UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA

IN RE:	. Case No. 04-27848 MBM
	.
ACR MANAGEMENT, LLC.,	. USX Tower - 54th Floor
	. 600 Grant Street
	. Pittsburgh, PA 15222
Debtor.	.
	. August 10, 2004
. . . . .	. 3:00 p.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE M. BRUCE McCULLOUGH
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: Campbell & Levine, LLC
By: DAVID B. SALZMAN, ESQ.
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For Official Committee of Unsecured Creditors: McGuireWoods, LLP
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For Unsecured Creditors Committee:	Stroock & Stroock & Lavan, LLP By: WENDELL ADAIR, ESQ. 180 Maiden Lane New York, NY 10038
For Carl Brown	Spence, Custer, Saylor, Wolfe & Rose By: JAMES R. WALSH, ESQ. 400 U.S. Bank Building P.O. Box 280 Johnstown, PA 15907
For California Erectors, Bay Area Inc.:	Bernstein Law Firm By: ROBERT BERNSTEIN, ESQ. 2200 Gulf Tower 707 Grant Street Pittsburgh, PA 15219
For Ray Anthony:	Law Offices of Robert O. Lampl By: ROBERT O. LAMPL, ESQ. 960 Penn Avenue Suite 1200 Pittsburgh, PA 15222
For Fleet National Bank:	Buchanan Ingersoll, PC By: JEFFREY STEEN, ESQ. One Oxford Centre 301 Grant Street 20th Floor Pittsburgh, PA 15219

1 THE COURT: Be seated. Okay. We have as Number
2 04-27848, ACR Management, LLC. The first one is docketed
3 Number 183.
4 MR. FREEDLANDER: Good afternoon, Your Honor, I'm
5 Mark Freedlander of McGuireWoods, proposed co-counsel to the
6 Official Committee. With me today, Your Honor, is Wendell
7 Adair of the Stroock firm, proposed counsel to the Committee.
8 Your Honor, if I could address the first to matters
9 together or I'll address them each separately if you'd like.
10 THE COURT: I don't really care. Whatever you want
11 to do.
12 MR. FREEDLANDER: They are, again, they're
13 applications to retain my firm as co-counsel. Mr. Adair's firm
14 is counsel to the Committee.
15 Your Honor, my firm and the Stroock firm have a
16 history together. We certainly know how to share
17 responsibility and duties and propose to do that. You, Your
18 Honor, are familiar with my firm and our ability to work
19 together as co-counsel. We've served the applications, have
20 not received comment or objection for any party and we'd ask at
21 this time that the Court authorizes the Committee's retention
22 of my firm and the Stroock firm in our dual capacities, Your
23 Honor.
24 THE COURT: Any objection? U.S. represented? They
25 are one of the people who wanted this continued, weren't they?

1 MR. FREEDLANDER: They have been served, Your Honor,
2 we have received no comment from the Office of the U.S.
3 Trustee.
4 THE COURT: Okay.
5 MR. FREEDLANDER: Thank you, Your Honor.
6 THE COURT: Okay. The next one is Docket 176,
7 continued motion for relief from stay by Carl Brown.
8 (Connecting counsel by telephone)
9 MR. WALSH: Hello, Jim Walsh.
10 THE COURT: Mr. Walsh, this is the bankruptcy court
11 in Pittsburgh on the ACR Management, on your continued relief
12 from stay on Carl Brown.
13 MR. WALSH: Thank you, Your Honor. How are you this
14 afternoon?
15 THE COURT: Good. We were supposed to have an order
16 by now, weren't we?
17 MR. WALSH: Mr. Bernstein and David Salzman should be
18 in the courtroom and they both have orders. We have sort of a
19 position that -- David and I agreed upon an order, Mr.
20 Bernstein had some reservations with it. He wanted to make
21 some changes and he's going to explain to you his changes and
22 we're going to give you a choice for which order you propose to
23 enter.
24 THE COURT: Okay.
25 MR. SALZMAN: Your Honor, at this point, David

