases were filed in the face of the global pandemic where unemployment rates have reached historic highs, double-digit highs, in May and April, 13 or 14 percent. And while unemployment has ceased to a certain degree and the most recent numbers indicate a 7.9 percent unemployment rate, that is still three or four points higher than the eight to nine months preceding these cases.

And again, it was consistent with our goal of saving the jobs of the people that work for this company and the families that have come to benefit from those very jobs. And while we started out with 80,000 employees and much has been made about the fact that we are down 60,000 employees, this company utilized the tools inherent in the Bankruptcy Code to right-size its operation, to reject 156 leases, and to facilitate what will be a vibrant going concern business for many years to come.

So, Your Honor, the question, and I think to your point the status update, is where do we stand and frankly what stands in the way of realizing this goal.

And on the next slide, we highlight some key components. First and foremost, we have an agreement as amongst the company, the Milbank Group, the majority lenders, and Simon and Brookfield on an asset purchase agreement for both the combined OpCo and PropCo estates. And we've talked about that at length over the six-plus months that these cases have been in existence. And that deal was supported by a more than $2 billion exit facility led by Wells Fargo and Mr. Fiorillo's clients. That was no small task to negotiate and put in place, and it's incredibly important to the continuation of the business.

We certainly had issues along the way, both at the beginning of this case and over the last several weeks with the

minority 1L Lenders. That group is represented by Akin Gump, and I am pleased to report that we executed a settlement agreement as amongst J.C. Penney, the minority group, and the majority group. It's referenced at Docket 1774 and then a statement from Akin Gump at 1775, and in Paragraph 4 of that statement, all of the objections and issues that stood in the way have been deemed withdrawn, and the minority group stands firmly in the path of those supporting this transaction.

In addition, Your Honor, and as we previously mentioned, we have reached an agreement with the Unsecured Creditors' Committee. That is a committee that is represented by widespread holders. It includes bondholders, trade vendors, landlords, and importantly the Second Lien Secured Trustee. All of those parties are part of the global settlement, and at Docket 1789, Mr. Van Aalten filed a statement in support of this sale and the Chapter 11 plan that Your Honor will hear later in November.

And interestingly, in that statement, and I quote, Mr. Van Aalten and Ms. Hershcopf said:

> "Unsecured creditors are not the debtors' fulcrum creditor class, and there is no alternative to the proposed sale transaction other than a full-scale liquidation that would not promote the interests of unsecured creditors."

And again, that is a committee made up of not just

unsecured creditors, but our second lien lenders as well.

So that leaves us at the bottom of the graph with the Ad Hoc Equity Committee, and we have standing in our way an objection to the sale at Docket 1715 and a motion to vacate and modify the DIP order at Docket 1573. We received, Your Honor, 19 formal objections, and 25 informal objections. And earlier this morning, we filed a chart detailing the success we've had in resolving 33 of the objections. The sole remaining objections relate to and are an offshoot of the arguments that the Ad Hoc Equity Committee will make today from various shareholders that have filed letters and/or pleadings over the last several weeks.

So, Your Honor, we've talked a lot about inter-lender disputes, we've talked about interclass disputes, but what we haven't talked about and what people haven't focused on is the next slide. These cases are about economic reality, and notwithstanding any of the professionals involved whose duty it is to maximize value, we have gone into the marketplace, we have pursued any and all opportunities, and what we have before us is the result of economic reality.

We have an unsustainable capital structure that precipitated the filing of these cases, not to mention it comes on the heels of the retail apocalypse and a global pandemic that nobody in their right mind could have thought would be continuing nine months to the very start. And there is no end

in sight. And so the economic reality of these cases and this capital structure is what guides the analysis and is what supports the debtors' business judgment.

And just to frame it, on the very next slide, and this is as simple as it can be, this company has outstanding claims of more than $7 billion, and unless and until all of those claims are satisfied in full, in cash, or otherwise accept treatment that's acceptable to each and every one of those holders, there is no recovery for equity. It's economic reality.

On the next slide, Your Honor, just to highlight, I want to note the capital structure again: the DIP facility at the top, which we'll talk about; the ABL credit facility of more than $1.2 billion; the first lien term loan of $1.1 billion; the first lien term notes of 469 million; the second lien notes of $400 million, again those are secured; unsecured notes of $1.3 million; and estimated trade debt of more than $1.6 billion. And that includes trade claims and rejection damage claims associated with the debtors' efforts to right-size its fleet. All of which, again, adds up to the more than $7 billion of claims that we highlight with the next click on the left of the slide.

On the next slide, Your Honor, in an effort to truly show the economic reality of these cases -- if we can click to the next page -- these are the current trading prices of the

debtors' securities from top to bottom. And as you see, Your Honor, our basis at the beginning of this case was that the first lien claims with a fulcrum security, and they were trading at far below par, they continue to trade at far below par at 32 cents and 30 cents on the dollar.

And from there, it is a cascade of economic reality where secured claims and unsecured claims are trading at less than a penny on the dollar, not to mention the company's common equity, as you see at the bottom of the page. And no doubt that common equity has traded up and has traded down during the course of these cases based on pure speculation, but nothing changes the economic reality of this slide and the facts and circumstances that we were handed at the beginning of this case.

On the next slide, Your Honor, I want to highlight the debtors' cash position because I think this is important. We do not have enough unencumbered cash to repay the DIP. And we're not permitted, under the DIP order, to pay off that DIP unless and until the ABL, which sits at the very top of the capital structure, is paid down in full. That is true even if the rollup was unallowed. And we're going to talk about, Your Honor, how inappropriate it is to focus on and think about an unwinding from a DIP financing.

And as you see on the right hand of the slide, Your Honor, at the very bottom, he'll talk about, and we cite to,

the amount of cash available to pay down the ABL and the amount of cash available to pay down the DIP. It's in their $225 million available to pay down that DIP, but unless and until the ABL is satisfied, there is no possibility of a pay-down pursuant to the order of this Court.

On the next slide, Your Honor, a lot has been made about the debtors' need to move quickly and the need for speed. It cannot be overstated. These debtors must move forward on an expedited basis, and this, frankly, has taken too long. And we'll be the first to admit that deadlines have been set and deadlines have been unsatisfied. But the time for those deadlines is no more and time is of the essence for these debtors to move forward on an expedited basis and be able to achieve what we set out to do on the very first day.

And it is absolutely the case that the media coverage and the inability to have satisfied milestones over these last six months has caused quiet consternation amongst our vendor base. We've had suspended orders, we've had shipping of orders with worse terms, we've had products short shipped. We are not in a place to conduct the business that we need to conduct and be able to operate as a viable enterprise unless we move quickly.

And because of the missed deadlines and because of an inability to move as quickly as humanly possible, our vendors are hanging on by a string. And unless and until we seek

approval of this sale with an order entered and actually effectuate that sale in short order, we will not return to normalcy.

All of this threatens the upcoming holiday season and even the back-to-school season in the fall of 2021. Uncertainty is also causing damage to the employee base, and it's making it harder to recruit new employees. That's just logic, and it's intuitive.

And so approving the sale order now ahead of the maturity of our DIP on November 16th, and ahead of the deadline for this OpCo transaction with Simon and Brookfield's Clothes is incredibly important, and absent approval of this sale, I fear that this company will move towards liquidation. And again, that is not something that anybody has contemplated, and it's not something we are prepared to embrace.

Your Honor, a few topics before we move to the evidentiary portion of this hearing: We filed a reply with respect to the sale motion at Docket 1784, and it was, in effect, to provide a roadmap to the Court as to how we intend to proceed today. And we have three witnesses that will be produced and testify: Mr. Kurtz, Mr. Mesterharm, Mr. Wafford. I'll explain what each intends to speak to. And I want to cover three points that will be inherent in the testimony and what we need to demonstrate today and what the Ad Hoc Equity Committee cannot demonstrate.

Number one, this sale result is the result of a robust five-month marketing process. The APA itself is not a sub rosa plan. And finally, the Ad Hoc Equity Committee, their theory on this case is so fundamentally flawed and out of touch with any reality, let alone economic reality. And it's unfortunate, but it's just state of play.

On the next slide, Your Honor, we highlight the market test, and we have spent a significant amount of time repeatedly updating the parties in this case as to our efforts. And I don't think anyone can credibly quibble with the robust and aggressive process that this company ran together with Lazard.

A hundred parties, more than a hundred, were contacted, including strategic and financial. Twenty-five parties executed nondisclosure agreements and got access to a robust diligence room. At the expiration of the DIP deadline in July, we had three potential OpCo purchasers, and we considered each of those OpCo purchasers hand in hand with the majority group represented by Milbank. And we made a determination, in our sound business judgment, that a combined Simon Brookfield and Milbank group bid was not only the highest and best bid, it was the only bid. And there were always opportunities for other parties to come into this process.

And it's absolutely the case, and it's evidenced by the Akin Gump Group participation and attempts by Akin Gump, as

minority lenders, to find partners, whether to team up with Simon and Brookfield or any of the other parties that were interested in the OpCo business, but none of those alternatives came to pass and no other party, including the Ad Hoc Equity Committee, has stood up to put its money where its mouth is and demonstrate an alternative.

And as a result of our decision to move forward with Simon, Brookfield, and the Milbank group, we have been engaged in daily discussion and negotiations over all the various agreements that will combine to allow this company to effectuate its value-maximizing reorganization.

The asset purchase agreement is at Docket 1668-1, and dozens of other key transaction documents have been filed that support the asset purchase agreement.

I will note, Your Honor, we filed a notice last night with respect to the master lease document itself. As we previously indicated, all business issues have been resolved through the efforts of Judge Isgur and the various parties to the master lease. We are finalizing that very document itself. The entry into the document and the consent of each of the various parties to that document will be a condition to closing in this transaction, and we expect to be able to finalize that in the very, very few days that we have left ahead of a closing.

On the next slide, Your Honor, we talk about the

asset purchase agreement not being a sub rosa plan. It is not a sub rosa plan under any articulated standard from the Fifth Circuit or otherwise.

The proposed 363 sale, as we note, is the highest and best proposal for the debtors' assets, and we exercised sound business judgment in agreeing to the proposed sale, and Mr. Wafford will speak to that. And we cite Continental Airlines and the Gulf Coast Oil case for the proposition that a disposition of substantially all the assets is not, per se, a sub rosa plan. And there are facts and circumstances that do indeed justify the sale of these assets in various circumstances, including these circumstances.

And, Your Honor, we read the Gulf Coast Oil case very carefully over a number of times. And I think it's important, and I want to walk through the 12 enunciated factors so that the Court understands that each and every one of those factors has been satisfied. So on the next slide, we will begin a recitation, and I will move through this quickly of each of the Gulf Coast 12 factors.

Number one, if you could click, is there evidence of a need for speed? The answer with the next click is unquestionably yes, and Mr. Mesterharm will testify to this very point and the comments that I made earlier on the need to move quickly and swiftly to a closing.

Number two, what is the business justification? This

is quite simple. It's to avoid a liquidation and that massive value destruction.

Number three, is the case sufficiently mature to assure due process? Your Honor, due process is the hallmark of any Chapter 11 case, and I do not believe that anyone could credibly stand up and argue that they haven't had opportunities throughout the six months that we've been in Chapter 11 to articulate their concerns and have those concerns adjudicated. We've had a "for sale" sign in our yard since May 15th, and it's been a fundamentally fair process.

Number four, is the proposed APA sufficiently straightforward to facilitate competitive bids or is the purchaser the only interested party? Considering the process that we've run, we are at a point where there are no other bids, and there are no other bids forthcoming. So we believe the process in and of itself satisfies the standard: Court supervised and demonstrated over six months' time.

Number five, have the assets been aggressively marketed in an active environment? Mr. Kurtz will speak to this. The answer, unquestionably yes.

Number six, are the fiduciaries that control the debtor truly disinterested? The answer there again, unquestionably yes, including the addition of four independent directors and each of the operating company and the property companies, who have no financial interest in these cases, have

demonstrated an ability to serve as fiduciaries in many cases before it and were very involved in the overall decision-making and marketing process.

Next slide, number seven, does the proposed sale include all of the debtors' assets, and does it include the crown jewel? The answer is yes. And sales of all assets are explicitly permitted in certain scenarios as articulated by the courts more than 30 years ago in Continental and Braniff and then in Gulf Coast Oil.

Number eight, what extraordinary protections does the purchaser want? We have standard break-up fee and expense reimbursement. We do not pretend to say these are not extraordinary, but they're not uncommon, and they're necessary, under the circumstances, to ensure that the bid was locked in.

Number nine, how burdensome would it be to propose the sale as far as confirmation of a Chapter 11 plan? And the answer is simple: It would result in a liquidation. The outside date to close the sale is November 20th, and as I mentioned, our DIP matures on November 16th. Absent approval of this sale, the company will have no choice but to seek the alternative that we have sought to avoid every single day of the duration of these cases.

Number 10, who will benefit from the sale? Your Honor, the answer is everyone because there is no alternative to a reorganization scenario. And notwithstanding

the devastating loss for many shareholders and bondholders and trade vendors and lenders, the going concern of this business will inure to everyone's benefit with stores open, employees employed, and tenant and vendor partner for many years to come. And J.C. Penney will seek to rehabilitate itself and operate once again as it has for 118 years.

Number 11, are special adequate protection measures necessary and possible? The answer no and no.

And number 12, was the hearing a true adversary presentation? The answer is absolutely.

So, Your Honor, turning to the Ad Hoc Equity Committee and their theory of the case, now, we originally agreed with Your Honor and the suggestion you made to provide the Ad Hoc Equity Committee with $250,000. And our understanding at the time was that money to hire professionals was to be used to educate the Ad Hoc Equity Committee. And undoubtedly, everyone is able and has an opportunity to make its position and to stake its claims, but I think we've gone well beyond the educational process.

And with an additional $750,000, so a total of $1 million, the Ad Hoc Equity Committee in this case has pursued what we believe to be completely flawed and completely unrealistic propositions on value and all the other issues in these cases. And none of this is personal. We do not blame the Ad Hoc Equity Committee for the position it's taken, but we

simply do not believe they are reflective of the real world and the facts and circumstances that we find ourselves.

So on the next slide, Your Honor, I want to lay out the Ad Hoc Equity Committee's theory. And really, what we're going to have today, and the testimony you are going to hear, is their re-litigation of the DIP financing, which in and of itself is inappropriate. But what the Ad Hoc Equity Committee thinks and what their theory of the case is, is that if the DIP and the rollup is unwound, then we should go pay off the remaining DIP and partially pay off the ABL. But again, going back to my comments earlier in the slide that demonstrates very clearly, we do not have sufficient cash to pay off the DIP and the ABL while maintaining liquidity to operate as a going concern. The ABL lenders would need to support this theory, and I am sure Mr. Fiorillo will say out loud today that they do not, and they have not and will not.

The rest of the Ad Hoc Equity Committee theory revolves around reinstating $2 billion of first-lien debt trading at 30 cents, as well as $500 million of second lien debt, which again, is trading at less than pennies on the dollar.

And then we have unsecured creditors with $3 billion in claims agreeing to accept equity in full satisfaction of those claims and then making yet another leap, and that is gifting to the equity a recovery in equity of the reorganized

company. That, Your Honor, is not a reorganization; that is not realistic; it is not possible. The DIP rollup simply cannot be un-allowed.

With the next click, we demonstrate there is no precedent for a coherent legal theory that would vacate the final DIP order. There was no mistake of facts, Your Honor, only reasonable short-term projections made during an unprecedented condition and time, and it turned out to be conservative, and that's okay; that's what projections are all about.

Unwinding the DIP itself, if we could continue to click, would have catastrophic, catastrophic results, not only for this case, but for all cases. With respect to this case, it would cause default on the ABL terminating consensual use of cash collateral. It would default the DIP, requiring the debtors to pay it off when they lack the funds to do so. It would require additional and new adequate protection to the ABLs and the 1Ls. It would burn the liquidity that the debtors need to operate, and maybe most importantly, outside this case, we would send the United States DIP markets into absolute chaos. And I don't think anyone can credibly stand up and argue that DIP lenders would ever provide companies with DIP financing if they were to be unwound six months after they were provided in the face of a global pandemic. That is irresponsible and unimaginable.

On the next slide, Your Honor, just to emphasize what you'll hear today, and I want to make very clear, this is not a reorganization alternative that the Ad Hoc Equity Committee is posturing, it's a liquidation alternative. Our cash position does not support it, and our cash is collateral for the ABL lenders. We have utility providers that have cash collateral, we have outbound cash in transit, we have cash in the registers, and foreign (indiscernible).

It's a myth to believe that the cash on hand can satisfy claims and continue to support the operation of more than 600 locations. And even if the DIP were unwound, Your Honor, repaying it again would require Wells Fargo and Mr. Fiorillo's consent, and we have admission from the Ad Hoc Equity Committee that they understand that there is no such consent.

None of what they posture is possible, nor could we ever cure the defaults necessary to reinstate indebtedness in this environment, reinstate and service $3 million of debt going forward; it's simply not feasible. Cram down 3 billion of unsecured claims, provide a gift of a recovery to shareholders, and operate the business. If anybody pursued this path, they would be out of business. Period. Full stop.

On the next slide, Your Honor, again, our cash position is higher only because of unanticipated issues and concerns. We have vendors that are refusing to ship, which

means a buildup of cash and a lack of inventory, and that in and of itself threatens the long-term survival of the going concern, and that is a requirement and a necessity for moving with all the deliberate speed.

We've deferred various costs which the debtors are ultimately going to have to pay. People ignore the fact that we've had strong performance in liquidation sales, but that provides no future benefits to the business. And we reopened stores earlier than expected from the COVID-19 pandemic, resulting in an increase of cash.

As to the Ad Hoc Equity Committee's expert on valuation, we submit, respectfully, and we know CR3 and Mr. Snyder, but in this case, this is no expert report at all. First, they did not even purport to determine the fair market value of J.C. Penney. Second, they relied on a fundamentally flawed, unreliable methodology. Third, they freely admit in the deposition that the market has rejected this reorganization alternative and does not believe that J.C. Penney is worth anywhere close to $6 billion. And $6 billion is not the hurdle; we showed that early on. Economic reality and the facts and circumstances demonstrate $7.06 billion in claims must be satisfied before the equity can get a recovery.

Finally, Mr. Snyder and the Ad Hoc Equity Committee agreed that the outcome of the market test proved its value today to be below the amount the first-lien debt. That is

consistent with economic reality. It's consistent with the trading prices. And it's consistent with the debtors' business judgment, Your Honor, to move forward with the sale today. Time is not a friend.

We have negotiated at an arm's length basis, to say the least, a complicated and interwoven transaction that now enjoys widespread support from all first-lien lenders, our second lien lenders, and the Unsecured Creditors' Committee. It is embodied in a revised order reflecting the sale. The terms of the overall settlement have been adjusted in the Chapter 11 plan, and we think today is the day, Your Honor, to move forward with these cases and allow us to achieve what we sought out to do at the beginning of the case.

And again, nobody on the debtor side, its professionals, or its management team takes lightly the loss of so many people. It is an unfortunate reflection of economic reality, and it's our job as fiduciaries to maximize value the best way we can. And the only way we can do that and the only way to achieve a going concern is by approving the Simon Brookfield and majority DIP bid for the PropCo and OpCo.

So, Your Honor, I'm happy to answer any questions. I'm sure people want to make comments, but we are certainly eager to get into the evidentiary portion of today's hearing, and Mr. Slade will be presenting our witnesses.

THE COURT: All right. Thank you. Let me see if

there are other opening comments. Let me try to add some order to this. Is there anyone that is supportive of the debtors' motion that wishes to make comments?

MR. LEBLANC: Your Honor, Andrew LeBlanc of Milbank.

THE COURT: Yes, sir.

MR. LEBLANC: Thank you, Your Honor. We represent the majority of the first lien lenders and of the DIP lenders. I will be exceedingly brief, Your Honor.

I did -- I think it goes without saying, and Mr. Sussberg referenced this, but the sale agreement that you have before you now today, Your Honor, is the product of six months, almost, of unbelievably difficult work by an enormous number of professionals, but most importantly over the last six weeks, an exceedingly difficult amount of work by Judge Isgur. And I can't -- I don't think we can collectively overstate his importance to this process and the amount of time that he spent.

Your Honor, I think, knows as well as anybody that he worked with us to resolve not just what he was originally assigned to by Your Honor, which is the resolution with respect to the Asian group that arose in or around September 24th, but at the request of all parties, including Paul Weiss representing Simon and Brookfield, he jumped into the fray to resolve many open and outstanding issues with respect to the asset purchase agreement. And it literally has been hundreds

of hours that has been spent by Judge Isgur getting us to the point that we are today.

We had a call with him yesterday on his wife's birthday, him talk about the master lease issues that he will continue to be part of. So I think it's important -- I know that -- I -- you're not going to hear a lot from me today, Your Honor, because this is really the debtors' motion, the debtors' business judgment that's at issue, but I thought it was important to say it's a good faith on the part of the purchasers here, Simon and Brookfield, of our client and of the parties that we've negotiated with, the UCC, Mr. Dublin and his clients, the Akin Group's clients. All of that came together through the graces of Judge Isgur's assistance and so I wanted -- I thought it was important to reference that as well, and just -- I don't think we can say it enough, how important he is to the survival of this institution and the number of jobs that are being saved here.

So that's all I wanted, unless Your Honor has any questions. I've got, on the line, a number of my colleagues who are available if Your Honor has questions about any of the documents and as we go through the day. But for the most part, I'm going to let the debtors do their thing and prove up the elements of the case that they have to.

THE COURT: All right. Thank you.

Mr. Dublin, did you want to make any comments?

MR. DUBLIN: Yes, Your Honor, briefly. Phil Dublin, Akin Gump Strauss Hauer & Feld on behalf of the First Lien Minority Group.

I'd like to just echo Mr. LeBlanc's comments. Judge Isgur, obviously, was invaluable with respect to the results that have been obtained thus far. Our clients, of course, wish we had a better outcome, but I think when settlements are entered into, people typically kind of do so begrudgingly and if you have a settlement where nobody's happy, that usually means it's a fair settlement.

I don't think you'll hear from me the rest of the day. Unless you have any specific comments for me, I'll just go offline but again, wanted to thank his -- thank Judge Isgur again for his assistance, as well as the various professionals involved.

THE COURT: No --

MR. DUBLIN: Thank you, Judge.

THE COURT: -- thank you.

All right. Anyone else that supports the debtors' motion wish to make any comments? Mr. Fiorillo, I saw you pop on there.

MR. FIORILLO: Thank you, Your Honor. For the record, Daniel Fiorillo from Otterbourg, P.C., counsel for Wells Fargo Bank, N.A., the prepetition ABL agent.

Your Honor, just really briefly, I wanted to just

echo what Mr. Sussberg said regarding the position of the ABL lenders. We have also spent hundreds of hours working with the Simon and Brookfield team and with the debtors' team to develop the financing to dovetail with the sale transaction. No small feat, but everyone in this case has done a lot to try to keep J.C. Penney's business operational and successful going out of bankruptcy, and it's been a culmination of a lot of efforts. And to entertain any path besides the one that we've all carved out after months and months of hard work is just unimaginable. And anything but this tab, I think unfortunately would result in a liquidation of the business, which I don't believe any of us, including the equity holders, want to see. The outcome may not be the best for all involved, but it's the best outcome under the circumstances that can be achieved.

THE COURT: All right. Thank you.

Mr. Hermann, did you wish to make any comments?

MR. HERMANN: Thank you, Your Honor. I'll be very brief. Brian Hermann from Paul Weiss on behalf of the Simon and Brookfield parties.

I obviously am supportive. It's somewhat self-serving as the buyer, but we are clearly supportive. I think Mr. Sussberg hit on all the points. I think that I would just like to echo what Mr. LeBlanc said about Judge Isgur's participation. It has been invaluable. I think it will continue to prove very helpful as we try to finalize the

negotiations over the mass relief and the distributions that I believe are in the next day or so, which we are hopeful we can do. And otherwise, I think we're largely an observer today, Your Honor, so thank you.

THE COURT: All right. Thank you.

Mr. Van Aalten, did you wish to make any opening comments?

MR. VAN AALTEN: Your Honor, good afternoon. Ms. Herschcopf will actually do the honors today. She's not on video, but she's on the phone.

THE COURT: All right. Thank you.

Ms. Herschcopf, good morning.

MS. HERSCHCOPF: Your Honor, I apologize for not being on video. For whatever reason, it didn't work today, but I did want to make a few comments on behalf the Committee.

Over the past several months, we've made every effort in and outside this courtroom to support the debtors' (indiscernible) goal and the shared goals of the parties who spoke before me to ensure that J.C. Penney's would continue as a going concern while also maximizing value for the estates and their creditors, including wherever and however we could for unsecured creditors.

We support the debtors' business judgment that this APA reflects the highest and otherwise best option to avoid what people had been discussing today as the best option to

avoid an otherwise imminent liquidation of J.C. Penney. We remained focused during the sales process on maintaining the administrative solvency of these estates, and the OpCo purchaser's commitment to an ongoing retail business of J.C. Penney.

Importantly, the sale order now clarifies that the OpCo purchaser will not use any of the avoidance actions as a sword against the very employees, landlords and vendors, service providers who got them this far, and it underscores the commitment of the OpCo purchaser the ongoing business.

You've heard from Mr. Sussberg this morning about the trade, so I'll speak to them a little bit directly. The APA ensures a wind-down budget that reserves funds for all post-petition expenses from the sale of proceeds. Importantly, as the merchandise payables, they're going to be assumed and aid by the OpCo purchaser.

And additionally with respect to the APA itself, it may have been hidden, but there's an affluent provision, a mechanism called the reserve claims budget that ensures that the (indiscernible) funds will be available for all -- to cover any and all allowed claims against the debtors pursuant to 503.

We know how hard the parties have worked to get here today, Your Honor, and the Committee supports the debtors' business judgment.

THE COURT: All right. Thank you.

Anyone else that is -- or who wishes to express an opinion that is supportive of the motion?

All right. Mr. Okin, did you wish to make any opening comments?

MR. OKIN: Yes, Your Honor, I did. And if you would, could I get the presenter control of the screen?

THE COURT: Of course. Should a -- to you directly or to you someone on your team?

MR. OKIN: To me directly.

THE COURT: Okay. Hold on two seconds.

All right. You should have it.

MR. OKIN: Okay. Hold on a second here. All right. Hopefully, we've got it up, Your Honor.

THE COURT: It is.

MR. OKIN: Thank you.

Your Honor, I appreciate that we're the lone voice here against this sale and while we don't relish that role and we certainly don't relish the idea of opposing a sale that the parties claim would result -- if it weren't approved, would result in the liquidation of 118-year-old store. We've got to do what we see and what we think is right, and this is not simply an objection out of desperation for a company against the wall to make it stick.

And we have really looked at these issues, given the limited budget we have, we've done as much as we possibly can,

and I think Mr. Snyder's work is really critical here and has -- he's done a great job of pointing out -- I think the debtor knows but I don't think the debtor really has had the option of implement, and that's the because of the stranglehold that these lenders have had on the company since the beginning.

And it was -- this is a perfect storm, Your Honor, and nobody's going to dispute it obviously. J.C. Penney already was coming in in the age of (indiscernible), and the retail apocalypse, and difficult times for operators' brick-and-mortar stores. They had substantial debt. They had $5 billion in public debt that was out there in the market. And then along came COVID and indefinitely they panic. They panicked, thinking they were going to run out cash.

And I'm not saying they were even wrong in believing they were going to run out of cash. Nobody knew what was going to happen in March of this year, how long the stores would be closed or what would happen, but in the process of doing that and in the process of putting themselves into bankruptcy and going through this process, they have essentially created for themselves an untenable position where they are giving this company away to secured -- to the senior secured lenders, the DIP lenders, and nobody's able to -- nobody's going to or able to stop them.

This cannot be a -- hold on a second, Your Honor. There we go.

Your Honor, as Mr. Sussberg -- oops. And now we're advancing it.

As Mr. Sussberg summarized, our position comes down to the legal points in the end. This is a sub rosa point. It is -- we're selling all the assets of the company, and we're selling it and predetermining what the plan of the reorganization looks like. That is a sub rosa plan. And if you go through the Gulf Coast factors, the factors that Judge Steen laid out, the -- except for -- gives a little short shrift to some of these things, and I don't intend to do a detailed discussion of each of the factors, but I will go through here a little more quickly -- a few of its points.

You know, the debtor cites a need for speed but all of a sudden, the sale has got to close before Thanksgiving; we've got to close by November 20th. But this case has been pending since May 15th. There hasn't been a need for speed. There has been a long, drawn out negotiations led by the senior secured lenders trying to find the perfect economic deal for themselves, and once they found that deal, once they managed to work out all other (indiscernible) to the assignment, get a deal worked out, now there's a need for speed. Now there's a rush. The parties cannot create their own emergency. They put themselves into that position. They've created the crises that they now want this Court to solve by approving the sale on an emergency basis.

The fact of the matter is, all the problems that the debtors' witnesses are going to tell you about today are a function of either the delay that has been caused by the negotiations that have gone on internally in this case, or are a function of the fact that the lenders have not allowed the debtors to spend money as they should have during the case in order to keep the vendors happy and keep the company functioning the way everybody would like to see it function.

At last, when the -- when Mr. Sussberg mentioned where -- Item 4, which is in the APA, straightforward, and can other parties participate in the process. The APA itself is obviously not straightforward; it's changed multiple times. It has associated with it a master lease that both Mr. Sussberg and Mr. LeBlanc have described as the most complicated document that they've ever dealt with. And we just saw in the Akin Gump group's objection to the sale that has just now been settled, that even though there was talk that the Akin Gump group's offer was better, they couldn't just step into this deal. They couldn't just take a higher offer. The deal was designed so that somebody else cannot just interject themselves into the middle of this deal. It's designed so the only parties that can do this deal are the DIP lenders and Simon and Brookfield. That is not a straightforward deal of an -- with an APA that another party can just jump into.

There are -- Step 5, which is the aggressive

marketing of the assets, we'll talk a little bit about the marketing process today through the evidence, but a key thing that underlines this whole issue is you're going to hear Mr. Kurtz testify as a debtor of, you know, a robust marketing process, and that this was all they could get for the assets. But Your Honor also needs to take into account whether this is, in fact, a true fair market test. While it's true Mr. Snyder, in his deposition, admitted that this is what the market price is now because it was marketed and this is the price, he didn't say it was a fair market value, and that's an important point.

This asset or these assets were marketed at the height of the COVID pandemic. In fact, the marketing started before the stores were even fully open and to this day, we don't know if there will be another surge, there won't be another surge. This is unprecedented times and yet, the idea that a marketing process that also requires dealing with these senior secured lenders who essentially can just say yes or no to a deal is somehow an aggressive fair marketing process that anybody who wants to come in and kick the tires and bid for some or all of the assets could just name their price is far from the truth, is far from (indiscernible).

And there are ways to make that work, but this is a pre-designed process to allow bidders to come forward, the DIP lenders can negotiate with each of them, find the one that works the best for them, cut a deal, and then split up the OpCo

and PropCo assets between them. What you're going to hear is that nobody ever really stepped forward and made an offer for the PropCo for the property assets but they were marry marketed; that essentially, the only party that was ever going to buy PropCo are the DIP lenders. What they're really looking for was somebody to pass off the loss to so they could hang onto the crown jewel, the property assets.

This is not a robust marketing process. It's a shotgun marketing process in the middle of an unprecedented pandemic. That's a little hard to say, Your Honor.

The other one that just I've got to laugh at is the ninth element, which is how burdensome would it be to do this as a plan and, Your Honor, I just -- it's almost -- I just believe that can actually argue with a straight face that it -- you couldn't do this deal as part of a plan. They filed the plan, and then the sale motion, and then the disclosure statement, in that order on the same day.

The plan and disclosure statement are set for approval on November 24th. Today is November 9th. We're 15 days from confirmation. They've already sent out the solicitation packet. The parties they're soliciting are already voting on the assumption, I guess, that the sale is going to be approved today. The fact of the matter is we're talking two weeks. I understand that there is a deadline of November 10th built into the documents and, Your Honor, I can't

help but believe that the deadline has more to do with the need to get this done before the plan than it does with some specific requirement that the sale has to close by November 20.

So roughly -- you heard on this issue -- you heard Mr. Sussberg talk about the -- whether there (indiscernible). Let's move forward a little bit.

Why are they doing this deal? They're doing this deal because they have no choice. I don't believe that the debtors have chosen to set out to try to give the company to the secured lenders, but where we are, they have no choice but to sell it to the secured lenders. And Mr. Sussberg is correct, that all stems from the fact that the DIP loans are done. And the reason the DIP loan was done was because when the debtors sought it, they didn't know what would happen. But by the time they came back for final approval, it was already becoming obvious -- am I freezing? Am I freezing, Your Honor?

THE COURT: No.

MR. OKIN: Okay. I just got a warning that my connection is slow. I want to make sure you're not losing me.

THE COURT: No.

MR. OKIN: When Your Honor approved that DIP loan, even you recognized and commented on the record -- I wasn't there at the hearing, but I have gone back and read the transcript -- that the DIP loan terms themselves were highly objectionable, that it was offensively expensive. And perhaps

at the time, and I certainly understand why everybody thought at the time that something had to be done, this was the only road available, the debtor might desperately need money, so we've got to do what we got do, let's borrow the money. But once these lenders had a $900 million loan, 450 million of new money, and 450 million roll-up, there is no choice for the debtor essentially but to go along with what the lenders want to do. And once you have that and they can determine whether there's a sale or a reorganization, you basically end up where you -- where we are today.

But the most problematic, Your Honor, is the second tranche. If you'll recall, the way this loan was done, there was an initial $225 million that was borrowed, and that came with a $225 million roll-up, making a $450 million administrative claim. And that $225 million had to be drawn by July 8th and if the debtor drew that money, it rolled up another $225 million. And that second tranche, that really sealed the debtors' fate. And the debtor knew that.

And this is, Your Honor, applied from one of the debtors' presentations. This is the debtors' presentation on June 4th and they're basically emphasizing the fact that if they -- what they want to make sure here is that they're not forced to just draw the two -- the whole 225- and then have a sale and they've rolled up the full amount of the money even though they don't get use of the full 25-. And the point there

is, Your Honor, there was the toggle, the toggle that we've all heard about; that debtors had to get the lenders their business plan by July 1. And then the lenders, by July 15th, had -- or didn't have, proved out they didn't -- but were supposed to let the debtor know whether they accepted that business plan by July 15th. Right in the middle there. Right between transmitting the business plan and accepting the business plan, the debtors had to draw on the loan.

And what Mr. Sussberg was understandably concerned about is if the toggle went to a sale the way the loan documents read, the debtors' only got access to $50 million. It didn't get access to the full 225-. And the debtor was understandably concerned that they didn't want a roll-up of 225-, even though they were only going to get access to 50 million.

In reality what happened is the debtor drew the entire 225- and when they drew the entire 225-, we got the loan. And what happened to that money? Did it meet the debtors' need for additional cash? Did it -- you know, did it strengthen the debtors' credit position with its vendors? It didn't -- what it did was it sat in an escrow account where it's still sitting today, unable to be used by the debtor and really of no use to the debtor. All it really does is create an additional $450 million in administrative claim that the lenders can use as part of their sword to force the sale

process.

And this, Your Honor, is actually the debtors' slide explaining those options. They could either not draw and have no money owed and no roll-up, they could draw $50 million if there was going to be a sale on the toggle, or they could draw the full 225- and presumably if they drew the full 225-, they were going forward with a reorganization.

And, Your Honor, when you really boil down what we're arguing about here, is that's our point. Our point is the debtor had a reorganization plan that provided the lenders with a business plan. It had four years of projections coming out of bankruptcy: cash flows, balance sheets, the works, all, you know -- and actually, quite frankly, as the debtor has proven in this case, we think it's a very conservative business plan. It's not out there on a ledge projecting all kinds of radical revenue. They presented that to the lenders.

Those same projections are the projections that Mr. Snyder has used. He's basically picked up the ball where the debtor dropped it and took those projections and did what a CRO would do. He modeled it out, he looked to see where the cash flow is, are we capable of actually operating this business, how much debt can this business service going forward, is it a viable entity without having to sell it off for pennies on the dollar at the middle of a hundred-year pandemic?

And the reason he looked at that, the reason we even got started on this -- again, this is part of the debtors' slide. We've seen it quite a few times in front of our pleadings. This is (audio interference) between the debtors' cash projection and the actual cash. So if you look on the chart here, at the time the debtor -- and this is the debtors' chart. We're going to argue later about how you measure cash and how much cash the debtor actually has available to it, but this is the debtors' own chart. And this chart shows that in July, at the time that they made the DIP draw, they had $913 million of cash. And this, by the way, is short-term investment cash. This is not cash in reserve accounts or other places. The cash went up. This is not because of the draw. This is additional cash that the debtor had in July.

So they didn't draw -- and you'll here Mr. Kurtz talk about this. They didn't draw this second tranche of debt because they needed the money. They didn't really draw it because they had projected down the road they were going to need it. They drew it to keep the lenders happy. They drew it because they knew the lenders wanted them to draw it, and again, we were right there in the middle, right between the business plan being delivered and when the lenders were supposed to hopefully go in and say okay, let's do a plan of reorganization and let's move forward on that business plan. So they drew the 225-. And what happens?

We all know what happened, Your Honor. There was never even a toggle. I think to this day, unless it happened and nobody ever told us about it, there's never actually even been a toggle. The lenders didn't accept the business plan, so we didn't toggle to a reorganization, but we also never heard that they rejected it. We never toggled to a sale. Instead, Mr. Sussberg came to court with his red herring squad and told everybody that it really didn't matter anymore, that the toggle was irrelevant; that we were doing this sale/plan all together and it was a one-combined thing, a plan, but it was a sale.

Nobody ever told us, well, does that mean that the roll-up goes back. Does that mean that the lenders take back their 225- or their 175- and that the roll-up gets unwound? Do they get to keep the roll-up? Do we just -- does the debtor just have to hold onto $225 million in cash and then give it back to the lender as part of this credit bid? Presumably, that's what's happening because the lenders' credit getting a full $900 million of debt, so the money's staying in the estate. The roll-up's staying in the estate.

And the whole attempt by the debtor to curry favor toward the plan ends up for naught. We end up getting the sale process where the debtor is building cash and nobody's ever explored whether a reorganization plan will actually work, but we're going to sell the company in the middle of COVID. And again, though (indiscernible) characterized a lot of what hauls

this cash buildup as one-time event. And I suppose some of them probably are but of course, they're one-time events that generated quite a substantial amount of cash. Again, this is the debtors' fraud from July 28th. I'm sorry. The July 29th hearing. Actually, this is the one where they said toggle no longer mattered.

And you'll see they noted that most of this is good news. All the pluses are good news. That there was a $400 million positive variant, but (indiscernible). $210 million of higher cash receipts due to higher sales from earlier and claimed store reopenings to debtors' unexpected performance. I suppose that's a one-time event but that's a positive build of cash as a result of debtor beating their projections, doing better than they expected. And really the only negative here is this one at the bottom on the escrow account for the ABL builder account. But these are positive developments for the debtor.

So I'm going to skip ahead a little bit here, Your Honor. I'm going to talk about the marketing process. Again, the debtor will tell you that the marketing was the main thing; that they would take offers for new equity, selling the real estate, selling the OpCo, selling everything all at once, but reality is going to show is that the really -- nothing was really ever marketed or focused on at the outset; that it was OpCo that they were looking for a partner for the DIP lenders

pool. The DIP lenders were going to always own PropCo. I believe -- I don't have it in the slide deck, but one of the early slides, we actually talk about -- the debtor actually talks about the DIP lenders as the future owners of PropCo.

The expectation has always been that the DIP lenders would own PropCo. What they were trying to sell, Your Honor, was OpCo. And in the end, they found three potential bidders, and I think these are all now public. They're -- they had Simon and Brookfield, they had Sycamore, and they had Hudson Bay Corporation. And what -- the emails that we've now been able to see and the testimony we've now been able to produce shows is that of those three, H/2 Capital, who was leading this process, essentially ran off Hudson Bay; that Sycamore essentially was interested most likely in buying the whole thing and never really could believe that they were going to have a shot.

And in fact, Your Honor, when Your Honor approved the $3 million work fee for the party to encourage people to do due diligence, the facts are going to show that that was for Sycamore. Sycamore didn't really want to participate in this process unless somebody was going to cover their costs. And that's because they knew they really had very little chance to find (indiscernible). And in the end, all $3 million of the work fee that this Court approved went to Sycamore. Not a penny went to any other bidder for a potential bid.

Essentially, the debtor paid somebody to add a third bidder to the process.

In the end, it was always going to be Simon and Brookfield. Sycamore realized that and H/2 Capital ran off Hudson Bay Corporation and made sure that it was Simon and Brookfield.

As late as August, the end of August this year, you know, we had emails with Mr. Sussberg essentially complaining to Milbank that H/2 Capital and Mr. Haber at H/2 Capital was not returning people's calls and that he had run off two of the three bidders (indiscernible).

Your Honor, I feel like we need to just briefly talk about the (indiscernible), the alternative. And I think you really do need to listen to what Mr. Snyder has to say. He's been a CRO for 30 years. He's done this over and over again, and he's done it in these kind of situations with far more success than we see in this case today. And we -- you know, he can tell you about his experience with the Pilgrim's Pride case or as examiner in the Merritt (phonetic) case.

The fact of the matter is, he's been involved in cases where the bonds and other public debt were trading far below par, nobody believed the assets were worth anything near what the six-year debt was owed. And by looking at the cash flows that the business could generate, by looking at the possibility of instead of just selling the assets to the

highest bidder, throwing up your hands and saying well, that's the best we could do, he looks at the idea of can this company support the debt that it has on its books, and how much of that debt that it has on its books can it support.

And I understand the appeal that Mr. Sussberg and the investment bankers for the debtor might be towards debt-to-debt trading is well below par or trading 30 cents on the dollar. Why would we reinstate it at full value and pay them what they're owed? The fact of the matter is that's the debtors' fiduciary duty. The debtors' fiduciary duty is not to get the best economic deal it can for the new owner of the business by wiping out as much debt as it can, or locking in the savings based on the perceived value of the market. The debtors' job is to try to recover as much money as it can for as many stakeholders as it can.

And just because right now the market sees the value of certain debt as significantly below par, that doesn't mean the debtor has to capitalize on that. That doesn't mean the debtor should take advantage of that situation and wipe people's savings out just because it can. The debtors' management and its professional fiduciary duty to check and see is there a feasible -- and it has to be feasible, and it has to make sense, but is there a feasible alternative that allows us to repay this debt. That's what the Bankruptcy Code requires.

And, Your Honor, what I'm going to -- what we're

going to show you today is they got halfway there. They did a very competent, very thorough business plan and that -- at that point, they left it in the hands of their lenders, who basically said sell the company, and that's what brings us here.

Mr. Snyder took that business plan and he turned it into a plan, and that plan does -- well, does what Mr. Sussberg says it does. It reinstates the first lien debt. It reinstates the second lien debt. All of which, by the way Your Honor, was not due when this bankruptcy was filed. There's one conscious debt that came due this year in all of the debtors' capital structure. The next maturity date, I believe, and I may be off on my dates, but I believe it's 2020 (indiscernible).

So we're not talking about massively in-default and past-due debt. We're talking about debt that has been timely paid, wasn't due, that can be reinstated. And Mr. Snyder is going to show you the debtor has the cash flow in its projection to pay that debt. And know what we're talking about is taking the unsecured debt, the unsecured notes, and the trade debt and (indiscernible) as equity.

And we haven't put a final valuation, the company is worth $8 billion or $9 billion or whatever that exact number is. Mr. Snyder has covered that work and that's the work that got him to this point, but depending on how you slight the

value, we believe there's room in that capital structure for unsecured creditors to get equity, probably the bulk of the equity. And for the remaining share -- for the existing shareholders to either get a piece of that equity or to get warrants or maybe give you a rights offering and you bring them in in some other fashion.

The fact of the matter is, there's -- as Your Honor knows, there are dozens of creative ways to restructure that part of the capital structure that could maybe not make people whole, but give them something. And the fact of the matter is nobody's tried. And we can sit here and we can say, yes, you don't have to deal with the ABL lender. And that's true. We have not talked to Mr. Fiorillo's client about under what terms they would make an ABL loan.

And, you know, you notice Mr. Fiorillo said, given where we are and all the time we've put into this deal, we can't imagine going another route. And I'm not trying to put him on the spot, and I don't think he really knows, but he didn't say my clients looked at this proposal and had meetings about it and determined that it wouldn't make a loan under any circumstances like this. And I wouldn't expect that they could. And even if they said that now, I would probably doubt that they really know enough of the details to be able to do it.

The fact of the matter is, what Mr. Snyder tells you

is this is not going to be a heavily drawn line of credit; that if the existing group doesn't make the loan, and he believes that ultimately if they were given the opportunity to look at it, they might -- they would probably choose to do so. But there are other ways to either replace that line or deal with it that have not been explored.

The real point is that nobody's looked at it, and it is possible to do it. The numbers show that it's possible. What everybody wants to focus on is look where we are. We're at the end of our rope. We've waited until nearly Thanksgiving. We can't go any longer, so we have to do the sale. And I understand that, and I understand why Your Honor would be thinking we've got to -- I've got to approve the sale. I'm not going to have another Toys 'R' Us. I'm not going to have this shut down.

Respectfully, to everybody, that's not your fault, Your Honor. That's not my fault. That's the fault of the DIP lenders here. They pushed it to that point and maybe there's some blame somewhere within the debtors' management or somewhere that they should have pushed back a little harder on this. But what we need to do and what the Court needs to do is what the law requires. And that is you can't just force this through because the lenders have created an emergency. You can't force through a sub rosa plan that nobody's had a chance to look at, nobody's even aware of the alternative.

I mean, Your Honor, this is not probably a key issue today, but it strikes me that the Committee settled last time. I suppose they were never going to object to the sale because they certainly hadn't indicated that they were going to, but the Committee, who is a fiduciary to the unsecured creditors but does not represent each individual unsecured creditor, has decided not to object to this sale. And effectively, what they have done by cutting that deal, is they have taken the vote away from the individual creditors.

The individual creditors are going to get a solicitation package, if they haven't already, and that solicitation package is going to assume that the sale has already been approved and, therefore, we're looking at a pile of cash, and I guess you've got to vote for the plan. I mean, there is no other alternative; otherwise, it's elimination and you get the big pile of cash. That is a sub rosa plan, Your Honor. That's why we have 1129. That's why, in certain situations, we don't do sales of assets separate and apart from the plan.

You know, one thing I failed to mention, and I'll go back. You mentioned that we talked about the trading prices and the need not to wipe out people just because you can. Another thing Your Honor might want to also factor in is while the market's not perfect and doesn't always understand whether something can or can't be approved, or what the chances are of

it getting approved, certainly the market does recognize the good deal that the DIP lenders are getting, because one of the prices that I don't believe we're going to see a slide on today because it wouldn't really make the argument for the debtors is the DIP loan is trading well above par. The fact of the matter is it's -- at one point, it was trading at 1.50. So somebody knows somebody's getting a windfall.

Your Honor, I won't belabor this anymore, but, you know, in addition to the idea that this is a sub rosa plan, I think, given the way this marketing process has played out, there's substantial reason to question the debtors' business judgment on this issue, and that this is the best and only option. It's only the only option because everybody's allowed it to become the only option.

And similarly, I think you have to look at whether or not there really is due process here. Now, we've got an extra week, so that did help because this was unbelievably fast when it was set for hearing last week. But the fact of the matter is nobody really has even seen most of these documents or had a chance to read everything. They've been changing constantly. In fact, I don't believe we actually have a final master lease agreement. So let's all take a breath and do this, the confirmation. Maybe then we could actually have some due process.

Now, there are a couple other issues we raised. One

is whether you really should be able to let the DIP lenders use their debt to credit this. And I'm not going to belabor the case long, but this is an offensive use of the creditor not defending their collateral. There is no proposal to sell the collateral for less than the lenders' value here. The only proposal on the table, the only proposal left is the lenders buying it for the exact amount of their debt. They've run everybody else off. They've chilled bidding. And now they're using the credit in an offensive manner to potentially take the company. If they don't buy it with the credit bid, they're going to foreclose.

And I submit, Your Honor, that while I know nobody likes to revisit orders, and I'm not -- I'm -- one, I want to make clear, I think Mr. Snyder will tell you it's possible to do this plan if you don't unwind the DIP loan, but there are alternatives to just unwinding the DIP loan. I think, quite frankly, you should unwind the DIP loan. I think that this won't chill the market for DIP loans in the future, despite the incredulousness of Mr. Sussberg and the over-top-nature of their pleading.

This is an unusual situation. This is not either a DIP loan, oh, it turns out it was a little too feisty, turns out they didn't need quite as much money as they borrowed, turned out I don't like the relief we gave them. They borrowed $450 million. They have never used a penny. 225 million of it

is in their treasury system. It's floating around, but if you look at the lowest and immediate balance, it's never gone below $225 million. They've never used the $225 million. The other $225 million is sitting in an escrow account. They can't even use the money. It's never been available to them. It's never been released. It's segregated. It's not subject to the ABL lenders' need. That's why it's segregated. And they don't even have the ability to touch that money.

And in exchange for money that they never needed, certain money that they never even got, they gave the lenders $450 million in rollout. And while that debt is already owed, and it's got to be paid, and it's reinstated under our plan, as Your Honor knows, it being an administrative claim makes it significantly more difficult to address in a plan.

And like I said, Mr. Snyder's going to tell you it can be done. It can't be done as easily, but it can be done. But there are intermediate solutions. You can find that the 225 million doesn't trigger a roll-up. You can find the 775 million, that there's only 50 million available because they're going to a sale and 175 million goes back and there's no roll-up there. You can find that if they choose to assert their administrative claim and force the estate into a sale, that they're not going to (indiscernible); that they can buy -- and they can buy these assets, but they can buy them without the protections of 363(f). There are a lot of things you can

do other than what I'm asking you to do, which is stop the sale. But it's not all the above.

You, as the judge, as you -- I know you know and I don't need to tell you. You have the power to do a lot, and I don't think that you indicating that you might revisit a prior order because it's clearly mistaken, clearly mistaken. And I'm not saying, Your Honor, that you made a mistake. I'm saying we all made the mistake. I wasn't there, but if I'd have been there, maybe I would've made that same mistake.

The fact of the matter is, we were at the height of something nobody knew how long it would last, how bad it would be, or where we would end up. The debtor made its best guess at how much money it would need and for safety's sake, it borrowed $450 million. It was wrong. Flat out wrong. And I don't think they can dispute that. I mean, I don't think they would dispute that. I mean, every slide except for -- has ever put up in this court since they borrowed it has touted how far above projections they've done, and that's right.

They did a great job of running this company. They did a great job of shedding unnecessary stores, of cutting costs, of getting their stores back open. And in exchange for that, none of the people that helped bring them back, none of the vendors, none of the shareholders who believed in this store -- these stores forever, none of the employees who have shares in their pension plan are going to benefit from that.

The only people that are going to benefit from that are the DIP lenders who saw an opportunity to grab an oversized slice of this pie.

And they're not -- you know, will they be hurt by you unwinding that and stopping this sale? Well, they won't get their windfall, but they won't be hurt. Mr. Snyder's plan pays everything in full. It pays their plan. It pays their specialties. It pays their interest. They're put right back where they started and really with what they argued for, which is repayment of their debt. It's really not harm at all.

So, Your Honor, I'll leave it at that. But I really think you need to give some serious thought to and what I urge the Court to do is consider is it really necessary here to buy into the idea that (indiscernible) point, to liquidate J.C. Penney tomorrow if I don't do exactly what (indiscernible) puts it, the majority lenders want me to do today. Thank you, Your Honor.

THE COURT: All right. Thank you. All right. I've got a couple of shareholders that have raised their hand.

Mr. Newman, do you wish to make any opening comments?

(No audible response)

THE COURT: All right. Mr. Thompson, do you wish to make any opening comments?

MR. THOMPSON: Yes. Hi, Judge. Thank you for giving me the opportunity to speak.

I just wanted to briefly speak openly that some things, I guess, that have happened since the last court date. I know that you were trying to get -- and remind me if I spell this wrong or pronounce it wrong, I should say -- Aurelius Capital, you were trying to get them to put in their -- I guess their bid because they kept talking about doing something and you're like, okay, well, come on. So recently, they were given, I think, like $40 million to waive their objection to the -- I guess the debtors' proposed sale, which seems very odd because they seemed very anxious to want to put in a bid. So I don't know what's going on with that.

But the one thing that Mr. Sussberg, during his presentation today, which was very lengthy, he did not point at all -- you know, talked about employees getting back to work and all that, but he never once talked about what is going to happen to the pensions of the people that work for J.C. Penney's for 30, 40 years back when it was a private company. I think that is a huge thing that I know there's weight on your shoulders.