1 Salzman, Campbell & Levine, on behalf of the Debtor-in-
2 Possession. At this point, Your Honor, we have reached
3 agreement on an order to be entered in this matter. If I may
4 approach the bench, I can provide a copy of the order, I
5 believe, that we've resolved the issues between the parties on
6 this.
7 THE COURT: Okay.
8 MR. SALZMAN: Your Honor, I would note on the record,
9 that there was an order that I believe was entered with regard
10 to this matter by mistake. I believe all the parties would
11 agree on the record that this is the order that the parties
12 would request be entered with regard to this matter and that
13 the order that was inadvertently entered by default, I believe,
14 which was the plaintiff's order, can be vacated.
15 MR. WALSH: This is Jim Walsh, and we agree, Your
16 Honor.
17 THE COURT: Okay. If you'd submit me an order
18 vacating, I'll vacate it. Do I have a bunch of copies here for
19 a reason?
20 MR. SALZMAN: Your Honor, only because I
21 inadvertently handed you the copies as well as the original.
22 It's only the first two pages that are the order.
23 THE COURT: Okay. Well, then I'll hand them back.
24 MR. BERNSTEIN: Your Honor, Robert Bernstein on
25 behalf of the California Erectors, Bay Area, Inc. We agree

1 with what has been said, this is an order that we've come to an
2 understanding on and we would ask that it be approved.
3 THE COURT: Okay. So, we'll enter the order
4 submitted, is that right?
5 MR. WALSH: That's correct, Your Honor.
6 THE COURT: Okay. Anything more, Mr. Walsh?
7 MR. WALSH: Nothing further, Your Honor, thank you
8 very much.
9 THE COURT: Okay. The next one is document Number
10 211.
11 MR. SALZMAN: Your Honor, this is the Debtor's motion
12 requesting authority to basically honor the terms of its
13 automobile and workmens' comp policies. There have been no
14 objections filed to this motion. If the Court wants, I can
15 describe fundamentally, the rationale for the motion, which is
16 we have insurance programs in place with regard to both
17 workmens' compensation insurance and automotive insurance that
18 are significantly less expensive than the policies we would be
19 required to enter into if we were not permitted to honor the
20 terms of the policies for the time periods up until now. I
21 would note that the Debtor's policies are about to expire and
22 it's the Debtor's business judgment that it will enable it to
23 save approximately 50 percent on the cost of its insurance if
24 not more by obtaining the relief sought in this motion. I
25 would note again that there no objections to the motion.

1 THE COURT: No objection, we'll enter the order.
2 Okay. The next one is document number 292.
3 MR. LAMPL: That's a motion I filed, Your Honor,
4 Robert Lampl, attorney for Ray Anthony. We appeared before
5 Your Honor and discussed the alterations -- I'll wind it back.
6 Originally, when there were first day orders
7 presented to Your Honor, one of them was for use of cash
8 collateral and post petition financing, and that was held open
9 by Your Honor, and came up for a hearing about three weeks ago.
10 At that point in time, there were two objections pending for
11 that. One was from the Creditors Committee and one was from
12 Ray Anthony. The essential objection that we're hitting on
13 right now is the rollover of the prepetition debt into an
14 enhanced position through the post petition financing. There
15 was a presentation to Your Honor at the hearing in which I
16 believe 13 points were discussed, leading to alterations in the
17 order to be presented. The next day an order was presented and
18 as discussed in open court, that order provided that there
19 would, in fact, be a rollover, an enhancement of position,
20 unless the Creditors Committee within 120 days, which had the
21 exclusive power in this estate, to investigate or contest such
22 claims did so.
23 I expressed my dismay at that and induced counsel to
24 represent to your court that that's, in fact, what was
25 imminent. They did draft an order and present it to Your