I know you have a lot of things to think about, but I would just say that just listen to the Ad Hoc's proposal today, and I think that -- I don't think that what they're trying to propose is outrageous. I think that it's something that's definitely doable. It's going to take work by all parties. It definitely will. And will they have to undo all the work that

they put in the last six months? Yes. But as -- you know, you're the judge. You have to make what's best for as many people as possible, and I think, you know, people's savings and pensions and everything like that are very important that we not dismiss them more so than even the shareholders.

Even though I am a shareholder, I think people that put in all that time to work for a company and help them build what they have, it's important to value them. So that's all I ask.

THE COURT: All right. Thank you, Mr. Thompson.

Someone from area code 301.

(No response)

THE COURT: All right. Mr. Sussberg --

MR. SCHEER: Well, I -- somehow I don't think I'm listed in here. I'm kind of new at this. I'm David Scheer. I have an objection in as a bondholder.

THE COURT: Yes, sir.

MR. SCHEER: Yeah, I apologize. I thought I was on the proof of the 240 but apparently, I'm new at this Zoom meeting thing and kind of ignorant.

I'm thinking somehow we lost our representation. Everybody that we've spoke, a number of us bondholders, and we're just shocked that the UCC agreed and said they're not going to contest it and that basically we're offered nothing. My $25 million of bonds was on the table at $6,250. You can't

even put that in cents for dollars, because it'd be such a tiny fraction.

And there's a number of things that concern me and one is that the world is changing fast. Pfizer has just sent their vaccine to be approved. The world might be -- this virus might be conquered here in a short period of time. If we're making a final decision because of this what they're calling "sub rosa" plan, which everything was predetermined and the ones that are getting the reap are making, basically, a killing.

When we invested in this, we were of the understanding there was 1,400,000,000 of unencumbered assets. Even if you cut that in half, that's a lot better than 750,000 that's being offered. We haven't had notice. We had no idea. No one notified us individual bondholders that they were even negotiating such a tiny settlement. And we didn't know -- when we heard the rumor there was a settlement, we had to wait until last night to find out what that settlement was. There's no time to get legal advice to have someone like Mr. Okin on our side to argue that, okay, maybe we can't work and reap the entire company, but why is the reap included?

Companies that have reaped that have triple net rent that's in that reap of 155 million a year, when you look on the open market, even when they have debt, their (indiscernible) 20 times what the rent is. Easily there could be a $3 billion

asset there, and that has not been offered separately. They only tried to sell the business as a going concern. They say they were open to bids for parts, but they didn't market parts.

There's a large market. One, an example, like yesterday for realty income. They say they're going to buy $2 billion worth of triple net property this year. They did 3 billion last year. So you have the pandemic is lessening, yet we're in a panic to sell all the business and you haven't tried to sell some of the individual parts. So the reap, for example, could be held back and they still could sell assets.

I prefer the Ad Hoc solution, but they would be able to sell it but hold back on the reap. Let's get some value for that reap before, basically, we wipe out $3 billion of creditors. You know, we have people's life savings in there, and they had no notice. I mean, I could -- I don't want to bore the Court with some of the examples I know of because I've been speaking with some of the bondholders, and we're trying to find out what to do here, the rumors of how horrible the settlement was. We thought it would be somewhat realistic.

And I always remember years ago (indiscernible) had a similar situation. They went into bankruptcy, supposedly they had more assets than they did debt. But as time went on, the unsecured creditors, the equity, basically everything was discharged, yet 18 months later the company, according to CNN, was worth eight times more than when it left bankruptcy. Well,

they didn't create that wealth. That was wealth that was stolen from the creditors and the equity.

And the same situation appears to be forming here; that there's -- there's (indiscernible). I mean, even in the sale, they have as many stores that are going OpCo as they're keeping in the reap that's going to be generating $155 million a year. They might well be worth far more than the entire price of 800 million. But at least, since the reap, those 150 properties are already outside of the sale, they shouldn't be allowed to be included in the sale. The should at least have to go further to show evidence that it's worth such a tiny amount.

The minority, before they got paid off to drop out, they put up a good argument that it was worth significantly more. But even those were very conservative numbers. And as I said, it hasn't been marketed and I think the Court -- the notices have not been there. They missed their deadlines again and again and again.

We thought we were represented by the UCC. Turns out we're not, and there's no time to put together a good defense or come up with some of these other numbers that Mr. Sussberg challenges us to do for what the reap, for example, is worth. It just seems like this was all pre-adorned -- preordained back in June and no other ideas were considered, like they were drafted in a box and they're trying to force fit it in the box.

That's all at this time, Your Honor.

THE COURT: All right. Thank you, sir.

MR. MARTIN: May I speak, Your Honor?

THE COURT: Yes, sir. Who is this?

MR. MARTIN: Your Honor, my name is Dennis Martin. I'm a shareholder and I would like a few minutes, please.

THE COURT: Sure. Go ahead.

MR. MARTIN: Okay. First of all, I thank you, and I do support Mr. Okin. I think he's doing a marvelous job representing us so I'm not really going to ask the questions later in the day that I had hoped to. I'll just leave that in Mr. Okin's hands.

I do want to make a couple comments on some things Mr. Sussberg said, and I think everyone involved in this case, from the lowest sales associate or shareholder agree with Mr. Sussberg a hundred percent that we will be devastated if this goes through.

And I am a former J.C. Penney employee and have known many -- and I know retirees are getting hurt, and if you've ever seen a war movie, the Korean war, and have seen devastation, oh, my God. To associate that with what J.C. Penney, who has all got the Golden Rule historically for -- and, Your Honor, for all 119 years, Mr. Penney himself, he created it. And for this to damned and devastation for so many who have given their lives to J.C. Penney in service and

investing in hopes of a future for themselves, their families, it's -- I mean, it -- devastation, you can't get worse than that. It will kill people. And Mr. Sussberg brought that up. And my God, I can't even do anything more on it.

The other thing he talks about is we have to deal with reality. And again, it all leads right back to that word "devastation" he used. That is the reality of this. Devastation if this plan goes through. And I'm just a next-to-nobody. I can't compete with the lawyers and bankers. I don't have your knowledge, but I know a little bit about keeping money, and it looks to me like the debt -- the lenders, they keep using that term. They look to me like they're buyers, that they've gone back, says to the company that they have taken the control and it kind of has painted us into our devastation that's going to come about. And it seems to me there's got to be ways around this.

The J.C. Penney William and Company can be saved, has to be saved, and J.C. Penney has got to come out of this with the highest character still. I don't know, maybe they've let it slip away the last decade or something. But my God, this company, it -- they cannot stand by what is being proposed, I guess, by themselves. I hope you'll seek two alternatives. I hope you will give Mr. Okin and Mr. Snyder a great listen to, and I hope you will somehow, in the bankruptcy law and with your discretion, somehow renew or breathe life or resurrection

out of this rather than the devastation Mr. Sussberg says is definite.

Again, it effects so many. You know, you -- we saw a picture on the slides for today from Mr. Sussberg of -- stating full -- I think he said there were like 80,000 and, you know, J.C. Penney at one time used to have about 200,000 employees, associates. You know, so many of those jobs over the decades, historically were part-time jobs and Penney's usually pays a -- quite a bit less than other places and you worked at it for the -- for the character, the integrity.

And I'll tell you, I -- I've never come across any company that people, from associates or customers, they actually relate (indiscernible) to Mr. J.C. Penney. They claimed that integrity, honesty, and life, and they want to be part of this. We are rooting for J.C. Penney to go forward, and we want to be a part of it. They're -- we just recommend that you rule -- like I say, the DIP lenders do strike me as buyers, and they've got the control and can say this is going to happen. So if they're truly lenders, even though this -- things have to be done or modified, that there's got to be a way they can receive back their 900 million.

There's got to be competent retail executives who would just love to come in and turn J.C. Penney around keeping the character, the integrity alive forever. I just think that if you're ruling out that J.C. Penney has to live by the Golden

Rule, which they seem to be kind of trampling on with us under it, that they will do more damage to J.C. Penney in the long term, but there may not even be a long term. And I think there's got to be some kind of middle ground here because, like I say, the devastation, it does mean literally that to so many and hopefully can be avoided.

And, you know, people got to dream. They got to dream big. Mr. Sussberg, in his book, deal with the reality. You know, there's -- I'm not in the -- keep on looking at the other screen about a gentleman to be -- oh, let's just say when you're around 55, 65, we've been around long enough, and America deals in doing the impossible and if this case is impossible to save the lives of many so they're not destroyed, devastated, we can do that.

We -- if we can put man -- men on the moon, you know, a lot of people said impossible, but we did it. So we can solve this case. So, Judge Jones, I'm not going to have anything further. I'm going to just listen to the rest, won't have anymore questions, but you know, we're associates, retirees, I guess bondholders, shareholders. We are not the enemy of J.C. Penney. We are its biggest supporters, which is why we became involved as shareholders, as employees, associates for our lifelines, so we'd like to be a part of this going forward. Thank you, Your Honor.

THE COURT: Thank you, Mr. Martin. I appreciate the

thoughtfulness of your words.

MR. POLLARD: Judge.

THE COURT: Yes.

MR. POLLARD: Sorry to interrupt. This is Paul David Pollard, and I did do the "star five" button, and I guess I didn't get reported. Can I make a few comments, please?

THE COURT: Well, you did get reported. The -- you're -- because you can speak. I unmuted you.

MR. POLLARD: Okay.

THE COURT: If I hadn't unmuted you, there are 400 people who cannot talk.

MR. POLLARD: Okay. I didn't really understand how it worked. First time I've tried to -- do I have the floor now?

THE COURT: Yes. Everyone is listening.

MR. POLLARD: Thank you, Your Honor. I listened to Mr. Sussberg's highly-polished speech. Oh, I'm sorry. I am a unsecured bondholder, and so that's my interest in this case.

I listened to Mr. Sussberg's highly-polished speech, and I listened to Mr. Okin, and I listened to Mr. Thompson, and Mr. Martin, and I'd like to say that I support Mr. Okin. I think he did a good job of defending the shareholders and other creditors against Mr. Sussberg and his other partners in this sale.

I heard Mr. Sussberg say several times that the

unsecured creditors were in agreement and support of this plan, (indiscernible). That's not really a true statement. I'm a creditor myself, and I do not agree with it. I don't know who Mr. Sussberg is talking about, other than perhaps the eight or ten members on the Unsecured Creditors' Committee. We unsecured creditors have really little to no involvement and say so in the way our positions have been presented.

Mr. Sussberg referred to a fractional payment of debt as a gift. I resent that. This is debt that's owed to hard-working citizens. I presented to the Court the calculations of present work value that needs to accommodate a (indiscernible) and the first lien lenders majority group will achieve from this transaction, and it's anonymous.

And I used some real numbers in here. I used the contract lease payment and the (indiscernible) revenue. And there's just a phenomenal amount of money here and after this deal is consummated, the rate of accumulation of revenue is very rapid. There's plenty of money available to satisfy these claims, and I don't understand why unsecured creditors are only being settled with pennies on the dollar. It just -- it doesn't make sense and it doesn't seem fair.

And I would ask that the Court do not only just the evaluation by the big banks. They use similar methodologies. They all like to use dirt-cheap values for real estate. They don't want to have to spend (indiscernible) against each other,

so they're kind of on the same page. I hope this Court will consider some realistic numbers of what these companies are going to get out of it when it's time to make a decision on this.

Now, as these other gentlemen stated, documents were submitted very late last night, and there's been no time to review them. And it's kind of gone that way through this entire case. And I don't care what Mr. Sussberg says about a legitimate marketing process, I can't agree with that because I personally didn't see it. I don't know how it went. And like Mr. Okin said, there were three very good bids for OpCo. What happened to those?

Well, they got dispersed out in -- Simon Properties Group would renege on the $1.75 billion offer, and now it's much lower, and now we're to the credit bid where they're allowed to participate in it by the of -- by assuming some of the (indiscernible) debt. This is strange to me. I've never seen anything like this.

And finally, Your Honor, Mr. Martin made a very touching, realistic statement about the damages of J.C. Penney. This sale, I think, is going to partially destroy the reputation and I would ask Your Honor to consider what kind of jobs are there going to be now that we're saving. Savings plans have been destroyed. Pensions destroyed. What kind of jobs are we going to have now that J.C. Penney with these new

operators?

I can tell you that a company like Simon Property Group, they wouldn't be involved in this deal unless it was big, big money. They're not doing this out of mercy. There's big money in this, and so I would ask you personally consider Mr. Okin's and the Snyder plan, and I hope, Your Honor, that we'll see some positive outcome to this, the creditors -- I would personally like to see one of -- pennies on the dollar for a lot of these investments.

So with that closing statement, I would like to thank you for giving me the opportunity to speak, and I do appreciate the time that you and Judge Isgur have put into this. I know what it's like to work around the clock. I've done it before, and it really makes you want to see the end result of it. So I just -- I ask sincerely that you will consider helping the unsecured creditors and even the stockholders get some kind of a dissent settlement. And so that's the end of my discussion, Your Honor. And thank you very much.

THE COURT: Thank you very much, Mr. Pollard.

All right. Anyone else?

(No audible response)

THE COURT: All right, Mr. Slade, are we ready to start with the evidence?

MR. SLADE: Yes, sir.

THE COURT: All right. Any way -- could -- is -- can

we -- can you turn your volume up at all. Is that possible?

MR. SLADE: Yes, we will do that. We will do that, Your Honor.

THE COURT: All right. Thank you.

Who is the first witness?

MR. SLADE: Your Honor, our first witness is going to be Mr. Mesterharm, but before that, I would like to offer some exhibits that I believe there will be no objection to.

THE COURT: Ah, fair enough. All right. Whenever you're --

MR. SLADE: Your Honor, based on your -- based on -- first, Mike Slade for the debtors. I have previewed this with Mr. Okin already. The debtors offer the final -- the following exhibits based on Your Honor's emergency protocol. The exhibits that are located at the following docket numbers: Docket number 1681-1, 1681-16, 1681-17, 1790-1, 1681-37, 1681-38, 1681-39, and 1798. That's all, Your Honor, for now. Thank you.

THE COURT: 1798. Hold on. Got it. All right. Mr. Okin, let me run through these with you. As I understand the offer, it's 1681-1, -16, -17, -37, -38, -39, 1790-1, and 1798.

MR. OKIN: Your Honor, if you'll give me one second, I have to cross reference, but I need to double -- I believe those are right, and I know read -- if Mr. Slade is correct

that we agreed and they may have some certain ones. Let me just --

(Pause)

MR. OKIN: Life would be so much easier if everything were -- came up in order, Your Honor.

THE COURT: That's -- you're -- you -- that's -- you're preaching to the choir on that one. I live with it everyday.

MR. OKIN: Actually, the only one I'm missing, Your Honor, and maybe Mr. Slade can just tell me what it is, and that's the last one, 1798.

THE COURT: Seventeen --

MR. SLADE: That's the --

THE COURT: Go ahead, Mr. Slade.

MR. SLADE: Sorry, Your Honor.

That's the earn-out agreement, Mr. Okin.

THE COURT: Yep.

MR. OKIN: Those are fine, Your Honor.

THE COURT: All right. Thank you.

And I assume, is there any other party that anticipates participating in the evidentiary portion?

(No audible response)

THE COURT: All right. Then, Mr. Okin, with that, I'll admit 1681-1, -16, -17, -37, -38-39, 1790-1, 1798. They are admitted without objection.

(Debtors' Exhibits 1681-1, 1681-16, 1681-17, 1681-37, 1681-38, 1681-39, 1790-1, 1798 admitted into evidence)

MR. SLADE: Thank you, Your Honor. Our first witness will be Mr. Mesterharm, and my colleague, Mr. French, will be presenting him. Both of them are on the screen and they're in this room, so you ought to be able to hear them just fine.

THE COURT: All right. Thank you.

Mr. Mesterharm, good morning. Can you just confirm that you can hear me?

MR. MESTERHARM: I can hear you fine, Your Honor.

THE COURT: All right. Thank you. If you would, raise your right hand, please.

JAMES MESTERHARM, DEBTORS' WITNESS, SWORN

DIRECT EXAMINATION

THE COURT: Thank you. We are picking up some noise from somewhere.

MR. CURRY: That was my fault. This is David Curry. I was getting the phone closer to me so that I could speak --

THE COURT: Thank you, Mr. Curry.

MR. CURRY: -- when I need --

THE COURT: Got it. No, thank you.

And Mr. French, could you confirm that you can hear me?

MR. FRENCH: Very well, Your Honor.

THE COURT: All right. Thank you. Whenever you're

ready.

BY MR. FRENCH:

Q Checking my watch, I was about to say good morning, Mr. Mesterharm. I'll say good afternoon.

A Good afternoon.

Q I know you testified previously in this matter, but for the record, would you tell the Court your relationship with the debtor.

A I lead a team that is serving as financial advisor to the debtors.

Q And who are you employed by?

A I'm employed by a restructuring firm called AlixPartners.

Q What's your role and title in AlixPartners?

A I'm a managing director at AlixPartners, and I lead the turnaround and restructuring services group in the Americas.

Q How long have you been a restructuring professional?

A I've been a restructuring professional for over 30 years, 25 of which have been at AlixPartners.

Q Can you give the Court a little flavor of your experience as a restructuring professional, what sort of roles you've worked on in the past?

A Sure. Over the years, as -- at AlixPartners and previously, I've predominantly served as a debtors' financial advisor or interim officer in companies going through Chapter 11 processes. Some of the cases I've worked on, I've been the

Chief Restructuring Officer of Pacific Gas & Electric, also known as PG&E. I was the Chief Restructuring Officer of Eastman Kodak Company. I've been the -- I was the Chief Restructuring Officer of Parmalot North America, and I've also been financial advisor in other notable cases, including Linn Energy, as well as Silicon Graphics, Zenith Electronics, among many others. Safety-Kleen as well, among many others, large public corporations.

Q Did any of those prior cases involve similar issues to those that you've addressed since doing your work with J.C. Penney?

A Yes. As companies going through Chapter 11 face new challenges, in particular around managing liquidity, dealing with vendors, securing sales, and -- and operating their businesses in general. During, you know, my career, I've worked on numerous companies in numerous industries, including retail, which have, you know, helped to form my views for this case.

Q You mentioned you've worked on a couple of retail cases. Would you list them for the Court?

A Yes. I was Chief Restructuring Officer of Gymboree Corporation in their restructuring. I was intern CFO of a company called Cotton Ginny, which is a Canadian retailer that went through an out-of-court process in Canada.

Q How about malls? Have you been involved in any cases that

have a nexus to malls?

A Yes. I was the Restructuring Advisor to General Growth Properties, which is the largest mall operator to go through Chapter 11 and which today is -- is actually owned by Brookfield.

Q I want to turn and focus on this case in particular. You were virtually present during Mr. Okin's opening statement. Is that right?

A Yes.

Q Did you hear Mr. Okin say something along the lines -- and I'm paraphrasing -- that the debtors do not have a legitimate need for speed to proceed with this proposed transaction?

A I did hear that statement.

Q Do you agree with Mr. Okin?

A No, I do not.

Q Why not?

A Chapter 11 is not a healthy place for a company to stay, and it's a costly process. It is a process where, because of the uncertainties regarding the potential outcome of the case, and in particular in this case, it creates particular hardship on vendors. It creates a concern in the mind of customers, employees, and it is, you know, not -- not a place where people go by choice.

Q You mentioned vendors. In this case specifically, what has been the effect on the company's relationship with vendors

that you have seen due to the Chapter 11?

A It's been a quite challenging environment dealing with our vendors in this case. As I think it's been reported, we -- when we filed for Chapter 11, we had built up nearly 600 million of unpaid trade claims from vendors that we were not able to honor prior to the bankruptcy filing. The company had been delaying payments for sometime to manage liquidity.

During the bankruptcy period, while we got a small amount of relief in the form of a critical vendor order of 25 million on that 600 million-ish sort of number, it -- it really wasn't sufficient enough to make a difference with many of our vendors and -- and we've had some challenges being able to use it and getting the lenders' consent to be able to use those funds.

In other retail cases that I've been involved with, the critical vendor relief is significantly greater. In the Gymboree case, it was an all-trade plan that got covered in full, so the vendors were much more willing to work with the company on a post-petition basis.

Here, with the amount of trade that was built up on a prepetition basis, the lack of sufficient critical vendor pool, the lack of the ability to use that pool, you know, has all created challenges. Vendors have reacted by effectively shipping us less than what we've asked. We've missed our original budget of purchases by nearly 25 percent. Since we were able to open the stores earlier and perform better than

expected and have more sales sooner in the case, we upped our forecast for vendors to -- to help replenish from the early sales that occurred, and we've missed that forecast by over 30 percent.

While our DIP budget called for us to be on a COD basis with vendors, at this point, the large percentage of our vendors is something like 70 percent have us on cash in advance. So we're actually having to prepay vendors to -- to be able to get goods, those that are willing to ship us.

We've had a significant number of vendors say that they are not interested in J.C. Penney being a retail outlet for their product anymore, and we've had a number of vendors who have basically, for private-label type goods, who have said that they're not going to accept orders for 2021 until we show that the company is emerging from bankruptcy, and then they will consider doing business with us.

Historically, we had a significant amount of factor support, nearly 700 million in factor support in 2019. Right now we have zero. All of the major factors have refused to factor to spending receivables. So the -- the challenge has been pretty tough with the vendor community.

Q I want to break that up with some follow-up questions. You mentioned the debtors' use of critical vendor payments. How much prepetition trade claims do the debtors have, according to (indiscernible)?

A As I said, about 600 million, roughly.

Q And how much critical vendor payments were they authorized to make?

A We had authorization from the Court for up to 25 million, but it still required lender consent to use them on an individual basis.

Q How much do critical vendors (indiscernible)?

A A little over -- just shy of 3 million, a little over 2-. Between 2- and 3-.

Q In your view, (indiscernible) paying $25 million that has caused the dissatisfaction among the vendor community?

A No. I believe that 25 million was not what we requested originally. And as I said, in other re-cal cases, significantly more was set aside for critical vendor, but that was just not available here.

Q You separately mentioned that many vendors have started insisting on cash-on-delivery or cash-in-advance terms. What's the effect of that had on the company?

A Well, it's a drain on liquidity. While we have been ahead on our -- on our plan, what we're -- what we're finding now is that it's actually -- that -- that becomes a -- a deduct from our positive position that we've had in terms of cash performance, and so we're having to prepay. And the challenge with that is sort of double. Number one, we're having to spend the money before we --

(Zoom interruption regarding the maximum duration allowed and is ending.)

THE COURT: So folks, that was not my line. That was somebody who's dialed in so don't be worried.

Mr. French, I apologize for that interruption. Please proceed.

THE WITNESS: I would -- I would also say that in addition to having to pay before we have the goods, it also has put us in a position with -- with the combination of lack of inventory on hand and having to pay for the goods before we get them, it's exacerbated our -- our challenge with our ABL formula and caused us to have to post money with the ABL lender to be in formula because we don't have possession of that inventory to be in formula.

BY MR. FRENCH:

Q Can you explain how the formula works and why this was openly having to post cash for the segregated ABL?

A Yeah, as part of the cash collateral order and the final DIP order, we had to agree in order for consensual use of ABL lender collateral to stay in compliance with the borrowing base formula. The borrowing base formula provides the lender a mathematical calculation where, based on accounts receivable, largely accounts receivable but then largely inventory times certain advance rates to be at a level, that that indicates that their loan is covered.

Since we haven't received inventory, we're not able to do that with our traditional collateral. We negotiated, as part of the cash collateral order, that if we fell out of compliance, that we'd be able to post cash into a segregated account for the benefit of the ABL lender to stay in compliance and as such, we've had to do that during this bankruptcy.

Q Do you know approximately how much cash J.C. Penney has posted in the segregated ABL account due to lack of sufficient (indiscernible)?

A The number fluctuates on a weekly basis because we have to submit a weekly borrowing basis. It's -- it's -- over the last several weeks, it's ranged anywhere from 150- to 200-, around 200 million.

Q In your experience, is it a time to help the company that has posted hundreds of millions of dollars into a segregated ABL account because it's unable to buy sufficient inventory?

A Well, I think in particular for a retailer, it's not a sign of a healthy performance that -- that we're unable to secure inventory. A retailer is in the business of selling inventory, and the fact that we don't have inventory and have had to post cash to stay in compliance with our borrowing formula can't be viewed positively.

Q Has J.C. Penney had difficulty maintaining its employees during the bankruptcy proceeding?

MR. CURRY: Objection, Your Honor. Objection.

Foundation.

THE COURT: Sustained.

Mr. French.

BY MR. FRENCH:

Q Mr. Mesterharm, do you have a view as to whether or not J.C. Penney has lost employees or gained employees during the bankruptcy?

MR. CURRY: Same objection, Your Honor.

THE COURT: Mr. French, do you have personal knowledge of the current status and what has occurred to the employee base during the case?

MR. FRENCH: Just (indiscernible), Mr. Mesterharm.

THE WITNESS: Oh, I thought you said Mr. French.

THE COURT: I did. I wasn't going to ask you the question, but I ask you the question through Mr. French.

THE WITNESS: Okay. Thank you, Your Honor. Yes, I do have information on the --

BY MR. FRENCH:

Q How did you acquire that information?

A From the company's HR department.

Q And what is your understanding?

MR. CURRY: Objection, Your Honor. Objection, Your Honor. The witness is being asked to provide hearsay testimony.

THE COURT: Yeah. Overruled. Go ahead,

Mr. Mesterharm.

THE WITNESS: The HR department keeps specifics on turnover and reasons for turnover and during the pendency of these cases, they've charted or tracked turnover, both in their store operations, as well as in their corporate and distribution operations. They -- the leading cause, over 50 percent of the time, were employees saying that they're looking to depart has been their concern over the company's future and the Chapter 11 proceeding itself and sort of the uncertainty over weather the company was going to continue as a going concern.

The company has also, as a result of these challenges, has had longer time than it's had to fill open positions, and so they also track the time horizon to fill open positions, and they said that's increased by at least a -- a week, on average.

BY MR. FRENCH:

Q Now, approximately how many (indiscernible) have they lost --

MR. CURRY: Your Honor, just real quick, I want to renew the objection to the testimony and move to strike the portion. There's double hearsay in there, and Mr. Mesterharm is testifying that someone at the company has told him that employees told them the reason that they were leaving. Mr. Mesterharm's not an expert on -- here on HR or employment

matters, so it's improper for him to be testifying or giving an opinion on those matters based on this double hearsay.

THE COURT: Okay. Mr. French, do you want to respond?

MR. FRENCH: Sure. On the double -- the second layer of hearsay, which would be written records -- recorded statements made by the employees during their exit departure -- well, I suppose I can lay foundation, but I will not have difficulty laying foundation (audio interference).

As for the top two layers of hearsay, he wasn't relaying individual statements from the HR department, he was describing his own personal knowledge based on his personal work conducted, his restructuring professional work and closely with the company management, his review of it, the company's books and records, including the incident.

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

MR. CURRY: Your Honor, I would just quibble with the statement that it's personal knowledge. I think Mr. Mesterharm's testimony was clear that he was receiving reports of what employees had told somebody else, not told him directly. So it is still hearsay.

THE COURT: Understood. I'll overrule the objection, and I'm sorry --

MR. FRENCH: I apologize.

THE COURT: No, my fault. Mr. Curry, and I owe you a

ruling on your motion to strike; that's denied.

BY MR. FRENCH:

Q And I apologize, Mr. Mesterharm. Did you answer approximately how many employees J.C. Penney has lost?

A You know, I'm not -- I'm not familiar off the top of my head on the exact number at the moment. I would say that what I -- I have ascertained is that turnover that the company has had is kind of running similar what they have said. It's running similar to historical patterns. However, it's not what they expected in this environment when people would have difficulty going and finding other employment.

So while the overall turnover has been in the ballpark of their historical averages, they have experienced that the main reason is -- is -- what people are citing in their surveys is their uncertainty over jobs and the future due to the current situation as well as, you know, the fact that the company is having a harder time replacing people. So the jobs are staying open longer. And their expectation was that in this current overall pandemic environment, they expected to have less turnover, not more or even the same.

Q Given the totality of circumstances you've just described, the difficulty with vendors, the need to (indiscernible) ABL account, the difficulty maintaining employee relationships, do you believe that there's a true need for speed for the debtors to proceed with this proposed transaction?

A I do.

Q Why?

A Well, beyond those factors which are factors that are hurting the operations, the DIP loan matures next week. And so, you know, absent some agreement to extend the DIP loan, you know, the time is -- the clock is ticking.

Also, the sale itself, the buyers have a walk right that they could terminate their interest in the deal if it's not closed by November 20th. So that clock is ticking as well.

So we have -- we have those factors which are working against us, the need to move forward. And then the longer the company stays in bankruptcy, there's just continued pressure on the vendor base, continued pressure on the employee base. And, obviously, with that -- with those deadlines out there also creating more challenges.

Q It's been suggested that because the debtors have out-performed some of their early DIP budget that they could operate in bankruptcy indefinitely. Do you agree with that proposition?

A No, I do not.

Q Why not?

A Well, I think, as I said, the DIP loan itself matures next week, absent an extension, and -- and we don't have sufficient funds to repay it without ABL lender consent. And, you know, I think those two factors would make it impossible to continue

right there alone.

The -- also, I believe, you know, while we have performed better, I think, as Mr. Sussberg said, some of those items are one time in nature. While they have inured to the benefit of a better cash position, they're not expected to repeat. The company is still performing at negative comp sale levels that are, you know, above -- more negative than -- than expected in its recent performance. And I believe that that's really been triggered -- triggered by the fact that we don't have the inventory that we've been -- that we've planned for having in our stores.

Q You mentioned the impending business (indiscernible). What's the current balance of the DIP Loan?

A The current DIP balance is $900 million.

Q Can the debtors just repay the DIP with cash when it comes due?

A No.

Q How much cash do the debtors currently have?

A The -- around the end of October, roughly $1.2 billion.

Q Have you prepared a demonstrative that walks through the various categories of cash that the debtors hold?

A Yes, I have.

MR. FRENCH: Can we please publish the debtors' demonstrative (indiscernible).

Oh, Your Honor, may we please transfer control to my

associate, Josh Rubin, who will present the document?

THE COURT: Sure. Hold on.

(Pause)

THE COURT: Sorry for the delay. It took me a minute to find it. He should have it now.

BY MR. FRENCH:

Q Mr. Mesterharm, do you recognize this document?

A Yes, I do.

Q What is it?

A It's the demonstrative that you referred to showing various components of the company's cash position.

Q Were you involved in the preparation of the demonstrative?

A Yes. It was prepared by staff at my supervision.

Q And do you believe it to be presently true and accurate?

A Yes, I do.

Q All right. I'd like you to walk the Court through this chart. Let's start with the legend. I see that it's color coded, and there's three separate colors. Can you explain for the Court what the color coding indicates?

A Yeah. The color coding was meant to -- to break down cash that's readily available to pay down the ABL, cash that's readily available to pay the DIP and cash that is not readily available for DIP pay down but is largely collateral of the ABL.

Q Okay. Let's start at the top row. And it's called STI

cash. It's shaded green. What is STI cash?

A STI stands for short-term-investment cash. This is the cash that is excess accumulated by the operations of the debtor, also includes -- is where the original 225- of DIP proceeds were deposited. That account is an overnight investment account, and it's the account the debtors draw from in order to make outbound payments of the vendors, employees, landlords and pay their costs of operations.

Q I see here it went from 633.3 million at the start of October to 476.2 million at the end of October. So my first question is, what happened in October?

A October was expected to be a month where the company is building inventory or attempting to build inventory. So it's normally a negative cash month because of lower sales offset by -- or lower sales, yeah, offset by higher inventory purchases.

There were also a number of items that were paid in the month. There was severance that was related to the GOB sales that has had some significant balances paid in the month of October as the GOB sales have concluded. They also had quarterly debt service payments that were in that month. So it was hit by certain one-time or heavy items that month that -- that have dropped -- driven the balance down.

Q On the green row that I see is the ABL builder account, 194.6 million. What's that cash?

A That's the cash that I referred to earlier as being posted with the ABL lender to remain in compliance with the borrowing base.

Q So these two green-shaded cells, are they ABL collateral?

A Yes.

Q Are they available to the debtors to use to pay down the DIP loan?

A Not without the ABL lenders' consent.

Q What would happen to the debtor if they tried to pay down the DIP loan using the ABL collateral without the ABL consent?

A We'd be in violation of the DIP order and, you know, would be in violation of use of cash collateral.

Q Okay. Let's go to the blue-shaded one. Now, these are funds that the debtors can use to repay the DIP loan?

A Yes.

Q Okay. What is the DIP loan (indiscernible)?

A That is where the original -- or the second 225- draw was placed in the segregated account. And since the time of that borrowing, we've also moved to that account the proceeds from some sale of DIP lender and first lien lender collateral.

Q Okay. And the third category -- I'll call them beige. These are funds that are not available to the debtors to repay the DIP loan?

A Well, these are -- these are what I would call sort of the cash in the system. It is mostly inbound receipts that are in

the process of working their way through the cash system to get to the STI account. They're cash in stores to operate the cash registers and the like at the store. It also includes outbound disbursement accounts which is where -- basically, the in transit on the outbound side where these are monies that have been put into our -- into our electronic funds system to make payments to vendors. And then it also includes some cash in foreign accounts, non-debtors.

So it's largely, as I mentioned, in transit. And this is sort of a -- on a regular basis, it fluctuates around 200 million. But if the business is going to stay as an operating entity, it's sort of required to keep that entity operating.

Q So you referred to this as cash in the system. Do you have a view as to what would happen to the debtors if they sucked out all the cash in the system to pay the DIP loan?

A Well, first, a large majority of it is -- is ABL collateral. So just like the STI account, it can't be used without the ABL lenders' consent.

And, secondly, if the business was -- some of it is just not possible to sweep out, because every day it does get transacted out, but then it gets replaced by other funds. So there's always an amount that's in transit unless the clock stopped and we ceased operating. Then those funds might become available. But they're not able to be grabbed on a daily basis

and used for -- for debt payments.

Q Am I understanding you correctly that there's approximately $230.2 million that the debtors could actually use to repay the DIP loan?

A Correct.

Q Are you aware that the Ad Hoc Committee -- Equity Committee has filed a Rule 60 motion seeking to unwind the roll-up portion of the DIP loan?

A I am aware of that.

Q If they succeed -- and I'm not saying that they will, but if they succeed, do you know what the approximate balance of the DIP loan would be then?

A Without the roll up, I believe it would be 450 million.

Q So even if they're successful on that Rule 60 motion, will the debtors have sufficient cash to repay the DIP loan?

A No.

Q Are you familiar with the restructuring alternative that's being proposed by Mr. Snyder?

A Yes.

Q What's your understanding of what that alternative would entail?

A That alternative would entail repaying the DIP loan, seeking the continuation of the ABL. It would entail the reinstatement of the first lien and second lien secured obligations of the company. It would also further entail the

equitization of unsecured bonds as well as other unsecured claims and some amount of equity left for existing equity holders.

Q Do you support the debtors pursuing that restructuring alternative?

A I do not.

Q Why?

A As we said, there's not sufficient funds to execute on that plan. The -- there's not sufficient funds to pay back the DIP loan. There is not -- the DIP -- the ABL lender would not likely continue to lend on the existing terms. The ABL lender in support of the sale of OpCo is reducing their exposure, is reducing their availability calculations, is requiring for a de-leveraging of the company that it is lending to. It is only permitting the new OpCo to have 520 million of debt behind it. So reinstating all of the debt that existed pre-petition would far exceed that 520 million.

Q Based on your experience as a restructuring professional, what's your view of what would likely happen if the debtors abandon the proposed sale under the ABL and instead propose to pursue Mr. Snyder's restructuring option?

A I believe there's a high likelihood that the company would move towards a liquidation.

Q Why is it your view that a liquidation is not the best result?

A Well, today we have a significant majority of parties involved in the case supporting the direction we're going. The DIP lender supports it. The ABL lender supports it. The first lien group supports it. The Unsecured Creditors' Committee supports it.

And so while I realize the ad hoc equity group doesn't, we have a large number of people who are supporting the plan, and they cover a variety of interests. It would be -- you know, as I mentioned, a number of our people who've lent capital to the business that would be supporting it and that under our priority rules are at the top of the -- the heap, it would have the opportunity to preserve over 60,000 jobs. It would also have the opportunity to preserve thousands of vendor and landlord relationships, keeping J.C. Penney's operations alive to continue to buy goods from our vendors and to be a tenant for landlords.

MR. FRENCH: Your Honor, I have no further questions at this time and pass.

THE COURT: All right. Thank you.

Let me just check. Is there anyone that supports the debtors' motion wish to ask Mr. Mesterharm any questions?

All right. Then, Mr. Curry, the podium's yours.

MR. CURRY: Thank you, Your Honor. For the record, David Curry from Okin & Adams on behalf of the Ad Hoc Equity Committee.

CROSS-EXAMINATION

BY MR. CURRY:

Q Good afternoon, Mr. Mesterharm. Good to talk with you about this again.

THE COURT: Let me -- Mr. Curry, could I interrupt for just one second?

THE WITNESS: Good afternoon, Mr. Curry.

THE COURT: Do you --

MR. CURRY: Yes, Your Honor.

THE COURT: Do you anticipate putting up any exhibits? Because if you do, I want to go ahead and give it to your presenter.

MR. CURRY: I do, and I will be the presenter.

THE COURT: All right. Thank you. Then just so you can seamlessly transition, I'm going to go ahead and give that to you now. And that way, we won't have to stop.

(Counsel confer)

MR. CURRY: Your Honor, actually, I'm having some technical issues. I -- with the screen share. So could you actually give presenter to Mr. Okin?

THE COURT: Of course. Let's see. I'm now really glad I did this before we got started.

MR. CURRY: Me too, Your Honor.

THE COURT: Let's see. Mr. Okin, I'm -- give me just a second. I'm trying to get down to the Os. I'm not there.

MR. OKIN: Your Honor, would it help if I were to request it?

THE COURT: It would -- well, either that or show me your -- oh, there you are. Okay. If I can see your face, then it's an easy transfer. I just didn't see you. Thank you. There you go.

(Counsel confer)

THE COURT: All right. Mr. Curry, whenever you're ready.

MR. CURRY: All right. Thank you.

BY MR. CURRY:

Q Mr. Mesterharm, I -- I want to explore -- I understand that you're here today testifying on behalf of the sale. And as I understand it, there are really three categories that you're here testifying on. One is the debtors' need for speed, as it's been stated or referred to as. You were testifying that the relationship with the vendors has deteriorated such that the company must get out of -- must complete this sale immediately or face imminent harm; two, that employees are leaving unless the sale is completed; and then three, that there really is no other viable alternative because of the company's cash position.

So I do have a couple questions that we want to go through on each of those categories. And the first --

A -- you characterized them correctly. But if -- but I'm

happy to -- are you asking me a question of whether or not these are the areas?

Q Yeah. But as I ask the question, certainly we'll be able to give more contour to the actual text, if you will. But I guess the first question we'll start with on the need to speed -- or need for speed -- and this conversely relates also to the idea that the debtors are struggling and the difficulties that the debtors face financially which is the idea that the build-up of cash is bad, because there's a correlating inventory shortage. Is that a correct statement?

A Well, what I believe I said and what I feel is that, while the company has built up cash, which is a positive, it doesn't -- it doesn't all translate into being positive, because part of the reason why the company has built up cash is because they have not been able to buy the level of inventory that they had planned to buy and that some of the reason the company has built up cash has been that it has deferred payments that it will still ultimately need to make. Those two items do -- are large contributors to why the company has built up a higher cash position.

Q And is it also your testimony that a correlation of that is that, in part, this cash buildup and this inventory shortage is related to the fact that more stores were open sooner than the debtors expected when they prepared their DIP budget?

A Than when we prepared our original DIP budget. Our

expectation at that time was that a large portion of the stores would not be open until after the July 4th holiday. In fact, we were ultimately able to open stores sooner, and all of them were open largely in the month of June. As a result --

Q And --

A -- of that -- as a result of that, debtors had more sales with the stores open than they otherwise would have with the stores being closed.

Q And so, in fact, compared to the initial DIP budget that was presented on June 4th to this Court, the debtors' sales have exceeded those projections, correct?

A They have, largely, as I mentioned, because of, you know, the -- the opening of the stores early as well as the GOB sales exceeding expectations.

Q And part of the story you're here telling the Court today is that as a result of that and a number of other factors, the debtor has been unable to purchase sufficient inventory to sustain operations. Is that correct?

A Well, not -- not because of the stores opening sooner or GOB sales doing better. It's not -- it -- you know, the reason why we haven't been able to -- to buy inventory -- we needed to buy more inventory because the sales -- the stores opened sooner. We needed to replenish that inventory. We weren't -- and we struggled to meet those -- the level of orders we've placed. And but furthermore, just the vendors' general concern

about J.C. Penney, their exposure with J.C. Penney and their risk of nonpayment going forward that we've struggled to get vendors to continue to transact with us on a normal basis.

Q And, Mr. Mesterharm, I think it was noted, this is not the first time that you've testified in this case, correct?

A Correct.

Q And, in fact, this isn't the first time that you've testified on what you thought it would take to get buy-in from the vendors, correct?

A Correct.

Q In fact, you testified on June 4th -- or at a hearing on June 4th in connection with the approval of the DIP loan that it was your opinion that if the Court approved the DIP loan that locked the debtors into this outcome that the vendors would then support the debtor at that time, correct?

A I think what I -- what I -- what I said was that having a DIP loan and being able to show vendors we would have sufficient funds to operate would be better for our vendor relationships.

Q And did you not advise the Court at that time that it was your professional opinion that having that DIP loan was necessary in order to smooth over those vendor relationships?

A Well, I think it was that if that was a -- if that was a factor that it would help with our vendor relationships.

Q And yet the vendor relationships have continued to

deteriorate?
A Yes. I think that the fact that we have continued to be in this process longer than expected -- you know, we originally filed with an RSA that had a path to reorganization built into it and that we expected to be largely out of this process by September. The fact that we are still here in November and that, you know, we -- we moved past some of the milestones without them definitively creating the comfort level for our -- for our vendor community, those relationships have continued to struggle.
Q Okay. And you're aware that Mr. Sussberg on occasion has presented some presentations at the beginning of hearings to advise parties -- I think Mr. Sussberg -- we've -- they've been completely open and transparent, provided, you know, frequent business updates. Are you aware of those presentations?
A I am.
Q And did you have a role in preparing the business updates or assisting in the preparation of the business updates that would have been presented in those presentations?
A Occasionally, we were asked to help give him some materials for those presentations.
MR. CURRY: And I'll apologize, Your Honor. The issue with screen sharing is actually affecting my ability to view things as well. So bear with me a bit here.
BY MR. CURRY:

Q But, Mr. Mesterharm, are you able to see the document that's on the screen?
A I see a document that is Document 1757-55.
Q Okay. And this is --
(Counsel confer)
BY MR. CURRY:
Q This is the presentation -- you recognize this is the presentation that Mr. Sussberg gave on June 11th in this case?
A That's what the header says on the -- or the title page.
Q And so if we move to page 5 -- and you see the first bullet here? It says, "With the approved DIP financing, more suppliers are ready to move forward shipping goods under reduced payments through July." Do you see that statement?
A I do.
Q And so after having come in and testified to the Court that if the Court approved the DIP that vendors would be more willing to participate with -- or support the debtor during these cases, in fact, after the DIP loan was approved, the debtor came back to the Court and said, great news, Your Honor, it's working. Is that correct?
A I'm not sure how Mr. Sussberg characterized it. But what I would say is at the onset of the case, you know, when we were able to indicate to our vendor -- our vendor -- prior to -- well, I'll take a step back. Prior to -- as you may recall, we filed initially without a DIP loan, and that caused a lot of

consternation among our vendor base. They said why was the DIP not approved. That seems very irregular in retail bankruptcies that they've been involved in.

And so this was probably shortly after our DIP loan had been approved, and so that gave us our first sort of set of talking points for our vendors that we did get DIP financing approved and we're now moving forward to pursue the RSA. However, you know, the RSA then became the focus of people's attention as to whether or not we were going to meet the milestones in the RSA to be able to get access to the DIP and what would be the outcome of J.C. Penney.

MR. CURRY: Okay. And, Your Honor, for keeper of the record purposes, that is the Ad Hoc Equity Committee's proposed Exhibit 54. It's at ECF 1757-55. I'd move to admit the exhibit.

THE COURT: Mr. --

MR. FRENCH: No objection, Your Honor.

THE COURT: Thank you. Mr. Curry, just so that we have a good, clean record and my notes are straight, you went faster than I could click on my pen and write it down. You said 1757-55. Did I get that right?

MR. CURRY: That's correct, Your Honor.

THE COURT: All right. Then 1757-55 is admitted.

(Equity Committee's Exhibit 1757-55 admitted into evidence)

MR. CURRY: Thank you.

BY MR. CURRY:

Q Mr. Mesterharm, there have been -- let me back up, start over here. I apologize. In connection with your role as financial advisor to the debtor, are you also involved in preparing updates to the board of directors?

A I participate in some board meetings, but I have not had a presentation directly to the board members.

Q Do you -- are you involved in the preparing of the material, though, that is provided to the board to let the board know how the case is going?

A I guess potentially from time to time if -- you know, if Kirkland is preparing materials, they may look for -- similar to those business updates, they may utilize some information we provide, or same with Lazard.

Q Okay. Mr. Mesterharm, I'm going to want you to look at another one of our proposed exhibits, but this is a confidential exhibit, and my understanding is that Mr. Yates [sic] had the exhibits prepared for you to be able to review them. The exhibit is our proposed Exhibit 65.

THE COURT: And, Mr. Curry, just for the record, where would I find that on the docket?

MR. CURRY: Yes, Your Honor. It is at 1787-1.

THE COURT: 87-1. Let me ask, is there an agreement on the admission of this agreement, Mr. French?

MR. FRENCH: Your Honor, I apologize. I don't have it in front of me, but will soon.

THE COURT: All right. Just let me know when you're ready.

MR. CURRY: I'm going to briefly leave the screen, Your Honor. I apologize.

THE COURT: No. Certainly.

(Counsel confer)

MR. FRENCH: Thank you for your patience, Your Honor. We have no objection to the admission of this exhibit.

THE COURT: All right. Thank you.

Mr. Curry, I assumed that you were going to offer it.

MR. CURRY: Yes, Your Honor, we are going to offer it.

THE COURT: All right. Then we'll admit what is identified as Equity Committee 1787-1 without objection.

And, Mr. Curry, I have popped it up on my screen. So if you -- I have not looked at it yet, so I don't know if it's one page or a hundred. But if you -- if there are multiple pages, if you would just make sure you guide me so I'm where you want me to be.

MR. CURRY: There is one page that we would like to discuss, Your Honor. And so I'd like both the Court and Mr. Mesterharm to turn to Page 16 in the PDF.

THE COURT: So let's see. Mr. Curry, and I do

apologize, I think we need to go back and look. So if I look at 1787-1, that's not the actual exhibit. That's just a piece of paper that says sealed. So did you file the actual exhibit under seal? I know I signed the order.

MR. CURRY: Yes, Your Honor. I'm working to try to find it.

THE COURT: Got it.

MR. CURRY: Give us just a second, Your Honor.

THE COURT: No. Of course. How about 1800?

UNIDENTIFIED: (Indiscernible) marked Exhibit 65.

THE COURT: Ah, 65.

MR. CURRY: Yes, it would be unmarked Exhibit 65, Your Honor. And Mr. Clark was saying that's what his notes originally said, so that may be correct.

THE COURT: All right. So let me tell you -- so I'm looking at 1800. It says sealed documents Exhibit 65, 66, 67, 68. So I'm going to look at that.

MR. OKIN: Your Honor, this is Matthew Okin. It starts with Bates Number JCP0127402.

THE COURT: All right. So let's go back, Mr. Curry, and just clean up the record. So by agreement -- and Mr. French, correct me if I'm wrong -- the actual document is at 1800-0. So that is the exhibit that I'm going to admit without objection.

(Equity Committee's Exhibit 1800-0 admitted into evidence)

THE COURT: All right. Mr. Curry, I now have it in front of me. It is --

UNIDENTIFIED: Your Honor?

THE COURT: Yes.

UNIDENTIFIED: Just to clarify, admitted under seal.

THE COURT: Admitted under seal. Yes, sir. Thank you.

MR. CURRY: And, Your Honor, for the record, skip over the title page there. I think we already -- these are -- this is a minutes presentation materials from board of directors meeting August 19, 2020.

THE COURT: Agreed.

MR. CURRY: And what I'd like the Court and Mr. Mesterharm to focus -- and I -- so for 16 of the PDF, it's got a Bates label on it. It's JCP0127417.

THE COURT: I'm there.

MR. CURRY: Okay.

BY MR. CURRY:

Q Mr. Mesterharm, are you there?

A I am.

Q Okay. And so I'd like you to look at the bottom half of the page below the second long graph there. And there's a major bullet point and then three smaller bullet points. Do you see where I'm talking about?

A Uh-huh. Yes, I do.

Q Okay. So we see in this presentation to the board, it says, "After a lull in receipts, the pipeline is opening up." Do you see that statement there?

A I do.

Q Okay. And then dropping down to the first bullet point:

> "The level of receipts has accelerated over the last several weeks after a very slow start in June and July. Receipt levels have now ramped up to approximately 70 million per week, now on track with the weekly levels expected in August."

See that statement there, correct?

A I do.

Q So out of August 19, 2020, the board of directors was being told that the vendor issue had been addressed and that supply was ramping back up and was commensurate with expected budgets. Is that correct?

A I don't know if that's exactly the way I would frame it. It does say that there's been a lull, but it's picking up. It says that receipts have shifted to August, because we're having delays with domestic suppliers. That's the bolded point. And there are still potential risks. Those were the bolded points.

I think what management was saying was that we have started to see a pickup, but there's still risk. That's the way I interpret that.

Q Right. But the last point, what the board was told was

that receipts were now on track with the weekly levels expected in August, correct?

A It does say that. But it also says that Q3 and Q4 receipts are expected to build from there. And, you know, and that's really what -- you know, it's -- it's sort of a -- it's a snapshot view at a point in time.

MR. CURRY: Objection, Your Honor, to everything after "that's what it says." Move to strike the non-responsive testimony.

THE COURT: Sustained and granted.

MR. CURRY: Thank you, Your Honor.

BY MR. CURRY:

Q That's all we need from this exhibit. Now, Mr. Mesterharm, the next part of your testimony is that the debtors have not been able to spend as much money as they initially projected on inventory, because vendors won't sell to them. Is that correct?

A Well, what I think I said is that they've missed their receipts forecast of receipting goods from vendors. And that's from a variety of reasons, some that vendors have short-shipped, some that vendors have delayed ship and some that vendors are not -- are no longer shipping.

Q Okay. And so, I think, in order for us all to be on the same page, I think we do need to explore a terminology issue here, and that is that you've, a couple times, referred to the

initial DIP budget. Now, when I hear initial DIP budget, I think the budget attached to the DIP order that this court reviewed and considered as evidence in granting that DIP loan. Do we agree that that's the initial DIP budget?

A I believe that to be -- I believe we're on the same page.

MR. CURRY: Okay.

(Counsel confer)

MR. CURRY: Your Honor, Mr. Okin is going to bring up the DIP order in this case which does have that initial budget there. We did file that as our proposed Exhibit 15. It's 1757-6. We are going to move to admit that exhibit. And while Mr. Okin's bringing it up, I guess I can go ahead and move to do that.

THE COURT: Mr. French, any objection?

MR. FRENCH: I apologize. Could you restate the exhibit number, please?

THE COURT: 1757-6 --

MR. CURRY: Yes.

THE COURT: -- is the docket number. He -- his Exhibit 15.

MR. FRENCH: Final DIP order?

THE COURT: That's what it's represented to be.

MR. CURRY: Yes.

MR. FRENCH: Okay. I -- it's already admitted, Your Honor.

THE COURT: I'm sorry, Mr. French. I just couldn't hear you.

MR. FRENCH: Your Honor, that's been admitted by agreement.

THE COURT: All right. Then we'll note that 1757-6 has been admitted.

(Equity Committee's Exhibit 1757-6 admitted into evidence)

MR. CURRY: Thank you, Your Honor.

BY MR. CURRY:

Q So, Mr. Mesterharm, we're bringing it up on the screen for you here, the initial budget. And I want to talk to you about some of the projections in here. First of all, in debtors' report to the DIP lenders on merchandise spends, which two categories in the budget reflect those spends?

A It's hard for me to see this. Is there a hard copy that you provided to us? I know it's generally domestic merchandise vendor and import merchandise vendor are the -- the -- the two where we would show payments to vendors. But I'm just saying it's hard to see given the small size.