1 Honor. I learned about it, I knew it was happening, I learned
2 about it on the electronic filing and I filed this motion for
3 reconsideration. I don't want to sit up here and beat the same
4 horse to death, but upon reflection, I laid out what I think is
5 the legal basis for preserving my clients rights to be an
6 objector, to investigate that claim and to contest it, if
7 that's appropriate.
8 Essentially, I believe that Fleet Bank is enhancing a
9 position that's in the, probably 50 percent collateralized into
10 a fully collateralized position, taking up all the assets in
11 the estate, including the ongoing business value, not the
12 liquidation value and going to run with the case on that basis
13 and the Creditors Committee is going to bottleneck everyone
14 else, and block them from getting into any investigation or
15 contest. I don't think it's appropriate, and I don't think
16 there's a legal basis for it.
17 I laid out in my motion some of the salient law which
18 is basically Section 1109, the right of any creditor under our
19 rules to contest a claim and some case law regarding
20 representative capacity of parties. I could have gone on with
21 a lot of analogies, for instance, all the riggers you have to
22 go through to represent a class in a class action situation, to
23 be a representative of that class, to represent the entire
24 class, the subclasses. I have in my motion set forth that I
25 don't believe there will be any Equity Holders Committee in

1 this case, that while the Creditors Committee may be cordial,
2 they have adverse interests to my client. They are not going
3 to represent my client. They have been empowered in this case
4 with extraordinary powers that are not, in my experience, given
5 to Creditors Committee or their counsel. Yes, they have
6 fiduciary duties, but they have fiduciary duties to probably
7 their class and in some more metaphysical way or in terms of
8 platitudes to the estate, but it's primarily to their class of
9 constituents.
10 Likewise, the Debtors counsel had fiduciary duties to
11 the estate and we know that the Debtors in practical terms, are
12 really looking out for the Debtor and the continuity of the
13 entity and normally management, sometimes ownership.
14 My client is not represented by them, my client has
15 some legitimate questions and inquires. I don't intend to
16 pursue anything that's, what I would view as silly. On the
17 other hand, I don't think that should be something that's
18 truncated on the front end, I can't believe I'm barred from
19 that kind of meaningful participation, relegated to being an
20 observer or a tag along to the Creditors Committee, where
21 there's no legal basis for doing so.
22 We can't foist the efficiency of running a case, even
23 what looks like a big case, at least for this jurisdiction, a
24 big case, into an efficiency mode at the expense of due process
25 and statutory and common law rights. My client seeks to simply

1 have that order, which was modified, and took cares of many
2 other concerns, modified again by eliminating the restriction
3 on other parties, to investigate and contest the claims of the
4 primary secured creditors. That's all we ask for, that's what
5 the motion for reconsideration is about.
6 There's little bit of whining in the three responses
7 I got about I'm just rehashing the same old argument, my client
8 is bitter, this sort of thing. That's irrelevant, I'm not
9 rehashing anything, I'm making a record. That order was not
10 on this record when we had that colloquy. I filed a motion for
11 reconsideration to the order, that I did not participate in
12 drafting, my client did not participate. We did not go through
13 it, pick through a lot of things that aren't germane to the
14 real sense of the case. I'll just pick on the standing
15 question. I found a case in which Your Honor was counsel and
16 Judge Markovitz was the judge, bringing up the doctrine of jus
17 tertii standing. They don't' have jus tertii standing for my
18 client or anyone else, they're a Creditors Committee, with the
19 rights of a Creditors Committee, the powers of a Creditors
20 Committee, the duties of it, but they are not a legal advocate
21 for my client and in some sense, not for the individual
22 creditors. So, I would simply ask Your Honor to reconsider
23 that portion of its order and let it go on.
24 MR. SATHY: Good afternoon, Your Honor, Anup Sathy
25 from Kirkland and Ellis on behalf of the Debtors. Not

1 surprisingly, Your Honor, we did file an opposition to the
2 motion. Your Honor, we believe that the motion should be
3 denied. We think the burden is high and the standard is fairly
4 strict on motions to reconsider. We do think that the case law
5 is very clear on the standard, Your Honor. What we've heard
6 today is the argument that we heard back on July 13th, and that
7 simply is not sufficient for basis of a motion to reconsider.
8 And the case law is very clear, there needs to be change in the
9 controlling law, new facts or a need to prevent a manifest
10 injustice. And that's not present here. The basis for the
11 motion to reconsider is basically all of the reasons that --
12 THE COURT: That's fine, but I want to make sure the
13 order we entered in the first place was justified under the
14 law.
15 MR. SATHY: Absolutely. And, Your Honor, we believe
16 that it was. We made it very clear on the record that this is
17 not a roll up. This is not a roll up, Your Honor, no part of
18 the prepetition claims are going to be deemed post petition
19 claims, other than with respect to any potential adequate
20 protection claim that results from the adequate protection lien
21 that's given to the prepetition lenders. That was the very
22 first point we made on the record. We do believe that the
23 order reflects the resolution of a very difficult and
24 contentious negotiation with the Creditors Committee and that
25 that order provided incredible benefits to the Debtors.

1 Virtually every one of the concessions that we received from
2 the difference between the interim order and the final order,
3 as was a result of the efforts of the Creditors Committee and
4 the concessions that we did receive benefit the estate, they
5 benefit the Debtors, they give the Debtors a better ability to
6 access funding, to access capital, to the extent that they need
7 it. The issues that are raised in the motion to reconsider are
8 all issues that we discussed, that were raised and were
9 disposed of by this court and the hearing transcript is
10 replete, Your Honor, with the discussions regarding standing of
11 individual creditors.
12 We believe that the most appropriate way to have
13 actions investigated is to have a representative of the estate
14 investigate and pursue those actions, not to have a litigant,
15 these are litigants, Your Honor, they are in contentious
16 litigation with the company and we believe that they have their
17 own parochial and insular interests that they're trying to
18 advance by virtue of trying to get the ability to investigate
19 claims against the prepetition lenders. There is a common
20 interest between all of the unsecured creditors and, candidly,
21 Your Honor, given the framework of this case, unsecured
22 creditors don't stand to do very well under our plan, we've
23 made that very clear, from the very beginning of this case and
24 so, the Committee has every incentive to investigate and try to
25 find value for that group of constituents, which may or may not

1 include Mr. Anthony. We are not admitting with any specificity
2 today that Mr. Anthony is a creditor of this estate, he is a
3 target of litigation, he had received a substantial amount of
4 money as part of the recapitalization transaction. As we
5 disclosed in our papers, we think that sum was over $100
6 million dollars of cash. We think he owes the company some
7 money back. This is an important asset of the estate. We
8 believe that this can be valuable to the estate and so, we
9 intend to pursue it and we do not believe that any individual
10 creditor should have the right to do the job of the Committee.
11 This Committee, as you've heard, has two sophisticated and
12 national counsels, they have the ability to do this
13 investigation. Your Honor, if there is a carve out within the
14 DIP order which provides for $4 million dollars for
15 professional fees accrued, plus accrued professional fees, so
16 there's ample value, there is no cap on the investigatory
17 rights of the Committee's counsel and, candidly, Your Honor,
18 the investigation period hasn't even begun. The way the DIP
19 order is structured, it's 120 days after the commencement of
20 the 341 meeting. That hasn't even occurred. So, the Committee
21 has had sufficient time, they have sufficient resources and
22 they have sufficient and capable advisers to represent them and
23 pursue this as a fiduciary to everybody.
24 And, you look at that, compared to an individual
25 creditor, we believe that it is appropriate to funnel that