UNIDENTIFIED: If I may? Mr. Curry, do you have a Bates number for this page? And I can provide him a hard copy.

THE COURT: There's also -- someone can show Mr. Mesterharm. He can blow it up and shrink it just on his screen by taking your cursor, moving it over to the right of the document. You'll see a little rectangle, a vertical

rectangle --

THE WITNESS: Yep.

THE COURT: -- that has -- okay. You got it?

THE WITNESS: I see it. Yep. Thank you, Your Honor.

THE COURT: Yes, sir. I do the same. Old eyes.

MR. CURRY: Thank you, Your Honor. That helps a lot, because we have some questions here.

BY MR. CURRY:

Q So, Mr. Mesterharm, I believe while we were looking for it, you generally noted that it's domestic merchandise vendor and important merchandise vendor. Are we in agreement on that?

A Those are the primary areas where we're going to pay for goods, inventory --

Q Okay. And the budget period for this time, this spans for the beginning of the DIP budget through October 3rd, correct?

A Yeah, I do see that. That is through October 3rd. Yes.

Q Okay. And so I believe -- and in your declaration -- and I don't think you actually testified to this today, but I want to come back to it. So the board was told receipts were ramping up in August. What about September?

A What about September? What's your question?

Q How did you perform as compared to the initial budget in September?

A Well, as I -- as I've said, over the entirety of the period, we've missed the original budget by roughly 25 percent

in terms of goods that we were hoping to receive. I don't have a specific analysis of the month of September.

Q Okay. Well, we'll -- and, Mr. Mesterharm, you did file a declaration ahead of today, correct?

A Yes.

Q And do you recall that in your declaration, you provided some specific testimony regarding performance in September?

A Well, that was not compared to the original DIP budget. That was referring to the fact that since we had more sell through, and the company upped their request for what they wanted to buy. So it wouldn't have been compared to this. I mean, the company updates their open-to-buy forecast at least monthly, if not more frequently than that.

Q Well, it maybe a little typo, Mr. Mesterharm, but let me read it to you. Since September receipts were 29 percent below the initial DIP budget -- do you recall testifying in that manner?

A Can you --

UNIDENTIFIED: Objection, Your Honor.

THE WITNESS: Can you put my declaration --

THE COURT: So --

THE WITNESS: -- in front of me, or can I have it?

THE COURT: So let's -- gentlemen --

UNIDENTIFIED: That was going to be the basis of my objection.

THE COURT: Fair enough. So, Mr. Curry, if you're going to impeach him, you can -- you don't have to give him a copy of his statement, but you need to do it the right way.

MR. CURRY: Yes, Your Honor. And we actually want to be correct on this. I'm more than happy for him to review his declaration.

THE COURT: Then -- fair enough. It was, what, 1681-1 or 16? I can't remember which.

Right, Mr. French?

MR. FRENCH: I believe so, Your Honor.

(Counsel confer)

THE COURT: Nope. I got that wrong.

(Counsel confer)

MR. CURRY: Your Honor, in our witness and exhibit list, it's 1757-2.

THE COURT: Perfectly happy to admit it twice, but I only want him to read -- I want him to reference things that are part of the record.

MR. CURRY: Your Honor, Page 12 -- I mean Paragraph 12 is the -- it's the second sentence in Paragraph 12.

THE COURT: All right.

BY MR. CURRY:

Q And, Mr. Mesterharm, are you there?

A I am.

Q Okay. So and the sentence says, "September receipts were

29 percent below the initial DIP budget." Did I read that correctly?

A You did.

Q Okay. So now I would like to go back to the exhibit that we were on, Exhibit -- our Exhibit 15, the budget. And Mr. Mesterharm, if you look, the September -- fiscal September -- I want to make sure that we agree on the same period. That would be September 5th, week ending September 5th through October 3rd. Is that correct?

A It would be the last four weeks of this forecast.

Q Okay. So then September 12th through October 3rd?

A Yes.

Q Okay. And, Mr. Mesterharm, do you -- are you able to add the totals there and let us know what the projection for September was?

A I'm doing it in my head.

Q And if it helps, my number, I have 150 million.

A And you're adding up which -- what numbers?

Q 75 million, 40 million, 29 million and 6 million.

A That would be domestic, yes.

Q Okay. And then on international, if we're adding the 28-, 41-, 36-, 32-, I get 137 million. Do we agree?

A I haven't done the math, but I'm assuming you have on that, so I'm -- unless you want me to add it up myself, I'm fine with what you've recited as the numbers to add up.

Q Well, as long as we can agree on the record that that's the projection that the debtors made in the initial budget on spends for domestic merchandising and --

A That would be domestic and -- import.

Q And import. And, Mr. Mesterharm, do you know what the debtors' actual performance was? So there --

A Not off the top of my head. Not off the top of my head.

Q Is there a document you could review that would refresh your recollection on that?

A Like I said, not in my fingertips. Not what I have available at the moment.

Q Well, I think we can get you something to come back on that. Would you have any basis for disagreeing with me that the debtors spent $236.4 million in September on domestic vendor expenses?

A If you don't mind, I will add -- add -- you're -- you're saying that's what you believe we actually spent or --

Q Correct.

A -- that's what this forecast called for?

Q No. I believe that's what you actually spent.

A Again, I would have to see -- see that analysis.

Q Well, Mr. Mesterharm, if we were able to give you the debtors' actual reporting, would you be able to refresh your recollection of that performance?

UNIDENTIFIED: Objection. Speculation. What

document are we going to show the witness?

THE COURT: Sure. Mr. Curry, if you want to offer him a document to see if that refreshes his recollection, then let's show him.

(Counsel confer)

MR. CURRY: Yes, Your Honor. We're going to try to get in -- this is one of the technical issues. I have it, but --

THE COURT: I am not bothered by this at all. I -- it's just fine.

(Pause)

MR. CURRY: Your Honor, and I apologize. And I --

THE COURT: It's okay.

MR. CURRY: I do know the Court has a busy calendar this afternoon.

THE COURT: No.

MR. CURRY: Would it be possible for us to take a short break?

THE COURT: So this is a great time. Of course we can take a short break.

Mr. Alonzo has been working his magic. He has cleared the afternoon up until 4:30, and he's working on getting rid of the 4:30. So I am working to give you the balance of the day.

But if you need five minutes, happy to take five

minutes. It is -- I have 1:32. Shall we just come back at 1:40?

MR. CURRY: Thank you, Your Honor.

THE COURT: All right. Thank you. Then we'll take a temporary adjournment.

UNIDENTIFIED: Thank you, Your Honor.

(Recess taken at 1:33 p.m.)

(Proceedings resumed at 1:39 p.m.)

THE COURT: All right. We're back on.

THE CLERK: Not yet. Give me a minute.

(Pause)

THE CLERK: All right.

THE COURT: Okay. All right. Mr. Yates, do we have -- I don't see Mr. Mesterharm. While we're waiting, let's just test audio just to make sure.

Mr. Curry, could you confirm that you can hear me?

MR. CURRY: Yes, Your Honor, I can hear you.

THE COURT: Thank you. Mr. French, same for you. So, Mr. French, I think you've muted yourself perhaps.

MR. FRENCH: Can you hear me, Your Honor?

THE COURT: Can now. Thank you. And we're working on Mr. Mesterharm.

MR. MESTERHARM: Here.

THE COURT: Okay.

MR. MESTERHARM: My microphone wasn't on. Sorry.

THE COURT: Mr. Mesterharm, could you just confirm that you can hear me?

MR. MESTERHARM: I can hear you, sir.

THE COURT: All right. Thank you.

All right. Mr. Curry, are we ready to proceed?

MR. CURRY: Yes, Your Honor. And I do want to note for the Court and the other parties involved that the document that I am going to ask Mr. Mesterharm to review to refresh his recollection is attorneys' eyes only, confidential. I had emailed a copy to Mr. Alonzo and also to Mr. Yates, and it is the -- for Mr. Yates, I'm referring to the JCP WE 20201003 (Indiscernible) Report.

THE COURT: Mr. Curry, let me --

MR. FRENCH: Your Honor, can I be heard?

THE COURT: Yes. But, Mr. Curry, if I could ask you, Mr. Alonzo is actually working from home today. I have a different staff member. It isn't that hard to figure out what my email address is, although I'd prefer not to state it on the record. Under these unique circumstances -- and again this is not an open invitation -- could you just send it directly to me?

MR. CURRY: Yes, Your Honor.

THE COURT: And so has --

MR. FRENCH: Your Honor, may I be heard?

THE COURT: If we could, I'd like to get the document

just so I have context.

MR. CURRY: Mr. Okin is going to send it to Your Honor. He has your email ready to go.

THE COURT: All right. Thank you. Let's give that just a second.

And, Mr. French, if we could, you've been relatively faint. You were good up until we took the break. Can you turn up the volume a little? Is that possible?

MR. FRENCH: Yes, Your Honor. Your Honor, is this better?

THE COURT: A little.

Let me just ask, Mr. Curry, can you hear Mr. French?

MR. CURRY: Your Honor, it is a little faint, but I can hear him.

THE COURT: Okay. Well, if you can --

MR. FRENCH: I'm --

THE COURT: -- please --

MR. FRENCH: I'm happy to speak loudly, Your Honor. Nobody's ever accused me of being soft-spoken.

THE COURT: Well, I -- it's just the technology, I think.

All right. So I have -- and this is a question. And, Mr. French, of course you can be heard. I've not yet looked -- I've received two documents, one Excel spreadsheet, one PDF.

Which document should I be looking at, first of all, Mr. Curry?

MR. CURRY: Your Honor, and we anticipated another need for this, so there are two documents.

THE COURT: Sure.

MR. CURRY: The first one is the PDF, Your Honor.

THE COURT: Okay. So let me bring that up. All right.

I now have that, Mr. French, so, of course, you can be heard.

MR. FRENCH: My only question at this point, real quickly without Bates stamps, is whether or not it appears on the Ad Hoc Equity Committee's (indiscernible).

MR. CURRY: Your Honor, we're not offering it as an exhibit. Mr. Mesterharm stated he couldn't recall what the performance was. I mean, I'll ask him to review a report and ask him if that refreshes his memory.

THE COURT: All right. I think under the rules it's not admitted. It's just simply being provided to him to see if it refreshes his recollection. It either does or it doesn't. I do think, as the opposing party, that Mr. Curry could seek the admission, and then we'd have the issue of should it have been on his original list or not.

So let's -- I guess I want to make sure you have your ruling, Mr. French. So to the extent that there is an

objection that it wasn't included on the Equity Committee's witness and exhibit list, at this point that objection is overruled.

So, Mr. Mesterharm, let me ask first, do you have this document? Or, I'm sorry, you don't -- you couldn't possibly know what that means. I have a three-page document that is styled "J.C. Penney Company, Inc. Variance Report." Do you have that in front of you?

MR. MESTERHARM: Yes, I do, Your Honor.

THE COURT: All right. Thank you. All right.

Mr. Curry, go ahead with your question.

MR. CURRY: Your Honor?

THE COURT: Yes, sir.

MR. CURRY: Your Honor, I would ask Mr. Mesterharm to review Page 2 of the document and let me know when he's finished reviewing that page.

THE COURT: Okay.

THE WITNESS: I've read it.

CROSS-EXAMINATION CONTINUED

BY MR. CURRY:

Q And, Mr. Mesterharm, does that help refresh your recollection regarding the debtors' performance, actual performance on vendor purchases for the domestic vendor and international vendor DIP budget amounts?

A Well, this is complex because this is a -- this is

measured -- what's called budget here is -- is we update the budget every four weeks. So the budget column here is the most recent budget, not the original DIP budget. But if you're asking me to look at the actual number, this is helpful.

Q So having refreshed your recollection, do you have any basis to disagree with my statement that the debtors, during the month of September, actually spent than $272.2 million on domestic vendor merchandising?

A These were payments made in the month of September that could have been for goods under terms. It could have been for goods on COD. It could have been for goods on cash in advance.

THE COURT: So --

THE WITNESS: This is the dollars we spent on domestic inventory in the month of September.

THE COURT: So, Mr. Curry, if I could interrupt a little bit. The fact that you got that answer was driven by a bad question. If you want to do that again, please feel free.

MR. CURRY: Thank you, Your Honor.

BY MR. CURRY:

Q Mr. Mesterharm, according to the debtors' reports to the vendors, in the month of September, the debtors spent $272.2 million to pay domestic merchandise vendors. Is that correct?

A Did you say reports to the vendors?

THE COURT: He did.

MR. CURRY: No, I said -- oh, sorry. I'll repeat the question.

BY MR. CURRY:

Q The report to the DIP lender that the debtors paid $272.2 million in the month of September to domestic merchandise vendors. Is that correct?

A That is correct.

Q And as to international vendors, same question. The debtors reported actually spending in the month of September $117.9 million. Is that correct?

A That is correct.

Q Now, Mr. Mesterharm, when I go back and I add the amounts from the budget on domestic vendors and international vendors, I come up with 300 and -- I come up with 287 million was the budgeted amount in the initial budget.

A That was the amount of payments that we expected to make.

Q Correct. And that's -- and the amount you actually spent was 390.1 million, right? So you actually spent more than you budgeted to spend on actual payments for merchandise, correct?

A That's because we've had to prepay for a significant amount of goods.

THE COURT: Mister --

BY MR. CURRY

Q I understand you want to explain why --

THE COURT: Gentlemen.

BY MR. CURRY:

Q -- but the question is --

THE COURT: Gentlemen. Gentlemen, stop.

Mr. Mesterharm, I promise you there are a lot of people who will tell you that I fell off the cabbage truck and hit my head. It wasn't on the first bounce. I understand this better than you know. If you would please simply answer Mr. Curry's questions as they are asked. Mr. French will have the opportunity to correct anything that he believes. I need for you not to be an advocate. I need your knowledge, your knowledge only. Fair enough?

THE WITNESS: Fair enough, Your Honor.

THE COURT: All right. Mr. Curry, go ahead, please. Mr. Curry, I think that you muted yourself.

MR. CURRY: Thank you, Your Honor.

BY MR. CURRY:

Q Mr. Mesterharm, just to repeat my question, the debtors in the initial DIP budget budgeted 287 million to spend on merchandise vendors. They actually spent more than that, correct? They spent 390.1 million.

A I'm not trying to stretch the answer here. The original DIP budget was a budget of payments, when we expected to make payments. We did forecast that we expected to make payments of 287 million. There is a difference between payments and spending.

THE COURT: I totally agree.

BY MR. CURRY:

Q But the budget that you presented at the DIP hearing show that in the month of September you would make payments of 272.2 million, correct?

A No, I think we said 287 million.

Q Sorry, 287, correct. But you actually spent -- you actually made payments totaling 390.1, correct?

A Yes.

Q And let's talk about the total budget period, if you will. We did have up Exhibit 15 a moment ago, and the budget -- and we actually have the period here, and so we can look at it. So for Line Item Number 3 there, Mr. Mesterharm, you would agree with me that in the initial budget for the entire budget period, the debtors projected making payments totaling $767 million, correct?

A I apologize, but I would need you to scroll over because the last column is cut off that I believe was the totals column.

THE COURT: Agreed. I can't see it either.

THE WITNESS: On the right.

THE COURT: There we go.

THE WITNESS: And did you say 767?

BY MR. CURRY:

Q Yeah, 767, correct?

A Those were the payments in the original DIP budget for domestic merchandise vendors.

Q And the budgeted amount for payments to international vendors is 511 million, correct?

A That is correct.

Q And, Mr. Mesterharm, do you recall the amount that the debtors spent during this budget period? Or, I'm sorry, strike that question.

And maybe we want to do the math. We did this last week, and I want to just make sure we still agree on it. The combined amount of this spend is 1,278,000,000, correct?

A I'm just going to add it up, 1278.

Q And do you recall the amount that the debtors actually spent?

A I would have to have that comparison put in front of me. Not off the top of my head.

Q Well, if we want to just do a comparison, let me ask you --

MR. CURRY: And, Mr. Okin, could you put up our proposed Exhibit 6?

BY MR. CURRY:

Q Now, Mr. Mesterharm, do you remember reviewing this document?

A Yes.

Q Okay. And we -- if you look on -- there are -- it's

divided in two columns, it's a comparison of two different budgets, with me. There's a -- the Docket 108 budget and the Docket 513-6 budget filed on 6/3. Now, that's -- the Docket 513 is the budget that was eventually attached to the DIP order, I'll represent that to you. That's from the debtors' witness and exhibit list instead of from the actual order. If you look down at Line 3 --

MR. CURRY: And, Your Honor, for the Court's purposes, this is ECF 1757-7.

THE COURT: All right. Thank you.

BY MR. CURRY:

Q And, Mr. Mesterharm, if you look at Line 3 and then follow all the way across to the column that says DIP Budget Docket 513, final order DIP budget, it's labeled at the top, you see the 767 number and the 511 number that we were just discussing regarding the budget. Do you see where I'm talking about?

A Yes, I do.

MR. FRENCH: Your Honor, I object that this document is not in evidence. I don't know if he's using it simply to refresh the witness' recollection or not, but to the extent the document isn't in evidence, I'd prefer that happen before he questions the witness about it.

THE COURT: Mr. Curry?

MR. FRENCH: (Indiscernible).

THE COURT: All right. I will take that as assumes facts not in evidence. I'll sustain that objection.

Mr. Curry, how do you want to proceed?

MR. CURRY: Well, Your Honor, we're not offering this yet. We will offer it. And for right now, it's being put up as a demonstrative, so I have a place for Mr. Mesterharm to look at. And I'm going to ask him some questions, and if he doesn't recall, then we'll go through the process we did just a minute ago.

THE COURT: Yeah, you're not --

MR. CURRY: But --

THE COURT: You're not using this as a demonstrative. Nice try, but you're not. So either qualify it and get it admitted, or go about this a different way.

MR. CURRY: All right.

BY MR. CURRY:

Q Mr. Mesterharm, then what we're going to do is do you have with you the second document?

MR. CURRY: And, Your Honor, this will be the spreadsheet.

THE COURT: Okay.

THE WITNESS: Do I have the spreadsheet?

THE COURT: So, Mr. Mesterharm, what I was sent and what you should be looking for is a J.C. Penney Company, Inc. Weekly Cash Flow Actuals through September 12, 2020.

MR. FRENCH: Judge, given that this is a, at least as it appears to me, to be a largely -- fairly large Excel file, does anyone have any objection if I email an electronic copy of this document to the witness?

THE COURT: I do not. Mr. Curry?

MR. CURRY: I do not, Your Honor.

THE COURT: All right.

THE WITNESS: Do I have permission to open my laptop and log in?

THE COURT: Mr. Curry, that's your call.

MR. CURRY: Your Honor, I believe that Mr. French, Mr. Yates, and Mr. Mesterharm are all honorable folks, and if they tell me that that's all that Mr. Mesterharm is going to review, under the circumstances, we've all got to make some concessions, so I think that that's fine.

THE COURT: All right. I will --

MR. FRENCH: Mr. French is very honorable. I can't speak for Mr. Yates.

(Pause)

THE WITNESS: I need the code, the login to the WiFi here.

(Pause)

THE WITNESS: It tells me the Kirkland website is not one that they recommend that I log in to, but I -- for this purpose, I'm going to go ahead and do that and hope it doesn't

cause my computer to blow up.

(Pause)

THE WITNESS: Sorry, I have to go through an authentication process.

THE COURT: No, we all have to do that. That's just fine.

THE WITNESS: Okay.

(Pause)

THE WITNESS: Was somebody sending me an email? I have not received it yet.

THE COURT: You'll either get an email from Mr. French or Mr. Yates.

(Pause)

THE WITNESS: Still waiting, I apologize. My computer has been turned off for several hours, so it's having to spool through everything that was sent to me.

THE COURT: Sure.

(Pause)

THE WITNESS: Okay. I have it open.

THE COURT: All right. Mr. Curry?

MR. CURRY: Thank you, Your Honor. I would ask Mr. Mesterharm to review the document and let me know when he's finished reviewing it.

THE COURT: Did you -- is there -- I don't remember a question being pending. Is he reviewing for something

particular or just in general?

MR. CURRY: Yes, Your Honor, I believe -- and maybe I hadn't. I believe I had asked him if he recalled the actual spend on -- combined for domestic vendors and international merchandise vendors and --

THE COURT: You did do that.

THE WITNESS: Okay. This file only goes through September 12th.

BY MR. CURRY:

Q That's correct. That's when you guys -- that's when the debtors stopped reporting actuals in the data room in this format, right? But we've already looked at actuals for the month of September, or I believe you've reviewed them to refresh your recollection on September. So you may have to refresh your recollection in two steps here. You're going to have to bridge the gap there. But we're looking at what you guys reported up through the beginning of September. And, Mr. Mesterharm, maybe I'll try to -- or I'll ask a question, which is by my math, the debtors spent $1,170,000,000 combined on domestic and international merchandise payments during the budget period. Would you agree with me that that's the correct number?

A Well, if you give me some time, I will try to add the two together from the various spreadsheets that I'm looking at. I just can't do that out of memory.

MR. FRENCH: Your Honor, I will object to the question, that it assumes facts not in evidence. Certainly the witness can refresh his recollection, but based on what he just described that he's doing, it doesn't sound like he's refreshing his recollection. It sounds like he's --

THE COURT: Right.

MR. FRENCH: -- (indiscernible) into evidence.

THE COURT: So, Mr. Mesterharm, the question is does this refresh your recollection on what the number is, not can you go do the math. I can go do that. So it's really a yes/no question versus go do a calculation. So does this spreadsheet refresh your recollection of what was spent from May 2 to -- I'm sorry, from June -- the week ending -- or the week beginning -- week ending June 6 through week ending September 12th?

THE WITNESS: Yes.

THE COURT: Okay. All right.

Mr. Curry?

MR. CURRY: I apologize, Your Honor. The mute lights for my phone are red and green, and as you may recall, I'm color blind, so that's part of the problem. I apologize for the hiccups.

THE COURT: No, go ahead.

MR. CURRY: It's a cruel trick that Mr. Okin has played on me.

BY MR. CURRY:

Q Mr. Mesterharm, having refreshed your recollection, the question that I would ask is, by my math, the amount seems to be about 1,170,000,000. But more importantly, rather than 20 or 30 percent -- I forget the exact amount you testified on direct at this point -- it looks about only 8 and a half percent beneath what you projected in the initial budget. Would you agree with that?

A Can I have some leeway to break down the question?

THE COURT: Sure.

THE WITNESS: So if I add the May -- the column, the first column that ends on May 23rd, and I run that through August 29th, and then I pick up the four weeks from the other spreadsheet, it does show 1,170 are the actual payments made. The -- and that versus a spreadsheet of the actual budget, of adding up the actual budget, the original budget said 1,278 of payments made. So I would agree that we budgeted 1,278 of payments and we made 1,170 of payments. That has nothing to do with receipts or prepayments or anything else, just for payments made.

BY MR. CURRY:

Q Talking about what you were spending, the amount that you spent, the budgeted amount that you spent is 8.5 percent, correct?

A Spent? I'm sorry, I'm an accountant.

THE COURT: Yeah.

THE WITNESS: Spending versus payments are a different thing.

THE COURT: Yeah, Mr. Curry, it's -- you're creating your own difficulty, and even I know the difference.

MR. CURRY: I understand. I'll go back.

BY MR. CURRY:

Q So the budgeted amount for payments to be made was 1,278,000,000. The actual payments made during the budget period was 1,170,000,000, correct?

A Yes.

Q And that is only about 8.5 percent below what the debtors thought they would need to make in payments during the budget period, correct?

A I'll do the math.

Q And I'm a lawyer, so I'm rounding a little bit, so --

A Around 8 percent.

Q Okay. So let's move on into the cause here, the issues why, in your opinion, we're having difficulty getting inventory levels from the vendors. To start, would you agree that industry-wide there is a supply chain issue following COVID for not just retailers in general but for department stores, correct?

A I'm not familiar about industry-wide. I can say that that is a problem that we're having here.

Q Let me ask it a little bit differently. The vendors or suppliers that J.C. Penney rely on themselves are actually having inventory issues that are unrelated to J.C. Penney's bankruptcy, correct?

A I have not had firsthand statement or discussions with vendors to know that statement to be true or not.

Q So, Mr. Mesterharm, I'm going to read to you prior testimony, and I'd like you to just tell me if I read it correctly from -- that you provided. And this is from your declaration.

"While the company attempted to ramp up receipts of new products to meet demand of (indiscernible) higher than forecasted in the initial DIP budget, it found itself in an environment where many of its suppliers had not only reduced their own inventory levels." Did I read that correctly?

MR. FRENCH: Objection, Your Honor. Improper impeachment.

THE COURT: So, Mr. Curry, what is the purpose of what you just read?

MR. CURRY: Well, Mr. Mesterharm testified, in response to my question, that he didn't have knowledge on this, but he's actually provided a declaration stating this.

THE COURT: Well, you asked him two very different questions, so I'll sustain the objection.

BY MR. CURRY:

Q So, Mr. Mesterharm, moving to the next (indiscernible) you -- your testimony earlier was that vendors are concerned about the status of the company and the company's ability to move forward and to remain in existence, right? Are you aware of whether or not there are concerns from vendors regarding if the sale is approved, what would happen post-sale?

A Sorry, can you repeat the question?

Q Well, isn't it true that vendors have withheld inventory because they're -- or refused to accept orders from the debtors right now because they're concerned that after the sale closes, the new owner won't honor those orders or will rescind those orders?

MR. FRENCH: Objection. Foundation.

THE COURT: Overruled.

Mr. Mesterharm, if you know.

THE WITNESS: I believe that we have heard from some vendors that they have some concerns, depending on how the process runs, that will the orders be honored by whoever the buyer is.

BY MR. CURRY:

Q And, in fact, you communicated that concern to the debtor and the debtors' advisors, correct?

A I can't recall who I -- where I might have heard it from or who I might have communicated it to.

Q Okay. Well, let's talk about the critical vendor payment

issue. The debtor did receive court authority to make payment on pre-petition amounts, correct?

A Yes.

Q And that, in fact, the debtor, during its first day orders, received interim relief allowing it to make certain payments, and then obtained a final order a few weeks later, shortly after the DIP loan was entered. Do you recall that?

A Yes.

Q Okay. And, in fact, you provided a declaration in support of that relief, correct?

A Yes.

Q And at the time your belief was that making the payment to the critical vendors was necessary, a necessary expense, and that it was necessary to ignore the priority (indiscernible) and treatment for pre-petition claims in order for the debtor to be able to maintain its operations with -- maintain its relationship with its vendors, correct?

A I believe the -- that it was necessary for the debtors to get that relief.

Q And are you aware, before the interim order was entered, did the DIP lender raise any objection to entry of the critical vendor order?

A I don't recall if they formally objected in court or not. Is that your question?

Q Yes.

A I -- I'm not aware if they objected in court. I don't believe they did a formal objection, but I can't remember precisely.

Q And what about the -- before -- prior to entry of the final order, do you know if they made a formal objection to entry of the final order?

A I guess I would ask the same question. Were -- if you're asking me were they supportive of critical vendor dollar -- of us having a critical vendor program, or are you asking if they objected in court?

Q I'm asking if they filed a formal objection in court.

A Okay. No, I don't believe they did.

Q Okay. And I believe you testified about this on direct, but let me find the --

MR. CURRY: Matt, can you bring up Exhibit 66? Oh, actually, before you display it -- well, Mr. French, just to make sure that we have the same agreement, we -- or that we're on the same page, we've been communicating about the exhibit that we've supplied, Exhibit 66, which strips out confidential information from a spreadsheet that Kirkland provided over the weekend. Are we okay proceeding with that as not confidential, or would you -- or do you want to maintain the confidential designation?

MR. FRENCH: We'll drop the confidentiality designation for this exhibit as (indiscernible).

MR. CURRY: And certainly (indiscernible) we filed our witness and exhibit list prior and -- to that, and I will note that you have noted there were a couple additional payments that weren't reflected in your initial spreadsheet. And we can certainly make sure that it's clear where those changes are, but --

MR. FRENCH: We did drop the confidentiality.

MR. CURRY: Okay. So if we could bring up our exhibit.

And, Your Honor, for your purposes, this is 1800-1.

THE COURT: I have it up.

MR. CURRY: Okay. Thank you. And we would move to admit the exhibit.

THE COURT: Mr. French?

MR. FRENCH: No objection.

THE COURT: Then by agreement I will admit Exhibit 18 -- I'm sorry, 1800-1.

(Equity Committee's Exhibit 1800-1 admitted into evidence)

BY MR. CURRY:

Q And, Mr. Mesterharm, I want to focus your attention to the first section to your -- the approved payments. And we see here, we've anonymized this, so we do have vendor category here, right? So we have domestic vendor for two copyright holders and then miscellaneous foreign officer vendors. Now, on the miscellaneous foreign officer vendors, do you recall is

that a merchandise vendor?
A I can't recall. I know those were payments that were made because officers would have personal liability if they weren't made. But I can't recall if they were specific merchandise vendors or not. I'm guessing they were not.
Q And just so that we're all clear about what we're talking about, this is a schedule -- it's styled, "J.C. Penney Critical Vendor Request Summary." And it looks as though it shows requested payments and then tracks approved payments. Would you agree that that's (indiscernible) look at?
A Yes.
Q Okay. So if we look at the requested payments, we can see that the debtor has actually requested about 7.8 million in critical vendor payments, correct?
A I think that was -- that was what was -- has been requested but not yet approved.
Q And that's a good point. I want to make sure it's clear, when we say "requested," or when I ask you if it's been requested, I'm talking about a request was made to the DIP lender to approve the spend. Are we on the same page there?
A Yes.
Q Okay. So the debtors have requested that the DIP lenders approve $7.8 million in critical vendor payments that to date have not been approved, correct?
A 7.8 that have not been approved. I believe that's

correct.

Q Okay. And, Mr. Mesterharm, are you aware that -- or was it ever communicated to you by anyone in your team or anyone in -- at the debtors that the inability to make the critical vendor payments was negatively impacting the debtors' ability to obtain merchandise?

A I believe that's true.

Q Okay. I'm going to ask you to look at a confidential exhibit. It's Exhibit 67 on our list.

MR. CURRY: Your Honor, it's listed -- it's filed at ECF 1800-2.

THE COURT: I have it. Thank you. I see -- you said 68, right?

MR. FRENCH: I think he said --

MR. CURRY: 67, Your Honor.

THE COURT: Oh, I'm sorry. Then yes, dash 2. Thank you.

BY MR. CURRY:

Q And, Mr. Mesterharm, please let me know when you have the exhibit in front of you.

A I have it in front of me.

Q Have you ever seen this email chain here?

A No. This is the first time I'm seeing this email chain.

Q Okay. Well, what I'd like to do, I'd like you to scroll down to Page 2, and on Page 2 it's going to be the second full

email. And you see that this was an email from Rebecca Chaikin to Ms. Treadway at the debtors. And if you see this email, it says, "Hi Brandy, Alix has been actively been discussing this week with the advisors in the 1-L group providing additional information." Were you part of this discussion with the 1-L lenders advising them regarding the problems that were occurring as a result of the debtors' inability to make critical vendor payments?

MR. FRENCH: Objection, Your Honor. Assumes facts not in evidence.

THE COURT: Mr. Curry?

MR. CURRY: Well, we -- we'll go a little bit more on it. If we go down a little bit here --

THE COURT: So, Mr. Curry, how can you be asking questions about a document that doesn't yet exist?

MR. CURRY: Well, Your Honor, we move to admit it.

THE COURT: And you can't -- I mean, he said that he's never seen it before. How are you going to get it in through this witness?

MR. CURRY: Your Honor, it is produced by the debtors. Near the bottom there is a discovery request.

THE COURT: How is --

MR. CURRY: So it's a self-authenticating --

THE COURT: How is that -- first of all, it's not self-authenticating just because somebody produced it. That's

a silly argument. So how are you going to get it in?

MR. CURRY: We can move on from it.

THE COURT: All right. I would appreciate your following the rules. I know them.

BY MR. CURRY:

Q Mr. Mesterharm, are you aware of whether or not the inability to make critical vendor payments was communicated to the DIP lenders -- scratch that, let me start over. I apologize.

Are you aware or not of whether the debtors or anyone from Alix ever communicated to the DIP lenders that the inability to make critical vendor payments as requested was negatively impacting the debtors' ability to obtain merchandise?

A I know that my team made the request of the lenders to make the payments. I was not involved in those phone calls as to how it was characterized, as to whether or not it caused problems, because I wasn't on those phone calls. I know our team did present requests. We followed up when they didn't respond. Followed up again when they didn't respond. But I don't know the content of the conversations.

Q And if we go back to Exhibit 66, which has been admitted, we have two vendors who have received critical vendor payments. Do you see that on the list, the first two approved payments? Well, first of all --

A Yes.

Q -- we have two vendors whose payments were approved by the DIP lender, correct?

A Yes.

Q And do you know whether --

A Two merchandise vendors.

Q Two merchandise vendors. Do you know whether or not the requested payment has been made?

A I believe they have.

Q And they were -- in fact, right, we have the payment date, September 23rd for the top line one and June 17th for the bottom -- for the second one, correct?

A Correct.

Q And on the second one, the June 17th, we actually know from the record that that payment resulted in the critical vendor agreeing to return to more favorable terms and delivering -- and promising to deliver product to the debtor through the remainder of the year, don't we?

A I would have to go back and review the record. I know that they processed (audio interference) in return for this payment, they agreed to make shipments. I don't know off the top of my head what terms they agreed to.

Q Okay. But we filed a -- and I don't want to talk about the terms, Mr. Mesterharm, and that's why I was using generic terms. But there was a settlement agreement that was filed in front of the Court with one of the debtors' vendors around this

time, and the basis of that settlement agreement was the vendor wanted to (indiscernible) some critical vendor money, and in return for that and certain other concessions, the vendor would agree to begin shipping product on more favorable terms through the remainder of the year. Do you recall that?

A Again, I recall that the payment was associated with -- it was required in order for them to ship. I just -- I can't remember what they did with terms.

Q Okay. In looking --

A Payment terms is what I'm referring to.

Q I understand. So looking at the second payment to a domestic vendor there, the one on September 23rd, are you aware of the identity of this vendor?

A I am not.

Q Okay. Are you aware of the request to the DIP lender to approve these payments in September?

A I'm not as familiar with that payment as I am the first one.

Q And so do you know whether or not there were any conditions to the DIP lender's approval for making this particular payment?

A I'm not aware.

Q So as we sit here today, you don't know whether or not having made the critical vendor payment helped improve the relationship with these two vendors?

A I don't -- I know in regards to the first vendor payment, I don't believe it did. Ultimately, they have decided to terminate doing business with J.C. Penney.

Q (Indiscernible) get a product during the case pursuant to the agreement?

A I believe they honored what they said they would ship during the agreement, but they said that's it.

Q Okay. And what about the second one? Do you know whether or not that improved the relationship?

A I don't know.

Q But do you know that if you made additional critical vendor payments, it wouldn't improve the relationships?

A Well, we would --

Q That was your opinion that you provided earlier, correct?

A Well, I think what I said was that the sum total of this versus the grand scale of the overall payments they were owed, it's a small critical vendor program. We hoped -- we obviously hoped it would be helpful, but it really hasn't turned out to be that helpful.

Q But you don't know whether or not it was helpful on the other vendor.

A Well, I would just say we've been able to use so little of it that I know it hasn't been helpful because we haven't used a lot of it.

Q Well, it was only approved on September 23rd, correct?

A Oh, that payment itself? Yes, September 23rd. I thought you were talking about the program in its totality.

Q And one thing I will note on this, so the DIP lenders didn't approve making this -- so other than the settlement in June, the DIP lenders did not approve any further critical vendor payments until after the debtor announced that it was selling its assets to the DIP lender and Simon and Brookfield. Is that correct?

A I guess that is true.

MR. CURRY: Your Honor, I pass the witness.

THE COURT: All right. Thank you.

Is there anyone else that wishes to cross examine Mr. Mesterharm?

All right. Mr. French, any redirect, or can Mr. Mesterharm --

MR. FRENCH: Briefly.

THE COURT: -- be excused? I'm sorry?

MR. FRENCH: A brief redirect.

THE COURT: Of course.

MR. FRENCH: Brief redirect. And can you hear me all right, Your Honor?

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. FRENCH:

Q Mr. Mesterharm, if you recall on cross-examination, you

were asked a series of questions about how much money was paid to vendors versus spent on inventory.

A Yes.

Q And do you recall you were drawing a distinction between the two?

A Yes.

Q Can you explain to the Court the distinction you were trying to draw?

A The distinction that I was trying to draw is that there is a difference between what we are -- what we are paying and versus what we are spending, paying meaning writing checks, spending meaning making commitments to pay. And what has happened during this timeframe is while our -- and I was trying to draw that distinction because I was trying to draw it vis-a-vis why our -- if the actual numbers don't, you know -- per that discussion, they were only 8 percent apart. Well, then how could that be a bad event? And what I was trying to highlight is that we've been doing a significant amount of prepayments of goods, which has actually brought the difference -- our original DIP budget assumed that we would be COD.

And the fact that we're prepaying means we're actually paying before we get the goods. So it's drawing the number closer, but it doesn't mean that that -- it's covering the fact that we have a larger inventory miss of what we've actually received because we're paying for stuff ahead of receipt. And

the DIP budget assumed we'd pay and receive at the same time. So the fact that we're paying before we receive, the delta on what we're actually receiving is larger than what is just shown by looking at payments.

MR. FRENCH: No further questions, Your Honor.

THE COURT: All right. Thank you.

Mr. Curry, any recross on that narrow issue?

MR. CURRY: No, Your Honor.

THE COURT: All right. Thank you. Any reason Mr. Mesterharm cannot be excused?

All right. Mr. Mesterharm, thank you, sir, for your attendance today. Obviously, you're free to stay and watch. You're also free to I'm sure tend to the many other matters you have.

THE WITNESS: Thank you, sir.

THE COURT: Thank you.

(Witness excused)

All right. Mr. French, who's next?

MR. FRENCH: Your Honor, my colleague, Mike Slade, will be presenting David Kurtz.

THE COURT: All right. Thank you. Do you want -- do you have a swap that you need to make? Oh, no, there we go. All right.

MR. FRENCH: I'll have Mr. Kurtz sit in Mr. Mesterharm's chair. That seemed to work.

THE COURT: Sure. All right.

(Pause)

THE COURT: All right. Mr. Kurtz, could you confirm that you can hear me, please, sir?

MR. KURTZ: Yes, I can, Your Honor.

THE COURT: All right. Thank you. If you would, please raise your right hand.

DAVID KURTZ, DEBTORS' WITNESS, SWORN

THE COURT: All right. Thank you, sir.

Mr. Slade, whenever you're ready.

MR. SLADE: Thank you, Your Honor. For the record, Mike Slade, Kirkland & Ellis, for the debtors.

DIRECT EXAMINATION

BY MR. SLADE:

Q Mr. Kurtz, where do you work?

A I work at Lazard.

Q What do you do?

A I am the head of our global restructuring practice at Lazard.

Q How long have you worked at Lazard?

A For 18 and a half years.

Q What did you do before joining Lazard?

A I practiced law.

Q If you can give the Court some of your experience and expertise in the restructuring business.

A Sure. Well, I've spent my entire professional career in the restructuring field, almost 41 years now. I practiced law for 21 years with several law firms. I left Skadden Arps in 2002 to join Lazard. I became head of the restructuring group at Lazard in 2012.

Q Now, during your 40-year career, did you have experience in marketing companies for sale?

A Yes.

Q Describe for the Court some (audio interference).

A Many engagements, both as a lawyer and as an investment banker at Lazard, have required us to market businesses.

Q Describe for the Court your experience in marketing retail businesses.

A Yes. I have extensive experience marketing retail businesses. Over the course of the last several years, I have led Lazard teams that have marketed five retailers.

Q What are they?

A Toys R Us, Radio Shack, Nine West, Claire's Stores, and J.C. Penney.

Q What is your role for the debtors?

A We are the investment bankers to the debtors.

Q When were you retained by the debtors?

A We were originally retained by the debtors in July of 2019, at that point in time to work with the company and provide guidance with respect to a (indiscernible) management

excises the company was contemplating, which really had two component parts. One was to address and extend the maturity of first lien secured debt that was scheduled to come due in 2023. The second component part was to assist the company in capturing discount on a little over $1 billion of unsecured debt that at the time was trading at a very substantial discount, I think in the mid-teens, if my recollection is correct.

Q Did that engagement change?

A It did. It changed in March of 2020.

Q Why is that?

A COVID-19.

Q What did your engagement change to after March of this year?

A In March of this year, our engagement evolved from advising the company on liability management strategies to working with the company to develop options to deal --

ELECTRONIC RECORDING: Our system will end this conference in five minutes. To extend this call for one hour, please enter the moderator PIN now.

THE WITNESS: So all (audio interference) definitions --

ELECTRONIC RECORDING: Invalid host code.

THE WITNESS: -- to deal with its liquidity circumstances and to address a balance sheet that had --

ELECTRONIC RECORDING: Our system will end this conference in five minutes. To extend this call -- your conference has been extended for 60 minutes.

BY MR. SLADE:

Q -- search for DIP financing.

A Yes, I was.

Q Since you already testified about this before, I don't want to go into too much detail. But describe for the Court just generally what did you do to try to find DIP financing or funding.

A We went out to 25 different potential providers of DIP financing to gauge their interest in extending financing to the company. There were different groups of targeted prospective lenders that I should probably run through. First, we went to a number of what I would describe as large money center banks to see if they would be interesting in financing the company. As I recall there were approximately eight of those institutions, and unfortunately none of them were interested in doing so. We also went out to a list of institutions that we knew from prior experience had provided DIP funding to companies in the past, had the wherewithal to do (audio interference) from the standpoint of having access to capital, but also having the expertise required to lend money to a company in these circumstances.

Q Ultimately, was any financing available for the debtors on

anything other than a priming basis?

A No.

Q Was anyone willing to finance the debtors just based on the (indiscernible) were unencumbered?

A No.

Q Was anybody willing to lend money to the debtors just behind the first lien debt?

A No.

Q Was the DIP that the debtors presented to the Court that was approved in June the best available to the company at the time?

A It was the only available to the company at the time.

Q So since the company filed for bankruptcy in May, have the debtors engaged in a marketing process to try to find a buyer or another transaction?

A We have.

Q When did that start?

A I think it's fair to say that that process began before we filed for bankruptcy, when I initiated a conversation with three institutions that I thought might be candidates to either acquire all or part of the company or to make a capital infusion into the company to facilitate a reorganization. Immediately subsequent to the filing of our Chapter 11 cases on May 15th, we initiated a formal process to reach out to potential institutions that we thought might be candidates to,

as I said a moment ago, purchase all or part of the business or to provide capital. Of the 100 institutions, we reached out to retailers, we reached out to department stores, we reached out to institutions that we knew from prior experience might be interested in this opportunity. Some of those targets we thought might be good candidates to acquire the retail business of J.C. Penney but not the real estate. There were other institutions that we knew to be real estate investors who might be interested in acquiring or investing in the company's real estate, but were not likely to be interested in acquiring and operating a retailer.

As I said, there were about a hundred names on this list. We tried to canvass all of the prospective investors or buyers that we could think of. We solicited input from not only our retail group at Lazard, the management team at Penney's, members of the board of directors. We talked to the professionals for the Unsecured Creditors' Committee. We talked to the professionals for the first lien group. And our approach to this was to be as expansive as possible. And so if anybody thought that someone might be a candidate for this opportunity, they were included in the list.

Q Were there any restrictions on what assets participants could or couldn't dictate?

A There were no restrictions whatsoever.

Q So the current proposal before the Court is an opco/PropCo

structure.

A Yes.

Q Describe for the Court how did that come about?

A Sure. So as you recall, the concept of an opco/PropCo, if you will, is incorporated in the restructuring support agreement that the company entered into before we filed for Chapter 11. It is an approach to a potential reorganization or sale of the company that developed out of discussions that we had with the -- I'm going to call them first lien group, or the Milbank Group if you will, the group of institutions that ultimately provided the DIP loan to us before we filed for bankruptcy.

The notion is that the business would be divided into a retail business, i.e., the opco, and a real estate business, i.e., the PropCo. The opco would lease real estate that was transferred into the PropCo pursuant to a master lease that we've talked a lot about through the duration of this proceeding. And, you know, this was a concept that the lenders were prepared to endorse and something that we thought was very helpful and facilitative to our marketing effort.

In connection with the creation of the opco/PropCo concept, the lenders agreed to, among other things, provide kickback debt or extend financing to a potential opco buyer, which we thought was very attractive, and were also willing to extend and enter into a master lease for real estate that the

opco wished to continue operating.

The opco/PropCo was not something that the company was wedded to. The opco/PropCo was not something that buyers had a duty or obligation to bid on. The opco/PropCo was an opportunity that was available to potential buyers or investors that would we hoped facilitate interest that might not otherwise exist. However, the door was always open, completely open, to a potential buyer or investor who had no interest in the opco/PropCo structure. For example, a buyer who might be interested in buying all the business of the company or an investor or buyer that had some other approach that they would wish to pursue.

Q Did any bidder submit a bid that wasn't contemplating the opco/PropCo structure?

A So as it turned out, there were only three bids submitted. All three bids were for the opco.

Q Of the hundred or so potential buyers that you reached out to, how many showed interest in potentially buying some or all of the debtors' (indiscernible)?

A So of the 25 institutions that we reached out to, 25 entered into non-disclosure agreements with the company. It gave them access to really a mountain of information that we had placed in a data room. Our approach to sharing information was let's be as transparent, open, and facilitative as possible. You know, we didn't have the luxury to be picky, and

so there was very little information that wasn't either voluntarily put into the data room or subsequently placed into the data room in response to requests that potential investors had been -- had made. And as I indicated, some of the hundred institutions that we reached out to, I'm going to say approximately 25 were institutions that were -- we thought specifically were candidates for the PropCo. And so to suggest the PropCo was never marketing -- was never marketed is just frankly completely false. There were 25 institutions that we reached out to specifically because we thought they might be interested in the PropCo. As I indicated, 25 of the 100 signed NDAs, but only three submitted bids.

Q Were the potential bidders permitted to work together?

A Ultimately, we agreed to allow the three bidders to work together by modifying the terms of the non-disclosure agreements that they had signed with the company several weeks before.

Q Describe for the Court the discussion about whether or not to permit bidders to work together.

A Right. You know, we spent a lot of time thinking about that because conventional -- a conventional approach to the sale process would have, one, ensure that bidders did not have the opportunity to talk to each other, because if they did, that would potentially depress competition and could result in a lesser price. And that's why we started out prohibiting

bidders from speaking to each other. But as the process evolved --

MR. OKIN: If I could interrupt, Your Honor.

THE COURT: Yes, sir.

MR. OKIN: I'm going to object. The questioning is -- lacks foundation, and to the extent it doesn't lack foundation, then it calls for hearsay because -- I mean, I don't believe Mr. Kurtz is testifying -- I don't know if he's testifying as the corporate rep here or just as the investment banker that was retained to market these assets, but I don't think he can testify as to what the entire group of professionals and the company were thinking.

THE COURT: All right. I'll overrule the objection.

Go ahead, please.

THE WITNESS: Where was I? And so we did decide -- although perhaps a little unconventional, but we did decide in June to modify the terms of the non-disclosure agreements to basically permit anybody to talk to anybody. And so the buyers were free to speak to themselves. The buyers were free to speak to members of what I'm going to call for the duration of my testimony the Milbank Group, the first lien group. And we made that decision out of a concern that if we kept bidders siloed, it might actually depress the ability of any one of those bidders to submit the highest and best bid that they were capable of. And it was -- it was specifically discussed at

that point in time that perhaps what needed to happen would be for one or more of these bidders to come --

MR. OKIN: Objection, Your Honor. Again, we're talking about general conversations without even attributing it to anybody. Hearsay and lack of foundation.

THE COURT: On this one I'll sustain the objection. And what I'd ask Mr. Slade is perhaps a little more control over the narrative would help.

MR. SLADE: Sure.

BY MR. SLADE:

Q Mr. Kurtz, did you permit bidders to talk to each other?

A We did.

Q Why?

A We did so because we felt that it had the potential to result in higher and better bids.

Q Was there a point during the process in which you did not permit bidders to talk to each other?

A Yes. In late July, we rescinded, if you will, the ability of the three institutions who had submitted bids and were still in the process, we rescinded their permission to speak to each other. So they were still free to speak to members of the lender group, but at that point in time we told them that from that point forward, unless we changed our view again, they were no longer able to speak to each other.

Q And why did you do that?

A We did that based upon a very vociferous concern expressed by the members of the Milbank Group that potentially allowing the bidders to speak to each other might chill the bidding, if you will, or result in a depressed price. We were of the view that it was more probable that the opposite would occur. But this was a judgment call on which people -- rational people could have a legitimate difference of opinion, and by virtue of the fact that they felt as strongly as they did that the bidders should not be permitted to speak to each other, we told them in I think maybe it was the first -- in the August 1st, August 2nd timeframe that from that point forward they were no longer permitted to do so.

Q Did the process that you went through to try to find the best bid require the approval of the first lien lenders?

A The process did not require the approval of the first lien lenders.

Q Who ran the process?

A The company ran the process and Lazard was on the front line of that process for the company.

Q You heard the opening statement made in this case by Mr. Okin, right?

A Yes.

Q You heard him say that H/2 ran off Hudson Bay from the process.

A I did.

Q Is that true?

A No.

Q Can you describe for the Court what happened.

A Well, Hudson Bay was one of the three institutions that submitted bids for PropCo. The reality is that Hudson Bay remained in the process, and in fact we were speaking to Hudson Bay as late as the weekend of August 29th and August 30th. However, the incident that you're referring to as -- goes as follows.

On August 5th, I believe, we were notified by the person who was leading the charge for Hudson Bay, if you will, that Hudson Bay's -- a lawyer at Hudson Bay's law firm, the law firm they were working with on this transaction, Willkie Farr, had received a phone call from a lawyer purporting to represent H/2. And the story that was reported back to me from HBC -- and frankly the first call was made to one of my colleagues, Christian Tempke. I did have -- subsequently, I had my own conversation with HBC, was that in order to have the support of H/2, it would be necessary -- in connection with the potential transaction with J.C. Penney, it would be necessary for there to be some resolution of another matter that HBC and H/2 were involved in.

Q Did the debtors express concern over this?

A We did.

Q What did you do about it?

A Well, the first thing we did was notify Kirkland & Ellis. Mr. Tempke and I called Mr. Sussberg to bring this matter to his attention. And then we very quickly reached out to lawyers at the Milbank firm to make them aware of this.

Q And ultimately did HBC stay involved in the process?

A Ultimately, HBC did stay involved in the process until -- as I said, I believe our last interaction with HBC was August 30th. I recall the matter of the H/2 conversation occurred on August 6th.

Q Now, who were all -- I think you talked about that there were three bids made. Is that right?

A There were three bids.

Q Do you have a view as to why there was so little interest in the company?

A I do. This is a tough deal. It's a big company. Its operations are large and complicated. We were in the middle of unprecedented circumstances relating to the pandemic. There were significant risks and concerns and uncertainties associated with the company's ability to operate in the future. You know, would there be another shutdown of stores, for example. What sales revenue would the company be able to generate even though the stores had reopened? And as you have heard from prior testimony, the company continues to operate at only approximately 60 percent of its comparable store sales --

MR. OKIN: Objection, Your Honor --

THE WITNESS: -- (indiscernible).

THE COURT: What's that, Mr. Okin?

MR. OKIN: Non-responsive and lack foundation.

THE COURT: I'll sustain the non-responsive objection.

BY MR. SLADE:

Q Was the company's actual performance available to bidders?

A Yes.

Q How did that performance compare to what the company had projected -- well, let me ask a different question. How did that performance compare to last year?

A I -- the actual performance and the projected performance was significantly down from the comparable period in 2019.

Q Were the company's projections of the business available to bidders?

A Yes.

Q Was information about the company's real estate assets available to bidders?

A Yes.

Q Did that include the pre-pandemic appraisal that had been done by Sycamore?

A They did.

Q Now, Mr. Okin turned his direct -- or his opening statement, made a comment about the Sycamore work fee.

A Yes.

Q Is it true that the company just paid Sycamore $3 million to be another bidder?

A I wouldn't put it that way at all. We had identified Sycamore as a very strong candidate for this opportunity even before the company filed for Chapter 11. In fact, when I mentioned a few moments ago that I spoke to a handful of potential investors or buyers before the case was filed, Sycamore was one of them. Sycamore's business is investing in distressed retail. This is what they do for a living. J.C. Penney was distressed retail. Sycamore had just raised the fund where they had in excess of $4 billion in capital available to invest in opportunities. So we very much wanted Sycamore to actively participate in the process because we saw them as a very strong candidate.