1 investigation right, we believe statutorily which belongs to
2 the Committee, does not belong with individual creditors, but
3 we believe that that function belongs exclusively with the
4 Committee. That's consistent with the case law, that's
5 consistent with DIP orders, that's consistent with practice and
6 we believe that this Committee will exercise its fiduciary
7 duties and as this Court mentioned on July 13th, if any
8 individual party does not believe that's the case, that they
9 have every right to come in here and tell you that that's not
10 the case. But at this point in time, Your Honor, we want to
11 have finality to the process, we have a final order, this may
12 be one of the few times that you see the lenders, the Committee
13 and the company all be on the same page with respect to an
14 issue and we ask that the motion be denied because it is a fair
15 and reasonable resolution to the DIP requirements for the
16 Debtor's, Your Honor.
17 And, I might just add one last point, in the motion,
18 the movant does mention the fact that there haven't been
19 schedules filed. We, in fact, did file a schedule yesterday,
20 ahead of the deadline that this Court imposed on us. There's
21 no desire for any party to hide information or to not make
22 people available. I think you will hear from the Committee
23 today that we have been very open with them, we have made
24 information available to them and the companies, the
25 international advisors -- and that there has been a meaningful

1 exchange of information. We may never agree with the
2 Committee, Your Honor, but the reality is, we believe there has
3 been a meaningful dialogue, meaning exchange of information
4 that continues on a daily basis, in order to enable the
5 Committee to meet it's fiduciary duty.
6 MR. STEEN: Good afternoon, Your Honor, Jeffrey
7 Steen, S-T-E-E-N on behalf of Fleet National Bank, in its
8 capacity as both DIP agent and agent for the senior prepetition
9 lenders. I would just like to supplement Mr. Sathy's remarks.
10 We not surprisingly, on behalf of both the DIP agent and the
11 prepetition agent, oppose Mr. Lampl's motion to reconsider.
12 I'd like to put this matter in a different context from what
13 Mr. Sathy said and we, obviously, stand on the case authorities
14 that we cited in our opposition papers, that the final DIP
15 order that was a product of significant negotiation and give
16 and take among the major players in this case, has three
17 important provisions relating to avoidance actions and other
18 collective creditor remedies that can be brought on behalf of
19 the Debtor's estates against the prepetition banks.
20 First, avoidance actions and all the proceeds thereof
21 have been expressly excluded from any DIP lien or any DIP
22 collateral. And that's in paragraph 3i of the final order.
23 Now, that obviously means that any proceeds as by way of final
24 adjudication or settlement that result from any avoidance
25 actions redown to the benefit of the unsecured creditors and

1 not the banks.

2 Secondly, the Official Unsecured Creditors Committee
3 is vested with the authority to investigate and bring avoidance
4 actions against the prepetition banks in paragraph 9-7 of the
5 final DIP order and I want to point out to correct the record,
6 that the interim Debtor-in-Possession financing order that was
7 filed with this Court before the commencement of the case, in
8 paragraph 9-7, contained the substantially identical committee
9 investigatory and prosecution provision that is in the final
10 order. There wasn't any change, any significant change between
11 that provision, that provision was in the order on day one, and
12 that is essentially the same provision that Your Honor approved
13 at the final DIP hearing on July 14th, or actually on July 13th
14 I apologize.

15 That provision is an extension of the provision in
16 the bankruptcy code, Section 1103(c)(2) that vests the
17 Committee as a fiduciary on behalf of all the unsecured
18 creditors to investigate the affairs and conduct of the Debtor
19 and its creditors and if appropriate, to bring creditor related
20 actions. That provision, Section 1103(c)(2) speaks of the
21 committee, it does not speak of individual litigants, insiders,
22 creditors or shareholders.

23 The third provision in the DIP order that has
24 relevance here is the one that Mr. Sathy just mentioned and
25 that is the carve out provision and that's in Section 3.5(a)