Q Did Sycamore actively participate in the process?

A Sycamore very actively participated in the process. Sycamore -- the Sycamore team did a tremendous amount of work and diligence analyzing the company's business prospects. We spent many hours on the phone with the Sycamore team over a period of months, asking their questions -- answering their questions, providing information, making management available to them. And it was very abundantly clear to me that they were taking this very seriously.

In addition, I had a line of communication open with the individual who own -- I believe owns Sycamore. He is certainly

the CEO of Sycamore. He and I spoke to each other usually several times a week, and I received strong assurances from him, as well as what we saw from his teammates who were on the front line of diligence, that he was very interested in the opportunity.

Q Ultimately, we're here seeking approval of (audio interference) between the company, the lender and (indiscernible), right?

A Yes.

Q Tell the Court what happened to the other two bids.

A Over the course of the process, and in particular as we found ourselves in the middle of August, it became clear that neither Sycamore nor HBC was willing to invest meaningful amounts of capital on an acquisition of the OpCo, unlike Simon and Brookfield, who by August had the $300 million purchase price, or equity check if you will, that is a component part of this transaction was already on the table. That was a significant amount of money. They were prepared to step up and provide it. By August, middle of August, it was clear that that was not the case with Sycamore and that was not the case with HBC.

Q At the end of the day, what was the structure of the proposals made by Sycamore and HBC?

A They were a little different, but neither involved the investment of any kind of meaningful amounts of equity. Both

companies -- excuse me, both Sycamore and HBC were interested in potentially being hired by the lenders, if you will, to manage OpCo on their behalf for a fee. And, in fact, HBC had made a proposal in that regard, I think it was on August 21st, and Sycamore also indicated an interest in being hired for that purpose.

Sycamore also proposed a structure whereby, although they wouldn't invest any equity in the company, they would be charged with the responsibility of engaging in conversations with landlords, which would have included Simon and Brookfield, of course, if they were not the buyers, with a view toward bringing significant amounts of capital into the company. But by the middle to the third week of August, neither was willing to write any kind of meaningful equity check.

Q And today, after five months of bargaining, are there any other bids for J.C. Penney?

A There are no other bids for J.C. Penney at this point in time other than the Simon and Brookfield transaction.

Q Overall, how would you characterize the debtors' marketing process?

A It was thorough. It was complete. We were completely indifferent as to outcome. We were open to any potential structure, any potential approach to the restructuring. And I am confident that there is no one else out there who, if we just made one more phone call, might be interested in stepping

up to the plate, you know, with an opportunity that, you know, we're not aware of.

MR. OKIN: Objection. Non-responsive, Your Honor --

THE COURT: Overruled.

MR. OKIN: -- (indiscernible) question.

BY MR. SLADE:

Q Since the Simon and Brookfield transaction was announced on September 10th, have any new parties emerged with (audio interference)?

A Interestingly, no. And we thought that perhaps putting the terms of the Simon and Brookfield transaction out into the public domain, which we did on September 9th in the form of a non-binding letter of intent -- so now everybody knew exactly what they were bidding against -- might cause someone who would not engage with us beforehand to step up and be heard. That did not happen.

Q Since the sale motion was filed on October the 20th, has anybody else emerged with interest?

A Well, we did receive a proposal from a minority group of first lien lenders, which are represented by the Akin Gump law firm. I'm going to call them the Akin Group. As I think everyone is aware, that proposal was precipitated by a significant amount of unhappiness on their part in terms of how they were being treated or how they would fare under the structure of the credit bid that was contemplated as the

vehicle to implement the Simon and Brookfield transaction.

MR. OKIN: Objection. Non-responsive, Your Honor.

THE WITNESS: (Indiscernible).

THE COURT: Mr. Kurtz, I'm sorry.

Mr. Okin?

MR. OKIN: Non-responsive, Your Honor.

THE COURT: Sustained.

BY MR. SLADE:

Q Since October 20th, when the motion was filed, has anybody made a bid (audio interference)?

A No.

Q All right. Can you describe the transaction that we're asking the Court to approve just (indiscernible)?

A Sure. As I have indicated, the assets of the company will be separated into two new entities, PropCo and OpCo. OpCo will be owned by Simon and Brookfield and will operate the company's retail business. PropCo will own 160 J.C. Penney retail store locations as well as six distribution centers that will be leased back to the OpCo pursuant to a master lease.

Q What from your perspective are the benefits of the proposed transaction to the estate?

A There are significant benefits to the transactions for the estate. One, it preserves the company as a going concern, and preserves the going concern value of the business, the retail business, and the company's retail assets. Number two, it will

enable the company to continue to employ the vast majority of the individuals who currently work for J.C. Penney, which is something that, you know, we and the board were very focused on. It will enable the company to significantly reduce its debt. It will enable the OpCo, through a commitment made by a group of lenders led by Wells Fargo, and it will provide (indiscernible) loans to the company to be appropriately capitalized in a way that will enable it to continue doing business with the company's vendors, continue paying the company's bills.

It will make assets available to the company to pay all administrative claims. A very significant percentage of our administrative claims will be paid by the assumption of those liabilities by the OpCo. And ultimately it will enable the company to avoid a liquidation, which frankly would have been the only alternative.

Q In your opinion, is this transaction the highest (indiscernible) to the debtors at this time?

A Absolutely.

Q Did you advise the board directors of J.C. Penney that it should pursue this (indiscernible)?

A I did.

Q Now, I want to ask a couple of specific questions that are responsive to some of the shareholder objections.

A Yes.

Q You heard I think at the beginning, people asked, well, why are you selling now in the middle of a pandemic?

A There are a number of reasons why we are selling now. Number one, I would describe and I have described the company as a melting ice cube. There's been a lot of conversation around the fact that the company has not been able to procure inventory that it believes it needs to operate as profitably as it's capable of operating and achieving its forecast going forward. There are important vendors who have become frustrated with the length of time it's taken us to complete this transaction who have decided to disengage from Penney's. There are other vendors who have made a determination to deprioritize Penney's, and so while perhaps they're shipping, they're shipping lower amounts than we had ordered. Number two --

MR. OKIN: Your Honor, objection. I didn't object to the question, but the answer lacked foundation.

THE COURT: Overruled. Go ahead.

THE WITNESS: Number two, our DIP loan matures on November 16th, and so if this transaction is not completed or authorized by the Court by November 16th, that DIP becomes due. And, you know, as you have heard from Mr. Mesterharm's testimony, the company has no wherewithal to pay that DIP. And that would be true even if the shareholders are successful, which we do not believe they will, but even if the shareholders

would be successful in overturning the DIP in the sense that somehow that they -- the roll-up associated with the second installment would be undone. And so we just don't see any way of paying off that DIP no matter what assumptions you make with respect to the motions that have been filed. And, you know, that is an area of significant concern.

And, you know, where that would take us, we believe and have been informed would be into the realm of what I believe would be a very high probability of liquidation. We have a mature debt that we can't pay. We would have the group of first lien lenders who would be pushing for the liquidation of the company. We believe that it is very unlikely that the ABL lenders would be supporting the company at that point in time. And I just don't know how we would hold this together if this transaction is not completed. If it isn't approved by the judge, well, we'll try our best. But there is a very high degree of risk associated with this transaction not occurring, and it is for these reasons that we -- I recommended it to the board.

BY MR. SLADE:

Q Have you considered the impact of the asset purchase agreement on people like second lien lenders or the unsecured creditors who are not getting much, or the shareholders who are not getting anything?

A Yes, it's terrible. It --

Q What would you say to them as to why we're pursuing this agreement despite that?

A I would say we're very sorry that we weren't able to do a job for those stakeholders that enabled them to experience or receive a better recovery. The one thing that the sale process established I believe definitively is that there is no one out there that is prepared to buy the company, buy Opco at a price point that would deliver value beyond the first liens. That is just the unfortunate reality of the circumstance. I wish we were here today with somebody who was willing to pay billions of dollars more for the business or invest significant amounts of money that would imply a higher value. Unfortunately and sadly that transaction does not exist.

Q I want to ask you just a few questions about the settlement between the majority lender group and the minority. Okay?

A Yes.

Q Are you familiar with the settlement agreement reached between the majority and minority first lien lender groups?

A Yes.

Q Could you describe for the Court the dispute that they had and the settlement of that dispute?

A Right. The -- as I mentioned -- excuse me. As I mentioned a moment ago, the dispute culminated from the decision of the majority group, the Milbank Group, to structure

this transaction as a credit bid and to establish the amount of the credit bid at $1 billion. What that had the effect of doing and had the effect of doing is shifting 90 percent of the value of the acquired assets to the institutions that control the DIP loan, and 10 percent of the value of those assets to the institution -- to the first lien institution.

Now, there is overlap, as we know, between the institutions that hold the DIP and the first lien debt holders. However, the majority first lien lenders, the Milbank Group, own a higher percentage of the DIP than they do the first lien debt. And it was the view of Akin's clients that that inappropriately diminishes their recovery, and for that reason they were objectors.

Q And what are the terms of settlement?

A That matter has been resolved. The terms pursuant to which the matter has been resolved contemplates the payment of $40 million from the majority first lien group, the Milbank Group, to the Akin clients, and the payment of $6 million in professional fees.

Q Why does it make sense for the debtors to become a party to (indiscernible)?

A This dispute was purely an intercreditor one, and frankly we would have preferred and we tried our best to do everything possible to find common ground between the two parties so that, you know, this objection did not have to be litigated. The

parties were able to resolve the dispute through the very significant support and participation of Judge Isgur, and the company is pleased that the matter has been resolved and that the Milbank Group was prepared to reduce their recovery by $40 million -- actually, $46 million if you include the fees -- in order to allow this deal to happen.

Q So in terms of the deal that's before the Court between the company, Simon and Brookfield, and the first lien lenders, was it negotiated at arm's length?

A Absolutely. There were -- I mean, to call it arm's length is an understatement. This was hard fought. This was tough. This was acrimonious. This was days, nights, and weekends. There were various points in time where I didn't think it was going to happen, where people got fed up and walked away. And the result is completely arm's length.

Q Did the company negotiate (indiscernible)?

A Yes.

Q The company believes -- well, do you believe lenders (indiscernible)?

A I do.

Q Now, I want to turn now to the proposal made by the Ad Hoc Equity Committee. Okay?

A Uh-huh.

Q Are you aware that the Ad Hoc Equity Committee has objected to the motion that's before the Court today?

A I am.
Q And are you aware that they engaged Mr. Snyder, who has submitted a report?
A Yes.
Q Have you read the report?
A Yes.
Q What is your understanding of the proposed alternative submitted by the Ad Hoc Committee?
A My understanding is that Mr. Snyder would have a --
MR. OKIN: Your Honor, I'd object. They haven't actually offered any evidence on a counter-proposal. If Mr. Kurtz wants to testify in advance in rebuttal to Mr. Snyder's opinion, that's fine, but I want to know if he's going to have the opportunity to do it twice.
THE COURT: No, just once.
THE WITNESS: I'm sorry, I can answer?
BY MR. SLADE:
Q Let me just restate the question.
A Please.
Q What's your understanding of Mr. Snyder's report in the alternative?
A Several steps. Number one, we walk away from the Simon and Brookfield transaction. Number two, the judge would decide to reopen and overturn a DIP order that was entered in June on some basis that would avoid the roll-up debt and make it easier

for the company to, at least in Mr. Snyder's mind, agree or deal with a -- with the repayment of the DIP loan. Number three, the company would have -- or, excuse me, Mr. Snyder would have us embark upon what would undoubtedly be a hotly contested reinstatement of the first lien debt over vigorous objection of the first lienholders.

Next, Mr. Snyder assumed that there would be ABL funding available to support his initiative. However, we know that that is not the case. We have been told unequivocally by the ABL lenders that --

MR. OKIN: Objection. Hearsay.

THE COURT: Sustained.

BY MR. SLADE:

Q I think my -- let's just finish your answer to my question. So just describe what --

THE COURT: So, Mr. Slade -- no.

And, Mr. Kurtz, if you'd hold on just one second.

Mr. Slade, I think -- and I may get the direction wrong, but you are much clearer and louder if you are to your left. Yes, that direction. Thank you. I don't know where the microphone is, but you come through much better when you are where you are now.

THE WITNESS: I'm sorry, where are we?

BY MR. SLADE:

Q I was -- I asked you what your understanding of this

proposal was, and you were talking about what his understanding of -- what your understanding of his proposal was from the ABL lenders. And I think you were going to talk about (indiscernible).

THE COURT: Right.

THE WITNESS: And then their other component. Yes, thank you. There were other component parts of his proposal. Not only would we reinstate the first lien debt, but we would reinstate the second lien debt. And then we would proceed to attempt to reorganize the remainder of the company's balance sheet. And so we would take all of the funded unsecured debt, all of the trade payables, all of the landlord claims, and we would get them to agree to convert their claims into equity under circumstances where they would agree to leave behind some of that equity for existing shareholders.

BY MR. SLADE:

Q Do you recommend that the debtors pursue this alternative presented by Mr. Snyder?

A I do not recommend that we do that.

Q Why did you not recommend that the debtors pursue Mr. Snyder's proposal?

A I believe the probability of success is very, very low, and the consequences of failure would be liquidation.

Q Why do you believe that the consequence -- that the probability of success is very, very low?

A Because there are so many things that would have to happen in order for Mr. Snyder's approach to come together. So first the DIP order would have to be invalidated. Secondly, we would somehow have to deal with a contested situation with our ABL lenders. Number three, I assume that we're going to use -- even after the Judge would overturn the DIP order, we do have to pay back, even if the Judge were to roll back part of the roll-up, there would still be a significant payment required to pay off the DIP. So, for example, if the second borrowing installment were eliminated, if you will, we would still have to come up with $450 million to pay off the DIP and still have sufficient funds in the company to convince the Court that the company's plan of reorganization would be viable and would meet the feasability requirements of Section 1129 of the bankruptcy code.

Somehow we would have to convince ourselves that our vendors would support this capital structure, which I believe is very doubtful. Then we would have to go out and negotiate with all of our unsecured creditors and convince them to leave behind recovery to shareholders in a world where the unsecured debt is currently trading at less than one cent on the dollar. So could all of this come together in a perfect way? I can't say that it's impossible, but I do believe that it is very highly unlikely that this approach would succeed.

Q Do you believe that the ABL lenders would be supportive of

this proposal?
A I do not believe they would be supportive.
Q Do you believe that the first lien lenders would be supportive of this proposal?
A I do not believe that they would be supportive.
Q Do you believe that the vendors would be supportive of this proposal?
A I do not believe they would be supportive.
Q Your opinion, Mr. Kurtz, what would happen to the company if they did not sell to Simon, Brookfield, and the lenders under the terms of the current (indiscernible)?
A I believe the overwhelming probability is that the company would liquidate.
MR. SLADE: The only further question I would have for Mr. Kurtz relate to some exhibits that I would want to introduce through him. I haven't -- Mr. Okin has not confirmed to me whether or not he's going to object, so let me proffer those and he can decide for himself. So the exhibits that I intend to proffer relate to the traded prices of these charities, and these are at the following docket numbers under Your Honor's (indiscernible) protocol, 1681-26.
THE COURT: I'm sorry, 1681 -- I just didn't hear you.
MR. SLADE: Dash 26.
THE COURT: Dash 26.

MR. SLADE: 26.

THE COURT: Thank you.

MR. SLADE: Through 35. And each one of these is a Bloomberg screenshot of the trading prices of the various securities. I would like to (indiscernible).

THE COURT: Mr. Okin, any objection?

MR. OKIN: Yes, Your Honor. I think they're not relevant. They lack foundation.

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

MR. SLADE: It's the trade price of the securities.

THE COURT: Understood.

MR. SLADE: (Indiscernible) relevance.

THE COURT: I'll sustain the objection to each of 1681-26 through 1681-35. Anything else?

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

THE COURT: All right. Thank you. Mr. Okin?

MR. OKIN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. OKIN:

Q Mr. Kurtz, good to see you this morning -- or this afternoon, I guess. A little time has gone by.

A Same.

Q Mr. Kurtz, so the debtors' plan that was filed -- well, filed back when the sale motion was filed and which was amended as recently I believe as last night, that plan required -- or

provides that it won't be confirmed unless the sale is approved today, does it not?

A That's true.

Q So if there is no sale, there is no plan.

A Correct.

Q Okay. And on the flip side, if the sale is approved today, then the OpCo sale, that's going to close prior to the November 24th confirmation hearing, right?

A Correct.

Q And if the sale is approved today, the PropCo sale is going to close regardless of what happens at confirmation, right?

A I believe that's correct.

Q In fact, isn't it true that the terms of the deal provide that a Chapter 7 trustee would be bound to close the sale of PropCo even if we never get to a plan in this case?

A I'm not sure I know the answer to that question.

Q Okay. That's fair enough. All right. So let's also talk about the deal with the Unsecured Creditors' Committee. Are you familiar with that deal?

A Yes.

Q Okay. So they -- as part of the deal that they accepted, they accepted certain payments to certain groups of their creditors, correct?

A Right.

Q You'd agree with me those are basically nominal amounts compared to the amounts owed?

A Yes.

Q Okay. And in certain situations, it's not even a specific discrete pool of cash. They just -- you know, the vendors basically are getting an agreement not to be sued for preferences, right?

A That's an important part of the deal.

Q Understood, understood. So as part of that, they're not objecting to the sale today, right?

A Right.

Q I mean, it was important to get that settlement done prior to today to make sure that the Committee would not object to this sale.

MR. SLADE: Your Honor, I would object. Lack of foundation.

THE COURT: Mr. Kurtz, if you know.

THE WITNESS: We're happy that the Committee is supportive of the transaction.

BY MR. OKIN:

Q I'm sure you are happy, but really I'm asking whether you know -- and I'll start with whether you know if it was important to actually get the deal done before today.

MR. SLADE: I'll object, Your Honor, vague. Important to who?

THE COURT: Fair enough. Mr. --

THE WITNESS: That's where I'm getting confused.

THE COURT: Mr. Okin.

BY MR. OKIN:

Q Sure. That is a fair question, Mr. Kurtz. I'm talking about important to the debtors' strategy in order to get a sale done and the plan done. Is it your understanding that it was important to the debtors' strategy to get a deal with the Creditors' Committee done prior to today?

MR. SLADE: Same objection, Your Honor. Vague. I don't know what he means by the debtors' strategy.

THE COURT: Mr. Kurtz, do you understand the question?

THE WITNESS: I don't think it was important to our strategy. The strategy would have been the same whether or not the Committee was supportive. We're happy that the Committee is supportive, but it wouldn't have changed our strategy if they weren't.

BY MR. OKIN:

Q All right. So now the unsecured creditors are part of the creditor -- or the stakeholder classes that are being solicited to vote on the plan, are they not?

A Yes.

Q Do you know, are they being asked whether or not they should vote on whether to accept the settlement that the

Committee made with the debtor last night?

A I'm sure they're not.

Q So the debtor will not have any idea and does not have any idea right now whether the creditors as a whole support this deal.

A The settlement is with the Committee.

Q Right. And the Committee -- you would agree with me the Committee, while it's a fiduciary for the creditors, does not speak on behalf of each and every creditor -- unsecured creditor of this estate?

A Sure, that's right.

Q So the debtor doesn't really know what the creditors themselves think.

A In general, no. I don't know what creditors in general think. I can't speak for everybody else.

Q You would agree with me that (indiscernible) a lot plans. That's the purpose of the balloting process under a Chapter 11 plan, isn't it?

MR. SLADE: Objection, Your Honor. The creditor (indiscernible).

THE COURT: So, Mr. Okin, and I'm sorry, I lost you -- part of the question. Could you ask the question again?

MR. OKIN: Sure. And it was a follow-on to the last one, so maybe I'll complete the full question.

THE COURT: Okay.

BY MR. OKIN:

Q Finding out what the unsecured creditors think of their treatment is part of the purpose of balloting them under a plan, isn't it?

MR. SLADE: Your Honor, same objection. Calls for a legal conclusion. It's also vague.

THE COURT: Perhaps, but Mr. Kurtz has given testimony that he was a restructuring lawyer, if he can still remember back that far. Mr. Kurtz, if you can. And if you can't, I understand that as well.

THE WITNESS: I'm not sure I'm answering your question, but the creditors will have an opportunity to vote on a plan, and the plan will --

MR. OKIN: But they will not have --

THE WITNESS: I'm sorry?

MR. OKIN: Finish what you were saying, Mr. Kurtz. I'm sorry.

THE WITNESS: And so it is the terms of the plan that they will be voting.

BY MR. OKIN:

Q They will not be voting on the terms of the settlement, correct?

A That is my understanding.

Q Okay. Now, you -- do you know which specific creditors actually do support the plan? Have you talked to any creditors

about whether they do or don't support the plan?
A I've talked to many creditors about whether they support the plan.
Q And is it your belief that most unsecured creditors would support what they're getting paid under this plan as opposed to what Mr. Snyder's proposing?
A I have no way of knowing.
Q Now, when you say you've talked to many creditors, is that mostly creditors that sit on the Creditors' Committee?
A No. I mean, I have talked to creditors that sit on the Creditors' Committee, but I was thinking about the ABL lenders. I was thinking about first lien lenders. I was thinking about institutions that I believe at one point in time owned second lien debt.
Q That's my mistake then, Mr. Kurtz. I meant to say unsecured creditors really. Not the creditors that are actually getting paid under this plan, but the ones that are getting nothing. So I guess Simon was -- is a creditor in this case, right?
A Yes.
Q In fact, they were the chairman of the Creditors' Committee, weren't they?
A I'm not sure of that. You might be right. I'm just not sure.
Q They were the chairman of the Creditors' Committee right

up until they became the winning bidder and actually became the transaction partner in this case, didn't they?

MR. SLADE: Objection. Lacks foundation. He just testified he didn't know.

THE COURT: And, Mr. Kurtz, if you don't know, just please tell us and we'll move on.

THE WITNESS: I don't know.

BY MR. OKIN:

Q Now, I know you don't think shareholders are -- should, based on the way this transaction's working out, recover anything under the plan. But I guess you would agree with me, though, that if this sale is approved, that will guarantee that shareholders receive nothing out of this case, correct?

A That is true.

Q Just like if the sale gets approved, the only thing unsecured creditors will get is what the Committee negotiated for them yesterday, correct?

A Through the plan process, yes.

Q They'll get it through the plan process, but would you agree with me that once this sale gets approved, if it gets approved today, there is no chance they're getting anything else, is there?

A There is. So --

Q There is?

A -- if you're an unsecured -- yes, sir. If you're an

unsecured creditor and you're a trade vendor, you have a company to do business with in the future.

Q Okay.

A It is a point of significant value and --

ELECTRONIC RECORDING: Our system will end this conference in five minutes. To extend this call for one hour, please enter the PIN. Your conference has been extended for 60 minutes.

BY MR. OKIN:

Q If in the process (indiscernible)?

A No. I didn't mean to suggest that all vendors will continue, but I believe that it's the company's intention that the vast majority of vendors would continue to do business with the company.

Q What do you base that on?

A Discussions with management.

Q And management has already worked that out with the new owners, who's going to -- which vendors are going to stay and which ones are going to go?

A Well, if you are a vendor of the company, it's because management has decided that you're a good partner for the company to do business with. And while I'm not saying that every single vendor is going to go forward, my discussions with the company have led me to believe that it is at least management's intention that most of them will continue to do

so.
Q And do you know what Simon and Brookfield's long-term plans for this company are?
A To make a lot of money.
Q But is that to make a lot of money by continuing the brand at its current size or even expanding it, or by selling off the pieces over the next few years?
A I've never heard anything mentioned by either Simon or Brookfield that would lead me to believe that their intention is to sell off the pieces. What I have heard from them is that, you know, they hope over the course of time to return this company to profitability.
Q Now, Simon and Brookfield is the logical buyer because they have malls that have J.C. Penney as their tenants, right?
A I think there was certainly a logic behind Simon and Brookfield ending up in the position that they're in, for that reason, yes.
Q When you -- right. I mean, you understand that to be the strategy behind why they're buying the stores, don't you?
A I think it's a very large part of why they're here. Yes. It's a defensive move on their part.
Q And that makes them probably the most logical buyer of anybody you talked to, doesn't it?
A I don't know what you mean by anybody I talked to.
Q Of the 100 parties that you reached out to, to buy these

assets, Simon and Brookfield had to be near the top of the list of people you thought was most -- were most likely to be interested in this purchase, didn't they?

A Yeah. We -- as I said, I reached out to them even before we filed, because I absolutely identified them as two companies that had a vested interest in ensuring that this business continued to operate and didn't liquidate.

Q And their vested interest is in keeping the stores in their malls open, isn't it?

A I wouldn't limit it to that. It's certainly keeping the stores in their malls, but -- I mean, they're writing a $300 million check here, and their hope is that they can restore the company to profitability and make a profit on that investment.

Q They're writing a $300 million check for a company with in excess of $1.3 billion in inventory and in excess of $1 billion on its balance sheet right now, aren't they?

A Yeah. They're not buying the cash, though. Well, they're getting $50 million of cash as part of the transaction.

Q They're getting over $1 billion in inventory, aren't they?

A Well, they're paying $1 billion for -- in effect what they're doing is paying down the ABL by almost $1 billion and freeing up that inventory in order for this transaction to occur.

Q They're paying it down with their cash?

A They're paying it down with new funding that will come from the new ABL facility plus -- I mean, cash is fungible, you know, plus a $300 million FILO.

Q Right. But they're putting in $300 million.

A Out of their pockets, that's right.

Q So the sum total of what they're giving up to acquire these -- this business is $300 million. Is it not?

A They're paying $300 million, that's right.

Q Now --

A Out of their pockets.

Q Right. So have you looked at the proposed sale order in this case?

A No.

Q All right. So I'm going to pull it up so you can look at it for the first time with me. It's always -- I find reading sale orders in these cases to be one of the more entertaining things you can do. Let's see.

MR. SLADE: Your Honor, I guess I would object to that. He said he hadn't seen it. I'm not sure what -- how he can ask him questions about it.

THE COURT: Mr. Okin, is there a question?

MR. OKIN: There will be a question, Your Honor. I'm going to just point out some language so that Mr. Kurtz -- I suspect that had I not put it up and I asked about language in the sale order, then Mr. Slade's objection would be that he

would like to see it first before he answered a question about it.

I was just trying to anticipate, but I -- you know, we can do it however he likes. I'm just going to read some provisions and ask him about them. I mean, this is not the current sale order, because of course as soon as I got my materials ready for this hearing the debtor filed another revised sale order. But I believe the provisions that I'm going ask to about are the same.

THE COURT: So -- just so there's no mistake, why don't I put up the current sale order. You can direct me --

MR. OKIN: Okay.

THE COURT: -- where to go. Mr. Kurtz can read it. And I really want to understand what you're doing. I don't know why an investment banker really cares what's in a sale order, but I'll certainly give you some latitude.

MR. OKIN: Thank you, Your Honor.

Remember, Mr. Slade, you can blow it up.

THE WITNESS: Yeah, I think I'm going to need a tutorial on that.

THE COURT: So -- oh, Mr. Kurtz, if you will. If you have a cursor -- or, I'm sorry, if you have a mouse, if you'll go to the right, you will see a vertical rectangle pop up. Two of the circles inside the rectangle will be a plus and a minus.

THE WITNESS: Okay. I think I can almost read it.

THE COURT: Is that better?

THE WITNESS: Yes. Thank you.

THE COURT: All right. Mr. Okin, where would you like me to be?

MR. OKIN: Yes. I'd like you to go to Paragraph 68 and we'll go to the same paragraph.

THE COURT: Paragraph 68.

MR. OKIN: I looked and of course it's not. It's -- well, I'm looking for the releases, Your Honor. So let's see. Maybe we'll go there. There we go.

BY MR. OKIN:

Q So I guess before we look at the language, Mr. Kurtz, do you -- were you aware that the terms of this sale required releases to be granted to various parties as part of the sale?

A I think I knew that standard releases, if you will, would be part of the transaction.

Q Okay. And you never reviewed the release language that's actually in the sale order?

A I've not.

Q Okay. So I'll represent to you -- and the reason I had the judge put it up is I just wanted you to be able to actually see it for yourself. So the released parties or the releasing party is defined here to include the debtors, the purchasers, the DIP administrative agent, the DIP collateral agent, the term loan administrative agent, and the term loan first lien

note collateral agent. Do you see that?

A Yes. For the most part. Some of this runs off to the right, but I'm sure you're reading it correctly.

Q Okay. And what I'll tell you is that the release language then gives a release to all of them by all of them. So the debtor is releasing all of the debt agents, the purchasers, and -- well, basically them, all of those -- the lending agents from --

MR. OKIN: And then, Your Honor, if you'll keep going down -- and the part I had actually highlighted in my version -- oop, sorry. Let's see here. From -- here we go. So from -- and it's right -- well, Your Honor keeps moving it on me.

THE COURT: I'm sorry.

MR. OKIN: That's okay. So it's at the very bottom of the screen now, from -- for the transactions or events giving rise to any claim and the debtor in possession -- well, the debtors in or out of court restructuring efforts, intercompany transactions, the transaction, entry into the asset purchase agreement, the instruction letters, the credit bid, the non-binding letter of intent attached as exhibit to the notice of filing letter of intent, the Chapter 11 cases, the formulation, preparation, dissemination, negotiation, filing and consummation of the RSA; the transaction -- I think that's a repeat; the purchase agreement; the -- Your Honor, maybe I read it twice, but -- I'm going to stop it there.

BY MR. OKIN:

Q But you see all those points, Mr. Kurtz, right?

A Yes.

Q Was that part of the original deal, that of all these parties would get releases from everything related to their participation in the bankruptcy, the RSA, the prepetition restructuring efforts?

MR. SLADE: I object (audio interference) I don't know what he means by original deal.

THE COURT: Fair enough.

Mr. Okin.

BY MR. OKIN:

Q Well, Mr. Kurtz, when the parties reached an agreement on the terms of a sale of OpCo and PropCo to entities owned by the majority DIP -- first lien lenders and to Simon and Brookfield, whether the terms of the deal as you understood them to include releases by the debtor to all of the lending agents for their participation in this bankruptcy or in the pre-petition negotiation of this bankruptcy?

A I never had a view or understanding on that.

Q Okay. Do you think that's appropriate here?

MR. SLADE: I guess, Your Honor --

THE COURT: Yeah. Mr. Okin, how is Mr. Kurtz in a position to have an opinion about that?

MR. OKIN: Well, Your Honor, he testified that he had

advised the board that this was in the debtors' best interest, and that he appears to be the debtors' witness testifying that the debtor is exercising its business judgment to accept this deal. So I think asking the debtor whether it's appropriate to release the lending agent for their activities in this case across the board in a sale is appropriate.

THE COURT: I disagree. I think that you can ask him if he thinks that granting these releases as part of the transaction is in the debtors' best interest. but "appropriate" has an entirely different meaning.

MR. OKIN: It does, Your Honor, and I was going to actually ask about -- but if you want, I'll move to the --

THE COURT: I think the best interest inquiry is certainly on the table. I don't think that Mr. Kurtz has been qualified as a legal expert, which is where the first question would have to go.

MR. OKIN: Actually, Your Honor, I meant morally appropriate, but that's fine.

THE COURT: Well, if that's the question, that has no part in this discussion.

MR. OKIN: Perhaps.

BY MR. OKIN:

Q Mr. Kurtz, do you think that granting these releases as part of the sale is in the best interest of the debtor -- or the debtors?

A I'm not -- yes, I'm not bothered by it at all.
Q Why not?
A Because everyone acted in good faith, based upon what I saw, and I saw a lot. And seems to me there is no reason why people shouldn't have the certainty of knowing that there will be no claims asserted against them going forward.
Q Even if those claims relate to activities that don't relate to this specific sale?
A I'm speculating on top of speculation. I never advised the board on the leases. The board never looked to me to provide advice on the leases.
Q So when you advised the board to agree to the sale, you weren't aware these releases were going to be granted.
A I wasn't aware that they either were or were not going to be granted. What I said a few moments ago is that my understanding is that standard releases would be incorporated into the terms of the transaction --
Q And you believe --
A -- (audio interference)
Q And you believe these are standard releases?
A I would have to read through all of the language that you put in front of me, and then I'm not really -- I don't think -- I don't feel that I am qualified to comment on standard releases or -- I haven't practiced law in 19 years. The law on releases has evolved significantly and I have no expertise that

gives me a level of comfort that I'm the one to comment on propriety.

Q Okay. So are you able to testify today as to whether the board was advised by somebody as to whether or not to accept these releases?

A Yes, I can tell you that. They were.

Q And who were they advised by?

A Kirkland & Ellis.

Q Okay. So you didn't know there were releases, but you knew that Kirkland & Ellis had advised the board that they were okay?

A No. Actually, that's not what I testified to. I think --

Q You're right. You said they were standard. Standard.

A That's right.

Q All right. So did you know that the sale order also approves your transaction fee for this sale?

A Yes.

Q Okay. And it approves it without any further order of court or actually even any calculation of what that transaction fee should be?

A I haven't really read the language, so I can't tell you exactly how it reads.

Q Well, it used to be Paragraph 5.

MR. OKIN: I don't know, Your Honor, if it's still there or not.

THE WITNESS: And I saw a version of it. I know the U.S. Trustee as recently as this morning, I believe, asked us to agree to some language that would give the -- I think it's -- gives the Court the ability to claw back the fee.

MR. OKIN: Okay.

THE WITNESS: We said yes to that. I don't know if that's reflected in this version of the order or not.

BY MR. OKIN:

Q It looks like that (audio interference) --

A (Audio interference) we're fine with that.

Q Okay. And that is new since the order that I have last seen, the provided "however" language. So has -- and when I deposed you I asked you about this, because I was trying to get to the transaction value. Do you know yet what Lazard's fee for this is going to be?

A Not precisely. No.

Q Do you have a general idea? I mean, you have a maximum fee of $23 million for a transaction, didn't you?

A That's right. So if it works out, because of the cap, the difference between our restructuring fee and the sale fee is at most $700,000. So that's what's at stake. And I believe that we will conclude that we're entitled to the sale fee that would take us right up to the cap, but I haven't made that determination yet. We haven't really been -- I have not been primarily focused on our fee at this stage.

Q Well, and I'm trying to get to the same issue that we talked about in your deposition and you couldn't answer it then. So I'm wondering, since it's getting approved in this order, have you now figured out what the sale value is, so you can calculate your fee?

MR. SLADE: Your Honor, I would object to the premise of the question, which again relays an assumption that's not true.

THE WITNESS: No. And as I said a moment ago, for us it doesn't work that way, because we're capped at $23 million. So the issue isn't how much would we earn as sale fee based upon different assumptions as to what the value of the transaction is. The question for us is do we hit the cap or do we not hit the cap? At that point, it's irrelevant to me whether it's more than that. So that's all I'm focused on, is whether we're entitled to the full capped amount or not.

BY MR. OKIN:

Q But wouldn't that require you to know the amount of the value of the sale, to figure out if you're capped?

A It would require us to know whether the value would exceed -- would allow us to be paid a fee that took us up to the cap --

Q Based upon --

A -- (audio interference) it's possible that the sale fee without the cap would have taken us into, you know, a higher

number, but that's irrelevant to me now.
Q So what is the value of this sale?
A The OpCo sale?
Q No (audio interference) --
A I don't understand what's being asked of me.
Q Well, my understanding is this is one integrated transaction. So the sale that the Court is being asked to approve today, what is the value of that sale, the dollar value?
A Don't know. We have not established a value for the entire package.
Q So when you advised the board to accept this deal in their business judgment, you didn't even have the ability to tell them what the deal was worth.
A Well, we told them that nobody had bid more than the first lien, that these were the only bidders. And we told them that we, Lazard, because we're not real estate appraisers, had not done an analysis of the value of the real estate in the hands of the institutions that will control the PropCo. They understood.
Q Right.
A They were not looking to Lazard to do that, because that is not within our area of expertise.
Q And are you aware of anybody having put a dollar value on this overall sale?

A I am not.
Q Now, the value of just the PropCo piece, in your opinion, is what?
A Well, value to the estate, value to the lenders, and I think you need -- and I'm not trying to be difficult, but you need to be more specific. So, for example -- and we won't know what the exact OpCo purchase price will be until we close the books as of the sale date, because the sale price will be trued up that date. But based upon the estimates that I have seen, after all the dust settles, and so the ABL is paid off, administrative expenses are paid, from the standpoint of the first lien lenders, they will get around $360 million.
Q Well, maybe -- let me clarify a little bit more, because I don't think you're answering what I'm trying to figure out. That's probably my fault.
The total consideration being paid by the purchasers -- and there's two purchasers, right? There's an entity that was formed to purchase PropCo and an entity that was formed to purchase PropCo, correct? Or did I say it -- sorry. OpCo and PropCo, correct?
A Right.
Q And the total consideration that those two entities are giving to anybody, let's say for now -- well, to the estate, are -- they are credit bidding $1 million worth of DIP and senior secured debt and writing a check for a bit more than

$600 million in cash, correct?

A That's not correct. They're writing a check for --

Q Well, okay. So let's start. Were those numbers wrong or is there more?

A Let me try it this way, because I --

Q Just could you answer my question first? Were my numbers wrong?

A I don't (audio interference) I can't because I don't understand.

Q So they're not credit bidding $1 billion?

A Oh, if that was your question, the answer is yes.

Q Okay. And they are writing an equity check for -- I don't have the number in front of me, 600-something million dollars?

A Who is "they"? Sorry. This is confusing.

Q The entity that's buying the OpCo.

A Okay. The entity that is buying OpCo is doing a number of different things. Number one, Simon and Brookfield are writing a check for $300 million.

Q Okay.

A Number two, and this is what I think you're getting at, there is a target cash amount that has been agreed to under the transaction. $692 million. I hope that's what you were referring to, because that actually ties out -- that is the number that will -- left in the estate after giving effect to the paydown of the ABL and all of the ABL expenses.

And so when the dust settles, $300 million check is written, new FILO has been implemented, and new ABL is on the books. The old ABL is paid off. The deal -- the agreement under the deal is that there will be $692 million in cash left in the estate as a result of this transaction.

And then, from that $692 million, the estate has to pay administrative expenses, and that 692 walks down to the $360 million number that I mentioned a moment ago.

Q Okay. So let's break that down. So the only cash that Simon and Brookfield are putting into the estate is $300 million.

A Out of their pockets, but OpCo -- the new OpCo is borrowing under a new ABL and a new FILO, the proceeds of which will go to the estate, approximately -- it's about $850 million. Again, this number will fluctuate depending upon how the closing adjustments come in. But it's around $850 million. And so then --

Q You're trying to answer my next question --

A And --

Q Okay.

A If I can finish please. Then let's not forget there's a $520 million note that is being provided to the OpCo. So if you want to look at the -- sorry, $500 million note that's being provided back to the estate that will be distributed to the first lien creditors.

So if you want to look -- let's look at what's happening on OpCo. I think that's what you're asking me. So let's look at what's happening at --

Q Mr. Kurtz, what I'd prefer to do is just re-ask some questions, because you've gone way beyond what I actually asked. So let me -- let's break it down again. So the money coming in from Simon and Brookfield is $300 million, correct?

A Out of their pockets.

Q Out of their pocket, right.

A Out of their pocket.

Q And then through the ABL, which will be owed now by OpCo or the entity that owns OpCo, will be used to fund additional cash that needs to be left behind in the estate, and that number -- depending on working capital adjustments -- should be total about $690 million, correct?

A No. I don't think that's right. Let me try it again. So maybe we could just take the -- let me try it -- I'm trying to be as responsive to your question as I'm capable of being. Maybe I'm not doing a very good job of understanding, but I'm going to try to walk you through it maybe a different way.

So, subject to adjustments, our view -- so what is being paid for OpCo? It's $1,622,000,000. And how do we build up to that number? $300 million equity (audio interference) $500 million of take-back debt, $300 million of FILO, and approximately $550 million of ABL drawn. And if I'm

remembering it correctly, all adds up to about $1,622,000,000.

Of that, the ABL has to be paid in full and the amount necessary to retire the ABL in full -- the existing ABL is -- it's a little over $1.3 billion. And so when you take all of that, the cash component -- I mean, the note is the note. That's a $520 million note that stands on its own. But when you try to work through the sources and uses, based upon forecasted closing numbers, there will be $692 million of cash in the estate after paying off the ABL; and from that 692 priority admin expenses will have to be paid, yielding recovery to first lien creditors -- again, based upon the closing estimates, of around $360 million. That's the best way I can explain it.

Q I think buried in there was the answer I was looking for, so we'll move on.

A I hope so.

Q Thank you.

A I'm just trying to be helpful. I'm not trying to be difficult.

Q So that is -- I'll call it the purchase price for an OpCo. What are the first lien lenders actually paying the estate for PropCo?

A Well, they're getting -- so -- well, let's be technical about it. They're credit bidding for the assets. And the credit bid is set at $1 billion. And what will they end up

with when the dust settles? It will end up with --
Q Well, before you do that -- before you do that, I want to just -- you keep getting down the road ahead of me. The billion dollars credit bid, that's part of what they're paying for PropCo, that's the same billion dollars that we already talked about with making up part of that $1.6 billion for OpCo?
A No.
Q There's another billion dollars?
A No. The $1 billion credit bid is for the assets of the estate after giving effect to the payments that I've just tried to walk you through.
Q Okay.
A And so what they will get is cash estimated to be around $360 million. They will get take-back debt of $520 million. And they will get the PropCo assets.
Q Okay. So -- and the problem we have with valuing the PropCo sale in part is -- well, Lazard obviously didn't do a valuation of the PropCo assets, because you don't do that, right?
A That's right. We're not real estate appraisers.
Q And the last appraisal that the debtor has ever had of its real estate was back in September of 2019?
A I don't remember if it was -- it was definitely 2019. I'm not sure if it was September. You might be right, but -- I can't vouch for the month.

Q Whatever -- but that was the Cushman & Wakefield appraisal.
A Yes.
Q Okay. And so since --
A It may have been done in -- yeah, it may have been done in two pieces. There may have been an appraisal of the unencumbered assets and a separate appraisal for the encumbered assets that -- but you are right in that this work was done in 2019.
Q Okay. And since then, there has been no new valuation done on those assets.
A Not that I am aware of.
Q Okay. And similarly, really, you didn't do a traditional valuation of OpCo in this case either, did you?
A What do you mean by "traditional valuation"?
Q You didn't do a DCF or a comparable company valuation or a comparable transaction valuation.
A No. The way we established value was by running a full process and assessing the output of that process.
Q All right. So your view of whether or not this sale is fair value for the estate is based on the fact that this is the price you got in this sale, correct?
A Yes, it is. It is absolutely a function of results of the process.
Q Okay. Now, are you familiar with the debtors' business

plan?
A Yes.
Q Did you have any participation in the creation of that plan?
A No.
Q That was done by the company and AlixPartners?
A Yeah, and there might have been -- I think McKinsey also participated in the creation of that plan. But we did not.
Q Okay. Did you review it?
A I read it.
Q It was well done and thorough?
A Yes.
Q Okay. And it was provided to buyers and potential investors and other parties in interest?
A Yes. I think it's a public document at this point.
Q And you think it's the kind of document parties can rely on for a projection of what J.C. Penney would do after emerging from bankruptcy?
A Not necessarily. What parties can rely on is that that business plan represented the best view of the management of the company assisted by Alix and McKinsey as to its future prospects at that point in time. And if I'm remembering this correctly, I think the business plan was completed in the first few days of July. So that is management's best vision as of July.

Q Okay. And that's the business plan that under the DIP loan had to be provided to the DIP lenders by July 1.

A I think July 1 is the right date, yes. You and I are on the same wavelength here. Yes.

Q And you'd agree with me that the DIP lenders never accepted the business plan as the milestones provided under the DIP loan?

A That's correct.

Q Did they ever reject the business plan?

A No, but there was really no -- I mean, there's no mechanism, if you will, to reject the business plan. It was -- the way the DIP was structured, they either approved it or they didn't approve it. There was no concept of rejection.

Q So when they -- so if they didn't approve it, then the company was supposed to toggle immediately to a sale process, right?

A Yes, unless the toggle date was extended, which, as you know, it was multiple times.

Q Right. And actually I never really heard. Do we still have a toggle date somewhere out in the future or has it occurred?

A Probably should have asked Mr. Mesterharm that question. I don't know the answer to that.

Q Okay. That's a good -- maybe I should have asked him, because I've really never heard. So at the same time that this

toggle or -- well, that the business plan was being delivered to the lenders, the decision came up or the deadline came up for making the decision as to whether or not to borrow the additional $225 million under the DIP loan, right?

A Yes, that decision was made, I believe, on July 8th.

Q Okay. And that decision was made because you -- the debtor felt that it would be better politically working with the lenders to continue to borrow the money.

A Are you asking me why did the company decide to draw the funds? Is that what you're asking?

Q No, I was suggesting a reason. But if you want to just tell me why did the company draw the funds.

A Well, that is the reason. So the company decided to draw the funds primarily because -- just the uncertainties around where the situation with the reorganization of the company appeared to be at that point in time, back on July 8th. We didn't exactly know where we were going. We didn't know where we were going to end up. And we felt that it was in the best interest of the company to have the funds drawn as opposed to not drawn.

Q But the best interest of the company weren't because you needed the money right then, was it?

A The company did not need the money right then, that's correct.

Q Right. In fact, the primary best interest of the company

was you did it because you felt like the lenders -- that would foster the best continuing relationship with the DIP lenders, right?

A I think that was -- that was an aspect of it. That was not the only aspect.

Q And at that point the company was still hoping to do a plan of reorganization instead of the sale?

A Well, we didn't know what we were going to end up doing. We knew what we didn't want to do. We knew that we didn't want to liquidate. We didn't know whether we were going to be selling the entire company, part of the company, reorganizing. There was no way to know at that point in time. And we thought that -- you know, our scenarios where that $225 million could be put to use in connection with whatever outcome we ended up reaching.

Q Well, but you knew that by borrowing that 225, you were also creating a bonus $225 million administrative claim for the DIP lenders, didn't you?

MR. SLADE: I object to the characterization of the question.

THE COURT: Sustained. Mr. Okin, why don't you rephrase.

BY MR. OKIN:

Q So you knew that by borrowing that additional $225 million you were also creating an additional $225 million

administrative claim for the DIP lenders?
A We were very mindful of that and gave it a lot of consideration before we made our decision, yes.
Q And I assume you'd agree with me that based on your experience, giving the lender an additional $225 million administrative claim and a total $900 million administrative claim was going to make doing anything that they didn't want you to do extremely difficult, wasn't it?
A I don't know that it made it incrementally more difficult. I mean, what we're talking about is $225 million of additional roll-up. Because that $225 million that we borrowed is -- it's sitting in an escrow, as you well know, and it's available to pay down the debt. So it didn't make it worse by $450 million. It increased the amount of the roll-up by $250 million. Had we not done it, we still would have had $450 million of DIP to pay off. I'm not sure it's fair -- I'm not at all sure that it's fair to say that that $225 million of incremental roll-up made it any more difficult than it already was to get this deal done without the support of the first liens.
Q Okay. So -- and I can't remember if we've -- if you've mentioned this already or not. The debtor never actually has used that $225 million, has it?
A That's correct.
Q And it doesn't look like it would ever actually need that money, does it?

A No. Well, I mean, those funds will be used -- when I talk about the $360 million that's going to lenders, that includes -- just so we're clear with each other, that includes the $225 million -- sorry, it's 230 now -- that's sitting in escrow.

Q That's 230 because there's been interest on that money?

A That's right.

Q Do you have any idea how much the debtor paid in fees and interest on account of having borrowed that money?

A You mean what were the original fees of the DIP --

Q No.

A -- (audio interference)

Q No. When you made the draw in July for the additional $225 million, how much did it cost the debtor holding that cash for the last four months?

A Oh. What was the negative spread? I don't have it.

Q But there was a negative spread.

A No doubt.

Q Okay. A pretty substantial one, right?

A I don't know what you mean by "pretty substantial." I mean, there was a negative spread. I didn't calculate it.

Q The interest on this loan is pretty high, isn't it?

MR. SLADE: Objection, Your Honor. Vague.

THE WITNESS: It's more than what the cash earned. That's for sure.

MR. OKIN: All right. I'll withdraw it.

BY MR. OKIN:

Q Let's move on to the sale process itself, Mr. Kurtz, so we can get this wrapped up. So you mentioned there were three bidders. We've already -- you already talked about them with Mr. Slade. But there never was anybody else who ever really emerged as even a slightly interested party, was there? Never -- let me be more clear. There were never any letters of intent, expressions of interest, or anything else, from anybody but those three parties.

A No, I don't think that's true. We did receive one kind of expression of an interest without any structure behind it for the PropCo and I did have a series of conversations with another institution that -- you know, very credible, who ultimately decided to drop out of the process. And I don't remember whether we ever got a letter from them or not, but I don't think it's quite fair to say that it was only these three.

At the end of the day, as you know, we established a bidding deadline of July 22nd, and there were only three bids that were submitted by July 22nd. But we did have conversations with, you know, other institutions, you know, beyond just these three that were potentially interested in doing something prior to the July 22nd bid deadline.

Q Okay. And that July 22nd bid deadline was after the

deadline -- the initial deadline for the lenders to accept your business plan and toggle you to a restructuring.

A So the initial toggle date was on -- excuse me -- if I'm not mistaken, July 16th. And I believe that that was moved to July 31st so that the lenders could see what came in as a result of the bid deadline before deciding whether to extend the toggle further.

Q And all of your bidders knew that you were still in that limbo as well, correct?

A Yes, it's all public.

Q Now, this process of creating the OpCo/PropCo structure, that was a fairly complicated structure that was worked out with picking which properties would go into PropCo and how that would work with OpCo, correct?

A I agree with that. That is correct.

Q And would you agree with me also that that was -- the charge on setting that up and structuring that was led by Spencer Haber at H/2 Capital?

A No, I would not agree.

Q So if Mr. Sussberg said that in court a number of times, you'd disagree with him on his characterizations of that?

A All I can tell you --

MR. SLADE: I would object. Assumes facts not in evidence.

THE WITNESS: Yeah. All I can tell you or testify to

is what I saw. And here's what I saw. H/2 was the largest holder of debt. And I don't mean just by a small amount. I think probably by a factor of around three. And so H/2's support and participation was very important to our ability to get, you know, this transaction done, because they were very large in size.

Number 2, H/2 is a firm that specializes in lending money against real estate, and had a level of real estate expertise that I think anyone in the transaction would acknowledge is exceptional. And you know, clearly of the institutions that were critical on the first lien side in negotiating the deal, he had the most expertise on the real estate side.

There were some parts of the transaction where I would say it's fair to say that H/2 was in the lead. For example, the terms of the master lease. But not to the exclusion of other institutions. There were four other institutions that were on the steering committee. But I think it's fair to say that with respect to the terms of the master lease, people looked to H/2 for guidance. But there were other aspects of the transaction where H/2 was clearly not in the lead. I just think you cannot say and it would not be true to say that -- you know, H/2 was leading all aspects of everything that occurred here. That's just not right.

BY MR. OKIN:

Q Okay. So now you would -- would you said it's fair, though, to say that Mr. Haber was the architect of this structure?

A Well, the structure was -- the structure was endorsed by all of the members of the steering committee, ultimately. I would say that Mr. Haber was the first to suggest it. At least the first I heard of OpCo/PropCo was from Mr. Haber before we filed for Chapter 11. So I will acknowledge that. But what ended up getting done here was the work product of many institutions over the course of several months (audio interference) with different aspects of a very complicated transaction.

Q All right. So would you also agree with me that it was always a -- at least a logical decision that the -- a group led by H/2 would ultimately be the buyer of PropCo?

A Not necessarily. For the right price, I'm sure they would have -- they would be happy to sell and be done with this.

Q Would you say they would be --

A (Audio interference) and just to finish -- that's why we worked as hard as we did in June and July to try to find not only an OpCo buyer but a PropCo buyer as well, so that we would have other alternatives available to us.

Q But would you say that they were the natural buyers of PropCo?

A I don't know what you mean by "natural buyers." I mean,

we -- as I mentioned earlier, we went out to 25 real estate investors, institutions who are large and sophisticated investors in real estate, and we showed them the PropCo opportunity. I'd say any one of them could have been a "natural buyer" for the PropCo. And I don't exactly know what you mean by "natural."

So we -- in my mind, it was not preordained that the Milbank group, if you will, would end up owning PropCo. That is the way it turned out, because there were no bids for PropCo. But we were just as focused on finding a buyer for PropCo as we were in finding a buyer for OpCo.

Q And so you don't think that when Mr. Haber first came up with the idea for the OpCo/PropCo structure before the bankruptcy was even filed that he wasn't already planning that his group would ultimately buy the PropCo asset?