1 and as Mr. Sathy made clear, the carve out which is in excess
2 of $4 million dollars for retained professionals in this case
3 to perform whatever duties and functions that they would do.
4 That $4 million dollar cap is only triggered upon the
5 occurrence of a debt termination event or event of default.
6 That does not cap or limit in any way the necessary and
7 reasonable costs and expenses that would be incurred by the
8 Committee's counsel in investigating the bona fides of the
9 banks liens, the banks loans and whatever other conduct the
10 Committee deems it appropriate to investigate under this case.
11 Thus, under the terms of the final DIP order, the Committee had
12 the authority, indeed, we think the Committee has the fiduciary
13 duty to pursue any well founded avoidance actions against the
14 banks, the Committee has the economic incentive to do so not
15 only for the reasons that Mr. Sathy said, but also because any
16 monies that come into the estate as a result of avoidance
17 actions will not go to the banks on account of their lien.
18 They're for the benefit of the unsecured creditors.
19 In addition, the Committee has the capacity to bring
20 these actions as witnessed by the two orders Your Honor just
21 entered for retaining both the Stroock law firm and the
22 McGuireWoods law firm on behalf of the Committee as well as, I
23 understand there's a motion pending to appoint KP&G, a national
24 expert financial advisor on behalf of the Committee.
25 In addition, the Committee has the means to pursue

1 these claims because of the carve out provisions that were just
2 mentioned.
3 Now, I'm not going to repeat any of the cases that we
4 cited in our opposition papers, Your Honor, but under these
5 circumstances where the Official Unsecured Creditors Committee
6 has the capacity, the means and the ability to perform its
7 fiduciary duties on behalf of the creditor body generally, the
8 case law cited in our brief is as extensive as it is compelling
9 in holding that individual creditors, private litigants, former
10 insiders, shareholders and board members, do not have standing
11 or authority to investigate and bring avoidance actions in
12 bankruptcy and with all due respect, Mr. Anthony has not cited
13 any case or authority in his brief to the contrary, nor has he
14 provided this Court with any basis to conclude that the
15 Committee is either unwilling or unable to fulfill its duties
16 and investigate any potential avoidance actions here.
17 Regardless of what hat Mr. Anthony wears in this
18 proceeding, and I've heard it described now in this hearing and
19 a couple of hearings ago, that he's an equity holder, he still
20 has significant equity, I believe, in this company, he's an
21 insider and was a former board member and a founder of the
22 company and he has apparently a counterclaim and pending
23 litigation against the Debtor that might mean he's a contingent
24 creditor. I know the Debtor has defenses to that. Regardless
25 of what hat he wears in these proceedings, the final DIP order

1 does not limit in anyway whatever rights he may have, wearing
2 whatever hat he may have, to participate fulsomely in the plan
3 of reorganization and disclosure statement process, to file a
4 proof of claim, or proof of interest in this case, to file a
5 motion, to form an equity committee which is not before Your
6 Honor, or to continue with this pending litigation and
7 arbitration against the Debtors.
8 Any conjecture and speculation by Mr. Anthony at this
9 point in the case, that the Committee might not be up to the
10 task or that there may be some other cause of action out there
11 that the Committee is not investigating, is just that, it's
12 conjecture and speculation and it does not provide any basis
13 under the overwhelming cases that we cited in our opposition
14 brief or the equities of this case, to authorize a private
15 litigant or any other entity, other than the statutorily
16 created fiduciary, the Official Unsecured Creditors Committee,
17 to engage in any investigation or fishing expedition at the
18 expense of the estate. There's simply no reason to permit any
19 further cloud over the Debtors continued access to working
20 capital in this case, and we respectfully, on behalf of the DIP
21 agent and the prepetition senior agent, joint the Debtors and I
22 understand the Committee in respectfully urging this Court to
23 deny the motion to reconsider.
24 THE COURT: Mr. Lampl, are you saying that any board
25 member, anybody that's a litigant has a right to do all this