A I think he recognized that they could end up owning the PropCo assets, just like they could have ended up owning the OpCo assets. But they were also -- and I think this is important to the point that you're driving toward -- the H/2 group, Milbank group, they were adamant that we run a sale process and try to find buyers for PropCo. They didn't try to in any way diminish our activity with respect to finding a buyer for the real estate. In fact, they demanded it.

So that fact is not compatible with the assumption that you're trying to make, which is they always knew they were

going to get it. I don't think that's true. As it turned out, they did get it, and maybe different people had different points of view within the framework of that group as to what the probability of success was, but -- not only did we run a process to try to find an OpCo buyer, they wanted us to run a process to find an OpCo buyer.

Q And as you ran the process for both the OpCo and PropCo buyers, it was inevitable that whoever was going to buy OpCo would have to negotiate with your lender group since they held the $900 million administrative claim that they held, plus the first lien debt beyond that.

A No, not necessarily. So if someone else had stepped up to buy the PropCo and the first lien lenders were supportive of that, then the master lease would have been negotiated with the PropCo buyer.

Q So is it not then fair to say that if your lender group didn't want you pursuing a particular transaction that you could still pursue it without their agreement?

A Oh, absolutely. And anybody could have come in and paid off the first lien and the DIP in full. That would have cost $2.5 billion (indiscernible) DIP in the first lien. For $2.5 billion, the first lien creditors were irrelevant. They were gone.

In fact, what I told potential buyers is don't assume that you have to pay them in full, because -- remember, that debt

was trading in the 30s even at that point in time. And while nobody made any commitment to me, I thought that we could get someone and pay them 90 cents on the dollar, 80 cents on the dollar, maybe they would be sellers. And I didn't want anyone to be intimidated by the $2.5 billion number thinking that they could never get there.

So what we told people was look, if you're interested in doing a deal here, you're not willing to -- if you pay off the first liens, you can forget about them. If you don't -- and the DIP. If you don't pay off the first lien and the DIP, and maybe there's still a deal that we can get to where you give them less than par, and they would be supportive. So to say that they held the keys to the kingdom as it relates to this transaction, that is just not true.

Q But they had to be included in all the conversations with all of the buyers you did talk to, didn't they?

A That was because the buyers that we -- well, no. We talked to potentially 100 buyers. They were included in any of those conversations. They were included in the conversations with the three institutions that submitted bids on July 22nd for the OpCo. But that was natural, because, number one, there was no PropCo bidder, and so now we knew that if this transaction was going to happen pursuant to an OpCo/PropCo structure, that the lenders would be owning PropCo. That we knew at that point in time. We didn't know that in the

beginning. The other thing was that the OpCo only -- the structure of the OpCo and the opportunity to buy at OpCo only existed if the lenders were prepared to support it because there's $520 million of take-back debt. And they have to agree to use cash collateral that sits on the company's balance sheet to pay down debt.

So it is true that with respect to the three buyers, by the time we got to three potential bidders for OpCo, that the Milbank group needed to be intimately involved in those conversations for the reason that -- reasons that I just articulated. But it is not true to say when we launched the sale process at the end of May, through June and through July, prior to the July 22nd deadline, that the first lien lenders, you know, were making all the decisions. There were absolutely transaction structures that I just described to you that could have made them completely irrelevant. Unfortunately, they didn't materialize.

Q And just to cover that just quickly, I'm going to have you take a look at Debtors' -- or I'm sorry, the Ad Hoc Committee's Exhibit 27. It's marked "confidential."

MR. OKIN: Your Honor, it is -- let me get the right number for you. It figures just as I get there, I lose my place.

THE WITNESS: Sorry. What tab did you say?

MR. OKIN: It's going to be the Committee's

Exhibit 27. It is, Your Honor, 1762-5.

THE WITNESS: I have it.

THE COURT: I do, as well.

THE WITNESS: It is Bates Number 74408. Is that -- am I looking at the right thing?

MR. OKIN: Yes, you are.

Your Honor, do you have it?

THE COURT: I do. Thank you.

THE WITNESS: Okay.

BY MR. OKIN:

Q So, Mr. Kurtz, this is an email chain that you're a party to.

A Yes.

Q And you received these emails?

A I did.

Q Okay. And this -- this is an email chain between you and Stefan Kaluzny.

A Correct.

Q And he is a managing director at Sycamore?

A Well, I -- when I referred to the person that owns Sycamore and is the CEO, it's Stefan Kaluzny that I was thinking about.

Q Okay. And so you had --

A I mean, to me --

Q Got it.

A -- Stefan Kaluzny is Sycamore.
Q Okay. And you had conversations with him throughout the process encouraging him to participate in this process.
A I had many conversations with him throughout the process.
Q And Mr. Kaluzny had some concerns about whether or not he would actually -- whether this deal made sense for him or whether he was really going to have a fair shot at purchasing these assets.
A No. He was never concerned about whether he had a fair shot. And he definitely had a fair shot because everybody had a fair shot. The transaction was not structured so that any one bidder would be in a better position relative to another. This --

ELECTRONIC VOICE: Our system will end this conference in five minutes. To extend this call -- your conference has been extended for 60 minutes.

THE WITNESS: Simon and Brookfield really couldn't afford to not do this deal, and therefore would be willing to pay more than he might be willing to pay. So he was not critical of the process at all. In fact, Sycamore stayed with us through the process right up until that last weekend in August. I think we had -- I think we had our last call with Sycamore on Sunday, August 30th. So he was in right until the end. But he was concerned that -- at the end of the day, was he going to be able to be as strong a buyer as Simon and

Brookfield would be willing to be in light of the fact that they had so much to lose if the transaction didn't go their way.

BY MR. OKIN:

Q And in your email to Mr. Kaluzny on September 11th, you actually say, "I think we wasted your time at the end when the lenders refused to believe that you meant what you said, and I'm sorry about that."

What did you mean when you said that?

A So that last weekend in August -- I'm talking about August 29th and August 30th, maybe I need to -- to put it in context, I need to step back a day.

On Friday, August 28th, we received a new bid from Simon and Brookfield that was viewed by frankly the lenders and the company as disappointing. And we decided, the company working in conjunction with the Milbank group, that we would reach out one more time to Sycamore and to HBC and see if there was some transaction that could be done with one of them. And we did that.

And so I called Mr. Kaluzny -- I think I called him on Saturday -- on that Saturday morning, so that would have been the morning of August 29th. And I said we're back again, and you know, we're interested in talking to you about a potential transaction. And what's very important to the lenders -- and the company as well, but especially the lenders -- was that you

have some skin in the game, that you write a check out of your own pocket and put some real money at risk here. And he was not willing to do that. And he had told me before he was not willing to do it. And I think the lenders wanted to take one more run at him.

And so my recollection was that he ramped up again that weekend. So we worked on Saturday. He reactivated his team. They worked on Saturday night. I talked to him Sunday morning, as I recall. He said I'm ready to go and I will make a proposal to the lenders, but the proposal to the lenders that I'm going to make is one where potentially they hire me to run the business on their behalf. And I'm prepared to put equity into the company.

And he made that point, and then we convened a call with the company, and I was on it, the lenders were on it. He was on with his team and advisors. And he took them through it one more time and made it clear that he was not prepared to risk equity dollars as part of the transaction. And as a result of that, things did not progress past August 30th with Sycamore.

What I'm referring to when I use the words "waste your time," was that -- you know, we knocked on your -- I knocked on your door one more time on Sunday, August -- excuse me, Saturday, August 29th, and I asked you to get involved in this again, and have another conversation with the lenders. And it was only after that conversation that the lenders sort of

conceded defeat that they were not going to be able to persuade Sycamore to put equity dollars at risk as part of this transaction.

Q Now, at the end of the day, Sycamore participated in this whole process because they had the ability to collect the work fee that the Court approved.

A No. That is completely false. Sycamore participated in the process because they were interested in the opportunity, and the Sycamore team, over the course of the many months that we engaged with them, spent -- as I think I said earlier -- thousands of hours working on this transaction, performing a level of diligence that was surprising to my team. They couldn't believe how in the weeds Sycamore was going. And so they spent time on it not -- they made no money on the $3 million work fee. There was no profit element for Sycamore in that. That was reimbursing their professionals.

Mr. Kaluzny did tell me that he would not engage unless his professionals' fees were covered. But to suggest or imply that that's the reason that they spent -- I mean, I probably had 50 conversations with Mr. Kaluzny -- that that's the reason why they were part of the process is completely false.

Q Well, you did just say he wouldn't engage unless his professionals got paid, right?

A Yes, but he wasn't engaging because his professionals -- so that he could get $3 million paid in expense reimbursement

for his professionals. And that's what I thought you were implying.

Q No. He just wasn't going to engage unless his costs were fully covered by the debtor.

A That's what he told me.

Q Now, your other bidder, HBC, Hudson Bay Company, I heard your explanation for the fact that they did re-engage after the issue. But I do want to come back to it so we're clear on it. HBC did disengage from this process because they believed, rightly or wrongly, that Mr. Haber did not want them participating in the transaction, correct?

A Look. I don't know that HBC ever really disengaged, because, you know, we continued to talk to HBC through the month of August. I can only tell you what was said to me. And what was said to me by Mr. Caplan, who was leading the negotiations for HBC, was that this discussion had occurred, this lawyer-to-lawyer conversation that I referred to earlier; that it was troubling to HBC, and that someone, probably Mr. Haber, would have to convince them that this opportunity was truly available to them in order for them to continue working.

The fact of the matter is that they didn't -- that Mr. Haber did address it with them, that other parties addressed it with them, including Deutsche Bank, financial advisor to the steering committee, who had a longstanding

relationship with HBC separate and apart from this transaction. And so I don't know that it's fair to say that they disengaged. They were definitely not happy by what they thought they heard from H/2's lawyer, but I don't agree they disengaged.

Q In fact, nobody was happy about it, right?

A Nobody was happy about it. At the end of the day, the explanation given, including by Mr. Haber, was that it was a misunderstanding and -- you know, of course he wanted them to bid.

And I will tell you that I had many conversations with Mr. Haber about Simon and Brookfield, about Sycamore, and about HBC. And he never said anything to me that suggested or implied that he was not just as open to an HBC transaction as he was a transaction with Sycamore or Simon and Brookfield, which is why I was very surprised when I heard what I heard from, you know, Mr. Caplan when we talked on August 6th.

MR. OKIN: I'm going to object as non-responsive to everything but the first sentence of the answer, Your Honor.

THE COURT: Yeah. Overruled.

BY MR. OKIN:

Q Mr. Kurtz, let's do it this way. Let's look at our -- the Committee's Exhibit 623, which is also marked confidential.

MR. OKIN: That is 1762-1, Your Honor.

THE WITNESS: Do you have a tab number?

MR. OKIN: 623.

THE WITNESS: Twenty-three?

THE COURT: Mr. Okin, hold on just one second.

(Court and clerk confer)

THE WITNESS: I do have it. I'm sorry.

THE COURT: Mr. Okin, go ahead. I'm sorry. There was a rustle of papers, so we didn't get the exhibit. But I heard you. But the recorder did not.

MR. OKIN: Okay. Are we good now, Your Honor, or do I need to repeat it?

THE COURT: No. We're perfectly fine. Thank you. And I have it up.

MR. OKIN: I think that's me rustling. I'll try to be quieter.

BY MR. OKIN:

Q So, Mr. Kurtz, you have it now?

A Yes, I do.

Q And the first page, just so we're all clear -- the first page is Bates labeled JCP0077140?

A Yes, I have it.

Q Okay. And this is an email chain that you were also a part of?

A It looks like it, yeah.

Q Starts out with an email from Nancy Davey at Deutsche Bank. She was the -- who was Nancy Davey at Deutsche Bank?

A Nancy Davey is a managing director at Deutsche Bank. As I

mentioned a minute ago, Deutsche Bank was one of the financial advisors to the first lien steering committee.

Q Okay. And her email was copied to -- well, we don't, I guess, who know that was one sent to, but we do know that you were copied on a response from Gordon Caplan to her. Who's Gordon Caplan again?

A Gordon Caplan is -- I don't know what his exact title is with HBC, but he was leading the negotiation on a day-to-day basis for HBC. I believe he's a very senior executive at HBC.

Q Okay. And he replies on August 6th with a copy to you among others, and he says, "Thanks, Nancy. This may be a bit at odds with the messaging we just received from counsel to H/2, so perhaps it would be good to get on a call to understand the dynamics a bit better here" -- or "here a bit better."

And what he's talking about is the call that you've already testified to, and we don't necessarily revisit it. That's what he's talking about here? That's what you understood him to be talking about?

A It is.

Q Okay. And that got forwarded by Christian Tempke who works with you?

A Yes, he does.

Q And it got forwarded to, among others, Mr. Sussberg?

A Correct.

Q And so Mr. Sussberg replies on August 7th, "Let us know if

you have a few minutes to discuss. Very concerned about what we're hearing from HBC per below. Would like to connect with Spencer directly too. We are in the wrong district for this ellipse." Do you see that?

A Yes.

Q Now, do you -- have you come to know why Mr. Sussberg thinks we're in the wrong district for this at this point?

A I think he was probably referring to an event that had transpired I think a few days before August 7th in the Neiman Marcus case.

Q Right. So this was immediately following what happened in Neiman Marcus, wasn't it?

A Could be, yeah.

Q And Mr. Sussberg was concerned that this was another situation just like that?

MR. SLADE: Objection. Lack of foundation, Your Honor.

THE WITNESS: Well, it definitely wasn't a situation --

THE COURT: Well, gentlemen, hold on. He can't possibly know what was in Sussberg's head when he sent this email, so I'll sustain the objection.

BY MR. OKIN:

Q Were you concerned this was a situation just like the Neiman Marcus case at the time?

A No, I wasn't.
Q Okay. And you say that after this -- after this -- I'll just call it "comment" by Mr. Sussberg, Spencer Haber or H/2 smoothed things over and you were able to convince HBC to come back?
A Again, I'm not sure that HBC ever really left, but they definitely were -- we received -- we received a new proposal from HBC on August 21st. We continued to talk to HBC throughout the latter part of August. We had phone calls with HBC on August 29th, as well as August 30th, I believe. There is no doubt that HBC was involved in a process right up until the end of August.
Q Okay.
MR. OKIN: Your Honor, while I'm thinking about it, I neglected to ask to admit Exhibit 23 before, and I'll go ahead and also -- 27 before. I'll go ahead and ask that we admit that and 27 -- 23, which we're looking at right now.
MR. SLADE: No objection, Your Honor.
THE COURT: All right. Hold on. Let me get these -- let me get this right. All right. So by agreement I will admit Exhibit 1762-1.
And the other was 1762-5. Correct, Mr. Okin?
I think you muted yourself maybe.
MR. OKIN: Let me check that again, Your Honor. Yes, that's correct.

THE COURT: All right. Thank you. So, just for clarity, by agreement I've admitted 1762-1, 1762-5.

(Equity Committee's Exhibits 1762-1 and 1762-5 admitted into evidence)

BY MR. OKIN:

Q So, Mr. Kurtz, I wanted to ask you about one more email. This is marked as Debtors' -- or Committee's Exhibit 69.

MR. OKIN: It is, Your Honor -- let me get the correct docket number. It is 1800-4.

THE COURT: Thank you.

THE WITNESS: 69?

MR. OKIN: 69, yes.

THE WITNESS: Okay. I'm with you.

BY MR. OKIN:

Q Now, Mr. Kurtz, let's just double-check, make sure we're on the right one. This is JCP0047681. Is that what you've got at the bottom of the page?

A Yes.

Q Okay. Now, this is an email from Mr. Sussberg to -- we'll call it the Milbank team -- Mr. Dunne, Mr. Leblanc and Mr. Reimer.

A Right.

Q And he copied you on this email when he sent it, correct?

A Yes.

Q And you received it?

A I have no reason to believe I didn't.
Q Okay. And you recall having read this email before?
A Well, I actually -- I read this email in the last day or so. I don't -- I actually don't remember reading it when it was written, but -- and I probably did.
Q You don't -- do you have any reason to believe you never received it?
A No, I have no reason to believe that.
MR. OKIN: I'm going to ask that this be admitted into evidence, Your Honor, Exhibit 69.
THE COURT: Any objection?
MR. SLADE: No objection, Your Honor.
THE COURT: All right. Then without objection, I'll admit Exhibit 1800-4.
(Equity Committee's Exhibit 1800-4 admitted into evidence)
BY MR. OKIN:
Q Now, Mr. Kurtz, Mr. Sussberg says here -- now, this was done -- this was written on August 19th. So this is nearly two weeks after the emails we just looked at, or 12 days?
A Uh-huh.
Q And Mr. Sussberg says, "Spencer has gone from working hard to disappearing. I understand that he refused to return David Simon's phone call, and that David Simon sent an email asking for a time, but Spencer has not responded. We just heard that Simon is officially out."

He then also says, "I also understand that HBC refuses to re-engage unless and until Spencer or D.B. calls them to walk back the threats that were made about litigation in a wholly separate case needing to be resolved in order for HBC to be in the game." Did I read that correctly?

A You did.

Q So at least 12 days later, Mr. Sussberg believed HBC was still out, right?

MR. SLADE: Objection. Lack of foundation.

THE WITNESS: Well, what he said is they refused to re-engage. All I can tell you is what the words say.

BY MR. OKIN:

Q Okay. Do you have any reason to disagree that they had already re-engaged and were participating in the process by then?

A Well, I think we were talking to HBC during this time. And while this issue -- I'm not saying that it completely went away, but -- you know, it's not like they weren't returning our phone calls. They were still talking to us. In fact, there was a phone call -- and just to finish -- there was a phone call with HBC on this day.

Q But Mr. Sussberg, at least, seems to be of the belief that Spencer Haber has to get involved and actually clear this up in order for them to participate, correct?

MR. SLADE: Your Honor, objection. Lack of

foundation.

THE WITNESS: I'm just reading the words, just like you are.

THE COURT: Yeah, Mr. Kurtz -- hold on.

I'm going to sustain the objection. Mr. Okin --

MR. OKIN: Actually, all I asked was --

THE COURT: No, you asked --

MR. OKIN: -- (audio interference)

THE COURT: You asked him an opinion about what was -- what Sussberg was thinking.

MR. OKIN: Okay.

BY MR. OKIN:

Q Do you have any reason to disagree that HBC would want to know that Spencer Haber was going to withdraw his threats regarding litigation in another case before they would participate?

A When I talked to Mr. Caplan on or about August 6th or August 7th, he said that to me. What he said to me was that Spencer's going to have to call Richard Baker -- Richard Baker is -- I think he's the CEO. He's the top guy at HBC -- and smooth this out.

But I was not -- I was not -- that's what he said to me at that point in time. But I was not sure at all whether that call had occurred or whether HBC was willing to engage or not, because we had had conversations with HBC. So I don't know

that I knew what the status was, the exact status as relates to this issue, with HBC, on this date.

What I can tell you is that I think on this date there was a call with HBC that Spencer participated in and this issue was addressed. So I don't know if Mr. -- if my understanding -- I didn't have a clear understanding as to whether they had reactivated, but still felt offended by it. You know, this comment. Or whether they were on ice.

What I can tell you is that there was a call on this day. Spencer was on it. He made clear to HBC that he wanted them in the deal. And they continued to engage.

Q Let me ask you one more question about this exhibit. It says here -- Ms. Sussberg -- he says "Kurtz," so I assume he's talking about you. He says, "As Kurtz pointed out to me this a.m., this is not Toys 'R' Us." What did you mean?

A What did he mean? Because I'm not the one who wrote this email.

Q Well, what did you mean when you -- did you say that to Mr. Sussberg? Let's start there then.

A What I said to Mr. Sussberg was that -- this company did not need to liquidate; and fortunately, hopefully, we're in the final stages, it will not. The U.S. operations of Toys "R" Us liquidated. I was involved in that case, financial advisor to the company, and Mr. Sussberg was the lawyer to the company. And unfortunately, there, we reached the conclusion that the

lenders -- the U.S. lenders' desire to liquidate that business was the only alternative available for the company. And sadly, we went forward and we led the way in terms of managing and orchestrating that litigation, because there was no alternative.

In J.C. Penney, there was an alternative -- there is an alternative. We're here today asking the Court to approve that alternative. And so the point I made to Mr. Sussberg was that we're going to continue fighting anybody who thinks that the right outcome here is to liquidate this company, because we don't believe it.

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

THE COURT: All right. Thank you.

Mr. Slade, any redirect?

MR. SLADE: No, Your Honor.

THE COURT: All right. Thank you.

Any reason Mr. Kurtz can't get on about his day?

All right. Mr. Kurtz, I thank you very much for your time today. You're free to go. You're also welcome to stay online, if you wish.

THE WITNESS: Great. Thank you, Your Honor.

THE COURT: Thank you, sir.

(Witness excused)

THE COURT: All right. Mr. Slade, who's next?

MR. SLADE: Your Honor, may we have a break? I'd

like to discuss with my colleagues whether we're going to call another witness at all.

THE COURT: Certainly. It is five o'clock. You want to say come back at 5:15, give everybody a chance to get up and walk around?

MR. SLADE: That will be great. Thank you, Judge.

THE COURT: All right. Thank you.

Then we'll be adjourned until 5:15.

(Recess taken at 4:56 p.m.)

(Proceedings resume at 5:14 p.m.)

THE COURT: You have us back up?

THE CLERK: Yes.

THE COURT: Okay. All right. Gentlemen, we are back on the record.

Mr. Slade, did you make a decision?

MR. SLADE: Yeah, we are going to call our last witness, Mr. Wafford, and Mr. Howell is going to present.

THE COURT: All right. Thank you.

Mr. Wafford, if you would please sir, raise your right hand.

BILL WAFFORD, DEBTORS' WITNESS, SWORN

THE WITNESS: Yes.

THE COURT: All right. Thank you.

All right. Oh, I'm sorry. Mr. Curry, did I -- did we miss something? I just saw Mr. Okin pop off and you pop on.

MR. CURRY: Just switching jobs, Your Honor.

THE COURT: Fair enough. Okay. I was worried something had happened. All right.

Mr. Howell, good afternoon, whenever you're ready.

MR. HOWELL: Good afternoon, Your Honor. Richard Howell on behalf of the debtors. Appreciate the time for the break. We utilized that to minimize any cumulative questions here and move through the witnesses as quickly as we can.

THE COURT: Thank you.

MR. HOWELL: Given the hour, and we certainly appreciate the Court's time today and Mr. Alonzo's work to apparently clear the 4:30 as well. So the magic continues. Thank you for that.

THE COURT: Good.

DIRECT EXAMINATION

BY MR. HOWELL:

Q Mr. Wafford, where are you employed?

A I'm with J.C. Penney.

Q How long have you been employed at J.C. Penney?

A I've been with J.C. Penney approximately a year and a half.

Q What is your position with J.C. Penney?

A I'm the chief financial officer.

Q Have you held any other positions since you joined J.C. Penney approximately a year and a half ago?

A No. I was hired to be the Chief Financial officer.
Q What are your general responsibilities as Chief Financial Officer for the company?
A Sure. I lead the financial activities of the organization. Financial planning, forecasting, treasury management and cash management. Comptrollership, general governance.
Q Are you generally familiar with the books and records of the company?
A Yes, I am.
Q Are you generally familiar with the capital structure of the company?
A Yes, I am.
Q Before we turn to the case specifically and the motion before the Court today, a little bit about your background. Where did you go to college, sir?
A I went to college at the University of California, Riverside.
Q What was your degree in?
A Economics.
Q Do you have any post-graduate degrees?
A Yes. I got my master's in business administration from Indiana University.
Q When did you get your MBA from Indiana University?
A In 2001.

Q Could you please describe for the Court at a high level, your work experience from the time that you got your MBA in 2001 until you joined J.C. Penney in 2019?

A Sure. After graduate school, I worked for Target Corporation. I led finance for the Men's and Women's Apparel Division of Target.

After Target, I went to a boutique consulting firm, Archstone Consulting; general management consulting there. I was there for about five years ago. I started as an associate and left as a principal there.

I moved from Archstone to join Walgreens Co. And with Walgreens, I led finance for the retail segment of the business. It was about $25 billion, %30 billion -- $30 billion then, the way they separated the P and L.

While I was with Walgreens, I was -- I led the finances of the retail business. I led international finance as part of our acquisition of Alliance Healthcare. And managed another base cap portfolio.

Once I left Walgreens, I joined KPMG as a partner in their advisory practice, primarily focusing on retail clients. After KPMG, I left KPMG to join the Vitamin Shoppe. And with Vitamin Shoppe, I had the roles of Senior Vice President of Strategy and Business Development as well as CFO. And I left Vitamin Shoppe to join J.C. Penney and become CFO here in 2019.

Q Around how many total years do you have of work experience

in finance?
A Roughly 15 years in finance, not counting my time in management consulting -- consulting focusing on management shifts for organizations.
Q And in that total professional career, approximately how much of that has been spent in what we broadly call the retail space?
A The vast majority.
Q Now, turning to when you came to J.C. Penney, how would you describe the financial condition that the company was in when you were hired in 2019?
A Yeah. J.C. Penney had a history of, I think, declining sales over the past several years, as well as a highly-leveraged company. So I think you could classify them as in, you know, in distress.
Q What steps did the company take to address that distress when you were hired in?
A A number of things. We created our plan for renewal and part of the plan for renewal had a number of initiatives in it. I think we launched it in late summer, early fall of 2019. It was really the plan to improve the operating financial performance of the organization. A number of initiates focused on revenue enhancement, gross margin improvement, cost production and an improvement in our capital structure. And that was part of the work that we kicked off with Lazard and

Kirkland during that summer.

Q When did the plan for renewal, as you described it; when did that kick off?

A I think we officially claimed it and rolled it out to the organization like late that summer of 2019, early fall. I don't remember the exact date.

Q Are there any long range plans that were part of the plan for renewal?

A Yes. We created -- our typical long range plan time horizon was a three-year plan. And so associated with the plan for renewal, we also had a three year LRP, which would have taken us from 2020, to 2021 and 2022.

Q When was the start time for that three year plan?

A Within year fiscal '20. And so that would have been in February of 2020.

Q So obviously there were some significant developments shortly after that plan of renewal went in to place. How did COVID impact the company's plan for renewal?

A Oh, I think COVID had a drastic impact on the plan for renewal and really put a stop to the business for a period of time. We went from operating 846 stores, the end of 2019, to closing all our stores in March and focusing only on our e-com business.

In addition, we furloughed the majority of the associates in the organization. Extended payment terms on all of our

suppliers. I would say that had a drastic impact on our ability to deliver on the plan for renewal.

Q And what was the company's ultimate response to Covid 19?

A We eventually -- based on work with our advisors and internal work with the teams and discussions with the board, we eventually were forced to file bankruptcy.

Q And as the CFO of the company, what was your understanding as to why the company ultimately filed for bankruptcy?

A It was really our inability to maintain as a going concern throughout the Covid pandemic.

Q Did the company consider other options besides bankruptcy?

A We considered all options. But the only option available to us to maintain as a going concern was filing bankruptcy.

Q How has bankruptcy impacted the company from -- that you've been able to observe in your position as CFO?

A Yeah. I believe it's had a number of impacts. Obviously impacts on our vendor base. I know it's been discussion -- you know, as well to the discussions earlier today with Mr. Kurtz, and Mr. Mesterharm and that obviously strains relations with our vendors and their inability to know if we're going to maintain as a going concern.

Obviously, it's had an impact on our associates. We've seen home office attrition this year since you know kind of the March period, at about 24 percent which is significantly higher than it would normally be in an average year. You know, a

substantial level of turnover. So then I would say, obviously the impact on our landlords, closing stores and having an adverse impact on the (indiscernible).

Q As you noted, there was significant testimony on this earlier today so I'm not going to belabor the point, Mr. Wafford, but I do want to ask you. You mentioned vendors. you mentioned your associates and you mentioned landlords. Taking those in turn, if -- in your position as CFO, do you believe that the sale that's before the Court today, if that's approved, that that will improve the relationships this company has with its vendors?

MR. CURRY: Objection, Your Honor. Foundation.

THE COURT: He's the CFO of the company. Overruled.

THE WITNESS: It's my understanding that it will improve our vendor relationships. We have vendors that have stopped shipping to us, or delayed shipments, are then waiting for us to emerge from bankruptcy and wanting assurances that we'll be a going concern. So yes, I think it will undoubtedly improve our relationships.

BY MR. HOWELL:

Q Do you believe, as the CFO of the company, that if the sale and transaction that's before the Court today, is approved, that it will improve relationships with the associates to an extent?

A I do. We've lost a number of associates recently because

of their uncertainty on J.C. Penney as a going concern. I think the ability to emerge from bankruptcy with -- we have a solid business plan and we feel like we have a, you know, a buyer of the organization, that will maintain, you know, kind of the integrity of J.C. Penney. We feel comfortable that our associates are going to stay with us as well.

Q You also mentioned landlords. How, if at all, do you believe as CFO of the company, that approval of the sale transaction would impact the relationship that the company has with its landlords?

A I think it's an incredibly positive impact. We're the anchored -- we're an anchor tenant in almost every mall that we're in. You know, unless we're a freestanding store. And so obviously, one of the things that's incredibly important for landlords to have anchor tenants that are driving traffic to their malls and that will obviously undoubtedly provide a benefit as well.

Q Now, you've heard some testimony earlier today, questions back and forth about something called the need for speed, meaning the need for the company to transact this sale transaction on this current proposed schedule. Do you recall hearing that testimony?

A Yes, I do.

Q In your view as the CFO of the company, is it important that the company finalize the sale now instead of waiting until

a confirmation hearing or later?

A I think it's incredibly important that we --

Q Why do you say that?

A For the reasons I just mentioned. You know, the relationships with our vendors, our associates, our landlords. And in addition, this is our most critical time of the year. We're a few weeks away from Black Friday and moving into the Christmas holidays. It is incredibly important for the -- for our customer base to ultimately see J.C. Penney is going to be a going concern. We've had a number of news stories that have had a detrimental impact on delayed timelines and things like that. And getting into the holiday season, we're not looking for our next headline to be that we've delayed the sale of the organization.

Q I'd like to briefly talk about the marketing process. Obviously we heard significant testimony already from Mr. Kurtz related to that, but did you have any role that you participated in the marketing process?

A Yes. Obviously there's -- the team put together a list of potential acquirers and targets. I obviously reviewed that list and think over 100 potential targets. Also had extensions -- extended discussions and presenting our business plan to potential acquirers as well as numerous due diligence discussions and follow ups especially with the pre-primary potential buyers that you know, emerged towards the end of the

process.

Q As an officer of the company, were you satisfied with Lazard's efforts that made up that marketing process?

A I was incredibly satisfied with their efforts. I believe that they exhausted all potential options to move forward and were able to find the option that was allowing J.C. Penney to move forward as a going concern.

Q Do you attend board meetings for the company, Mr. Wafford?

A I do. I attend all board meetings with the exception of any potential board only or executive sessions with only the board.

Q Generally speaking, was the board kept apprised of the marketing process?

A The board was kept apprised of all aspects of the bankruptcy. We obviously had multiple board meetings throughout this summer. Sometimes weekly. Sometimes a little less frequently. But they've been kept apprised of all aspects throughout the bankruptcy process.

Q Was one of the aspects that you're referring to -- well, let me just ask. Was the board kept apprised of the bids that did come in that we heard about from Simon Brookfield and HBC and Sycamore?

A Yes. Yes.

Q Did you discuss those bids with management and the company's advisors?

A Yes, they did. There was frequent discussion, questions and feedback from the board, at all meetings.

Q What about with respect to the minority 1L proposal? Was the board apprised of that proposal?

A Yes. The board -- we had discussions with the board on multiple occasions about the minority 1L proposal.

Q Did you have a preference with respect to which bidder would win here? Which bidder would ultimately get the deal here?

A No. My preference was to maximize enterprise value for J.C. Penney and ensure we maintained as a going concern.

Q And ultimately the company and the board supported the Simon and Brookfield deal, right?

A That is correct.

Q Did management provide recommendations to the board as to which -- as to whether or not to go forward with the Simon and Brookfield and 1L majority group deal?

A Management did recommend we move forward with (indiscernible).

Q Anyone besides management make a recommendation to go forward with that sale and process?

A I believe both Lazard and Kirkland and Ellis made the same recommendation.

Q Was it your view that the bid that ultimately won and is before the Court today, that this sale transaction was the

highest and best bid available to the company?
A And that was my -- that is my thinking, yes.
Q And why is that your thinking? What led to that?
A We ran a five-month marketing process. We presented the company to over 100 potential acquirers, and this was the highest and best value that arose from that.
Q Do you believe that it's in the company's best interest to go forward with the sale transaction today?
A I do.
Q Why do you think so?
A For a number of reasons. I believe it's in the best interest of our associates, of our vendors, of our landlords and our creditors to move forward with the process today. Because I believe it maximizes the most value and it also capitalizes on the opportunity to be out in front of the holiday season.
Q Are you familiar with any other option that would allow the company to go forward as a going concern?
A I know the Ad Hoc Equity Committee has proposed an option that we move forward with one of the restructuring plans, to move forward.
Q And do you have a view as to whether or not that's a viable path forward?
A My view is that that's not a viable path forward. It would --

Q Why do you say that?
A It would require us to pay off the DIP loan or get approval to reinstate the DIP loan, to get consent from the ABL Lenders to all of our first lien lenders, which I don't believe that they would consent to moving forward as something with other than the process, structure we have proposed today.
MR. HOWELL: I have nothing further, Your Honor. I can pass the witness.
THE COURT: All right. thank you.
Mr. Curry?
MR. CURRY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. CURRY:
Q Good afternoon, Mr. Wafford. Just --
A Good afternoon.
Q -- couple follow up questions here for you. Did the board consider any specific alternatives to the proposed sale?
A The board considered all alternatives that were presented to the company.
Q Were there any specific alternatives to this sale transaction presented to the board?
A I believe the 1L minority group transaction or the Akin group, as we've been calling it earlier was presented to the board.
Q And do you recall in the Aiken Group proposal that there

was a contingent [sic] that that offer would result in a higher and better recovery for certain classes of creditors? Were you aware of that allegation?

A There was an analysis presented that showed different recovery for first-lien lenders under that proposal, yes.

Q And do you recall -- did the board direct its advisors to pursue that transaction?

A I'm sorry, to pursue which transaction?

Q The Aiken alternative as we referred to it.

A Yes. The Board directed the advisors to pursue the transaction that could generate the most enterprise value for J.C. Penney.

Q Well, what is the enterprise value of the transaction that you're here in support of today?

A I believe the enterprise value is comprised of a number of things. Not only value for those, the acquirers, but the employment of our associates, greater trading power for our vendors, and creating rent for our landlords. That's in addition to any recovery creditors are getting, so I believe that's -- I would think of the enterprise value in totality.

Q So then sitting here today, you can't actually give us a measurable enterprise value?

A No, I cannot.

Q What about a measurable enterprise value that would have been assigned to the Aiken transaction?

A No, I cannot because they did not have an entire transaction to propose.

Q Mr. Wafford, do you know what -- what kind of recoveries will your creditors, other than the DIP lender or the first lien lenders get under the proposal that the proposed sale that you're asking the Court to approve today?

A A very limited recovery.

Q Do you know whether or not there are transactions that could result in better recoveries for any other creditors than the first lien lenders or the DIP lenders?

A We did not review a proposal that would have given better recovery for other - for other classes.

Q What about liquidation? Did you conduct a liquidation analysis?

A Nothing other than what was -- what you read in the disclosure statement.

Q So the company did not analyze whether or not a sale of the component parts of the company would result in a better recovery for its creditors?

A We did not.

Q And Mr. Wafford, you talked about the plan for renewal. And the plan for renewal included certain pro forma projections, correct?

A Correct.

Q And as part of your responsibilities as CFO, you reviewed

those and you agreed that those were accurate at the time that they were made?

A Yes. Those were put together with the best knowledge we had at the time.

Q And in fact, right around the time that the company filed for bankruptcy, those business projections, the pro forma projections, were actually include in a publicly filed SEC statement made by the company, correct?

A Correct. I believe they were.

Q And obviously the testimony you made earlier was that the Covid certainly had an impact on the plan for renewal. During the bankruptcy case, the lenders required the company to deliver a business plan, correct?

A That is correct.

Q And during this case, it's been testified that that business plan -- not here today, but previously. That the business plan was essentially the plan for renewal, modified for the impact of Covid. Would you agree with that assessment?

A I agree, by and large. The strategy and initiatives of the plan for renewal remained consistent. Obviously, we had a Covid impact that was layered across the financial plan that we put together, correct.

Q And the DIP loan that the debtors got in this case actually required the debtor to provide that business plan to the DIP lenders as part of the progression of this case,

correct?
A That is correct.
Q And there was a milestone by which the debtors had to provide that proposed business plan to the DIP lender in order to stay in compliance under the DIP loan, correct?
A Correct.
Q And in fact, the lender's approval of the business plan was also tied to whether or not the debtors could access the second draw. If I say second draw on the DIP loan, do you know what I'm talking about?
A Yes. I understand, yes.
Q Okay. And so it's correct that the DIP lenders' approval of the business plan was a prerequisite for the debtors having access to the second draw. Is that correct?
A That is correct.
Q And did the debtors meet their deadline, their milestone, for delivering a proposed business plan to the DIP lenders?
A We delivered the business plan early July. I don't remember the exact date and time but I believe we did.
Q So as far as you know, you didn't default under the DIP loan by missing the deadline, right?
A Correct.
Q Okay. And have the DIP lenders ever approved the business plan?
A They have not approved or rejected the plan.

Q So as we sit here today, the debtors do not have access and have never had access to the second draw, correct?
A That is correct.
Q That business plan that was delivered in or around the first week of July, that also included some updated pro forma projections, correct?
A It did. It went through 2024. It had an updated store count and pro forma projections, correct.
Q And you were involved and you reviewed those projections, and you agreed that they were accurate based on -- as best as they could be, based on the information you had at the time?
A When those were put together with the information we had at the time, correct.
Q And you're aware that through -- that during this case, the business plan including those pro forma projections, the revised pro forma projections, have been filed in a subsequent 8-K statement, SEC document filing by the debtors?
A Yes. I'm aware.
Q And today, have the debtors issued any sort of statement modifying or changing those projections that were included in that business plan?
A No. We have not modified or changed those projections as of today.

MR. CURRY: Your Honor, I pass the witness.

THE COURT: All right. Thank you.

Mr. Howell, any redirect for Mr. Wafford?

MR. HOWELL: No, thank you, Your Honor.

THE COURT: All right. Thank you. Any reason Mr. Wafford cannot be excused?

All right. Mr. Wafford, thank you, sir. You're free to go. You're also free to stay on the line and observe.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you, sir.

(Witness excused)

THE COURT: All right. Mr. Howell, is that -- oops, I lost Mr. Howell.

MR. HOWELL: I'm back.

THE COURT: Got it.

MR. HOWELL: Sorry, Your Honor.

THE COURT: So, do I understand that that concludes the debtors' evidentiary presentation?

MR. HOWELL: Yes, Your Honor. Nothing further except for reserving obviously to cross-examine any witnesses called by the Committee.

THE COURT: Of course.

All right. Mr. Okin, do you intend on calling a witness?

MR. OKIN: I do, Your Honor. I intend to call Mr. Snyder.

THE COURT: All right. And is Mr. Snyder going to

appear?

MR. OKIN: He is. He should be appearing here any second.

THE COURT: Got it.

MR. OKIN: There he is.

THE COURT: Ah. There he is. Mr. Snyder, could you confirm for me that you can hear me and that we can hear you?

MR. SNYDER: Yes, Your Honor. I can hear you fine. Thank you.

THE COURT: All right. Thank you. If you would, please, sir, if you would raise your right hand.

WILLIAM SNYDER, COMMITTEE'S WITNESS, SWORN

THE WITNESS: I do.

THE COURT: All right. Thank you, sir.

Mr. Okin, whenever you're ready.

MR. OKIN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. OKIN:

Q Mr. Snyder, will you please just state your full name and introduce yourself?

A William Snyder.

Q And where do you work?

A So I'm a partner at CR3 Partners, based in Dallas.

Q And what does CR3 Partners do?

A We're basically a boutique turnaround firm. Do primarily

middle market work, some larger clients too. Primarily also in the debtor space.

Q And all in the restructuring area?

A Yes.

Q And just give the Court, if you would, a very brief overview of your educational background.

A Okay. Well, I graduated from Texas A&M, a long time ago,'81. And then I got a turnaround business in '89, and with Buccino, and then was on my own for a while. Then I helped start Crossroads Capital Partners in '77 and then we started -- 1997. We started CRP, the original CR series in 2001, and then merged with another firm. Sold the whole thing to Deloitte in 2012. We had a nice liquidity event.

Then Deloitte didn't really want to be in that CRO space. So we left in 2016 and formed CR3 Partners. So I've been in the business about 32 years.

Q So and during that time, you've primarily worked with troubled companies and restructurings in and out of court?

A That's correct.

Q What else besides the work that you do -- what else do you do in the restructuring industry?

A So I mean, we primarily do -- our number one thing we do is CRO work. I mean, that's probably the bulk of our work. We also do debtor advisory. We do some creditor advisory work. And we also do a little bit of lit support, and you know, just

based -- the bulk of our business, the nuts and bolts, is CRO work.

Q Well, I'm actually also -- what about you personally outside of working at CR3? What else do you do in the restructuring or bankruptcy space? Any organizations or professional --

A Oh yes. Yes, so I am, you know, I'm a member of the ABI and TMA. I've sat on committees at the ABI. I've sat on committees of TMA. I've been - I've hosted conferences. I speak frequently. I'm a fellow at the College and you know, work, you know practically in the industry quite a bit on -- as a matter of fact, our group of us wrote probably over half the body and knowledge for the TMA for their CPT program. So, trying to contribute back to the industry in addition to billing hours.

Q You said you're a fellow at the college. What college is that?

A Oh. American College of Bankruptcy. Fifth Circuit.

Q Okay. So, you've mentioned CRO work, considerably. Can you just give the Court some examples of various CRO engagements that you've had over the years?

A I've been in a lot of them. I think some of the most notable work I've done. I was in one of the, you know, most prominent ones, I was CRO of the Texas Rangers. Took them to the World Series. That was cool.

Q Did you personally took them to the World Series?
A Yeah. I was -- I was signing their paychecks when they did it, but they lost so I won't take credit for it. And then I also was an examiner at Mirant. Been an examiner several times (indiscernible) some other cases. And been CRO. Right now, I'm CRO of (indiscernible). We just filed two weeks ago. I'm the CRO there.
Q Okay. Well, let's first talk about Mirant then. What was your experience in Mirant?
A So I was the examiner and then I became an examiner with expanded powers. Ended up working on a lot of different issues for Judge Lynn. And then we got into a huge evaluation fight. This was a 27day trial. And it ended up, I think, with the value -- everybody was using the exact same data and came up with evaluations of between $4 and $13 billion, all using the same data.

And so, the Judge formed an evaluation committee. I was the chairman of that committee. And we were working on a - on a evaluation to give to the Court when we ended up settling the case. So we never issued the report.
Q What was the result of the Mirant case?
A Well, Mirant was -- was a huge success. You know, it had $13 billion in claims; they were trading on the cents of a dollar and that ended up being a 100 cent case. So Mirant was a -- was a success.

Q So talk to us a little bit about Pilgrim's Pride.

A So Pilgrim's Pride was a chicken producer, $8 billion company that filed for bankruptcy in 2008, right after Lehman, if you remember we had that giant recession. And it reminds me a lot of what we're dealing with today, right? You couldn't get money. The markets were frozen. And Pilgrim's Pride was in a death spiral. They had lost $350 million. They could not -- they filed for bankruptcy and I was the CRO.

I'd only been hired a few weeks prior to filing. And so, sort of scrambled. And anyway, that case, like I said, had a lot of parallels to this case. Just, for instance, all of our -- all of our securities were trading on pennies on the dollar. Our stock had fallen to 18 cents. We -- our DIP -- we had a $450 million DIP. We drew almost 300 million of it within three weeks. The banks were -- the banks were in a tizzy.

We had to perform a liquidation analysis which was a problem because we had 350 million chickens we had to kill in the liquidation analysis, which was a huge environmental hazard, trying to bury that many birds. And --

Q You didn't actually kill the chickens, right?

A Yeah, well --

Q In the liquidation.

A Well, we had to -- in the liquidation analysis. We were going to kill them anyway but we had to kill them faster.

Q But it was a theoretical killing of chickens.
A Yeah, oh yeah. I'm sorry. No, it was a theoretical kill. And it was -- the liquidation was a horrible, horrible outcome. So we looked at a sale. We had seven plants. We put them up for sale. Actually Lazard was our advisor in that case. And the bids that we got in were less than liquidation value.

So -- so the next thing we looked at was a reorganization. We couldn't liquidate. We couldn't sell. And we ended up firing most of the management team.

I went and hired an awesome president. We put together a turnaround plan, just like this management team has at J.C. Penney has done a great job and we made a lot of hard decisions. We fired 14,000 people. We shut down 1,000 farmers. We cut $500 million of expenses. Made a lot of really painful, painful decisions, but we started making money and generating money in the bankruptcy. And -- and we proposed a plan in that -- in that case. And that's how we ended up reemerging, rather than selling or liquidating.

Q Was your decision to go with the plan a popular decision?
A Well, -- well it was -- at first, it was everybody was fraught with fear. You know, because of the whole discouraged; we were trading in the pennies. And I think there was a lot of trepidation.

But the turnaround plan started to work and so we started generating cash. All of those cuts --all of that stuff started

coming in. And once we started generating money and we proposed a plan, our securities all started trading up, you know. And we finally convinced somebody to buy our bonds for the debt conversions. We ended up converting our unsecured bonds to equity and coming out.

Q Did equity ever return in that case?

A We did. Initially I think it was $3 to $4 a share that came up and went -- it went on up to $22 a share.

Q Let's talk a little bit about this case. When did you first get involved in the J.C. Penney case?

A It was -- June 15th, right around that time frame.

Q And you were contacted by the Equity Committee?

A Yes. I was.

Q And do you recall what the initial scope of your representation was supposed to be?

A Well, you know, we were working on a shoestring. So basically to evaluate the liquidity, evaluate the business plan, evaluate restructuring options, and then -- and also to see if there's any possible outcome where equity would be in the money. So we did -- we started on all that work immediately.

Q And when you started that work, what did you do to begin to reach your conclusions on that? What did you look at? Who did you talk to?

A Well, we looked at data. I'm going to say this debtor has

been very, very cooperative. Okay. They have an extensive data room. Alex has bent over backwards to get us data and Mr. Weiss has been just --

Q Mr. Weiss at the (indiscernible)?

A Yes. Yes. He's been -- he's been very, very cooperative. FTI at the Unsecured Creditors' Committee was very helpful. So, we were provided access to the data room. There are thousands and thousands and thousands of documents in there. And - and so, all of that was made available to us. And I must say, a lot of professionals were readily available for phone calls. So, I'm -- I'm -- I think the debtor gets big kudos for that.

Q So who did you talk to specifically? Or what -- you can give us categories, not individual names.

A Oh well -- so I mean, we -- we also spoke -- we also were offered to talk to Cushman and Wakefield. So we spoke to Cushman and Wakefield, the appraisers. And -- and we also -- they arranged a management interview session, that Alex arranged for the management to go through their business plan with us and the Unsecured Creditors' Committee. So they made that available also.

Q Is there information that you think you could have used that you didn't have available to you?

A Well, I don't know -- you know, you always ask for too much. But yeah, no, generally we got mostly what we needed.

Some of the information was a little confusing, but we generally got everything we wanted.

Q So once you got access to all of that information, explain for the Court what type of analysis and work you then did to carry out this initial (indiscernible)?

A Well, the first thing I did was try and figure out if this -- how fast this company was going to die if it was going to die. Because the reorganization -- remember this was June, and they'd only opened up recently. And trying to get a handle on their cash flow and the current cash flow, and I was amazed that in June, the company actually made money. You know, J.C. Penney, months after it filed, actually on a -- on a -- on the filing with the Court, made money.

So I was just -- I was incredibly surprised how fast that management team was able to react and how proactive they were and get that company generating cash immediately. Immediately, they turned the corner, and started generating money.

And then I looked at their business plan they filed in May. It was updated in July. But I looked at the business plan and they were returning to historical EBITDAS back within three years.

And the other thing, J.C. Penney is a cash machine. J.C. Penney makes over $300 million on their credit cards. They make almost $300 million on their online business. They don't have to make money at the store's. They can just break even at

the stores, and they make $600 million a year.

So looking at these numbers and poked on them, and poked on them with the management team, and saying, you know, is this really real? You know, I'm -- this sixth -- so it's not -- they are a retailer but they have a private brand that they're a finance company. They're also a finance company. They have a -- they're -- they have a private credit card. They generate hundreds of millions of dollars out of that. And they have an online business that's a 1.4 billion and growing and it generates over $300 million a year and growing. So that -- if that was a standalone company, just their online business, would be worth a lot of money,

So I quickly was able to just discern that there was actually something here. It did not appear to be to be hopelessly insolvent. Right? I mean, I'm looking at the company. By the end -- by the end of June, they had generated $900 million. $900 million, before they even said there's a second draw. And they were positive cash flow. And they were positive income statement and they had a business plan that made sense. I'm looking at this as a CRO and drooling. I mean, how many times do you get a client like that?

So I quickly came to the conclusion that there was actually something here that could be reorganized.

Q So what did you do when you saw those cash flows? What was your next step in the process of analyzing this?

A Well, the big thing was trying to watch the debtor possess that second draw. Because I think we all figured if they made the second draw, they were going to reorganize. Because why would you borrow $225 million if you were going to go for a sale, you could only access 50 of it?

So, you know, if you're going use good business logic, you wouldn't -- if they were going to draw the 225, they were going to reorganize.

So I think in the Ad Hoc Committee and myself, we had high hopes, very high hopes, if they made that draw. Remember we'd only been there three weeks. If they made the draw, they would reorganize. And there would be hope that they, you know, with this plan, the equity might get some tip or something.

So, the general feeling -- I'll be honest with you -- after the first three weeks, talking to the Ad Hoc Committee, there was a general good feeling that this company had good prospects and drawing the second thing, the second draw, meant that they were going to go towards the reorganization. That was the general feeling.

Q So did you do any work to try to put some sort of a value on what you were seeing?

A Well, I did. I'm not an valuation expert but you know, I do -- as a CRO, you know, we work with Lazard and Houlihan and everybody. We generally make the projections for them, right? And are familiar with DCF and other kinds of ways of value,

EBITDA multiples and costs.

So we're -- and we're working on a shoestring here. $4 million, right? Between you and me, and I think you got more than I did. So you know, we're working on a really small shoestring, trying to figure out what the values would be. And so, just sort of taking a look at the cash flows and EBITDA multiples --

MR. SLADE: Your Honor, objection. Your Honor --

THE WITNESS: Trying to figure that.

THE COURT: Yes. Mr. Snyder, hold on, please.

Mr. Slade?

MR. SLADE: Yeah. I hate to interrupt but I do want to object to the extent he's going to provide valuation testimony given that he just admitted that he's not a valuation expert.

THE COURT: So --

MR. SLADE: I would ask for voir dire on that topic if he's going to do that.

THE COURT: Let's -- let's try to keep because I gave this -- I think I've been consistent. Let's try to keep the answers to the questions actually asked. And keep the, you know, keep the commentary to a minimum.

Mr. Okin?

MR. OKIN: Thank you, Your Honor.

BY MR. OKIN:

Q So Mr. Snyder, did you do any back of the envelope calculations? I don't need you to explain to the Court what your conclusion of a dollar value was, but did you do any work along these lines?

A Yeah, we did some back of the envelope calculations, yes.

Q What do you think -- what would those have been? What type of calculations did you do?

A Well, you know, we approached it several ways.

MR. SLADE: I object. Your Honor. Your Honor, I object. If he doesn't have expertise in valuation, I don't think it's appropriate for him to testify as an expert on it.

THE COURT: Well, I mean, I've known

MR. OKIN: Your Honor --

THE COURT: No, Mr. Okin, just hold on. I've known Mr. Snyder for probably close to 30 years. And there are a lot of people who aren't experts who can do DCF calculations.

And I'm not taking -- he's not going to tell me what he concluded, because I'm not going to hear it. Because you're right. He's not a valuation expert. But CROs all the time do back of the envelope calculations because it helps their decision making. And so I'm interested to hear that.

Mr. Okin, I better not hear a question about what did you conclude the value was, given the leeway I'm giving you. But I understand where you're going with this. I'm going to overrule the objection. Go ahead.

MR. OKIN: Thank you, Your Honor.

BY MR. OKIN:

Q Mr. Snyder, so explain to the Court what type of calculations and work you did.

A Well, there's just basically three ways to approach this thing, right, because we're in the middle of a pandemic, so we really didn't do a transactional analysis, right? I threw that out. And the comps -- a lot of the -- like, some of our comps aren't bankruptcy. You know, like, Neiman Marcus and others, so just focused on the future cash flow of the business.

We also looked at just the liquidation value. Like, what's the value of the assets as a going concern? What if we could sell the stores as a going concern? What if the inventory was sold as a going concern? So part of it was just looking at the component pieces of the company. Just, you know, what is -- what does everybody think it's worth? What's the info worth? What's the -- you know, what's the value of the real estate? So part of that analysis was just the going concern value of the assets.

Q Okay. The first thing you mentioned was looking at the cash flows. And what did you do to value the cash flows?

A Well, I don't want to get out of line here, but --

Q I'm not asking you for a number.

A No, I --

Q But you can tell the Court what you did.

A We took the debtors' -- debtors' projections and we did a, you know, fairly simple cash -- discounted cash flow. That's what we did, both in perpetuity and in, you know -- in EBITDA multiples. We did both of those.

Q And why do you think that was a valid way to look to see if there was something there of value?

A Well, it's just common. I mean, that's sort of what he does. Right? I mean, you look at -- that's what you do. You look at the value -- liquidation value of assets, look at the value of the cash flow and the value of the earnings, and sort of other transactions, try to come and see where you are, you know.

Q And after you did all of these analyses, what was your conclusion about whether or not this company should survive?

A I think that the company's viable.

Q And what was your conclusion about whether or not -- well, let's move on from there.

So you had mentioned at first the company's overall profitability in bankruptcy. What did you do in order to determine whether it was profitable in bankruptcy?

A Well, we're really look at cash flow, right? And so we're really looking at the MORs and also the cash flows that the debtor produces. They have a weekly cash flow. And they do a budget to actual. And then we also looked at the MORs that were filed. And we also look at the 8-Ks. Right? This is a

public company, so they file 8-Ks and we read those too, so --

Q All right. Well, let's start with the MORs. When you looked at the MORs, I mean, did you just look at one MOR? What analysis did you do?

A Well, they do them every month, right? So I mean, every -- there's a lot of good data in there. The MORs, especially on checking accounts, what the cash is, and all that. And so you know, they filed it as some of the more current data you get on a -- on a -- you know, on a rolled-up basis. So we did look at the MORs to see where their cash flows, and on an operating basis, where they're generating money. So on an MORs -- on an operating basis, are they generating money or not. So we were looking at that.

MR. OKIN: So, Your Honor, could I have the control of the screen?

MR. SLADE: I have another objection. I apologize.

Your Honor, I would like to lodge an objection that these opinions were not disclosed. I mean, the opinions that were disclosed for Mr. Snyder were valuation opinions and an opinion about this restructuring alternative discussed at length today.

THE COURT: Right.

MR. SLADE: Discussion about profitability during the course of the case was never disclosed.

MR. OKIN: Your Honor, it was a big part of

Mr. Snyder's report that was part of his declaration that was filed in support of our objection that this company was cash-flowing positive and was profitable -- most of the exhibits we're going to show were in that report. There's one that we're going to right now is just a compilation of numbers off of the debtors' own MORs. There's no calculation -- almost no calculation involved whatsoever.

THE COURT: Yeah. So Mr. Slade, help me understand what the objection is.

MR. SLADE: The objection is that if this is an expert opinion, it was not disclosed prior to the hearing today.

THE COURT: So fair enough, and I do not believe that Mr. Snyder is being offered as to give an expert opinion on profitability. What he's doing, at least best I can tell -- and it is a bit unusual, is that he's simply laying the groundwork of the things he did so he tries to give credibility to the plan that Mr. Okin's ultimately going to get to.

Mr. Okin, am I missing what you're doing?

MR. OKIN: Your Honor, I'm not even sure I need to do it. You seem to know exactly where I'm going anyway.

THE COURT: So let me make you the presenter.

So first of all, Mr. Slade, I'll overrule the objection.

And Mr. Okin, I've given you the presenter role.

MR. OKIN: Okay. Thank you, Your Honor. Let me -- all right. That's set. Is that visible?

THE WITNESS: Yeah. Let me --

BY MR. OKIN:

Q And what I'm showing you, Mr. Snyder, is the Committee's Exhibit 64, and I know you have a notebook in front of you that has the exhibits in there if that would make it easier for you to --

A Yeah. That's a really small font, but I -- I have the notebook here.

Q So, Mr. Snyder, is this a document that you or somebody working for you created?

A Yes.

MR. OKIN: And Your Honor, I know you can see it on the screen, but just for the record, this is Document 1757-65.

THE COURT: All right.

BY MR. OKIN:

Q And explain how this was created. I know we've talked about it a little bit already, but just --

A Well --

Q -- if you could explain how you did it.

A -- if you -- everything on this is really just a compilation of the MORs, right? So it shows May, June, July, August, September MORs down to the net income loss line. And then the only calculation on here is we added back

restructuring costs, reorganization costs, and the pension just to show what the operations from -- what they're doing it at the store level and on the -- you know, the online business, just trying to understand what they're doing on a operating basis. Right?

And so that's what this does. It shows, you know, the individual month and then it shows the cumulative cash flow from operations from May through the end of September.

Q And will this help you to be able to explain part of the basis for your opinion in this case?

A Yes.

MR. OKIN: Your Honor, we'd offer Exhibit 64.

THE COURT: Mr. Slade, any objection?

MR. SLADE: Yeah, I mean -- yeah. I do have an objection, Your Honor.

THE COURT: Okay.

MR. SLADE: I'm not sure what the foundation for the exhibit is. If it's a summary, there's no citation as to what it's summarizing, and I would object.

THE COURT: Mr. Okin?

MR. OKIN: Your Honor, Mr. Snyder testified it's directly off of the debtors' own MORs. It's true it doesn't cite them, but I don't think it has to actually cite the document that it's compiling.

THE COURT: I agree.

MR. OKIN: It's accurate, and it's helpful.

THE COURT: So let me go through this. I agree that it doesn't have to cite where it came from, but let me first ask, are you offering this as a summary?

MR. OKIN: Yes, Your Honor.

THE COURT: So doesn't the rule require you to have all of the documents from which the summary was created available in the courtroom?

MR. OKIN: That's a little tricky, Your Honor, since we're not all in the same place, but it is -- they all are on the docket; and if Mr. Slade needs the cites to the docket for each of the documents, we can provide that.

THE COURT: So what I'm going to do is -- I am not going to admit this document at this point for the truth of the matter asserted.

I'm going to admit it for the limited purpose of being a document that Mr. Snyder created and relied upon in his role as a professional on behalf of the Committee.

(Equity Committee's Exhibit 1757-65 admitted into evidence)

MR. OKIN: Okay, Your Honor.

BY MR. OKIN:

Q And Mr. Snyder, can you explain what you were trying to accomplish by creating this document and what it shows?

A Well -- by the way, this shows the September MOR. They're

all on there. If you realize that, they roll on forward.

MR. OKIN: That's true, Your Honor. The September MOR -- Mr. Snyder makes a good point. The September MOR is one of our exhibits, and it does contain all of this information. We don't actually need all five MORs.

THE COURT: I gave you an opportunity to tell me that, and you didn't, so we're --

MR. OKIN: I should have let --

THE COURT: -- going to proceed ahead.

MR. OKIN: -- Mr. Snyder argue it.

THE COURT: Perhaps.

MR. OKIN: That's fine, Your Honor. I think we're fine with where we are.

THE COURT: All right.

BY MR. OKIN:

Q So Mr. Snyder, if you could explain what this helps you to conclude.

A Well, we're trying just to determine the viability of the company, right? Is it generating cash or not from operations? And the MOR is one of the better things to look at because they -- it's cash based. Right? And the MORs are cash based, and they have -- list all the checking accounts and everything's going through there. So the MORs are one of the more reliable documents you can look at in a bankruptcy, you know, to verify cash, uses of cash, and how it's (audio interference) --

THE COURT: So Mr. Snyder, let me -- I want to understand. It is your testimony here today under oath that an MOR is entirely cash based?

THE WITNESS: Not always.

THE COURT: How about --

THE WITNESS: It doesn't --

THE COURT: -- never?

THE WITNESS: No. They -- they're not always cash based. They -- but, as you can see, this MOR does include depreciation, amortization -- but the MORs always tie the cash out to the --

THE COURT: I'm actually not looking at an MOR.

So, Mr. Okin, go ahead.

MR. OKIN: Okay.

BY MR. OKIN:

Q So, Mr. Snyder, what ultimately is your conclusion from looking at the MORs with regard to debt?

A The company's generating cash on an operating basis. It's that simple. That's what -- I mean, it's -- that's all I'm trying to -- I'm looking at, trying -- are we generating cash or not? Is this company driving off a cliff?

Q And just to explain -- follow up on the judge's question, and I think you started there, what are you doing to get to cash from these MOR numbers that you're compiling here?

A Okay. Well, we used these and also the cash flow

projections, trying to estimate where the cash is going to be during the case. Right? In other words, where is the cash going? How much are you going to have? And what's available to the debtor to use? In other -- what can the debtor do with this cash? Because if you're looking at a reorganization opportunities, you're trying to determine, you know, what kind of cash you're going to need to get out and how much you're going to consume and what you need for closing. So the MORs are very valuable for that.

Q And so what are you backing out of your calculation here?

A Well, that's -- what we back out is the depreciation and amortization. We back out the reorganization. And we back out the pension expense, because the pension, as you know, they kicked over to the PBGC, and it's generally -- a lot of this is non-cash adjustments to the pension. Or -- or their profits, and they don't have to do with operations. You know, they have to do with funding the pension plan or unfunding it.

They actually took $92 million out of it, I think, on that one month. So -- but that doesn't have to do with -- that doesn't have to do with operations, so I backed that out.

I'm just trying to figure out what they're doing at the store level and on the online business.

Q And so what are the numbers that you come to and what does it tell you?

A On that four and a half months, they generated about

$113 million from operations.

Q Okay.

A And that would be from the income statement. Okay. That's -- this is an income statement, by and large.

Q Now, did you -- you keep mentioning the analysis of cash. What did you do to try to look more specifically at the debtors' cash flows throughout this case?

A Well, one of the things is seeing how they're performing, right? So they had a budget, and then they had a final DIP budget. So how are they doing the cash on the line items and where are they generating cash. And so in addition to looking at the MORs, we're also looking at the cash flows that have been filed, the DIP, and then also the debtors' budget to actual. So we did that analysis too, trying to look at line items in more detail of where they're making money -- or -- or where they're, you know, missing their budget or losing and trying to understand how well they're forecasting. And so we did that analysis too.

Q And when you say you did that analysis, what did you (audio interference) --

A Well, we created a summary where we took their -- we had laid in their budget -- their initial DIP budget and the updated DIP budget that was -- the final DIP budget that was attached, and then we compared it to their actuals that they posted in the data room.

Q Okay. So I'm going to show you another exhibit. This the Committee's Exhibit 6. It's Docket Number 1757-7. I'll move this down a little bit.

Is this a chart that you or someone working for you created?

A What number is this?

Q It's Exhibit 6.

A 6. Okay. Yes.

Yes. So this is just a -- basically a summary of -- of the -- of the two budgets, the initial one that was filed on 5/15 and then the final order that was filed on 6/3 and -- this a roll-up through October the 3rd. That's when the budget ended. And it shows, by line item, how they performed, you know, in sales, expenses, and non-operating disbursements. So this is -- and then the flow of cash.

Q All right. And let's start, though, first with where the information comes from. You said it comes from the DIP budget. Can we tell from looking at this which specific budget and where we would find those budgets that it came from?

A Yes. So the one on the left, the blue one, that's the Docket Number 108. That's the budget from 5/15, when they first filed. And then the final order DIP budget is -- shows the Docket Number 513-6. That's the final one that was issued in June.

Q Okay. And then that's the budget line. Where do the

actuals come from?

A So those come from the data room that the -- the debtor -- they track that every week and post it, and we track it too. So we put in the actuals out of the data room compared to the budget that (audio interference).

Q This is debtors' own reports showing how they did as compared to the budget?

A Yes.

Q And all the categories that are shown on here are just the debtors' own budget categories?

A These are their exact line items off of their report. We didn't add any line items.

Q Okay. And would walking the Court through this calculation you did be helpful to showing the Court -- or explaining the Court your opinions in this case?

A Well, it's just that -- you know, you've got to give the management some credit. So they beat their sales here. They beat their sales, their collections by $279 million, right? And that's -- that's amazing, you know, considering they were shut down. And I know they're down 40 percent and their online business has not been growing like they thought, but still, they managed to beat what they thought.

They -- and they've managed -- they spent $468 million less than they thought. Now, this is an important number. On Number 3, you can see on the domestic merchandise vendors --

remember they kept talking about that? They were going to spend $767 million, and they ended up spending $881 million, so they -- they bought $114 more million on a domestic basis, but they were unable to get $222 million on a foreign basis.

So remember they were saying that is an issue, that -- so they under-bought their inventory by a hundred million, and I -- I don't know what the impact of that is. They have a billion -- at this point, they had a billion-eight in inventory, and they're short a hundred million. But they testified before that they did -- they could not get material, and this validates what they said.

Q Okay. And then --

A This -- this report validates they came up short about a hundred million.

Q Okay. And you understand the distinction that Mr. Mesterharm was making in his testimony between the spending and the actual receipt of the inventory?

A Yes.

Q And so you can't tell from looking at this one way or the other whether this is prepayment or payment on delivery or payment after delivery?

A No. But he did testify that -- I think in his declaration that about 80 -- 70 to 80 percent of this was CIA/COD. So you know, I would think it's pretty contemporaneous.

Q Okay. So let's work through this a little logically.

When you compare the debtors' budget amount to the actual receipt amount, what do you see?

A Well, they have collected more than they thought; and they have spent, you know, $468 million less than they thought they were going to spend.

Q Well, let's focus on the receipts first. So you said they collected more than they thought. How much more from their initial budget when they first filed the case have they collected than they anticipated?

And again, let's just be clear -- let me back up before you answer that question. What day is this added up? When does this run through?

A It's through October 3rd.

Q Okay. So we still have another month and a week of operations that are not reflected in this report?

A Yes.

Q Okay. Now, for the portion that's reflected in this report, how much ahead of their initial budget are they on their receipts?

A Okay. Now, you're focusing on the DIP budget from 5/15. That's where your graphs --

Q Correct. Yeah.

A Okay. So -- but they did update it. So the first one, they're $700 million ahead of that.

Q Right. And then -- so the final budget, how much are they

ahead?
A About 279. So they did upgrade this budget, because they were doing better. They even beat that.
Q Okay. Now, the reason they're ahead on cash is not only because of the increased receipts, right?
A Right. No. They -- they do say -- so $100 million dollars of this $800 million -- well, it's -- 279 is because they just sold more merchandise than they thought.
Q Right. Now -- but what else accounts for the total amount that they're ahead on their budget?
A Well, then the rest is just spending less money.
Q Okay. So how much less than their initial budget did they actually spend through October 3rd?
A $141 million.
Q And when they updated their budget at the time of the final DIP order, how much did they outperform that final budget by as of October 3rd?
A $468 million.
Q So they spent $468 million less than they had budgeted?
A Yes.
Q And so what is the grand total of save -- or additional cash generated as compared to their initial budget, the original budget?
A Well, so their original budget is $888 million less, and then -- I mean, the total, you know, gain in cash; and then on

the reorg -- on the updated budget, $803 million.
Q Okay. So from the final budget, the updated one they did at the time of the final approval, they're ahead -- by $803 million?
A Yes.
Q So I want to go back to your discussion of the look at liquidation values. What did you do -- did you do a traditional Chapter 7 liquidation analysis of this debtor?
A No.
Q Have you ever seen one that anybody's prepared for this debtor?
A No.
Q So you didn't perform that as part of your engagement?
A No.
Q What did you do?
A I just did a -- basically a compilation of the value of the assets of the going concern, you know, based on third-party -- you know, a bunch of third-party reports.
Q So was the work that you did intended to show what the debtor was worth shut down and sold off for parts?
A No.
Q What is it supposed to show?
A Well, it's just another indicator of going concern value. Right? If you can get an appraisal for going concern profit, that's just another data point you have. I have from my -- I

go to them and say, hey, listen, the sum of the parts of this thing, you know, forgetting about the cash flows and whatever -- futures, that's one -- another data point of what do third parties think this is worth. And you do that a lot when you're a CRO. You're looking at appraisals on inventory, real estate, you know. It's a pretty common thing to do.

Q Okay. So I'm going to show you what we've marked as Exhibit 63. It's Docket Number 1771-0. Is this a document that you or somebody working for you created?

A Yes.

Q And this is --

ELECTRONIC VOICE: Our system will end this conference in five minutes. To extend this call for one hour -- please enter the -- your conference has been extended for 60 minutes.

BY MR. OKIN:

Q I'm trying to walk you -- will this help you explain the analysis that you did to the Court?

A Yes.

Q So I want to walk you through the sum of the parts that you looked at. So the first one you looked at, I guess, as it shows in here, is cash and cash equivalents. What was your -- what number did you use for that?

A Okay. So we have a -- it's another set, but we have a walkthrough, right, where we have the actual cash and the

debtors' own budgets that walk you to December the 5th, which -- that's what we put in here as the confirmation date, right? And so we have -- we take the, you know -- the 8-K, which shows what the actual cash is, and then overlay the -- the debtors' latest budget. And -- and it rolls up to on December 5th, about a -- a billion-three, four, three.

Q Okay. And that's cash across the whole system, easily available or in a cash drawer in Des Moines, Iowa?

A Well, it's not all easily available. It's all in the system, right?

Q Right.

A Whether it's in a cash drawer or it's in escrow, whether it's -- it's held by, you know, the DIP lenders and -- and so I would not say it's easily available. That's the total cash in the system.

Q Okay. And then your next number is adjusted gross inventory. What's your number and where'd you come up with it?

A Okay. So on here, we had to rely on the borrowing base that they publish, you know, the -- the bank -- for the bank. The banks have a liquidation value of 101 percent. You realize this is the inventory at cost, so it's generally marked up two times, right? So if you buy something with a 50 percent margin, you pay 50 cents for it. You sell it for a buck. And you have a 50 percent margin.

So if you buy something that's half off with a -- with a

-- you know, with an initial margin of 50, you're -- you're basically paying to -- the cost for the company.

So we took the -- so the borrowing base, (indiscernible) loan, based on an appraisal at 101 percent. So that's what that -- then the bank loans against that at 90 percent. So they have a liquidation value that's appraised, and then the bank loans 90 percent of that. So we use that same number. The bank advanced that at 90 percent.

Q So is that the 90 percent number or 101 percent?

A Well, it's 90 percent of 101 percent.

Q So that is the amount that the bank actually loaned on the inventory?

A Correct.

Q Okay. And as of what date?

A So this is based on the 10/4 -- the borrowing base --

Q You said 10/4?

A 10/24? 10/24 borrowing base.

Q And what is the amount as of 10/24 that you calculate that inventory amount to be?

A That would be a billion-six, five, four.

Q Okay. And so what -- just among the cash and inventory, what did you calculate the hard asset value of these debtors to be?

A $3 billion.

Q Okay. How much confidence do you have in that value

number?

A Well, the cash is pretty sound, right? The -- we relied on the advance -- you know, on the appraisal. I believe it was Gordon Brothers. So I -- they're beating this number. You know, they're actually beating the liquidation value in their current stores that their bank's advancing on. So if you look at what they're doing in the stores and the appraisal, you'd have a pretty high degree of confidence you could sell this stuff, you know, at that value.

Q Okay. So the next category on here is real estate. Explain the categories you used and where you got those numbers.

A Okay. This all comes from a Cushman & Wakefield report that was issued last September. It's the only appraisal we could find, okay? And so -- and that's actually -- we have the docket number. It was filed as -- on May 15th these numbers.

And it shows that, you know, there's a billion-three of liq value. Now, liq value is going concern value of the real estate. This is not lights out and liquidated. This is sold at the store. And it's -- takes up to 12 months to do this. So in their appraisal, they're saying it takes up to a year to sell these things; and then in the warehouses, six months to sell them, right? So it's not like you dump them today, right? You take some time and you sell them.

And so Cushman had the unencumbered at a million-397 and

encumbered at almost $2 billion and then the warehouses at 356. And there was one store that was left out of the spreadsheet that we caught that Cushman missed, and they verified it for $9 million. There was a store that got left out. So where we said the going concern value was 3.757 minus your selling cost, and came up with a value of 3.531 as a liq value.

Q Now, do you think, sitting here today, that you could turn around tomorrow and sell all of these stores for $3.5 billion?

A No. Not today. No.

MR. SLADE: Objection. Lacks foundation, Your Honor.

THE COURT: Overruled.

BY MR. OKIN:

Q And why don't you think you could sell it for that?

A Well, number one, you're in the middle of a pandemic, right? And I don't know why you'd sell anything in the middle of a pandemic, but -- if, you know, next year, they get a vaccine and things come back, I think that's when you'd go on the market, right?

But -- and they said it would take up a year to sell them anyway, so this value -- this value would not hold up in a total shutdown. That value doesn't hold up. There is a -- there is a dark value here estimated to be $2 billion.

Q Is that a Cushman number?

A That's the Cushman number, was $2 billion for all the real estate shut down. Now, maybe that's a closer value to today, a

shut-down value. That's probably the only estimate we have. And they did estimate the shut-down value at $2 billion, not 3 -- 37. So you would lose a billion-seven of value if you just shut these things now and turned off the lights.

Q Okay. So when you add that -- let's use your shut-down value of $2 billion. When you add that to your cash and inventory number, what is your total for the hard assets of this business liquidation?

A Well, you -- you can't close --

Q The going concern, just to be clear.

A Well, I mean, going concern would be $6.5 billion. Right? If you shut it down and lose a billion-seven, right? So you're down closer to, like, $5 billion. But as a going concern, it's $6.5 billion.

Q So is that all the parts that you have available to add up to get a value for the assets of this business?

A No. Then you've got to sell the online business and the marks. And the marks. So we sort of combined them -- the IP -- I mean, they own Liz Claiborne. They own some very, you know, prominent brands, and we assume that would go with the online business. So you got an online business and --

MR. SLADE: Your Honor? Your Honor? Can I object?

THE COURT: Of course.

MR. SLADE: Lack of foundation. This is a pure valuation, and I don't believe this witness is qualified or has

laid foundation to be able to give this opinion.

THE COURT: I totally agree and I'm going to let him continue to do it. So it's overruled.

Go ahead, Mr. Snyder.

BY MR. OKIN:

Q Go on. (Indiscernible).

A So what we did is the company actually developed a cash flow and a business plan for the online business, and we went through a similar, you know, valuation just -- I'm not telling you what the amount is, but it -- you know, we looked at the cash flow and did a discount and then a rate, but we cut it back by half the growth because they had really high growth numbers, so we cut it in half to be more conservative on their online business, and we came up with a value of those future cash flows.

Remember this thing -- the online business generates over $300 million a year in cash flow. So you know, we valued that. And -- and that would include, though, the J.C. -- I'll be very clear. That does include the marks, you know, and the brand. They have a lot of brands. So -- and -- and we sort of lumped -- we threw that all in that pot, right? So we're not qualified to value a brand. And so we just sort of threw it all in the online pot.

Q Do you think that's something that would add significant additional value to the number that you've already given?

A I think if you went to go sign the online business and the marks, you could get something for them. I mean, they have sold -- like, Kodak sold in bankruptcy and Sharper Image sold, so -- and they got tens of millions of dollars for those things, so I don't know. I would assume there is a mark -- there is a market for this online business.

Q Now, I want to ask you about another indicator of value. We've heard quite a bit today about whether or not there's a value for PropCo. We just talked a little bit about the Cushman appraisal.

Is there anything about this transaction and the way it's structured with the master lease that enables you to look at potential values of the property that's being sold as part of propco if you were going to do some sort of evaluation of PropCo?

A Well, there's two ways to approach it. One would be look at the Cushman appraisal, each individual property, which I don't think we have all of those. But the other way to look at it would be just the cash flow. Right? So they're going to have -- I think the beginning rent is $121 million a year on the stores. It's 160-some stores.

And then there's $35 million a year for their warehouses. So you're starting at $151 million a year in cash flow. And then it escalates. So you could, you know, use a discount rate and you could value that income stream.

So you know, you -- you could do that a 12C calculator. Right? Put in $155 million for 20 years and -- it would be a discount rate and a value. That's one way to do it.

Q Now, do you know enough about the terms of this master lease to be able to evaluate -- I mean, are these all -- is this a triple net? I mean, is there any cost of ownership for the PropCo, or is that all passed on to the tenants?

A Well, the best that I can discern, it's a triple net lease.

Q And do you know the length of the lease?

A I thought that was 20 years.

Q So let's move -- after looking at all of this and looking at the -- what we just talked about, what's your conclusion about whether or not there ought to be a return beyond the 1L, the first lien creditors in this case?

MR. SLADE: Your Honor, I have an objection. Lack of foundation.

THE COURT: Overruled.

THE WITNESS: Based on just the inventory and the cash, this $3 billion, you know, it just seems to me like the -- the first-lien creditors are only $2 billion -- a billion and a half and another billion, and then but you also -- also, you do have the ABL in there, right? So it's really two plus three -- it's closer to three.

So just the inventory and the cash means, like, you could

pay off the -- the ABL was fund out -- and then would fund out -- the inventory would pay off the ABL and leave you a billion-three, and they've got $2 billion, right, of -- of that first lien debt. So you want -- don't have to sell the (audio interference).

So it just seems like it's undervalued, right? And when I look at it -- and I'm not an expert. Just common sense. It looks like you should be able to get more for this company -- other than selling it in a pandemic, in my opinion.

Q Okay. So based on that, what did you then do?

A Well, I thought there was going to be a reorganization. Okay? So we were -- we were working and then we had that big hearing -- hearing at the end of July and realized there isn't going to be a reorganization; they're going to sell this thing. And that's when we went actually into overdrive, to be honest with you, trying to look at is there another option. Because the debtor wasn't putting forward -- we thought they were going to put forward a -- a, you know, reorganization plan. So we went into overdrive mode to try to figure out is there a way to reorganize this company other than sell it at the bottom of a pandemic.

So after that red herring hearing is when we started seriously looking at, you know, some kind of reorganization plan.

Q And did you come up with one?

A Well, I did.
Q Okay. And do you think it's feasible?
A Well, it's got issues, okay, but I mean, if the debtor wanted to do it, they could probably -- you know, maybe they have a chance to do it. But there -- there is a scenario. There is a very narrow path to get this done where you could have a reorganization.
Q And you put together a structure that shows what that reorganization would look like?
A Yes.
Q Okay. I'm going to show you what we've marked as Exhibit 60. And this is Docket Number 1757-61.
You see that on the screen?
A Yes.
Q Is this your chart showing the summary of your restructuring plan?
A Yes. (Audio interference).
Q (Audio interference) Okay. And you put this together?
A Yes.
Q And will this assist you in being able to explain to the Court what your reorganization plan would look like?
A Yes.
Q All right. So let's walk through it. Explain, I guess, the first column, the prepetition, post-DIP column. What does that show?

A Okay. That just shows you your balance of your debt at pre -- when you -- at the time of filing plus the DIP. The new money on the DIP, not the roll-up. So this shows the value of the new money and then the value of the different tranches at the time of filing.

Q And just to be clear, since you don't show the roll-up, does the lien term loan include the portion that would otherwise be rolled up into the DIP loan?

A Yes.

Q Okay. So we're accounting for all the debt?

A Yes.

Q All right. And so what is the total -- and we're talking approximate or round numbers here, generally?

A For what?

Q Before I ask -- you haven't got this down to the penny yet, obviously. Right?

A No. No.

Q So what is the rough total of the total secured debt that you would have to restructure for the debtor?

A There's $4 billion.

Q Okay. And then how much unsecured -- well, let's start with unsecured notes, the public debt.

A Well, that's the balance of the notes at time of filing.

Q Right. And what is that?

A It's a billion-318.

Q Okay. And then have you estimated what you think the unsecured debt looks like?

A Yeah. So the trade debt it an estimate based on the critical vendor motion they filed. You know, I've been seeing that exact number. And then we have the rejection damage that we estimated. And I think this is pretty close. It's about $3 billion, because of the --

Q Three -- I'm sorry. Three billion?

A There's a billion-three plus --

Q Oh.

A -- 600 million, plus another billion.

Q Oh. You were adding the unsecured --

A Yeah. The total unsecured notes is that, and if -- when you look at the -- what was filed by the Unsecured Creditors Committee on settlement, they pretty much said there was $3 billion. So I realize that rejection damage -- we had to estimate it, but I think we estimate it fairly close.

Q Okay. So the total unsecured debt by your estimate is just about $3 billion?

A $3 billion.

Q Okay. So let's move to the next column. Explain for the Court, if you would, what your reorganization looks like.

A So if we had a billion-three of cash, we can't use it all. You know, there's a couple hundred-million dollars you can't touch. It's in transit. It's in escrow. It's deposits. It's

paying the professionals. That's another $90 million. So you can't use it all, but what we could use is -- now, this is assuming you could undo the roll-up piece of this, right? If you could undo that, you could pay the DIP off, pay the ABL facility down 550 -- 500 million, and then reinstate the term -- the first lien and the second lien notes based on where they were prepetition.

And so it -- it's just a really old-fashioned -- it's an old-fashioned just reinstate the debt and come -- do a debt conversion, right, at some point. And that's what it is.

Now, if you could not undo the DIP, there's a -- remember there's a billion-three of unencumbered real estate.

Q Well, is it unencumbered right now?

A No. Not now. No. The DIP liens have -- the DIP got liens on it, and I believe the first lien was extended liens too in the bankruptcy. So you'd have to undo -- if you paid off the DIP -- I'd have to go back and look at it, but if you got that billion-three, you could borrow $400 million and you could still -- right? So you could still do this plan with the unencumbered real estate if you couldn't undo the DIP.

So maybe there's a couple ways to get there or some permutation of this. And you still also have to have -- the ABL facility would have to work with you, and we can talk about that later. But the ABL lenders have to go along with this.

Q Okay. So we talked about -- you talked about paying down

the ABL and reinstating the secured debt. That gives you how much total secured debt coming out of bankruptcy?

A About a little over $3 billion.

Q Okay. And then what do you do with all the unsecured debt, your $3 billion in unsecured debt?

A That's all converted to equity.

Q Okay.

A They're given shares.

Q And how much of the delevering of this company does that effectuate?

A It's pretty significant because when you look at -- and we'll get to this on the cash flow -- when the ABL lender gets the remaining cash from the rest of the season, you know, they get paid down to like, less than $150 million by the time you get to Christmas -- by the time you get to January. That's why everybody wants to close this thing. There's a lot of cash coming in.

So they, you know -- so there's a lot -- the company has a lot of availability and the -- so this debt gets down below $3 billion by the time you get to January, and it has -- it has almost, you know, like, I -- I've looked at the exhibit. I think it's 5- to $700 million of excess availability on this -- on the ABL.

Q Okay. And now, what happens to equity under this scenario?

A Well, the theory is, for my constituency, if you valued it -- if you had a valuation hearing and everybody through -- you know, everybody compared it, that there'd be something here for the equity.

Q Okay. You don't know what that would be exactly?

A No. I don't.

Q Okay. Now, is it feasible to get to the pay-down numbers? Does the company have the ability to use enough cash to do that?

A No, not without unwinding the DIP or getting another loan.

Q But assuming one of those things, does it?

A Yeah. But you have to -- that has to get done. So you -- you have to either undo the roll-up or you have to go get $400 million out of the unencumbered real estate and pay off the DIP.

There's enough money to pay the DIP off. If -- if the ABL lender will work with you, if you could get another $400 million, you could pay them down too.

Q So have you compared the sources and uses to try to figure out how all that money gets applied?

A Yes. I have.

Q Okay. And I'm going to show you Exhibit 62. Docket Number 1757-63. Zoom out just a little bit.

Is this a sources and uses chart that you created?

A It is.

Q And what is it created to show?
A Well, we estimate at -- by December the 5th, we'd have some debt. We'd have a -- a confirmation of -- and what exhibit number is that?
Q It's Exhibit 62.
A Okay. I can -- I can see better on paper.
Okay. So we had estimated the cash at December the 5th to be about a billion-three. And out of that, if we could undo the roll-up, we would pay $450 million to the DIP lenders. We would have to put $75 million on our cash in the balance sheet. You know, we have to have that much cash. And then there's the ABL pay-down of about half a billion dollars. That would pay the ABL down.
Q That's where you get that $700 million number that you --
A Yes.
Q -- testified to just --
A It's like a billion-two, and then you can pay them down about $700 million. And then this is all the stuff that -- that the company testified -- there's a bunch of money you cannot touch, right? I mean, there's a professional fee escrow, secured cost, funding of the swap reserve.
So, you know, there's a sizable amount of money here the company cannot get to; but there is enough money, if you could get to 450, you could pay off the DIP loan and -- and pay down the ABL and have enough availability to come out.

Q Now, so you're showing total available cash for all these purposes, including the cash you can't touch, to be $1,330,000?
A At December 5th.
Q Okay. What happens if -- first of all, based on your experience, since it's November 9th right now, is it realistic that -- anymore that this plan could actually be accomplished and the company could come out of bankruptcy on December 5th?
A I don't know. If it got delayed, the cash goes to about a billion-eight by the end of the year because of the runoff from the holiday season. So the cash actually gets better, not worse.
Q Well, so that was where I was headed, but I guess first, is it likely that we would actually get to an effective plan by December 5th?
A I don't think so.
Q So it's more likely to happen January or later?
A I believe so.
Q And you just answered my question, but I'll make sure we're clear. What happens to cash if this gets delayed another 30 days?
A Well, through about the middle of January, it grows. And then you start building the revolver back up.
Q Okay. And that has to do with the holidays?
A Yeah. It's a holiday runoff. It's a runoff. You collect all the -- these sales.

Q Okay. Now, let's we've created a slightly -- a delevered company, but it still has debt. Does this company that you've restructured have the ability to service this debt going forward?

A Yes.

Q How long have you looked at it for?

A Okay. So I'm looking at the debtors' projections, right? And based on what they filed in May and then updated in July, this company generates sufficient cash flow to service $3 billion of the senior debt. And a matter of fact, by the time you get to the third year, you're seeing about a three and a half multiple of debt, you know, to EBITDA, which, you know, that is not horrible. That's not a horrible leverage, you know.

So, yes, we looked at the cash flows and we looked at the -- the -- you know, what you'd have to pay on this debt if it got reinstated, and we modeled that.

Q And when you say you looked at the cash flows, what cash flows did you look at?

A The company's forecast.

Q Based on the business plan that we talked about?

A Yes.

Q Okay. And you modeled that out for the years that they had available in the business plan?

A Yes. We did.

Q Okay. And did you create a chart to -- to show you whether or not there would be available cash during these time periods?

A Yes. We did.

Q Okay. I'm going to ask you to look now at Exhibit 70. Docket Number 1787-6. Is that your pro forma showing the ability -- the free cash flow to service debt and for other purposes? I'm not asking that very well.

Is that your chart showing the free cash flow of this business?

A Yes. And used the debtors' numbers for 2001 [sic], '22, '23.

MR. SLADE: Your Honor, can I lever -- Your Honor, can I lodge an objection. I believe this is something that was done for the first time yesterday and posted at about -- you know, some time yesterday afternoon. So I would object as untimely.

THE COURT: All right.

MR. OKIN: Your Honor --

THE COURT: You can deal with that in cross. The objection's overruled.

Go ahead, Mr. Okin.

BY MR. OKIN:

Q So, Mr. Snyder, again, you were saying you used their numbers for what years?

A Yes. We did. But we extrapolated -- they did four years. We extrapolated the last year. When we were doing our valuation analysis, we extrapolated to get five years, so to be perfectly clear, the -- the debtors only forecasted through 2024, and then we took the average, you know -- the growth rates and stuff from 20 -- from '22 to '23, '24, and extrapolated '26. So --

Q '26 or '25?

A '25. I'm sorry. Yeah, but so these numbers -- the -- '21 through '24 are the debtors' numbers and we extrapolated one more year.

Q And so when you take the debtors' numbers, what do you start with? What calculation do you start with?

A The -- their adjusted EBITDA numbers. So they have a adjusted EBITDA number. Now they modeled their OpCo/PropCo and we sort of unwound that, you know, to get to a true EBITDA number. So we -- they had the OpCo/PropCo modeled, and we -- if we reorganized, you wouldn't do the OpCo/PropCo, right? You'd keep the stores. And so that -- these are their numbers. 419, 691, 772, and 836. That includes the OpCo/PropCo.

And then they calculated their working capital changes, their return on pension asset. They put those in there. And then they -- we added back the REAP rent and we added back the -- the expense -- the rent on the stores.

Q You said REAP rent, you mean the -- is that --

A The rent in the master lease agreement. We added that back to get to a -- you know -- a revised number and then -- and then we ended up having to come up with interest on that debt, right? Because they sold those stores into the REIT, and we did not -- well, on the reorganization, you know, I don't know what they sell for or anything, so we just -- we had to unwind the OpCo/PropCo for our analysis. And -- and then we showed how much money is available for debt service. And you can see the 653, 800, 662, 601 -- so all of this cash is available for debt service, and then we calculated --

Q Let's slow it down just a little bit so we have a clear record. So when you add back those numbers to the debtors' adjusted EBITDA, with just the free cash flow that's available in 2001 [sic] is how much?

A The total free cash flow you have for debt service is $653 million.

Q And then in 2022, the same number would be how much?

A $800 million.

Q And in 2023?

A 662.

Q And in 2023?

A 601.

Q Okay.

A And then we estimated the last one, but that's --

Q For 2025, you estimated how much?

A 674.
Q Okay. And then what is your calculation --
THE COURT: So --
MR. OKIN: -- based on the restructuring --
THE COURT: -- Mr. Okin.
MR. OKIN: -- that you're proposing of what --
THE COURT: You may want to go --
MR. OKIN: Yes, Your Honor?
THE COURT: -- you may want to go back and fix that because while you attempted to clarify the record, you asked about 2025. He gave you the number for 2026. So now, as opposed to having a clear record, you have a completely messed-up record.
MR. OKIN: I did not hear that, Your Honor, but I appreciate it.
THE COURT: I listen to everything.
BY MR. OKIN:
Q Mr. Snyder, what is your calculation for the free cash flow for 2025?
A 674.
Q Okay. Thank you.
THE COURT: That's still not right. Read the chart.
MR. OKIN: Well, Your Honor --
THE COURT: 2025 is 601. 2026 is 674. Right?
MR. OKIN: Well, Your Honor, I think maybe we're

reading the chart differently and maybe I need to ask Mr. Snyder to explain that.

THE COURT: That would be --

MR. OKIN: I think that is the confusion.

BY MR. OKIN:

Q So --

A Oh, oh. I see now. I see what the problem here is that the year ends -- the 2025 ends in 2026.

THE COURT: Oh, I got it. It's just you've been inconsistent in how you've answered these.

MR. OKIN: Yeah. Yeah.

THE COURT: I just want it to be clear.

THE WITNESS: That's the problem, Your Honor, is their calendar -- their 2025 year actually ends in January 31st 2026. That's the problem. And so if I -- if we just stick to the upper numbers, it's easy -- it's better.

MR OKIN: We're talk -- just in --

THE COURT: Go ahead.

BY MR. OKIN:

Q Just to be clear, Mr. Snyder, we're talking about the debtors' fiscal year when you talk 2021 or 2022?

A That's their fiscal year.

Q And their fiscal year ends when?

A Ends January of the following year.

Q Okay. So each of those numbers you gave me were for the

fiscal year as denominated by the debtor?

A That's correct.

Q So what do you calculate the debt service to average out to under this restructuring plan in each of these years?

A Well, we had to add back the interest and alternative interest -- and this is higher than what the debtor was showing because we -- they took that debt off the books. We had to add it back in. So we're showing the interest expense, you know, to be about $150 million a year; and then the principal, based on the current debt -- the current instruments, is $43 million a year.

And then the first lien notes -- also another thing to be clear, the first lien notes mature in 2023. In June and July of 2023, the first lien notes and the term notes and the other notes mature in, I think, in June and July. They're a month apart. And we assume we could reinstate that debt at that point. We could refinance it under the same terms because we would have 700 -- well, we'd have $662 million of free cash flow. So at that point, we thought it would be fairly easy to refinance that debt.

But I want to be clear that that does mature. The first lien notes, term notes, the $2 million [sic] of debt matures --

Q Two million or two billion?

A It's two billion, again, matures in fiscal 2023 in June and July. And we assumed we could refinance it.

Q Okay. So Mr. Snyder, when you look at all this, what's your conclusion about the debtors' ability to reorganize?

A Well, if -- under certain circumstances, if this debtor could either unwind part of this DIP and either do one of two things -- get rid of the roll-up, or if this debtor could borrow, you know, $400 million and work with the ABL lender, they could -- they could pay, you know -- still pay off the entire debt, the whole $900 million and reorganize. And there's enough cash flow here to service this $3 billion of debt.

Q And what's your opinion about whether that's better than the sale that's currently on the table?

A Well, the sale is in the bottom of a pandemic, right, with -- and -- and no one can even say what the value is of the real estate they're moving into the REIT. No one will even say it, right? And so it's -- just seems to me there's some value being left on the table here by the debtor not going back and looking at a reorganization plan.

Q And what do you say about the debtors' management when they say that the DIP lender could force them to foreclosure, that they have to do this deal, that they really have no choice or they're going to end up in a liquidation?

A I'm sure they believe that.

Q And in your opinion, is that -- should they then just act on it and go forward with the sale?

A Well, the one thing, the DIP lender, according to my numbers, would probably come out okay. You know, I mean, let's be honest about it. There's $3 billion laying here in cash and inventory. And so under actual priority loan, the ABL lender would get the -- get all the inventory, get paid off, they walk away, and there's still a billion-three of cash left over. That would actually pay off the debt.

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

THE COURT: All right. Thank you.

Mr. Slade?

(Pause)

THE COURT: And now, Mr. Slade, can we make the adjustment, because now we couldn't hear you at all.

MR. SLADE: (Audio interference)

Is this better, Your Honor?

THE COURT: It is better, although it's still hard. Is there -- are your technical folks there? Can they tweak something to make it a little louder?

MR. SLADE: They are. Let's me see. There's a -- is this better, Your Honor?

THE COURT: It is. It is.

CROSS-EXAMINATION

BY MR. SLADE:

Q Good evening, Mr. Snyder.

A Good evening.

Q Good to see you again.

Mr. Snyder, your expert report, which has been publicly filed in the docket, are available information accessible to the public and to investors that are thinking about investing in J.C. Penney, right?

A Can you repeat that? You're asking if everything we publish was public? Is that the --

Q Yeah. Every -- your opinion about what the company should do and what the value of this company is published, right?

A Oh, yes. Yes. So everything I just said, I have put in --- in motions -- in my -- most of this analysis has been made public. That's correct.

Q And all the information that you relied, your assessment of value, that's also public, right?

A That's correct.

Q So if anybody agreed with your analysis, they could sweep in and buy J.C. Penney for $3 billion, hold it for a year, and then turn around and sell it for significant profit, right?

A Well, if they thought they could do it, they may, yes.

Q Right. But would you agree with me, Mr. Snyder, that uncertainty creates opportunity, right? Would you agree with that?

A I agree with that.

Q All right. If somebody was willing to take the risk, they could come in, put in a bid for $3 billion, buy this company,

and then hold it for a year, right? They would make a lot of money, right?

A Yes.

Q Nobody did that, right?

A No, no one did.

Q A few specific questions about what you did and you didn't do in this case. Mr. Snyder, do you agree the fair market value is the price a willing buyer would pay and a willing seller would accept today? Right?

A I agree.

Q Yet you did not try to figure out what a willing buyer would pay to J.C. Penney today, right?

A I did not.

Q You're aware that J.C. Penney went through a marketing process first to try to find a DIP loan, right?

A Yes.

Q Okay. And you're aware that J.C. Penney was not able to find anyone that was willing to lend them money behind the first lien, right?

A Under the terms they could accept, that's right.

Q Right. You agree that the inability of J.C. Penney to borrow money on anything other than a senior secured basis suggests that the market does not agree with your assessment of J.C. Penney's value, right?

A Well, my assessment is, like, five months after the

filing, right? So I don't know what they looked at.

You're asking me what they were looking at then and what I'm looking at now?

Q The inability of -- let me just ask you this specific question.

The inability of J.C. Penney to borrow money on anything other than a senior secured basis suggests that the market does not believe J.C. Penney is worth 6- to $11 billion, right?

A At the time, I believe that, yes.

Q You also know that there was a marketing process to try to go out and sell J.C. Penney, right?

A Correct.

Q You assume that Lazard extensively marketed the debtors' assets, right?

A Yes.

Q You have no information that suggests otherwise, right?

A Correct.

Q All right. You have no dispute that the process was thorough and legitimate, right?

A I believe they -- Lazard ran a good process.

Q You have no reason to think it was a bad process. Fair?

A No, I don't.

Q And you agree it's the general model is that J.C. Penney has been for sale since May. True?

A Correct.

Q And as part of the bidding process, you would assume that bidders were asked to bid for any assets that they wanted to bid for, right?

A Right.

Q You're not aware of any constraints that was placed on any bidder as part of the marketing process, right?

A I -- I don't know about that. I'd have to go back and -- whether they had opposed -- I don't know. I'm sure they signed NDAs and stuff like that. There must have been some constraints, right?

Q I'm talking about in terms of what they could bid on. You're not aware of any constraint that was placed on any bidder during the marketing process. Fair?

A On what they could buy? No. I don't believe there was.

Q Do you agree that what the market test proved is that no one is willing to pay more than the first-lien's debt for J.C. Penney today, right?

A I believe that's true.

Q Now, the bid accepted (audio interference) was a combined bid from Simon and Brookfield and the first-lien lenders, right?

MR. OKIN: Can you repeat that?

MR. SLADE: Sure.

BY MR. SLADE:

Q The bid that the company accepted that we're asking the

Court to approve today is the combined bid from the lenders and Simon and Brookfield, right?

A Correct.

Q And that's the only bid, as far as you know, for the whole company, that J.C. Penney received?

A I believe so. Yes.

Q Now, you agree that Simon and Brookfield have a lot to lose if J.C. Penney liquidates, right?

A Yes.

Q But nevertheless, you agree that the bid actually made by Simon and Brookfield and the majority lenders is a market price today, right?

A For today. Yes.

Q And the market price for J.C. Penney today is significantly below the off the first-lien debt, right?

A Correct.

Q Do you agree with me that the result of the debtors' marketing process is the best indication of J.C. Penney's market value today? Right?

A I think that's the best indication of the market value today.

Q So I want to talk now about the company's performance. Okay?

So you went through this a little bit with Mr. Okin on your direct exam, and I think you looked at Exhibit 64. It's

that Exhibit 64 that I objected to and it was overruled. So let's just talk about that. Ad Hoc's Equity Exhibit 64. Okay?

MR. OKIN: Can you bring that up, Josh?

Your Honor, can you give out the presenter role to Mr. Urban again?

THE COURT: I certainly can.

BY MR. OKIN:

Q Okay. This is -- Mr. Snyder, are you with me? This is Exhibit 64 from the Ad Hoc Equity Committee that you went through with Mr. Okin on direct, right?

A Yes.

Q And I noticed that you stopped Exhibit 64 at September, right?

A Right.

Q Okay. You're aware that in October 2020, J.C. Penney earned $68 million from operations alone, right?

A Correct.

Q It wouldn't surprise you if J.C. Penney -- you include restructuring fees, J.C. Penney earned $100 million in October of 2020, right?

A That was my understanding. Yes.

Q Okay. And I think, in Exhibit 64 -- I wasn't sure, but I think what you said to the Court was that you were excluding pension expenses. Is that what you said?

A So the -- the pension line we excluded from operations.

Q Okay. But if the company is going to continue to operate, it's just going to reorganize, it's going to have to pay the pension, right?

A Yes. And those are generally balance sheet adjustments, right? In other words, for market value and taking money out or putting money into the -- and I just read that J.C. Penney kicked a bunch of its pension to the PBGC. So I don't have enough clarity on the pension expense to understand it. And they have that big $92 million withdrawal on -- that's actually a benefit for the -- you know, the company, actually -- so I fanned out the pension expense as an operating number.

Q Right. But you agree that if the company isn't sold, that they just reorganize, they're going to have to pay all the pension, right?

A Not unless they kick part of it to the PBGC. No.

Q So I think you testified to this on direct. You think that management has done a good job running the company during the course of bankruptcy, right?

A Yes. I believe this management team has done a very good job.

Q Yet on a year-over-year basis, you agree J.C. Penney's sales are down substantially, right?

A Oh, yes. Almost 40 percent. That's correct.

Q Okay. You don't even know whether J.C. Penney's online sales are up or down on a year-over-year basis, right?

A No. I have some data points on that, but it -- I -- I -- we haven't gotten consistent data. In the second quarter, they were actually up 22 million over last year, but I don't have any third quarter data, so I don't know. I don't know if they're up or down now. But the second quarter, they were up.

Q Year-over-year, it would surprise you if they were down, right?

A Yes. Because -- well, I mean -- on the second quarter, they were up, so I don't -- I don't have third quarter data.

Q Well, the reason it was it would surprise you if it was down, is -- we're in a pandemic. We're almost four to six months and people were sitting in their basements shopping online, right?

A Correct.

Q You would expect J.C. Penney's online sales would be up on a year-over-year basis, right?

A Yes, I would.

Q And if J.C. Penney's online sales actually were down, that would not be a good sign for the company. Would you agree?

A They're what?

Q It would not be a good sign for J.C. Penney, would it?

A No. If -- if the online sales were down, that would be -- that would be bad.

Q Now, I want to ask some questions a little bit about -- you had -- Mr. Okin showed you the document which is 1757-7,

right?
A 1757? Yes.
Q You know what --
A Oh --
THE COURT: So I think that's the Equity Committee Exhibit 6, right?
MR. SLADE: Yes.
THE WITNESS: Oh, Exhibit Number 6? Yes.
BY MR. SLADE:
Q So I'm clear, now that the Court has referred to us to the correct exhibit, (audio interference).
Mr. Snyder, Exhibit 6 is a comparison of actual performance against the DIP budgets that have been performed by the -- put together by the debtors for this court case, right?
A Right.
Q And so what you're saying here is that the debtors have done significantly better than the DIP (indiscernible) during the course of the case, right?
A Correct.
Q But the debtors are still significantly down year-over-year by pretty much any measure. Would you agree?
A Yes. I stated their sales are down almost 40 percent.
Q Okay. So I want to spend more time on your proposed reorganization action. And let's start with -- hang on one second please.

So I want to look at is the two documents you walked through with Mr. Okin, Exhibits 60 and 62. Okay? Ad Hoc Exhibit 60 is your proposed reorganization capital structure, right?

A Correct.

Q And Ad Hoc Exhibit 62 is your proposed sources and uses?

A Correct.

Q Right? Now, you have not analyzed whether or not your proposed reorganization option could be imposed on creditors over their objection, right?

A Well, I'm -- I've looked at some of it. Yes. And, yes, I have looked at that.

Q You say you have looked at it?

A Yes.

Q And Josh -- do you remember having your deposition taken with me a couple of weeks ago?

A I'm -- what was -- mine? When?

Q Yeah. Do you remember having your deposition taken in this case a couple of weeks ago?

A Yes. Yes.

Q And we were in the similar style where we were online and I was asking you questions?

A Yes.

Q Okay.

MR. SLADE: Josh, can you pull up page 149, line 11

to 14.

BY MR. SLADE:

Q Were you asked this question? Did you give this answer?

"Q Have you analyzed whether or not reorganization options could be imposed on creditors over their objections?

"A No. I haven't looked at the legal part of that. No. I have not."

Did I ask you that question and did you give me that answer?

A Right.

Q So you heard Mr. Mesterharm's testimony from earlier today, right?

A Yes. Well, not -- some of it. Not all of it. Yeah.

Q Okay. Did you Mr. Mesterharm describe how, in his view, the debtors do not have enough cash to pull off your proposal, whether or not the roll-up portion of the debt was overturned?

A Right. Because of the ABL lender. That's right.

Q And you have not spoken to Mr. Mesterharm, right?

A No.

Q But you know of him, right?

A Yes.

Q You know Mr. Mesterharm's in charge of a team that's monitoring J.C. Penney's cash on a daily basis, right?

A Yes.

Q And if the Court has a choice between trusting you on the

available cash and its uses or Mr. Mesterharm, do you agree with me that the Court should trust Mr. Mesterharm, right?

A Yes.

Q Okay. Now, I want to walk through your proposal. Let's look at Exhibit -- Ad Hoc Exhibit 62. And let me know when you're with me, Mr. Snyder.

A Okay. I got you.

Q So you agree -- you're only proposing to pay off half of the first DIP payment, right?

A Paying half -- yeah, full -- not paying off the full portion of the DIP loan. That's correct.

Q So you agree that the only way this could be done is for the Court to undo the DIP or for J.C. Penney to somehow find another $400 million of cash, right?

A Correct.

Q You have not looked into whether J.C. Penney can raise another $400 million of cash, right?

A Correct.

Q Are you aware -- have you looked at the terms of the first lien indenture?

A I have not. I haven't looked at that. No.

Q Are you familiar with something called a "negative pledge"? Do you know what that is?

A I know what a negative pledge is.

Q Okay. So do you know whether or not J.C. Penney would

even be allowed to borrow against unencumbered assets if, as you say, the first lien --

AUTOMATED VOICE SYSTEM: Our system will end this conference in five minutes. To extend this call for -- please -- your conference has been extended for 60 minutes.

BY MR. OKIN:

Q Well, I'll ask that question first.

A Okay.

Q You're proposing not only that the roll-up the DIP is unwound, but you're also proposing that the Court would unwind the actual protection liens previously granted to the first and second lien creditors, right?

MR. OKIN: Objection, Your Honor. That assumes facts not in evidence and misstates his testimony.

THE COURT: Well, I'll take it as a form objection, which I'll sustain. I'll overrule the assumes facts not in evidence.

You can reask the question again, Mr. Slade.

MR. SLADE: Absolutely, Your Honor.

BY MR. SLADE:

Q Are you supposing not only that the law part of the DIP is unwound, but also that the Court would unwind the adequate protection lien previously granted to the first and second lien holder?

A If we had to borrow the -- well, if we had to borrow the

money on the unencumbered real estate, yes. I mean, if I -- if I -- if they just took away the roll-up part and I could just pay the -- it's an either/or, right? It's an either/or. Either they unwind the roll-up part and all I have to do is pay off the -- the advanced new money, or if I have to pay off the entire 900 million, I have to go borrow 400 million on the unencumbered real estate and -- and if I paid off the entire DIP, it'd have the liens that were granted set aside from the DIP. Yes. It's either/or. I get -- I've got to get one or the other. Does that make sense? I don't need both.

Q Okay. Well, in a world where the DIP roll-up is unwound, and you're saying you don't need to find $400 million somewhere else, right?

A Correct.

Q Right. You haven't looked at whether or not the company can get $400 million somewhere else, right?

A I -- I have not gone out to see somebody who would loan 400 million on that billion, three. No. I haven't.

Q And if the DIP is not unwound, there also are adequate protection liens for the first and second lien lenders, right?

A Correct.

Q So there is no unencumbered assets against which to borrow the $400 million, right?

A Not unless you unwind the DIP and the DIP liens. Yes.

Q But if you don't do that, then there's no way that the

company's going to find $400 million. Would you agree?
A I would agree with that.
Q Okay. So with respect to the DIP -- let's just talk about that for a minute. You agree that when we went to court in June and got the DIP loan, the debtors and the lenders were proceeding in good faith based on the belief that the company would need the money, right?
A Correct.
Q And you can see we're shopping off -- after a number of companies. Am I right?
A Absolutely. Yes.
Q If you were the CRO of J.C. Penney, you would not feel free to ignore the final DIP order, right?
A Correct.
Q In your 32 years in this business, you can't identify any case ever in which a DIP order was unwound after it was entered by the court and on (indiscernible), right?
A I cannot recall for one. No.
Q And you've negotiated with a number of DIP lenders before, right?
A Absolutely.
Q Your experience is that DIP lenders negotiate a hard, with specific terms in their orders against which they lend. True?
A True.
Q Okay. You agree that they expect that the orders that

they negotiate for will be honored, right?

A Correct.

Q You have not considered the potential impact to the DIP financing market if a DIP order were to be unwound. True?

MR. OKIN: Objection, Your Honor. I don't see the relevance of that question.

THE COURT: I got it. But it's been brought up. It wasn't objected to before, and I've given everybody a lot of leeway. So I'm going to overrule the objection.

Mr. Snyder, did you consider it?

THE WITNESS: No, I did not.

THE COURT: All right. Mr. Slade?

BY MR. SLADE:

Q You haven't -- you don't know why a lender would ever lend money again to J.C. Penney if it went to court five months after the DIP order was approved and asked the Court to unwind the order, right?

A Well, I don't know about that. I mean, they overturned the entire absolute priority for General Motors and the DIP -- you know, the DIP market didn't go to hell. I mean, that was worse. I think it worse they came back the DIP lender, and the world was going to come to an end and it -- it didn't.

Q Okay.

THE COURT: I have to laugh. I saw that one coming.

BY MR. SLADE:

Q Do you remember being asked (indiscernible) at your deposition, Mr. Snyder?
A Okay. I'm sorry?
Q Do you recall being asked that same question in your deposition, Mr. Snyder?
A That question? No, I don't.
MR. SLADE: Josh, if you could pull up page 161 on 1520?
BY MR. SLADE:
Q I asked you this question and you gave me the answer: "Q Now, have you considered whether J.C. Penney will ever be able to borrow money again because they've successfully unwound a DIP order after it's been entered and a lender has lent money in reliance on it.
"A I have not evaluated that. No."
Were you asked that question? Did you give that answer?
A That's -- that's my testimony. I've said -- yeah. I've not evaluated that.
Q Okay. Well, let's look back again at your sources and uses, which is Exhibit 62. I have a few questions about this document. So the top line, caption on the balance sheet, you have a billion, 263 -- 267.3, right?
A Yes.
Q Okay. That's your assessment of all of the cash in the system, right?

A Close to professional -- PS goes -- it's a billion, 333. That would be all the cash in the system. Everything.
Q Okay. Where did you get that number, 1267.3-?
A Okay. That is taking the actual cash from October the 3rd and then using the debtors' fifth budget, which hasn't been published. It's not published. I don't know why it's never been approved, but taking their fifth budget and rolling it forward, you end up with cash flow, billion, three on December the 5th.
Q So you're not saying that this is the number that the debtors think they're going to have on the balance sheet as of December 3rd, right?
A Well, this is taking the debtors' actual from December the 3rd -- October the 3rd, and rolling it forward with their budget till December the 5th.
Q You're assuming, in this sources and uses, Exhibit 62, that all of the cash in the debtors' system can be used, right?
A Well, I didn't say that. It --
Q Well, you have $75 million of cash going on the J.C. Penney balance sheet, right?
A I've got a billion, 333 on the balance sheet, total.
Q All right. Well, I'm talking about the use after your proposed transaction. You have $75 million on that J.C. Penney balance sheet, right?
A Yes.

Q Did you hear Mr. Mesterharm testify this morning that there's about $200 million just in the J.C. Penney system at any given time?

A That's right.

Q Do you know whether J.C. Penney could possibly operate with only $75 million on the balance sheet?

A Well, there's $200 million -- there's $300 million they identified that you can't touch, right? And they're -- and they're -- and -- and if you look at it, in their operating account, they have $85 million in their operating account. And then they've got all this stuff --

Q My point, Mr. Snyder, is that you presume that all the cash is useful, and you know that it's not, right?

A That -- and I've identified all those pockets on there which have -- amounts about what you said there's several hundred million dollars you can't use.

Q Okay. But you're using it and only leaving $75 million on the balance sheet, right?

A Well, yeah. Because some of that money you can't use. That's correct.

Q Okay. Now, let's go down to the ABL. Your reorganization option assumes that the ABL lenders would continue to lend money to the debtors, right?

A Yes. That is a major assumption.

Q Okay. You haven't spoken to anyone at Wells Fargo, right?

A No, I have not.
Q You have no idea whether Wells Fargo would be supportive of your proposed reorganization option, right?
A I do not know that.
Q You do know, however, that Wells Fargo has taken the position that it's only willing to extend the new loan to the company if the ABL loan is paid off in full and the company's substantially deleveraged, right?
MR. OKIN: Objection. Assumes facts not in evidence.
THE WITNESS: Well, they actually turned right back around and advanced another 550 million, so you know, you can't -- when you're saying they pay it off, they turned right around and readvanced a bunch of that money back, and we end up paying down -- if you look at our numbers, if you pay down the -- the -- if you pay them down $550 million by December the 5th, by the time they get to January and they get the rest of the run--off from Christmas, they're paid down below 200 million. And so I'd have to sit down with them and see if that -- that's actually better than what your reorganization plan does in cash. And we've -- and I think the debtor at this -- if this debtor sat down with the ABL lender and they realized they'd get a half million now plus another 400 million coming off the Christmas season, I think they would probably think that's a pretty good deal.
THE COURT: So --

THE WITNESS: But if I have misspoken, I don't know.

THE COURT: So Mr. Okin, do --

MR. SLADE: Your Honor, I object. I object to this and move to strike the testimony as not responsive to what was asked.

THE COURT: So Mr. Okin, first of all, you made the first objection, and Mr. Snyder kept going. Do you still wish to pursue your objection?

MR. OKIN: No. I liked his answer, Your Honor.

THE COURT: I thought you might.

All right. And Mr Slade, your objection?

MR. SLADE: It's not responsive to the question asked.

THE COURT: I agree, and motion to strike is granted.

BY MR. SLADE:

Q Josh, you brought up -- your deposition testimony, page 174, line 13 to 18. Were you asked this question and did you give this answer:

"Q Are you aware that Wells Fargo has taken the position that it's only willing to extend a new loan to the company if the ABL loan is paid off in full and the company is substantially deleveraged?

"A I did hear that. Yes."

Did I ask you that question and did you give that answer?

MR. OKIN: Your Honor, before Mr. Snyder answers, I'm

going to object to the impeachment. I don't think there's actually a question that was ever properly asked and answered to impeach him on with this testimony.

THE COURT: So I do think that there was a proper question, but he gave an improper answer, and I struck it in its entirety, so I do think that that is a proper objection to the attempt to impeach because there's nothing to impeach.

So if you want to start over, Mr. Slade, you're welcome to do that. I know it's hard on video. But I think, given the fact that I had an objection, Mr. Snyder kept going, you waited until the end to make an objection, I did the best I could to try to be polite to everyone, but I don't think that there was a question and an answer to which impeachment would apply.

MR. SLADE: Fair enough, Your Honor. I'll just try it again.

BY MR. SLADE:

Q Mr. Snyder, you are aware that Wells Fargo has taken the position that it's only willing to extend a new loan to the company if the ABL loan is paid off in full and the company is substantially deleveraged? Right?

MR. OKIN: Objection.

THE WITNESS: Oh. Go ahead.

MR. OKIN: Objection, Your Honor. Lacks foundation.

THE COURT: All right. Overruled.

Go ahead, Mr. Snyder.

THE WITNESS: That -- that was my understanding.

BY MR. SLADE:

Q But you agree that your proposed reorganization option is not feasible without an ABL lender, right?

A The what?

Q Your proposed reorganization option's not feasible without an ABL lender, right?

A No. We assume we'll have an ABL lender.

Q And if you don't get one, your plan's not feasible, right?

A Correct.

Q And you're not aware of any ABL lender on the planet that would be supportive of your proposal, right?

A That's correct. I've not shopped it.

Q And you do know that all of the debtors' cash, except for the $225 million that's in the DIP escrow, is the ABL lender's cash collateral, right?

A That's correct.

Q You don't know whether or not the ABL consented to use the cash collateral to pay the DIP. True?

A Correct.

Q Okay. Let's go back -- and I'll talk about the first and second lien creditors, and let's go back to Ad Hoc Equity Exhibit 62. You are proposing that J.C. Penney reinstate the first and second lien debt, right?

A Correct.
Q You think this company should reinstate a billion, six of first lien debt that's currently trading at 30 cents, right?
A Correct.
Q You can't think of any debtor in any case reinstating debt that's trading at 30 cents, right?
A Well, at Pilgrim's Pride, we were trading at 17 cents when we proposed payment in full. And it's traded up. So not everybody trades at par when you reinstate debt. But I don't -- I can't -- I don't know. You asked a specific question about 35 cents on the dollar, and I don't know of any debtor that trade at 35 cents a dollar that was reinstated. No. I don't.
Q You don't know how much default interest somebody would have to pay to reinstate the 1L term loan, the first lien note for full, right?
A I do not know that number.
Q And whatever that number is, it's not in your source and use, right?
A Well, we have -- well, no. I don't -- I don't think it is.
Q Now, there's also currently $400 million of second lien debt trading at pennies on the dollar, right?
A Right.
Q And you know that the debtors have not been paying any

interest to second lien lenders, right?

A Correct.

Q And your theory is that the debtors should reinstate the second lien debt too, right?

A I think they could afford to pay it, yes. That's what the numbers show.

Q You've never seen a debtor reinstate a debt that's trading at 3 cents or below, right?

A I have never seen somebody -- no, reinstate a debt trading at 3 cents. No.

Q Okay. Do you know how much interest would be owed to the second lien lenders if the company decided to reinstate that debt?

A I do not.

Q And your sources and uses does not include the payment of any of the interest that would accrued to the second lien lenders during the bankruptcy case, right?

A Correct.

Q Now, I want to talk next about the cash number on Exhibit 62 (indiscernible). I think you testified on direct in response to Mr. Okin's comment that if case was delayed another 30 days, somehow, wouldn't have to pay off the debt, that the cash number would go up. That was your testimony, right?

A Well, the company is building cash through the Christmas season. Yes.

Q Okay. But just so we're clear, the company's cash number goes up, but its borrowing base goes down because it's liquidating inventory, right?

A That's correct.

Q Mr. Snyder, you know the DIP matures next week, right?

A Yes.

Q All right. Now, I want to talk about the unsecured creditors under your proposed reorganization. Can you turn us back to exhibit 60? So unsecured creditors, under your proposed reorganization, are going to equitized, right?

A Yes.

Q And you're estimating that there is a billion, three in unsecured notes, 600 million in trade debt, and a billion dollars of rejection damages, right?

A Yes.

Q You agree that equity would not be entitled to anything unless the valuation was high enough to pay all secured creditors in full and to give unsecured creditors equity in value of the full amount of their claims, right?

A Correct.

Q Okay. Today, Creditors' Committee has not indicated any support at all for your proposal, right?

A No. They have not.

Q Okay. And nobody on behalf of the second lien creditors has indicated any support for your proposal, right?

A No. They have not.
Q And nobody on behalf of the first lien creditors has indicated any support for your proposal, right?
A Correct.
Q And the same about the ABL lenders, right? They have not indicated any support for your proposals?
A Correct.
Q But you agree that J.C. Penney should not propose a plan of reorganization unless it's (indiscernible). Right?
A Correct.
Q If J.C. Penney concludes, after thinking about it, that it does not believe your plan would be feasible, it should not pursue that proposal. True?
A Correct.
Q I want to talk now about your going concern orderly liquidation that you walked through with Mr. Okin. That's Ad Hoc Equity Group Exhibit 63. Let me know when you're there.
A Yes.
Q Okay. And just so we're clear. I think you testified to this on direct, but this is not the same thing as a liquidation analysis under Chapter 7 of the Bankruptcy Code, right?
A That's correct.
Q Okay. And all the information that's reflected on your going concern orderly liquidation, that was available to bidders who were thinking about bidding on the company, right?

A Well, I -- I think so. The borrowing basis were in the data room, so I assume they would access to them -- I believe they would. I know the Cushman & Wakefield numbers were available in the business plan, so I think they could find most of this data. Yes.

Q And no bidders (indiscernible) was going to pay more than the first lien bank for these assets, right?

A Correct.

Q Now, I want to walk through each of the line items of on Exhibit 63. So on the first line, the cash line item from the September 8th case. Right?

A Correct. And the roll -- well, September AK actual, and then the roll forward to January -- I mean, to December 5th.

Q And you were listening to Mr. Mesterharm's testimony this morning, right, that much of that cash can't be used except to satisfy specific obligations, right?

A Right. Right.

Q Now, the real estate in there, you say that your 3.5 billion dollars in your going-concern orderly liquidation. That's what you wrote, right?

A Correct. Correct.

Q And you recognize that the information on here is publicly available, Cushman & Wakefield appraisal data from September of 2019, right?

A The summary numbers were available from the business plan.

That's correct. Not the detail.
Q Okay. But you're not an appraiser, right?
A I'm sorry? What?
Q You're not an appraiser. Are you?
A I -- I can't hear you. I'm not a what?
Q You are not an appraiser, are you, Mr. Snyder?
A Afraid?
UNIDENTIFIED: Appraiser.
THE WITNESS: Appraiser. Oh, I thought you said I was afraid. I said, yeah, you do scare me. No. I'm not an appraiser.
BY MR. SLADE:
Q Sorry. I'm --
A I'm not an appraiser.
Q Okay. And you're not aware of any appraisals of the debtors' real estate assets since last September. Are you?
A The only one I'm aware of is the one that's done by Cushman last September.
Q But you agree that the world has dramatically changed since September of 2019, right?
A Yes.
Q Okay. And you also used liq values and identified Cushman & Wakefield's 2019 appraisal, right?
A Correct.
Q And liq value applied to stores that are being stored as a

J.C. Penney, right?

A Or as another store. I don't -- I don't know if Nordstrom, (indiscernible), or whoever could be run as a department store. Yes.

Q Okay. So I mean, I just want to make sure we're clear. In your going-concern orderly liquidation, you separately identified the cash. You separately sell the inventory. And then you separately sell the real estate as a (indiscernible), right?

A Correct. Correct.

Q And I think you testified a little bit with Mr. Okin about it on direct. You said our values were about $2 billion total for the real estate as of September of 2019, right?

A Yes.

Q A dark price in 2019 would still face a very different world today if we were in an orderly, going-concern liquidation.

A I -- I believe so.

Q Now, you agree that if J.C. Penney real estate was alone worth $3 billion in today's market, somebody would have bid high enough to take out the first lien debt, right?

A If they believed that, they may have.

Q Nobody did, right?

A That's correct.

Q What you do know is that no one was willing to make a bid

for the real estate in an amount that would satisfy the first lien debt, right?

A Right.

Q And you've not done any work in this case to look at the state of the commercial real estate market today, right?

A Correct.

Q Okay. Now, I want to go to the next line item, the IP and e-commerce practice. Okay, Mr. Snyder?

A Yes.

Q You with me? Okay. So again, you have a liquidity inventory, identifying the cash, selling the stores as a liq value, and then you separately identify the IP and e-commerce platform. That's added in, in your going concern liquidation, right?

A Right.

Q Now, to do your valuation, this number of 1.5- to $2.7 billion, you used the company's forecast for 2021 to 2024 and you separately broke out the e-commerce, right?

A Correct.

Q You did not allocate any corporate costs to the valuation of the e-commerce business, right?

A No. We used the -- we used their numbers. They're a publicly traded company, and we used their e-commerce numbers that they published.

Q Right. But in a separate world where you're going to sell

the IP and e-commerce business separately, you're going to have corporate costs, right?

A Yeah. I know -- the -- the strategic player that bought it, they may have it already. I don't know. I know what we -- we just used the numbers they reported as the cash flow out of that business.

Q And you also just assumed that whatever advertising expense related to the online business would be embedded in the (indiscernible), right? You don't know that, but you assume.

A I assume that.

Q You understand that the company's forecast for e-commerce assumes that the rest of the company's business still existed, right?

A Correct.

Q And you're familiar with the concept of an omnichannel business, right?

A Yes.

Q That's what J.C. Penney is. It's an omnichannel business, right?

A Correct.

Q Now, the company's forecast for e-commerce assumed that the company still had a brick-and-mortar presence to support the outcome. True?

A I don't know. I -- I -- I didn't look a that. I don't -- how much is picked up in the stores. I think most of it

shipped, so I honestly don't know, but I believe in general -- I'll just say that in general -- I don't know about the store supporting the online business in general, but they did assume that there -- there would be clicks and bricks, there would be stores out there. But I don't know about the level of support. Like shipping out of stores, I don't believe they do that, so I -- I don't know about the level -- I -- I can't really answer that question. I don't -- I don't know.

Q If it was your understanding -- it was your understanding, Mr. Snyder, that the company's forecast of e-commerce assumed that the company still had a brick-and-mortar presence to support the online business, right?

A Yes. I agree.

Q Now, you agree with me that if J.C. Penney stores went away in an orderly liquidation order the next year, the company's e-commerce forecast would change, right?

A I would assume so.

Q And in your orderly liquidation, you're assuming that the company's stores are sold sometime within the next 6 to 12 months, right?

A Correct.

Q And you agree to some degree that your orderly liquidation amount was -- is not an orderly liquidation of the company today, right?

A Agree what? As -- there is no liquidation analysis. What

I did is not dependent on an orderly liquidation.
Q The analysis that's on this page, Exhibit 62, your orderly liquidation, it's not an orderly liquidation analysis of the company today, right?
A No. I'm not -- not -- no. Not today.
Q What you did in your going-concern liquidation analysis, you assumed that the company would go through another marketing process over the next 6 to 12 months in which it sold the real estate and e-commerce business post-COVID, right?
A Right. These are all pre-COVID numbers. All the appraisals -- well, other than the inventory. That's actual currently number provide. That's -- that's a current borrowing base. But the real estate was done pre-COVID. So I would agree that this would assume you were out of COVID when you sold them. I -- I agree with that.
Q And your going-concern liquidation analysis, to put a finer point on it is you assume you sell a going concern in a post-COVID world, right?
A Correct.
Q You don't know when post-COVID is going to be. Neither do any of us, right?
A No. If I knew that, I'd be on Wall Street. I don't know.
Q You and me both. But you're going-concern liquidation analysis assumes that sometime in the next year, we'll be living in a post-COVID world where you can go out and sell the

real estate and e-commerce business for substantially more than you can sell it for today, right?

A That's correct.

Q And you think that uncertainty in the market today is stopping somebody, for example, from bidding $3 billion for J.C. Penney, holding it for 12 months, and then making a big profit, right?

A Yes. I believe that's true.

Q You agree with me that during the marketing process, any potential bidder in the world has an opportunity to take that chance, come in and bid $3 billion for this company and just see if you are right, right?

A Right.

Q Nobody did, right?

A Not that I'm aware of. No.

Q Okay. Just a few more questions, Mr. Snyder. You agree that there have been a lot of retail bankruptcies since COVID-19 hit, right?

A Yes.

Q There have been a lot of liquidations, retail liquidations since COVID-19 hit, right?

A Yes.

Q Over the past two years, the only retailers that survived bankruptcy were those that were sold to their first-lien creditors in a credit bid or were bought by a third party.

True?
A So the only ones you're saying that survived are the ones that went through bankruptcy that delevered? That's what you're asking?
Q I'll just ask the question again. Over the past three years, the only retailers that survived bankruptcy were the ones that were sold to their first-lien creditors in a credit bid or were bought by a third party, right?
A That's correct. That's my recollection. Yes.
Q You can't identify any retail reorganization in the last few years that shareholders retained any value, right?
A Well, the only one is Tuesday Morning, but that's in process, right? They're -- they actually have an equity committee and it looks like they're in quantity. So there's actually one out there that may apply.
Q Well, sitting here today, you're not aware of any retailer in the last two years that have gone through bankruptcy and -- where shareholders retained any value, right?
A Oh, you mean and actually have come -- yeah. Tuesday Morning hasn't come out yet. So I'll say yes. That's correct.
Q In fact, you can't think of any retailer that survived bankruptcy and gave a recovery to its shareholders, can you?
A No. I cannot.
Q If you were the chief restructuring officer to J.C. Penney, you would be doing everything possible to get out

bankruptcy as soon as possible, right?
A That's correct.
Q And you agree that the company is being damaged while it's in bankruptcy because nothing good happens in bankruptcy? You agree?
A Well, I think some good things do happen in bankruptcy. I mean, how -- how do you think you get rid of these leases and get rid of all of these -- you know, these -- I mean, there's a reason people file. I think that's too general to say nothing good happens in bankruptcy. I mean, I think most people -- it's not a good -- I don't think it's their place (indiscernible), but some good things do happen. You know? I mean, that's why you and I have a job.
Q Well, some people --
A We wouldn't have a job without that.
MR. SLADE: All right. Josh, can you pull up page 30 -- 230. Line 7 to 11.
BY MR. SLADE:
Q Were you asked these question and did you give this answer:
"Q Do you agree with me that being in bankruptcy is doing substantial disadvantage to the debtor?
"A Well, yes. I don't think bankruptcy is good. Nothing good happens in bankruptcy."
Were you asked that question? Did you give that answer?

A Yeah. That's the answer I gave.

MR. SLADE: Nothing further. Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. Snyder, let me -- before I give you back to Mr. Okin, I have, for a long period of time, respected your ability as an operator and the sensitivity of the management decisions that you make when you're the guy in charge. So let me ask you this.

Your proposed plan -- and I applaud the creativity. I spent my legal career living outside the box trying to come up with things that no one else could think of. I got that. But your proposal depends upon a number of assumptions all falling in line for it to work. Would you agree with that statement?

THE WITNESS: That's absolutely true.

THE COURT: And what happens if they don't?

THE WITNESS: Then you could be faced with a liquidation.

THE COURT: And if you were the guy making the call, you willing to get in front of 60,000 people and say I could have done something to save your job, but I decided to take a risk. Would you do that?

THE WITNESS: At this point --

THE COURT: I know the -- I know the answer to this one.

THE WITNESS: -- no, at this point, no. Three months ago, I would have probably done something very different.

THE COURT: Yeah. No. I got that. But if you were -- we're in today. We're living right now. We can all criticize. We can criticize the decisions that I made. We can criticize the decisions that the company made. We can criticize all sorts of folks. But we are where we are.

All right. Mr. Okin, do you have any redirect for Mr. Snyder?

And Mr. Snyder, I do appreciate you being here today. I always appreciate the way that you look at things because you look at things through the eye of an operator, not anything more or less than that and I always appreciate that.

Mr. Okin?

MR. OKIN: I have no further questions, Your Honor.

THE COURT: All right. Thank you. Any reason that Mr. Snyder cannot be excused?

Again, Mr. Snyder, I --

MR. OKIN: No, Your Honor.

THE COURT: -- appreciate your help. Thank you, sir.

THE WITNESS: Okay. Thank you.

(Witness excused)

MR. OKIN: Your Honor, one thing though. I had not intended to actually admit the exhibits, but Mr. Slade asked about them as well, so I would ask that we admit the

Committee's Exhibits 6, 60, 62, 63, and 70.

THE COURT: So I have them written down pursuant to the emergency protocol numbers, so let's go back and make sure I got them right. I was going to ask you about them. I think I have them marked.

MR. OKIN: That would be -- 6 would be 1757-7.

THE COURT: Yes, sir.

MR. OKIN: 60 is 1757-61.

THE COURT: Yes, sir.

MR. OKIN: 62 is 1757-63.

THE COURT: Yes, sir.

MR. OKIN: Exhibit 63 is 1771.

THE COURT: Yes, sir. Dash zero. Just for the record. Yes.

MR. OKIN: And then Exhibit 70 is 1787-6.

THE COURT: All right. Those are five I had.

Mr. Slade, given that we talked about them, asked questions from them, any objection to their admission.

MR. SLADE: Your Honor, they're certainly illustrative of the witness' testimony. To the extent that they're -- I guess no objection, Your Honor. I'll let them in.

THE COURT: Yeah. Let's -- all right then. I will admit them without objection.

(Equity Committee's Exhibits 1757-7, 1757-61, 1757-63, 1771-0, and 1787-6 admitted into evidence)

THE COURT: All right. Have you all talked about, since we have effectively competing claims for relief, have you all talked about how you'd like to do closing?

I should first ask, Mr. Okin, there was only one witness that hadn't yet been called on your witness list. I assume that there is no further testimonial evidence to be introduced?

MR. OKIN: That's correct, Your Honor. We'll rest.

THE COURT: All right. Thank you.

And Mr. Slade, I assume there are no rebuttal witnesses.

MR. SLADE: Correct, Your Honor.

THE COURT: All right. Then I'll consider the evidence closed.

Have you all -- do you have thoughts about closing arguments? Should we just argue them together and does order matter?

MR. OKIN: I think, Your Honor --

MR. SLADE: I think I'm going to hand it back to Mr. Sussberg.

THE COURT: Mr. Sussberg?

MR. SUSSBERG: Thank you. Your Honor, what I would propose to do -- and obviously, Mr. Okin should weigh in. I would like Ms. Yenamandra to walk through the objection chart that we had filed earlier today so that we clear out all the

outstanding objections and point Your Honor to the provisions in the sale order that resolve those. And then from there, I would suggest that we move to very brief closing arguments, and I'm happy to go in any order that Mr. Okin would like.

THE COURT: All right. So I have -- and if you need to do it because you've given your word, I understand that. I have had the opportunity to look at 1807, and I have the redline. I have seen the provisions that got added in order to resolve objections. I read the chart. It was really helpful. So I was able to identify okay, well, this paragraph went here.

If you need to make statements because you've given your word that you would, I'm more than happy to take those announcements, but I don't need that.

MR. SLADE: I think we can move right to closing, then, Your Honor.

THE COURT: All right. Thank you.

Then, Mr. Okin, since you're -- at least on the GoToMeeting screen, you're outnumbered. You want to go first or last?

MR. OKIN: I'll go last, Your Honor.

THE COURT: All right. Then, Mr. Sussberg, your podium.

MR. SUSSBERG: All right, Your Honor. And I do want to thank you and the court staff. We are now going on ten-plus hours, and we very much appreciate the time and the adjustment

of your schedule. This is obviously important for a whole host of reasons and to a lot of people, and so I speak for everybody when I say thank you for your time.

And to Mr. LeBlanc's point earlier today, I'd be remiss not to thank Judge Isgur for his efforts here. They were truly instrumental in getting to where we are. And where we are, Your Honor, is where we started at the beginning of this day today, seeking approval of a sale transaction between J.C. Penney, Simon & Brookfield, and our majority lenders that now has the support of our minority lenders, as well as the Creditors' Committee. And the Creditors' Committee settlement, as Mr. Kurtz spoke to, is embodied in the Chapter 11 plan, and all unsecured creditors will have an opportunity to vote on that plan, and it's out there for them to review and to weigh in, and we will cover that in due course on November 24th and November 25th.

I looked at a quote today, Your Honor, from James Cash Penney, and I thought it was apropos to what we're dealing with here. And he said:

> "We must remember that all good days in human life come from the mastery of the days of trouble that are forever recurrent."

And I will tell you that the most persuasive thing that I heard today, Your Honor, were the comments from Mr. Martin. And I've read the eight letters that he filed, as well

as the motion to dismiss this case that he filed early on. And Mr. Martin said, and I agree, that approval of the sale would be devastating for many creditors and shareholders. And again, we do not disagree. And I tell everybody from the bottom of our heart that we sympathize with so many people that stand to lose so much, and we very much respect the participation of the equityholders throughout the duration of these cases. People are losing savings and seeing investments wiped out, and that's not lost on us. And if there was anything we could do to change that -- and I think Mr. Kurtz spoke to this -- we would have. But as Your Honor heard today, there is no other alternative, there just is not. And we must play the cards that we're dealt, as professionals and as a management team.

And I submit to Your Honor we left it all on the field here. We pulled together a going-concern transaction when at times, to be completely candid, it seemed like it was slipping away. And we started these cases from a confident standpoint on our toes without really knowing what the outcome was going to be, but by sheer will and force, we were able to pull together a bunch of disparate parties and figure out a way to do exactly what we said we were going to do, and that was preserve the going concern and the 60,000 jobs that come with this company and the families that are attendant to those jobs that count on this business. It was our job to do everything we could to save a company that has been out there 118 years

and deserves a chance to continue moving forward.

And so when Mr. Martin talks about devastation, I think it's important to view that comment not in a vacuum but in a world of "compared to what." Because it's not the debtors or their advisors that decide creditor recoveries. It's economic reality, and I talked about it early on today, that dictates the outcome. And economic reality here has demonstrated, after a five-month market process, as confirmed very clearly just now by Mr. Snyder, in one of the most public Chapter 11 cases that any of us have been a part of, that we have the only viable, the highest and best, and the unquestionably appropriate transaction to move forward with that's before Your Honor today.

The Ad Hoc Equity Committee's theory, respectfully, is not a theory. It's simply based in hope. And we certainly understand why it was suggested, and like you, Your Honor, we appreciate the creativity. And trust us, we thought through every single possible outcome here, but the reality is hope is never a strategy. And Mr. Snyder is asking holders of more than $7 billion in claims to finance a recovery to equity as a gift. The Ad Hoc Equity Committee has not offered one penny to a solution, and that is critical. That speaks volumes.

We work here to save an enterprise and, in Mr. Martin's words, avoid mass devastation because we understand the destruction and the devastation to investments. But

pursuing the Ad Hoc Equity Committee path will result in the most devastation for all parties. Pursuing the Ad Hoc Equity Committee path and pursuing any alternative other than this sale that's before Your Honor today will result in a liquidation. And I think the testimony today confirms, on an uncontroverted basis, that the alternative here is liquidation, and we're not prepared to let that happen.

Mr. Mesterharm's testimony was unrebutted on the debtors' need for speed. His testimony was unrebutted that we do not have the cash necessary to satisfy the DIP, and his testimony was unrebutted that our cash balance is a function of strain on the business, including a lack of inventory. And if this business is going to survive, it needs to get out of Chapter 11 ASAP.

Mr. Kurtz's testimony likewise was unrebutted in all respects. Mr. Kurtz testified that this is not only the best path forward, it's the only path forward, and it's the result of a five-month robust marketing process that Mr. Snyder agreed was robust. And we heard nothing from the Ad Hoc Equity Committee to suggest the marketing process was anything other than that. Instead, we heard a lot about nothing.

Mr. Wafford's testimony was likewise unrebutted, demonstrating that the debtors have satisfied their business judgment and explored every possible alternative and run out every single ground ball.

So we stand here, Your Honor, again after ten hours, and there is absolutely nothing that stands in the way of approval of this sale. It would satisfy all the applicable standards. The debtors' business judgment has been absolutely appropriately satisfied. This is not a sub rosa plan. We've gone through and demonstrated in briefing and in argument the Gulf Coast (ph) factors and the footnote in the Gulf Coast (ph) case that speaks exactly to this case that's before Your Honor today.

So we'd respectfully request Your Honor enter the sale order and allow this company to continue what it's been doing for 118 years and ensure that this enterprise and the 60,000 families that count on it can continue to count on it. Thank you, Your Honor.

THE COURT: All right, thank you.

Anyone else that supports the request wish to make any closing comments? Mr. Fiorillo, you want to get on the record and say unequivocally that you're not in -- you're not desirous of being a lender in an alternative plan?

Ah, I'm -- Mr. Fiorillo, had you -- I don't know that I ever unmuted you. I thought I had you marked. Had you hit "five star" before? You had, okay. How about now? There he is.

Mr. Fiorillo, now you -- can you hear me now?

MR. FIORILLO: Okay. Your Honor?

THE COURT: Yes, go ahead.

MR. FIORILLO: I can hear you. Can you hear me?

THE COURT: Yes, sir. Thank you.

MR. FIORILLO: Thank you.

Your Honor, real quickly for the record, Danny Fiorillo from Otterbourg, P.C., counsel for Wells Fargo Bank, N.A, the prepetition ABL agent and hopefully the agent for the ABL to be extended to the Simon & Brookfield purchaser of J.C. Penneys.

Your Honor, I think that the statements that were made by the witnesses for the Ad Hoc Equity Committee kind of underlined the point. Wells Fargo was never approached by anyone from the equity side to provide financing. In fact, up until today, we never even heard of an alternative proposal to the one that we had been working on, as I said, previously at various hearings for months. And it's not just Wells Fargo, Your Honor. It's a group of ABL bank lenders, about 17 of them inclusive of Wells Fargo, that has to combine their collective resources to provide a $2 billion DIP financing facility -- sorry, acquisition facility, in addition to a $310 million ABL FILO facility in order to facilitate the sale transaction. Hundreds of hours have been spent negotiating and documenting this deal. TO even consider an alternative path at this late stage in November for this company who has -- which has been inventory starved, as I think the record clearly reflects, that

the cash on hand is more a function of selling inventory without the ability to replenish it at the -- at a commensurate rate is only going to lead this company down one path if this sale cannot be approved, and I think that is, unfortunately, a liquidation.

We've all worked extremely hard to avoid that issue. Wells Fargo does not have any other proposals to consider but the one before Your Honor, and we have already committed to provide the financing to the purchaser in order to help effectuate the sale. Thank you, Your Honor.

THE COURT: All right, thank you.

Mr. LeBlanc. Mr. LeBlanc, we cannot hear you.

MR. LEBLANC: Oh, I'm sorry. I muted myself, Your Honor.

THE COURT: Got it.

MR. LEBLANC: Very briefly.

Your Honor, I thought one of the most noteworthy things that came out of the evidence today was the email exchange between Mr. Kurtz and Mr. Sussberg where there was a reference to "this is not going to be Toys 'R' Us." We've known that from the beginning. I mean, Mr. Sussberg could not have been more clear that this was not going to be a liquidation on their watch. And we have worked tirelessly to get to the point that we are at today.

And I think the choice that you face right now, Your

Honor, is between this being a restructuring, where the jobs are preserved, or this being Toys 'R' Us, where it liquidates and these jobs are lost and whether they're found somewhere else, we don't know. But those are the choices Your Honor faces. We were faced with that choice but with a very, very clear fiduciary telling us that they were not going to go down the path of liquidation, and so we found a different path, and we found that through combining with the Simon Brookfield Group to have somebody operate these businesses who had a real incentive and was experienced operating retail businesses.

That's the path that we've chosen, and that's the path the debtors have chosen. We think it's the right path for this business. We think it's the right path for all of the stakeholders here. We -- while, you know, a liquidation may well prove, as Mr. Snyder suggested -- it could very well prove to be more lucrative to the first lien lenders to liquidate this company today, that is the not the path that we've chosen.

And, Your Honor, I think we all have a responsibility to this Court, and when we represent clients before the Court, we have a responsibility to our clients to take positions that are realistic and reasonable, and I have no doubt that Mr. Sussberg and Mr. Van Aalten have done exactly that in their capacity as fiduciaries for their respective clients, recognizing that the alternative to what's on the table here is the liquidation. And so, Your Honor, we very much support the

debtors' motion and urge the Court to approve the sale that's before Your Honor.

THE COURT: All right.

MR. LEBLANC: I'm happy to answer any questions if Your Honor has any.

THE COURT: I don't, thank you.

Mr. Herman, did you wish to make any remarks?

MR. HERMAN: Your Honor, thank you. Can you hear me?

THE COURT: Very well, thank you.

MR. HERMAN: Oh, great. Thank you, Your Honor. Look, it's late, and I very much appreciate you persevering through a very long day, so I'm not going to belabor it. I think Mr. Sussberg covered all the key points, and we're obviously supportive of the motion and would request entry of the order. And we're happy to answer any questions Your Honor may have.

THE COURT: All right, thank you. And I don't have any. Thank you.

Mr. Van Aalten.

MR. VAN AALTEN: Your Honor, thank you.

Your Honor heard Mr. Kurtz say today that had the Committee not cut a settlement before today's hearing, then nothing would change in terms of today for the debtors. They would have been here putting on the same case with or without the Creditors' Committee. And the reason for that is simple,

Your Honor. Unsecured creditors are not the fulcrum creditors of these estates. It's not even close. And it's certainly not the case in a liquidation, and those are the only two scenarios here.

And Mr. Kurtz was right on another point, Your Honor.

ELECTRONIC VOICE: Our system will end this conference in five minutes. To extend -- one hour. Your conference has been extended for 60 minutes.

MR. VAN AALTEN: So (indiscernible) for vendors, for service providers, landlords, and ongoing employer for tens of thousands of employees, we understand that the value of the go-forward business doesn't translate across the board with all of our constituents, and we empathize with that, and it's something we spent hours and hours on with Jefferies, with FTI, working through any and every valuation-related argument that would put unsecured creditors in the money. It just doesn't exist, not in these circumstances. This is about, as Mr. Sussberg said a dozen times today, economic reality, and they are inescapable.

Your Honor, the Committee supports the sale, and I'm happy to answer any questions Your Honor has.

THE COURT: All right, thank you.

Anyone else that supports the sale have comments?

All right. Mr. Okin, podium's yours.

MR. OKIN: Thank you, Your Honor.

And I'll just say that I think nothing could be more appropriate than that this case had a ten-hour hearing on an emergency sale after ten months of rushing to a sale. And I think that ultimately, if you had to boil down the frustration and the complaints and ultimately where we are as a Committee and as shareholders is that we are in November. This case was filed two months into the COVID epidemic, back in May, and this has been slow motion emergency all the way. And now, we're at the end, and all anybody can see is we have to do this deal, we have to do it in the next week or liquidation.

And, Your Honor, maybe you won't give yourself enough credit, but I think -- I know one person in this virtual room who can prevent a liquidation, certainly in the short term, and that's you. And you've heard enough testimony here today to know that while, yes, there may be a cash collateral fight with the ABL lender over use of cash, but there is a lot of FILO here, in that there probably would be use of cash collateral and that the debtor has cash that it can operate on in the short term.

And so would there be some difficulties if you were to say no to the sale? There would be. Would it be an automatic shutdown and liquidation? I don't think that's fully established. I think perhaps the debtors' professionals are doing the prudent thing and advising their client that there's a high likelihood of that because they can't, themselves,

guarantee their client that that wouldn't happen. But this Court can stop this, and I think, quite frankly, Your Honor, this Court should stop this. I think we've heard enough and we've seen enough.

This was a predetermined sale of the real estate assets to the first lien lenders. They found their partner. They found somebody who would operate these stores and pay the rent, and they're getting $150 million a year in rent on these properties while they slowly sell them off as the market recovers and they make a killing on their loan. And in the meantime, Simon and Brookfield walk away with the operating assets. They walk away with a pot of cash, an ABL loan, inventory in the stores, and the holiday sales because they're going to get this thing closed in time to maximize the cash that they get. And they're paying $300 million for it. That's why they're willing to do it, and we know they're desperate to do it because they want to keep cash in their stores. It's a great deal for everybody, and it's a great deal for everybody because it comes at the cost of all the parties that are losing everything.

And perhaps -- you know, everybody else saw it coming sooner, resigned themselves to what was going to happen and just accepted their little slice of crumbs from this deal to make themselves happy so they could say, well, at least we got something. The shareholders aren't even getting those crumbs,

and so they don't have any choice but to come in here and point out what I think is the obvious, which is that this -- you -- we're talking (indiscernible) right now. We'll talk about the law next, but it isn't right. It's not fair to anybody, and what it comes down to is, well, the first lien lenders have the leverage, nobody else does, including the debtors, and that's clear. I mean, I -- you know, I haven't read all of Mr. Sussberg's emails, but I've seen a lot of them in the discovery that we did. I know the fight that he had to fight just to keep this deal on track the way it is, and you can look at the liquidation analysis and you can see why because I have no doubt that there are plenty of those lenders that would have rather just shut this down and liquidated it for its parts.

But there is an ongoing business here. There is a third choice, and there's a third choice that we can still make and that we should still make. And I think not only should we still make it, I think you have to, Your Honor. I think if ever there were a sub rosa plan and, you know, everybody sees them in every case and, I guess, maybe since those cases are now starting to get a little long in the tooth, people have stopped citing sub rosa plan for every sale of all the assets, but every now and then, along comes a case where it actually is true.

We're going to confirmation in 15 days -- or sorry, not 15 days. We're going to confirmation in 12 days. I'm

changing my math and it's too late, but soon. Let's go with that. We're going to confirmation soon. And the fact that we can't wait that amount of time -- nobody has shown why. The reason we can't wait that time is because Simon & Brookfield said, we want to close before then. The reason Simon & Brookfield said they want to close before then is so we can have a 363 hearing and not a hearing on confirmation of a plan. And the Committee settlement only makes that worse because maybe the Committee wouldn't have opposed the sale anyway, but they basically waived any objection to the sale in exchange for treatment under a plan. And that just cements the sub rosa-ness of the sub rosa plan.

And there's a reason why we have that doctrine. There's a reason why we don't do that. Because this ought to be vetted fully to the confirmation process. and really, what ought to happen is this Court may (indiscernible) the DIP loan. And I think you've heard all the evidence you need to hear on that, as well. It was a mistake of fact. Rule 60 allows that if it is a final order -- I'm not sure a DIP loan, even though we call them a final order, really are final orders. We haven't set all the priorities, and there are -- there's certainly good case law for the idea that perhaps this is still, in some sense, interlocutory and the Court can modify it. But even if you can't, I think Rule 60, you know, squarely applies.

It's not a -- this is not fraud on a court. This is not anybody hiding a fact. We obviously had good faith projections that everybody thought were accurate, but it's COVID. Nobody's been through this before. We were wrong. Everybody was wrong. And (indiscernible) mistake of fact, and the Court can fix that. And yes, Mr. Snyder answered the obvious question the way anybody would. He's never seen a DIP loan unwound like this. I've never personally seen a DIP loan that was never used, that all gave rise to a $450 million administrative claim on top of the new money loan. So if it's novel all the way around, we might as well continue going with that novelty.

The fact of the matter is I don't know what the effect on the DIP market would be if this was unwound. I think I would tell any potential DIP lender that it's perfectly safe to make a DIP loan, just make sure that you make one that the debtor actually needs.

And not -- they didn't -- they barely needed it. They didn't extend a penny. And I'm sorry if the DIP lenders are going to be upset because they get their money back in full, they get all their fees paid, they get the interest paid. If they're upset, if they feel like they didn't get the benefit of their bargain, then what they're really complaining about, Your Honor, is that they didn't get the leverage. They didn't get the leverage that they thought they were getting, and that

was the leverage that they needed to steal this company from everybody else.

And this is your opportunity to take that leverage back. We are on the precipice of it obviously being too late. It's not too late yet, but it will be once the sale is approved. And I said it in my opening. I've given you some other partial options that you could go to other than just completely undoing the DIP loan and saying no to the sale. Your Honor, you're a lot more creative than I am at how you do that.

Personally, I think you need to go for the whole enchilada. I think you've got to undo the DIP loan. I think you've got to halt the sale. But there are other things you can do along the way if you choose not to go so far. But I think we're there, Your Honor, and I don't think I need to rehash all the facts that we've gone over for the last ten hours. Thank you.

THE COURT: All right, thank you.

Mr. Thompson.

MR. THOMPSON: Yes. How are you doing?

THE COURT: Little tired. How about you?

MR. THOMPSON: I am tired, too. I listened to this whole call while I worked my entire work shift and rode my motorcycle home and now fixing my dinner. So I want to thank you for allowing me the time to add my last words.

So a couple things. One is you had asked Mr. Snyder if, given the restructuring plan, if it didn't work, you know, it would result in liquidation and if he would be willing to risk the 66,000-some-odd employees to do that. And I think the bigger question would be the people whose pensions who's already worked for J.C. Penneys and already have put in all the years and their sweat and blood into the dollars that J.C. Penneys makes. I would say it would be (indiscernible) of us to force J.C. Penneys to have to make it work for those people that worked so long to have a pension because if this sale order's signed, their pensions are gone. And I think the people, if they were able to speak up as a group, that have pensions, that they would say they'd be willing to risk it all because if you sign the order, they get nothing. So they've got nothing to lose other than to force J.C. Penneys to make it.

I think also, too, that it's been pretty much clear news out there that Simon & Brookfield have been in talks with Amazon about, I guess, turning some stores into fulfillment centers for the end of last-mile deliveries for Amazon. And I think that if you turn the sale -- you turn down the sale, that it will then give the ball in J.C. Penney's court to be able to work with Amazon to figure out what stores they could get the most money for that Amazon really needs to get the biggest bang for buck out of some of the stores that they would need to

close probably to even -- to make the restructuring plan work. And that would be jobs that would still be saved. They wouldn't be lost. Might even gain more jobs at an Amazon fulfillment center if one of the stores was to convert into them.

But I think that -- I know there's a lot of weight on your shoulders to make the right decision because, you know, if you pick the wrong one, then -- you know, let's say you vote for the sale to go through and, a year from now, you see that Simon & Brookfield sold, you know, a ton of stores to Amazon for top dollar, made a ton of money off of it, and people got their pensions wiped out, shareholders got wiped out, and J.C. Penneys went running to the bank with all the money.

And one thing that wasn't brought up during this whole hearing and that I wish somebody would have asked the CFO was, how much money and bonuses were these executives that are supposed to be making these sound decisions for the operations of J.C. Penneys -- how much were they paid prior to going into bankruptcy. And if I'm not mistaken, it was millions and millions and millions of dollars.

So I just ask that you undo the DIP financing, make everybody put their heads to the grindstone and figure out a way to make this work. And will some stores have to close? Yes. But is there a way that they could downsize and make all this work and get through it and top it out? Absolutely, and

it would save people's pensions. It would save shareholders' equity. And maybe they don't get all their equity back. Maybe in a restructuring of the new company, they get, you know, two-thirds of it back and a third is lost. I think that you would go down in the history of judges, bankruptcy judges, and be used in future case law on why DIP loan was undone and the precipice behind that and how to restructure a company that said that they were struggling when they really weren't.

So I just ask that you do the right thing and make them work for staying alive. Thank you.

THE COURT: Thank you, Mr. Thompson.

Someone at area code 301.

UNIDENTIFIED: Yes, hi, Your Honor. (indiscernible). And simple question. I did hear testimony from J.C. Penney's witness, when he mentioned that J.C. Penney's (indiscernible). And what I'm wondering is -- not suggesting at all that Your Honor (indiscernible). But what I'm wondering is has there been any negotiation or thought given to doing some kind of (indiscernible) or anything like that between the bond holders and the shareholders for this transaction. And if not, would there be any chance that it would be given any consideration if Your Honor (indiscernible) could be a solution (indiscernible) and would give equity a chance versus just a complete (indiscernible), if you were, (indiscernible).

THE COURT: Understood, thank you. I'm just simply

not able to answer your question.

UNIDENTIFIED: Thank you, Judge.

THE COURT: Yes, sir.

MR. SUSSBERG: It's Josh Sussberg. Just one point, I think it's important. On the heels of Mr. Thompson's comment, I just wanted to note that on November 6th, the PBGC put out a press release saying that they will pay the pension benefits for J.C. Penney Corporation workers and retirees and assume the pension. So I know that's out there. Workers have seen it. Just wanted to make sure the Court was aware.

THE COURT: I saw it, as well.

Mr. Martin.

MR. MARTIN: Can I speak, Your Honor?

THE COURT: Yes, sir.

MR. MARTIN: This is Dennis Martin again. I just wanted to say something since my name was mentioned by Mr. Sussberg in that closing. This is one heck of a court case to observe today. I mean, you guys are fantastic, and you're really in the spot, I guess. I guess all of us are.

But I did just want to say here about the devastation, and Mr. Sussberg brought that up today, you know, when it happens to you, whether it's mass devastation or just devastation, it's devastation. The devastation really is (indiscernible) and that's really -- as far as being (indiscernible) shareholder, that's what's going to happen to

us. You know, maybe it's our tough luck, but we went down the path of listening to J.C. Penney CEOs and board of directors and such for years, and you know, a lot of us put our trust in that, faith. And, you know, we are last in line, and as you say, there doesn't appear to be any money for us. But also, you know, can J.C. Penney really afford not to include shareholders in this? And (indiscernible). What you do to the least, you do to him.

You know, we are at the bottom of the order. We're not -- they didn't -- (indiscernible) emotional or just, you know, common man statement. But we're at the bottom of the pecking order, and we are least in this case. And as you guys -- some of you said, the world has changed today. And for me, any chance to listen to Mr. Snyder -- he's one of the most authentic men I think I've come across in my life, and so he's inspired me to speak up here at the closing.

I thought (indiscernible) -- I just really don't know what else to say, Judge Jones. I think you're probably a great poker player because I've watched all these, and I can never tell by your face if you're going to overrule or sustain or how you're going to rule. But I guess I'm going to say this. And again, you know, we've got the associates -- I'm trying to think, about 60,000 now, I guess -- but we don't know how many shareholders are out here. And a lot of shareholders are current or former employees, associates. And, you know,

(indiscernible) that's really taking place, and with all the doings being talked about -- and Mr. Okin might win this, I don't know. I just -- I have no idea. But is there a place where something can get to shareholders? Is there room for a compromise just because, you know, when you trust in a company so much where you follow the press releases or any reports on that or, you know, years and years, a decade in some people's cases. And I'd say shareholder equity is all we have. J.C. Penney is a priceless company, and I honestly believe if we go down the path where the J.C. Penney reputation is put at stake by shareholders getting nothing, I think that is really going to be a true devastation to the company. And I don't think it will last, but I think the public will remember this.

And I would call on -- beg you, Your Honor, to do your best, and I'd call on the debtors, all of you guys, try to work this out and get something to shareholders. We are the least in this, and I know you're in a tough spot, but I pray they do work out.

Okay. Thank you all very much. Thank you, Your Honor.

THE COURT: Thank you, Mr. Martin.

Anyone else?

MR. SILVERSTEIN (phonetic): Hello? Can you hear me?

THE COURT: Yes, sir.

MR. SILVERSTEIN: Hello, sir. First and foremost,

thank you very much for the time to speak. I know it's been a long, long day for everybody, so I'll be brief, brief as I can.

My name's Sam Silverstein. I own stocks, bonds in this company. I have family that's worked here for years, and they're invested. So that's where I'm coming from. Now, I just put my baby to bed and lost my notes, so I'm going to have to wing this a little bit, but there are only real points I want to make.

(Indiscernible) my father's memory. My dad used to say, "Don't waste the good air." And he meant that if I'm sitting here standing in front of him complaining about a problem that I've got the ability to fix on my own, well, I'm wasting all the good air, telling him about my problem, you know, saying that I need help or I can't do it. And he would remind me of my abilities to take care of it. That's how we grow. It's helped me grow as a man, helped me become, you know, a (indiscernible), a good father, good husband.

So when I learned about bankruptcy, you know, unfortunately in 2008, I had to go before a judge and declared my case, and that's when I learned that bankruptcy basically means that you no longer have the ability to pay off your debt in a reasonable amount of time based on what you're making and what you owe. Is that fair?

THE COURT: That's fair.

MR. SILVERSTEIN: (Indiscernible). Thank you, Your

Honor.

Well, I think what I heard -- and when I was military intelligence and (indiscernible), what I heard come out today was what I think most of the world has been picking up on based on news clips and articles is that J.C. Penney makes quite a bit of money (indiscernible), more than we expected. Whether or not they are able to pay their debt in a reasonable amount of time, that's the sole question. Now, they're not going to like it. It might take a little bit longer than they anticipate. They might have to make a few adjustments, but I think it's coming pretty clear that they can do it and they just need to be willing to accept that.

The second and last thing is wisdom from my mother, and me and my brother would come in with one of these disputes. Usually, one of us has been (indiscernible). She throws it back out during the argument and says, "Go fix it." So we will. She knew that most of the time, all of that dispute and trouble, turmoil could be easily fixed amongst ourselves. Basically, just variance on what my father says.

So my point of view, my (indiscernible) is that we've come to the conclusion that J.C. Penney can pay off their debts in a reasonable amount of time. May (indiscernible) a lot of creativity and (indiscernible), but they can do it. And I know Your Honor is a good man. I can hear it, hear it in your voice, and I've been paying attention to this case. And

there's a lot of us that are rooting for you and (indiscernible) the justice that you give. (Indiscernible).

My last line is that will you please send J.C. Penney back outside to go fight amongst themselves and figure out how they're going to pay their own bill and dismiss this whole thing or some variance thereof (indiscernible). But otherwise, you know, that is (indiscernible). That's all, Your Honor.

THE COURT: All right. Thank you, sir.

All right. Anyone else?

MR. SCHEER: (Indiscernible). Hello. David Scheer here, Your Honor.

THE COURT: Yes, sir.

MR. SCHEER: Yes. I'm the bond -- one of the bond owners, and I just -- one thing I did not see discussed very much is the fact that Pfizer submitted their vaccine for approval, which could change dramatically the value of many of the assets of J.C. Penney. And also, as was the minority first lien holders (indiscernible) why the REIT is tied into the sale. If Your Honor feels it's necessary to keep the sale going, I don't see why the REIT cannot be split out. The OpCo is getting the stores they need, a number of stores already. All they are doing are leasing. Who owns the REIT down the road doesn't make any difference to Simon if you (indiscernible). It's being valued at the peak of pandemic that comes once in 100 years, but now today, a 90-percent

successful vaccine has been submitted for approval, which should only take a couple more weeks. And the world, by the first of the year, may be dramatically different.

So if it -- Mr. Wayne Snyder's plan is not approved by the Court, I would suggest that the Court at last split off the REIT that does not have to be included in the sale, at least until the 24th, when we can discuss it as part of the plan. Thank you, Your Honor. I appreciate your understanding.

THE COURT: Thank you, sir.

All right. Anyone else? Someone from --

UNIDENTIFIED: Your Honor?

THE COURT: Yes, sir?

UNIDENTIFIED: Thank you so kindly. First of all, I am almost driven to tears for the respect I have for you and this court and, more importantly, to our EC Committee that has stood up unlike anything I've ever seen to defend our few rights that we have and not being paid by any of us. So thank you very much, Your Honor, for at least giving us this closing opportunity to express ourselves.

Lastly, Your Honor, I own in excess of 1.7 million shares. My mom retired from J.C. Penneys. I would gladly trade every share I have to see to it that justice happens in this court, however you see that fit. I trust you, I trust EC, and I trust everybody's that's gone through this process. And thank you for allowing this to happen this evening.

THE COURT: Thank you, sir.

MR. PETER (phonetic): Hello?

THE COURT: Yes. We have someone from area code 240.

MR. PETER: Yes, Your Honor.

THE COURT: Yes?

MR. PETER: My name is George Peter. And first of all, I'd like to thank you so much for giving me the opportunity to make a brief statement. I'm a little bit nervous. I'm not used to this, but for the past 24 years, I've been a police officer here at DC, and I've risked my life helping other people in their time of need. And now, the roles are reversed and I need help. And I'm hoping that you would consider us shareholders.

I invested a substantial amount of money in this company, based on what I'm hearing -- what I heard from the board of directors, from the statements put out by J.C. Penney, and I do believe that they didn't carry out their fiduciary duties towards the shareholders. And I hope that you can find some compassion for us and find some -- any type of equity you can provide for us. I don't have much time to recoup my losses. I'm up there now in age, and I'm about to retire soon. So I hope you would consider that. Thank you.

THE COURT: Thank you, sir, and thank you for your service.

Anyone else?

All right. Then, I have before me the debtors' motion to approve their sale, the Equity Committee's motion to vacate, the DIP order. Those are Docket Numbers 1592 and 1573. I do find that I have jurisdiction over both matters pursuant to 28 U.S.C. Section 1334. I do find that both matters constitute core proceedings under 28 U.S.C. Section 157, further find that I have the requisite constitutional authority to enter a final order with respect to each motion.

So let me try -- there are all sorts of issues that I want to try and address, and I will probably be less than eloquent with all of them.

Number one, with respect to the folks who took the time to write me letters, I read every single one of them. I read those that were thoughtful. I read those that were scared. I read those that were angry. I read them all. They all weigh on me when I walk out of the courthouse every day.

I also want to thank the Equity Committee. They did exactly what I contemplated that they would do the day that I tried to find the right solution. And it was -- and I don't mind admitting it. There was no entitlement to an Equity Committee, but I had some shareholders who stood up and said, we simply want a voice. I tried to find a way to give everyone a voice. That voice has become louder.

I compliment Mr. Okin and his firm for taking this seriously, and for those who watched today, he is passionate

about his position. He has advocated in the face of overwhelming opposition to his position. My view, Don, nice job.

I also want to compliment all of the other professionals involved in this. If you remember when we started this case and Mr. Sussberg got up and gave me his timeline and I politely told him that it was too long. I told him it was too long because, you know, the hair on my head is not turning gray just because. I have seen a lot of these come through and fail, both as a lawyer and as a judge, and this was simply one that I wasn't going to allow to fail.

I -- you know, it's hard to ask a 69-year-old federal judge to give up his weekends and to pull all-nighters to try and get something done. That's exactly what I asked Judge Isgur to do. He was as vested in the cause as anyone that I've ever seen, and I've only ever seen him one other time like this. And for those of you who are Houstonians, Judge Isgur and I were the lawyers when Ninfa's filed their bankruptcy. And for me, it was just another case. For Isgur, it was a lifelong calling, and he would not let it die. He just simply wouldn't quit.

And as I watched him in the J.C. Penney negotiations, I saw the same light in his eyes. He was as convinced as ever that he was going to figure out a way that the company would survive. And, you know, I listened to some of his complaints.

I saw how hard he was working. I covered his docket when he said, I can't do my cases today because the folks in J.C. Penney need my time.

But I am confident that he explored every avenue. He pushed the parties, quite honestly, probably further than they wanted to be pushed. I'm sure he got you thinking about things you didn't want to think about. But I am confident in the process. The evidence is overwhelming that everyone has looked at every viable option that could exist.

I've said it before, but I want to reiterate it again. There are a couple of things that I cannot do. When I took an oath, I took an oath to enforce a law, to enforce a process. That means that I do not get to react emotionally. It means I do not get to sacrifice the Code simply because I don't like the outcome. It also means that I have to make hard calls.

And as I've said before, you don't lose -- everyone's talked about, well, they're going to lose, they're going to lose their equity, they're going to lose their value. That simply is not true. Value's already gone. Value was gone long before today.

The other thing that I cannot do is that I cannot create value. I simply have to recognize what is there, and I have to follow the Code's requirements that says I have to look at various classes of creditors, I have to understand how the

rules work, and I have to apply them in a uniform fashion.

It has also been very troubling to me, as I've read a lot of the letters that I've gotten, that there are a lot of folks out there who don't understand what a share of stock means. One of the most troubling letters that I read -- and it brought a tear to my eye when someone wrote a letter and said, "All I want is my money back. I bought J.C. Penney stock because they paid a higher interest rate than my local bank." And that, while we all know is wrong in terms of what a share of stock is, it also reflected that someone tried to make a good decision and simply didn't have the requisite understanding to make the right call.

I wish that I could fix everything, but unfortunately, I cannot. I am comfortable that the process has been fair. I am comfortable that the highest and best offer has been accepted by the debtors. I think the debtors have exercised prudent business judgment. And I want to view that finding in the context of what Mr. Snyder said.

And for those of you who are listening, you may have heard me, you may not have. I have known William Snyder for 30 years. I have worked on the same side with him. I have worked against him. And for the gentleman who said that he had such great respect for William Snyder, I agree with that. He is one of the best operators that I have seen.

I overruled the objections on the numbers because I

have lived what he has lived, and I know the analysis he went through. And he was attempting to find a path where no one before him had walked, and I appreciate the creativity that he tried to apply. I -- he had a tough day on the stand, but he tried, and he was also honest. And you heard it when I asked him the two questions that I asked him.

There are so many pitfalls in what Mr. Snyder proposed. It made so many assumptions, the majority of which I know could never come true. There are also so many issues. Nobody really pointed them out, but I looked at the numbers and I recognized the shortcomings. I recognize the failure to account for time. I get all of that. And as much as -- if I were gambling with my own money, I might just give Mr. Snyder a shot because of the confidence that I have in him, but I'm not gambling with my own money. I am gambling with the investments of a capital structure that supports this plan. I would be gambling with 60,000 jobs and the families of those folks. And that, I am simply not willing to do. It would take a lot for me to walk away from something that has been negotiated by the best professionals in the world, that involves people who are adequately capitalized and who have all of the proper incentives to make this work.

So I am going to approve the sale as requested. I've had an opportunity to review the revised form of order. The order contains other findings of fact and conclusions of law,

which I've read and I adopt in their entirety. I also incorporate the findings that I've made on the record within that order pursuant to bankruptcy 7052.

With respect to the Equity Committee's request to vacate the DIP order, it would take a lot for me to do that. I don't want to say never because I don't live in a word of never, but it would take a lot. And I've been given no reason that I should undertake such a drastic measure. Monies were advanced. People acted based upon the finality of an order that I entered, and again, it would take a lot for me to undo that. There's simply no basis to grant that relief. I will deny that motion.

Mr. Sussberg, if you could have Ms. Yenamandra prepare just a short order denying the motion to vacate for the reasons stated on the record, run it by Mr. Okin to approve as to form only.

Mr. Okin, I'll put on the record that by approving as to form only, you're not waiving any right, any right of review or appeal that you may have. You're simply confirming that the written paper conforms to the statement that I've made on the record. Does that give you comfort that you can sign that order as to form only?

MR. OKIN: It does, Your Honor, although I would ask by granting the sale motion, you are also granting the waiver of 6004.

THE COURT: Yes.

MR. OKIN: So I will then just ask, although it seems redundant, for a stay pending appeal.

THE COURT: Yeah. Mr. Okin, I'm going to make you file a motion, and if you file a motion and can set forth cause, we'll have a bond hearing. You're not an official committee. We'll take that up if, as, and when you decide to go down that path. I'm not entertaining a simple one-line statement so that you get over the requirement. You'll do it the right way.

Anything else, folks, that we need to talk about this evening? All right.

UNIDENTIFIED: Thank you, Your Honor.

THE COURT: Then, thank you everyone. We'll be adjourned.

COUNSEL: Thank you, Your Honor.

(Proceedings concluded at 8:58 p.m.)

* * * * *

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

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428 DATE: November 11, 2020

ACCESS TRANSCRIPTS, LLC

United States District Court
Southern District of Texas
ENTERED
January 13, 2021
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

AD HOC COMMITTEE OF EQUITY INTEREST HOLDERS, *et al*,	§	
	§	
Appellants,	§	
VS.	§	CIVIL ACTION NO. 2:20-CV-280
	§	
J.C. PENNEY COMPANY, INC., *et al*,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Debtor, J.C. Penney Company, Inc.'s Motion to Dismiss Appeal as Moot and for Lack of Standing (D.E. 44) and Walker & Patterson's Emergency Motion to Withdraw as Counsel for Appellant (D.E. 53). Appellant represents itself to be an ad hoc committee of equity interest holders or shareholders of the Debtor. D.E. 2. According to Appellant's withdrawing counsel, the committee is led by an individual named Mr. Niko Celentano (without any indication that he is a licensed attorney) and the committee does not intend to secure new counsel or prosecute this appeal. D.E. 53, 58.

It is not clear whether any of the members of the committee are business entities that must be represented by counsel or natural persons who may appear pro se. *See generally, Sw. Exp. Co., Inc. v. I.C.C.*, 670 F.2d 53, 55 (5th Cir. 1982). Nevertheless, an individual named Li Li has filed a response to the motion to dismiss (the only timely-filed opposition filing), purporting to be a shareholder and member of AHEC, and proceeding pro se as an appellant. D.E. 51; *see also*, D.E. 57 (Li Li's Appellant's Brief).

Because Li Li's response does not adequately address the grounds for dismissal, the Court GRANTS the motion to dismiss (D.E. 44) without addressing whether Li Li may act alone as an Appellant on the record of this case. And because the motion to withdraw (D.E. 53) is unopposed, it is GRANTED.

DISCUSSION

A. Statutory Mootness

AHEC filed this appeal to halt the bankruptcy court-approved sale of virtually all of the assets of the Debtor. AHEC argued, among other more technical bankruptcy issues, that the sale proceeds were grossly inadequate and unfair to creditors and equity interest holders, allowing for no distributions to equity interests holders through the bankruptcy proceeding. After an emergency temporary injunction hearing, the Court refused to enjoin the sale and the sale has since been consummated. D.E. 38, 44, p, 28 (Affidavit of Wafford). As a result, the Debtor claims that this appeal should be dismissed on the basis of statutory mootness. 11 U.S.C. §§ 363(m), 364(e).

> The statute assures purchasers that once the bankruptcy court approves the sale and it is consummated (that is, the order is not stayed), then no appellate court can later second-guess the deal. The cost, of course, is disposing of the full judicial review for legal accuracy that typically follows a trial court's ruling. But Congress thought that trade was worth making to encourage buyers to come to the table ready to revitalize useful assets, as those buyers might otherwise stay away when a transaction remains shrouded in legal uncertainty. The Bankruptcy Code thus entrusts review of a sale solely to the bankruptcy court's in-the-moment judgment unless a stay is obtained that prevents the sale from closing prior to appellate review.

Matter of Sneed Shipbuilding, Inc., 916 F.3d 405, 409–10 (5th Cir. 2019).

Li Li argues that § 363(m) mootness does not apply because the transaction does not reflect a purchase "in good faith." The Debtor argues that a good faith challenge may not be raised for the first time on appeal. *In re Ondova Ltd. Co*., 620 F. App'x 290, 292 (5th Cir. 2015); *see also, In re Ginther Trusts*, 238 F.3d 686, 689 (5th Cir. 2001). Li Li has not countered this issue by demonstrating that a good faith issue was raised in the Bankruptcy Court proceeding.

Li Li further argues that consummated transactions may be unwound, citing *In re Tribune Media Co*., 799 F.3d 272, 281 (3d Cir. 2015). *Tribune* permitted a claim for disgorgement of plan distributions to creditors in connection with a contractual claim by the trustees. The legal theory involved was equitable mootness with respect to a plan confirmation, not statutory mootness regarding a sale of assets. Consequently, *Tribune* does not negate the Debtor's mootness argument.

B. Standing

The Debtor also argues that the equity interest holders that make up AHEC do not have standing to appeal the order of the bankruptcy court under the "person aggrieved" test, which limits appellate rights in order to effectuate the intended equitable efficiencies of bankruptcy proceedings. The record of the bankruptcy hearing by which the sale was approved, uncontradicted by any evidence produced in the stay hearing in this Court, demonstrated that the Debtor's assets were insufficient to allow any recovery for equity interest holders under any available scenario. Consequently, they have no pecuniary interest to support standing. Li Li has not addressed this argument.

Standing to appeal a bankruptcy court decision is a question of law. *Furlough v. Cage (In re Technicool Sys., Inc.)*, 896 F.3d 382, 385 (5th Cir. 2018). And it involves a bankruptcy-specific test.[1] The bankruptcy court granted AHEC "interested party" status, with the right to participate in the decision at the trial stage. 11 U.S.C. § 1109(b). However, that does not translate into a right to appeal as to AHEC or any of the committee members.

> Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.

Furlough, 896 F.3d at 385; *see also, In re Coho Energy Inc*., 395 F.3d 198, 202 (5th Cir. 2004); *Matter of Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983); *In re AFY*, 734 F.3d 810, 824 (8th Cir. 2013) (specifically distinguishing status as a party-in-interest from a person-aggrieved).

The limited right to appeal is afforded to "persons aggrieved by an order"—language the courts have carried through subsequent Bankruptcy Code amendments from the Bankruptcy Act of 1898. *Fondiller*, 707 F.2d at 443; *see also, AFY*, 734 F.3d at 824; *In re EToys, Inc*., 234 Fed. App'x 24, 25 (3d Cir. 2007); *In re Saldana*, 534 B.R. 678, 684 (N.D. Tex. 2015). According to this test, "appellant must show that he was 'directly and

[1] Article III standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (listing the irreducible minimum of constitutional standing) does not apply. *Furlough*, 896 F.3d at 385 n.4 (citing *Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 210 n.18 (5th Cir. 1994) (explaining that "Article III is inapplicable to bankruptcy courts").

adversely affected pecuniarily by the order of the bankruptcy court' in order to have standing to appeal." *Coho Energy*, 395 F.3d at 203 (quoting *Fondiller*, 707 F.2d at 443).

The consensus in the caselaw is that status as a shareholder, alone, is not sufficient to demonstrate a direct and adverse pecuniary effect necessary for standing. The shareholder's interest is derivative, not direct. *See e.g., AFY*, 734 F.3d at 820; *EToys*, 234 Fed. App'x at 25 (citing *Kauffman v. Dreyfus Fund, Inc*., 434 F.2d 727, 732 (3d Cir. 1970) ("A stockholder of a corporation does not acquire standing to maintain an action in his own right, as a shareholder, when the alleged injury is inflicted upon the corporation and the only injury to the shareholder is the indirect harm which consists in the diminution in value of his corporate shares resulting from the impairment of corporate assets."); *Hardes Holding, LLC v. Sandton Credit Solutions Master Fund, III, LP*, 3:19-CV-3009-RAL, 2019 WL 6347775, at *4 (D.S.D. Nov. 27, 2019) ("Under the shareholder standing rule, shareholders cannot appeal a bankruptcy court decision if they have only a derivative interest in the outcome.").

The Fifth Circuit has acknowledged only one limited exception to this rule: *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977), *superseded by statute on other grounds as recognized by In re Woerner*, 783 F.3d 266, 274 (5th Cir. 2015) (en banc). In that case, the shareholder was permitted to object to the trustee's attorney's fees only because of the unique situation presented by the trustee's apparent conflict of interest—an issue not presented here.

In another unique case, a sister court allowed appellate standing to a creditor, based on a debtor's shareholder interest. *Saldana*, 534 B.R. at 684. There, a divorced

wife was a creditor in the divorced husband's bankruptcy case. He had also placed two of his companies in bankruptcy and the cases were jointly administered. The husband's bankruptcy estate stood to recover equity from one related company's estate, which could then be used to fund her claim as her husband's creditor. Under those circumstances, she was granted standing to enforce her claim, through the husband's equity interest. Again, no such scenario is operative here.

Another district court has suggested that a shareholder might have standing if it can show that there was sufficient equity in the debtor's estate to make a difference to the value of its shares. *See generally, In re Paragon Offshore PLC*, 597 B.R. 748, 758 (D. Del. 2019). The equity holder did not have standing because the debtor's liabilities exceeded its assets and the plan of reorganization would under no circumstances provide for a recovery to him. In comparison to the law set out above, this test is not supported by the majority of the courts. And even if it were an appropriate method for demonstrating standing, Li Li has failed to provide any evidence on which this Court may find the Debtor's assets to exceed its liabilities. Therefore, Li Li has not demonstrated standing.

CONCLUSION

For the reasons set out above, the Court GRANTS the Debtor's motion (D.E. 44) and DISMISSES this appeal. The Court further GRANTS the motion to withdraw (D.E. 53) and directs the Clerk of Court to substitute Mr. Niko Celentano as the contact person for AHEC. In the event that AHEC seeks to participate further in this action without licensed legal representation, the Court ORDERS that any paper filed on behalf of AHEC

demonstrate that right. This Order terminates all pending motions and this action is terminated.

ORDERED this 13th day of January, 2021.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

Certified as a true copy and issued as the mandate on Mar 11, 2021

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 21-40046

A True Copy
Certified order issued Feb 17, 2021

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE MATTER OF: J. C. PENNEY COMPANY, INCORPORATED

Debtor,

LI LI,

Appellant,

versus

J.C. PENNEY COMPANY, INCORPORATED,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:20-CV-280

Before DENNIS, SOUTHWICK, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the opposed motion of appellee to dismiss the appeal for lack of jurisdiction is GRANTED.

Exhibit E

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 11, 2021

Mr. Nathan Ochsner
Southern District of Texas, Corpus Christi
United States District Court
1133 N. Shoreline Boulevard
Corpus Christi, TX 78401-0000

No. 21-40046 Li Li v. J.C. Penney
USDC No. 2:20-CV-280

Dear Mr. Ochsner,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Jann M. Wynne, Deputy Clerk
504-310-7688

cc: Mr. Matthew D. Cavenaugh
Mr. Li Li
Mr. Michael Brian Slade
Mr. Joshua A. Sussberg
Ms. Jennifer Francine Wertz

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS (CORPUS CHRISTI)

IN RE:	.	Case No. 20-20182
	.	Chapter 11
	.	
	.	(Jointly administered)
J.C. PENNEY COMPANY, INC., et al.,	.	
	.	1133 N. Shoreline Blvd.
Debtors.	.	Corpus Christi, TX 78401
	.	
	.	Tuesday, November 24, 2020
. . . . .	.	9:00 a.m.

TRANSCRIPT OF CONFIRMATION HEARING
BEFORE THE HONORABLE DAVID R. JONES (VIA VIDEOCONFERENCE)
UNITED STATES BANKRUPTCY COURT JUDGE

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Exhibit F

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TELEPHONIC APPEARANCES (Continued): 4

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TELEPHONIC APPEARANCES (Continued): 8

Also present:

JILL SOLTAU
J.C. Penney CEO

DAVID KURTZ
Vice Chairman and Global Head of Restructuring, Lazard Frères & Co. LLC (fact and expert witness)

JAMES MESTERHARM
Managing Director, AlixPartners LLP

CHRISTIE RHOADES
Shareholder

DAVID SCHEER
Bond Owner

MICHELLE WLAZLO
Employee

I N D E X
11/24/20

EXHIBIT	ADMITTED
Debtor's Exhibits 1958-1 through 1958-20	28
Debtor's Exhibit 1985	28
Debtor's Exhibit 2022	28

(Proceedings commence at 9:00 a.m.)

THE COURT: Good morning, everyone. This is Judge Jones. The time is nine o'clock. Today is November the 24th, 2020. This is the docket for Corpus Christi, Texas. We have first on the docket this morning the jointly administered cases under Case Number 20-20182, J.C. Penney Company, Inc.

Folks, I will remind you, please make your electronic appearance. You do that by going to my website. Two clicks. It will take you less than 20 seconds.

First time that you speak this morning, if you would please, state your name and who you represent. That will give us a good voiceprint for any written transcript request.

Finally, we are recording this morning using CourtSpeak, so we'll have the audio -- maybe in pieces, depending upon how long this goes, but we will get it up on the docket as quickly as we can so that you can download it.

Mr. Sussberg, good morning. Are you starting us off this morning?

MR. SUSSBERG: I am, Your Honor. Thank you.

THE COURT: Yes, sir.

MR. SUSSBERG: Joshua Sussberg from Kirkland & Ellis on behalf of J.C. Penney and its related debtors. We do want to move directly into the evidentiary portion of today's hearing, but I wanted to make a couple brief opening remarks.

Your Honor, there have been suggestions that this

bankruptcy was artificially manufactured and that we imposed a fake emergency with the intention of escaping legal review. Nothing could be further from the truth, Your Honor. We acknowledge that many parties will, however, receive a limited recovery in these cases, and shareholders new and old will seek their equity cancelled. I am truly sorry to everyone, and I've said it before, who stands to lose in these cases. But economic reality does not afford creative liberty to distort the facts and the law and attack the character of those who are involved in these cases and have worked tirelessly to save a retail company against all odds.

Many of the professionals and creditors in this case have been on the wrong side of a retail Chapter 11. And for those of you that are not familiar, all the data suggests that when a retailer files for Chapter 11 it is more likely than not that the case ends in a liquidation. And having been a part of the largest retail liquidation ever, along with Mr. Kurtz, this was simply not something that we were prepared to relive. And the accountability theme that we seized on from the outset of these cases was so important to realizing the only outcome that we believed was acceptable.

Now, if the Court recalls, and the parties in interest may remember, Kirkland and Lazard were retained all the way back in July of 2019 to assist the company in addressing its balance sheet. The company was heavily

overlevered. And it started out as a liability management initiative. And brand new management had come on just before the bankruptcy cases in an effort to help turn things around after ten years of operational mishaps.

But to say this company was thriving pre-COVID is untrue. And when each and every location was closed in March, the entire workforce was furloughed, and the cash flow was close to $50 million per month. Chapter 11 was not simply an option; it was the only way that this company could potentially survive. And while we filed these cases with a restructuring support agreement with the Milbank group, that RSA was nothing more than an attempt to create momentum. The holes and outs in that document were significant.

The last six plus months have been about executing on a vision, and frankly pure will. The sale that Your Honor approved on November 9th is likely to close tomorrow, ahead of Black Friday. Parties are working to dot the I's and cross the T's on all the various documents and ultimately submit the draw request on the new ABL.

The evidence today, Your Honor, will demonstrate that the plan before the Court complies in all respects with Section 1129 as detailed in our memorandum of law at Docket 2021. Mr. Slade will handle the evidentiary portion of today's hearing for the debtors; and Ms. Yenamandra, who really is the glue on the debtors' side, will handle the argument as it

relates to the Ad Hoc Equity Committee and related shareholders, all of which we'll handle collectively. And as you'll hear, Your Honor, and as was reflected in the objection chart filed about an hour ago, all other objections to the plan have been resolved. We will need to spend a few minutes talking about the first lien trustees' motion, which will address in due course.

There were many times over the last six months that we did not think we'd be standing here today. The twists and turns played out publicly. But to be able to stand here with consensus amongst most all of our major creditor constituencies is a credit to the many organizations and professionals involved. These parties ultimately set aside their differences and concerns to get to the only result that made sense.

There was nothing nefarious here, no grand master plan to steal value from shareholders. There is no better test of value than a market check. And I remember this from being a kid and collecting baseball cards. I used to look at the Beckett's guide for baseball card value, and my father always told me that card is not worth anything until someone's willing to pay for it.

And here, the market check unequivocally demonstrated that everyone other than our first lien lenders are woefully out of the money. That was potentially the case all the way back in 2019, and it certainly is the case in the face of the

ongoing pandemic.

All other theories, unfortunately, defy reality. And as professionals, it's our duty to take into account the realities of each situation and play the cards that we are dealt. It is a shame that so many people have been victimized for their efforts in saving a 118-year-old company under some of the most difficult circumstances we've ever encountered, and it should not detract from what has been accomplished. We again want to acknowledge and thank all of the parties involved for getting to where we are today.

We also understand that Mr. Okin and his team are simply doing their level best for shareholders, but the facts and the law do not support any of their arguments or the many conspiracy theories espoused in the dozens of letters docketed in these cases. Instead, Your Honor, the facts and law, as we will demonstrate today, suggest that the plan should be confirmed.

So with that, Your Honor, unless you have any questions, and I'm sure you'll want to open it up for people to make comments, but we would like to move to the evidentiary portion of this hearing as quickly as we can.

THE COURT: Understood. Thank you.

Anyone else wish to make any opening comments? If you do, and you haven't already done so, you need to hit "five star" on your phone.

Someone from area code 713-228.

MR. OKIN: Your Honor, that's me, Matthew Okin, on behalf of the Ad Hoc Equity Committee.

THE COURT: Thank you, Mr. Okin.

MR. OKIN: Your Honor, I won't belabor the points. I think it's clear in our objection, and I can address it after we hear the evidence in a little more detail, but I do think -- we've made our arguments with regard to the sale. The Court's ruled. It's up on appeal. We'll address the merits or lack thereof of the sale itself through that process.

But on the assumption that the sale is a done deal, although it still hasn't closed -- and I'll note that, you know, the rush to get it closed well before plan confirmation seems to have been one of the many deadlines in this case that never seems to actually hold -- we're now past confirmation and they still haven't closed the sale, which probably surprises no one.

But that said, assuming the sale closes, as ultimately expected, there is no need for a plan here. The plan at this point is purely to hand out releases to parties for their participation in the sale. And to the extent they were granted as part of the sale order, they're part of the sale order. To the extent they weren't granted as part of the sale order, to the extent parties were not able to bargain for that as part of the sale, there is no reason why, given the

lack of any consideration really being provided in this plan, that parties should get additional consideration in the form of releases.

In particular, Your Honor, the opt-out provisions for releases -- third-party releases by the shareholders, the ones I'll address specifically -- I know Your Honor's views on opt-outs, but I'll ask you to consider whether in the current context an opt-out is really equitable here.

The fact of the matter is shareholders are getting absolutely nothing. They're getting no consideration under this plan whatsoever. And for their wipe-out of their stake, they're being asked to wade through all of the documents and everything that's been filed in this case, understand the nature of the opt-out that's been sent to most of them -- I don't know if they've all gotten them -- and return that form properly.

I appreciate the additional 90 days that the Court forced the debtor to give us, but the fact of the matter is shareholders -- innocent shareholders who may or may not even know that they're being asked to release their claims are going to lose their claims against third parties for no reason. And there's no benefit to them from giving this release, they're getting nothing under the plan, and they shouldn't be asked to give up rights in what essentially amounts to them a bankruptcy case that has no benefit to them; and, I guess, they lack any

standing then by that theory, yet they're being asked to give up their claim. And that's just not fair.

And I'll submit, Your Honor, that I don't know what our status is as an ad hoc committee, whether we're an official committee in all but name, or whether we truly just represent the four members of our committee. We tried as best we could in our order to make that clear. But the fact of the matter is these are not consensual releases. We've objected to them. We've objected to them on behalf of all shareholders and --

THE COURT: So, Mr. Okin --

MR. OKIN: -- we can argue about whether we have standing to do that.

Sorry, Your Honor. Go ahead.

THE COURT: Let me ask you this. Under the circumstances, if I were to determine that no releases on behalf of the shareholder class -- but because of a lot of the confusion, if you will, of direct versus derivative, that I maintain the status of a gatekeeper with respect to any such claims to ensure that we implemented the plan, that resolve your issue?

MR. OKIN: As to that release? I think that would work, Your Honor. I mean, it would depend on the language, but I certainly have no problem with this Court acting as a gatekeeper on those issues.

THE COURT: All right. And so if that's -- and I

read your objection, and I -- you know, I try to just cut to the chase. If that issue were taken care of with respect to shareholders, what else is left?

MR. OKIN: What else is left is the issue of the debtor releases and whether there's any point in those releases being granted at this point. They're superfluous to whatever was granted in the sale order.

THE COURT: So -- but that's not really your issue at that point, is it? I mean, if I --

MR. OKIN: Your Honor --

THE COURT: If I give shareholders a way to have their day, if they truly have any individual claims, then how could you do anything more for that group?

MR. OKIN: Your Honor, we think that the plan shouldn't be confirmed and that there ought to be somebody to look into whether or not there are claims to be brought. And I don't think the plan provides any benefit beyond a Chapter 7. And I think for that reason it fails the best interest of creditors test and it just fails from the need for a plan here.

THE COURT: So --

MR. OKIN: And that makes releases superfluous.

THE COURT: I got you. So -- and I want to continue this dialogue. I just want you to think through this. So the argument that you're making gets dwarfed, and quite frankly just run over, by the creditor constituency that isn't being

paid in full that says we agree.

I'm seriously thinking about, if you're listening to me, about creating a remedy for you so that if there are in fact direct claims that are out there in this unique circumstance where we have a liquidated plan, I'm thinking hard about that. But it's not the beginning. It's the end.

And so I want you to think really hard about that. Because I haven't talked to the debtor yet, and I haven't talked to other parties. But before I start -- I mean, debtor is going to live or die with its plan. And there's an argument that that's what I ought to be doing. But I read your arguments and there is one small piece of that that rang true in what you said. But if I'm going to go through this process, I have to know that that's it.

You know, the other arguments -- again, and I'm not being critical, but the other arguments that you made really weren't equity committee arguments. They were UCC arguments. They were other unsecured arguments. They don't really ever filter down to where you are. And if I make it neutral as to the equity holders in terms of if they have individual claims, that they still have the avenue to assert those in the future, I got to know that that -- I got to know that that's it.

MR. OKIN: Your Honor, you've put me in a difficult position because I don't have the ability to talk to my client about that. We would be giving up the ability to --

THE COURT: Well, I mean --

MR. OKIN: -- appeal the confirmation order --

THE COURT: Uh-huh.

MR. OKIN: So I do --

THE COURT: Let me ask --

MR. OKIN: I can't put that on the --

THE COURT: No, let me ask -- and I'm not trying to put you in -- well, I am somewhat trying to put you in a difficult place, but it's a difficult place with an end.

If you need -- I mean, I'm assuming that your committee members are listening.

MR. OKIN: I too.

THE COURT: And if you need an opportunity to go have a quick emergency meeting, I'm -- I never was putting you in the spot to say you have to make the call without getting client input. That was never -- that was never in the cards. It's just I'm looking at what -- I'm looking at what you filed. And as I do -- and unfortunately -- I wish I had the chart on the objection resolution sooner, because I read every single one of them, and it turns out I didn't have to.

If I'm going to -- if I go through all of that -- well, you already know what I think is important about the objection that you filed. And if you want an opportunity to talk to your members, obviously, you know, 15 or 20 minutes is what I was thinking. I'm more than happy to do that. Because

this is important. And if I'm going to go through this process, I want to know that, number one, they understand -- because it's very clear to me, given all of the letters and everything that are out there, there are a lot of people who simply don't understand the process.

And so, one, I want to make sure that they understand it. And two, I need to know that it brings this issue to a close and that it is a result that is both fair and transparent and strikes the right balance.

MR. OKIN: Your Honor, I would be happy to take 15, 20 minutes to talk to the committee. Otherwise, I feel I would have to oppose the confirmation throughout --

THE COURT: Understood.

MR. OKIN: So that's --

THE COURT: So let me do this --

MR. OKIN: The other question I have for you, Your Honor, is -- we're talking about just resolving confirmation. We do have an appeal pending on the sale --

THE COURT: Yeah, I wasn't asking -- I wasn't asking you to do anything with that. That is -- as far as I'm concerned, that is outside my jurisdiction at that point -- at this point.

MR. OKIN: Okay.

THE COURT: Let me ask Mr. Sussberg -- and I've thought about this an awful lot, and I expressed my concern

about this issue at our last hearing. I've thought more about it. This is something I've done before. It has worked. Not quite in this context, but tell me what I'm missing in terms of striking the right balance.

MR. SUSSBERG: Your Honor, I understand it, and I've heard your articulated concerns in the past. I think that so long as people truly understand the difference between derivative claims and direct claims --

THE COURT: Yeah.

MR. SUSSBERG: Right? These are individual direct claims that someone may have against a third party.

THE COURT: Right.

MR. SUSSBERG: And that's the limit.

THE COURT: Right. And well -- don't --

MR. SUSSBERG: And if Your Honor is the gatekeeper, I'd be okay.

THE COURT: Okay. So, Mr. Okin, let's do -- and I'm assuming, Mr. Van Aalten, on behalf of the Committee, you have no position with respect to that. Is that -- and I don't mean to put words in your mouth, but I can't figure out how you would care.

MR. VAN AALTEN: I can't figure it out either, Your Honor. So that would be my position.

THE COURT: Fair enough. And again, this is all going to go -- you know, these would all be direct claims, you

know, as of the petition date. The plan exculpation issues I think are appropriate, unless I hear something today that's wrong. But it would be -- you know, they would be claims -- they would be prepetition direct claims as of, you know, that belong to the individual shareholders.

So, Mr. Okin, you want to go have your meeting? You want to tell folks -- assuming that you're listening -- you want to give them a number to call, or tell them how to contact you --

MR. OKIN: (Audio interference)

THE COURT: Okay. You've obviously done that before. I was just trying to be helpful.

It is -- someone has popped up. Area code 608. Let me unmute them. Who do we have, area code 608?

MS. MASON: Thank you, Your Honor. It's Katie Mason from Quarles & Brady on behalf of Royal Appliance Manufacturing Company doing business as TTI Floor Care, North America.

THE COURT: That was hard to say.

MS. MASON: I just wanted to -- yeah, it's a mouthful. But I've represented them a long time, so I'm used to rattling it off.

THE COURT: Got it.

MS. MASON: I just wanted to state -- we had filed a limited objection and it is resolved by the modification to Article X-G that was filed last night. However, I did note

that the language in the confirmation order at Paragraph 86 was not updated to reflect that modification. I would just ask that it be -- that they mirror each other, and that is all.

I also wanted to let you know that I may have to jump off of this hearing around noon for a different hearing.

THE COURT: Got it. So, Ms. Mason, what I would ask you to do, while we take our break with Mr. Okin, perhaps you and Ms. Yenamandra could connect. I know -- I am sure that it was nothing intentional. Just given the size of the chart that got filed, I know what Ms. Yenamandra has been doing for the past 36 hours.

MS. MASON: Absolutely.

THE COURT: So perhaps you all could use the time while we take a break to figure out if we have an issue or not.

Ms. Yenamandra, I see you there. Any objection to doing that while we take a break?

MS. YENAMANDRA: No. Not at all, Your Honor. It was inadvertent, just with the amount of paper we're trying to push out. Not an issue at all.

THE COURT: I got it. And do you and Ms. Mason know how to reach out to one another while we take a break?

MS. YENAMANDRA: Yes, Your Honor.

THE COURT: All right. Thank you.

MS. MASON: Thank you.

THE COURT: Then, Mr. Okin, is it 9:21. You think

9:45 will give you ample opportunity?

MR. OKIN: I think that should work, Your Honor.

THE COURT: All right. Thank you.

All right. Then we'll be adjourned until 9:45. Folks, I'm going to leave the line on, although it is muted, but I am going to turn my camera off. So we'll be back at 9:45.

(Recess at 9:21 a.m. until 9:46 a.m.)

THE COURT: All right, folks. It is 9:46. Let me ask, Mr. Okin, were you able to have a discussion with your committee members?

MR. OKIN: I was able to have a discussion with some of my committee members. But given the short time, that's going to suffice as a -- under our bylaws, as a committee meeting, Your Honor. So I do have a resolution of the question you asked.

THE COURT: Okay.

MR. OKIN: So we are willing to accept the proposal that you've made, Your Honor. The key for us, though, is going to be how that gatekeeper function works.

THE COURT: Okay.

MR. OKIN: We don't want it to become an unnecessarily large hurdle.

THE COURT: Sure.

MR. OKIN: It needs to be as simple as possible, so

that somebody who wishes to bring a claim can do so without having to spend, you know, a lot of money or time in the bankruptcy court.

THE COURT: Sure.

MR. OKIN: But subject to seeing some language -- and I know Mr. Slade was going to look for some from prior cases that he was familiar with and send it to me. Subject to seeing that language and being able to agree on it, we would stand down on our objection.

THE COURT: All right. So let me ask you, Mr. Okin, just so -- and I may be able to help move this along. What is it -- do you have an expedited process in your head that you're thinking about?

MR. OKIN: No, not really, Your Honor. I hadn't given much thought to how this would work until now, so -- I know it's been done in other cases, so I just need to look at some of the -- maybe what's been done in prior cases and see if that works.

THE COURT: Sure. So I will tell you how I did it, is it was just a very short motion. I had a reduced response time. And it was, "I want to bring the complaint attached as Exhibit 1."

MR. OKIN: And you would be asked to decide -- is whether it's a claim that was released under the plan or not?

THE COURT: Correct.

MR. OKIN: That's acceptable, Your Honor.

THE COURT: Okay. All right. Then I am sure that with all of the brains that I have on the call that you all can quickly work through some language that makes sense.

All right. Mr. Sussberg, I lost -- I do not see Mr. Slade. Did we lose him? Ah, there he is. All right. Got it.

In that case, do we want -- Mr. Slade or Mr. Sussberg, is the contemplation that we will now proceed ahead with the evidentiary presentation?

MR. SUSSBERG: Yes, Your Honor.

MR. SLADE: Yes, Your Honor.

MR. SUSSBERG: I think we can streamline things --

THE COURT: All right.

MR. SUSSBERG: -- in light of this.

THE COURT: All right. Thank you.

Then, you know what? I actually stopped at Mr. Okin. That probably wasn't fair. Is there anyone else that wanted to make any opening comments?

All right. Then Mr. Slade, why don't you proceed ahead, please.

MR. SLADE: Thank you, Your Honor. I believe we will be able to complete the evidentiary presentation solely with the papers that are previously filed on the docket. So pursuant to Your Honor's emergency protocol, I would offer into

evidence the following exhibits. I've previewed this with counsel for the Ad Hoc Equity Committee. My understanding is that there is no objection. I would offer the following exhibits.

THE COURT: All right.

MR. SLADE: Docket Number 1958-1 through 1958-20.

THE COURT: Okay.

MR. SLADE: Docket Number 1985 and Docket Number 2022.

THE COURT: All right. Thank you. So the offer is -- again, pursuant to the emergency protocol, Exhibits 1958-1 through 1958-20, 1985, and 2022. Any objections?

All right. They are admitted.

(ECF 1958-1 through 1958-20, 1985, and 2022 admitted into evidence)

MR. SLADE: Your Honor, I believe that's sufficient to meet our burden on all the confirmation standards. If Your Honor would like, we could put also in a supplemental proffer on the 1129 factors. But given the resolution of all the objections, I'm not sure that's necessary.

THE COURT: All right. Thank you. I agree.

Then, Mr. Sussberg, did you wish to -- or I guess it's Ms. Yenamandra that is making the argument.

MS. YENAMANDRA: Good morning, Your Honor. Can you hear me okay?

THE COURT: Yes, ma'am. Thank you.

MS. YENAMANDRA: Thank you, Your Honor. For the record, Aparna Yenamandra from Kirkland & Ellis on behalf of the debtors. Your Honor, this resolution effectively guts my closing and I can now make it very quick.

Your Honor, I think between this resolution and the overwhelming support for the plan as set forth in the voting declaration, with every single voting class voting in favor of the plan, I think the evidence is uncontroverted that this plan is in the best interests of the debtors and their estates and their stakeholders and satisfies the 1129 requirements.

And so, unless Your Honor has any questions or anyone else would like to be heard, we would take the time to work through the language with Mr. Okin. We also have a couple of what I'll call "wordsmithing" changes we need to make to the confirmation order to just close out one or two of the 41 objections that were filed and are now resolved.

In addition, Your Honor may recall the sale order had a provision that the confirmation order itself would not be entered until December 12th. That was to maximize the 365(b)(4) period. So in a perfect world, what I would ask of Your Honor is to approve confirmation orally based on the record you've heard today, and we will work with Mr. Okin and make those couple wordsmithing changes I alluded to, and ultimately file a proposed form of order with the revised plan

under certification of counsel.

THE COURT: All right. So -- and I'm perfectly happy to proceed that way. Just given the number of objections and the number of resolutions that we had, what I thought I would do is to simply give you a time either this afternoon or tomorrow, since you have the time reserved; and it would be there just in case you get into a dispute over a word or choice of words, that you then have a time reserved. And I am more than happy for Mr. Alonzo to get an email that says order's been uploaded, don't need anything, you know, proceed ahead. That would -- that's music to my ears. But you've got a time just in case there's a problem. Does that make sense to you?

MS. YENAMANDRA: Thank you. It does. My expectation is that we probably won't need it, and hopefully the email I send Mr. Alonzo is we've resolved everything, here's the proposed form of order that we will ask to be entered on the 12th.

THE COURT: All right. Thank you.

MS. YENAMANDRA: But that helps and makes sense.

THE COURT: All right. Thank you.

Mr. Gold, you have a very serious look on your face. Did you want to be heard? "Five star" on your phone perhaps. There you go. Mr. Gold.

MR. IVAN GOLD: I don't mean to be too serious, Your Honor. Good morning. Ivan Gold of Allen Matkins for a number

of landlords. In fact, I feel much better than that, in the sense I'd like to thank the Kirkland team along with the Paul Weiss team for working with us.

There is some landlord-favorable language that resolved many objections; and perhaps more importantly to Ms. Yenamandra's comment about 41 objections, we probably avoided 10 more by some language that now appears in Paragraphs 96 and 97 of the confirmation order that kicks a few issues down the road for further resolution. The parties are fully engaged relating to the prospective assumption and assignment of leases, both the OpCo and PropCo, and we're satisfied with that result today. And those landlord issues will not be any impediment to the confirmation order you're asked to enter today.

So, again we do thank their teams and -- a lot of work and a lot of emails at strange hours, and phone calls over the weekend and the like, not usual in this case by any means, and -- not on the magnitude of some of the other issues. But on the other hand, we did it without Judge Isgur. So maybe that's something worth noting.

But we would like to thank Your Honor. And we obviously will be back in front of you in the event there are further lease-related issues as the process moves forward; but for purposes of confirmation, I can pretty safely represent, based on what I -- the email traffic I've seen, that the bulk

of the landlord body is satisfied as to where we got. So thank you.

THE COURT: Got it. I wanted to thank you particularly. I really appreciated the way you approached a very difficult combination of knotty issues. And you did it in such a straightforward, practical, unemotional way. Certainly definition of a good lawyer.

It was also very educational for me. We can always -- we can always learn something. I just appreciated the way you approached the whole issue. I think your clients are better off for it. I think the process is better off for it. So I just -- I wanted to -- I just wanted to pick you out of the morass of people who are on the line and say thank you. I appreciate the way you've approached the case.

MR. IVAN GOLD: Thank you, Your Honor. I really appreciate that.

THE COURT: All right. Thank you.

Anyone else?

All right. Then I've got before me a request -- oops, I'm sorry. I've got someone from area code 315. 315-398.

All right. We'll assume that was a mistake.

All right. I've got before me a request to confirm the debtors' joint plan of reorganization. I do find that I have jurisdiction over the matter pursuant to 28 U.S.C. Section

1334, do find that today's proceedings constitute a core proceeding under 28 U.S.C. Section 157, further find that I have the requisite constitutional authority to enter a final order.

Let me start first with the request for final approval of the debtors' disclosure statement. I've had the benefit of hindsight. There are no outstanding objections. I will find that the disclosure statement contains adequate information, as that term is defined under Section 1125, and I will give final approval to the debtors's disclosure statement.

With respect to the debtors' proposed plan, based upon my review of the docket, review of the plan, the lack of any objections, I will find that the plan satisfies the mandatory requires of 1123(a), do not otherwise run afoul of the permissive provisions of 1123 or other applicable sections of the Bankruptcy Code.

With respect to the request for confirmation, the code requires me to conduct an independent analysis of the proposed plan. And based upon the evidence that I have before me, I will find that the proposed plan satisfies the requirements of 1129(a)(1), (a)(2), (a)(3), (a)(4), (a)(5). I'll find that the requirements of 1129(a)(6) are not applicable to this case. I will find that the proposed plan satisfies the requirements of 1129(a)(7), (a)(9), (a)(10), (a)(11), (a)(12), (a)(13); find that the requirements of

1129(a)(14), (a)(15), and (a)(16) do not apply to this case.

Having found that all of the provisions of 1129(a) have either been satisfied or are not applicable, other than 1129(a)(8), I will find that the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests that is impaired under and has not accepted the plan; and further, requirements of 1129(b) have been satisfied.

I will find that there's only one plan that I've been asked to consider. Therefore, the requirement of 1129(c) has been satisfied.

Further find that the primary purpose of the proposed plan is not the avoidance of taxes or the application of Section 5 of the 1933 Securities Act. Therefore, the requirements of 1129(d) have been satisfied.

Further find that the requirements of 1129(e) do not apply to this case.

With respect to the outstanding objection by the Ad Hoc Equity Committee, I will find that that objection has been resolved subject to approval of language by both sides, as we have discussed on the record this morning.

With respect to the remaining -- with respect to the releases as to the remaining constituents in the case, there are no objections. I will find that they are supported by adequate consideration and are necessary to implement the

overall structure that this plan was intended to address.

I'm going to leave it at that, just at the risk of forcing folks to stand up and make a statement. All of this is subject to the submission of an approved form of confirmation order by those parties that have negotiated resolutions and need to sign off on specific language.

That includes all parties, but specifically included, Mr. Okin, your approval of the language, the process, the procedure, however you want to reference that, that we've talked about to deal with the direct versus derivative issues.

I do want to spend just a moment. I called out Mr. Gold, and I particularly thought that he did a great job. He just did it in such a very straightforward way, but he's certainly not the only one. I appreciate all of the hard work that went into this. That included being realistic about what the case was about and what the value that was involved in the case. There have been -- an awful lot of noise in the background, and I compliment all of the professionals on not listening to that noise and working through the issues.

Mr. Leblanc, I also want to compliment you on what you have been through. I, quite frankly, off the top of my head don't know what your hourly rate is, but it's probably not enough. I thought I was the only person in the history of mankind that had signed up to spend 24 hours at a time with Isgur. I know how painful that is. And you did it. You did

it a couple of times. So you're in a small club that has at least survived that process.

I also want to say that members of the debtor team have been unfairly targeted, and it is -- I am ashamed to some degree that I live in a country where people are targeted for trying to do good work. That is not the country that I want to be proud of. It's not the type of country that I want to be a part of.

You know, folks out there, economics are economics. And people make bad decisions every day. That is no reason to make something personal. It is no reason to make something racial. It is no reason to make something gender-based. It's just wrong. If it ever gets put before me, I will deal with that harshly and swiftly, but I shouldn't have to.

We are a country that should be proud to be together, and recognize that nothing is perfect, but to be tolerant. And I have seen in this case that it hasn't been. It has made me reevaluate the degree to which I bend over backwards to ensure that voices that do not have counsel are heard. But I won't be deterred. I will do it again. But I haven't forgotten this experience. I'm ashamed of some of you. But that is what it is.

The people who have acted the way they've acted don't care. I do care. I want a better country. I want a better place. I want us all to do our part to be more accepting. And

I'll leave it there.

I appreciate the job that has been done.

Mr. Sussberg, you and your team, you know, unbelievable. You started off on day one with a statement. I at times had my doubts. You never did, and I compliment you on that resolve.

Ms. Yenamandra, when you are ready with your proposed order -- and I know that that order has got a date in it, and if you want that to be effective on a certain date or you just don't want it signed until a certain date, if you will just let Mr. Alonzo know how you want that to occur. He will do my best -- or he will do his best to make sure that I follow instructions.

MS. YENAMANDRA: Understood, Your Honor.

THE COURT: All right. Thank you.

Anything else from anyone?

All right. Then I wish each and every one of you a happy Thanksgiving. Please do be safe. It is important to me that I continue to see everybody in a video square alive and well. So please remember that, and I will see everyone after the holiday. Thank you all. We'll be adjourned.

MR. SUSSBERG: Thank you, Your Honor.

(Proceedings concluded at 10:05 a.m.)

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

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

Alicia J. Jarrett

ALICIA JARRETT, AAERT NO. 428 DATE: November 25, 2020

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