1 investigation?
2 MR. LAMPL: Within reason. You can't disrupt the
3 case. But what -- they miss one point here.
4 THE COURT: So, you mean I have to kind of monitor
5 everyone that wants to fool around with --
6 MR. LAMPL: Of course you do and if they misbehave or
7 if they're out of line or if it's already duplicative, you stop
8 it, but it's not a practical problem. I think they miss a
9 point here.
10 I am not saying I am the creditors committee and
11 cryogenics or the genesis, the Monsure case, can a creditors
12 committee be a plaintiff in an avoidance action, I am a party
13 in interest who can object to claims, file motion to determine
14 security positions. They won't find a case that bars a party
15 in interest, such as my client, which has a statutory right
16 under 1109, from participating in the case in a meaningful
17 manner. What they will find are cases that empower a creditors
18 committee to do various things, over the objection of a debtor.
19 I can understand where you have a plan and you endow
20 the creditors committee with chasing down avoidance actions or
21 normally preferences, maybe a fraudulent conveyance. Sometimes
22 they're substantial, sometimes they're just the crumbs left at
23 the end of the case. What we have here, though, is the essence
24 of the case. I am not raining or putting a cloud on their post
25 petition financing. I stated out of their way. I've limited

1 my objection to one particular thing, that is my clients right
2 and I believe any other party in interest in the estate, to
3 investigate and object to the Fleet claim because what you're
4 going to see here and it doesn't take a crystal ball because
5 there's been 18 months of planning for this, is that Fleet
6 Bank, and I'm doing it in really round numbers, $500 million
7 dollar claim on 250 million in assets, probably got, if you
8 went back a year, probably got preferences of 50 to 120
9 million, and all the rest of that value, to the extent there's
10 value, belongs to the estate.
11 Now, my client, I believe, wears both hats, as a
12 creditor and an equity holder. I looked at all the law that
13 they cited, they can't find a case that says that -- especially
14 on the front end of a case preplanned, not even -- no
15 confirmation, no notice to everyone, no schedules, yes, they
16 filed them yesterday, the 500 pages, we'll go through them,
17 yes, they have a meeting of creditors scheduled, that came out
18 since we were here last. They will not find a case that bars
19 me. And if your plain meaning, interpreter of the law, all you
20 have to look at is 1109 and you could understand the rationale
21 for all this because they proved my case, that they have a
22 unity of interest which may not be my clients. They've got a
23 compact and a little clip going and that's probably proper
24 because they're going to work for their own class, they're not
25 working for mine, I just want to have my hands free to do what

1 I've got to do.
2 I think there's a claim objection here to Fleet Bank.
3 It's very substantial and it's going to be overlooked and I
4 don't want to be derivative --
5 THE COURT: Do you really think the Unsecured
6 Creditors Committee, representing a client that's going to get
7 almost nothing, is going to overlook --
8 MR. LAMPL: Well, I think they have a --
9 THE COURT: What do you think they've been paid
10 something or something?
11 MR. LAMPL: You have a carve out provision, but I
12 think that once they file these objections or claims, the
13 faucet is turned off. We have a structural anomaly here, which
14 is common to carve outs and that is where the creditor, the
15 lender, controls the purse strings and concedes a carve out.
16 You also forfeit it, or suspend it when you attack them.
17 They're not going to attack them, they're going to try to
18 negotiate into a position where instead of --
19 THE COURT: The document doesn't say if they attack
20 them, the carve out --
21 MR. LAMPL: I believe if you read through it, that's
22 how I was reading it. There's a default. I think it creates a
23 default.
24 THE COURT: It doesn't create a default.
25 MR. LAMPL: Well, maybe we should ask them directly

1 because I can't understand the order then. Like we did the
2 last hearing --
3 THE COURT: Is the Unsecured Creditors Committee
4 attacking the bank to create a default? How dos that create a
5 default on the part of the Debtor? The Unsecured Creditors
6 Committee isn't a party to the loan agreement.
7 MR. FREEDLANDER: Your Honor, I can -- again for the
8 record, Mark Freedlander. I think I can help clarify. I'm
9 looking through the events of default and I'll continue to look
10 through them as I speak. Mr. Lampl -- the Committee as part of
11 the provisions of the DIP order relating to the payment of
12 professional fees, the Committee will be paid as part of the
13 bank's collateral package from proceeds of their collateral
14 package with respect to investigation.
15 In the event the Committee were to undertake an
16 action adverse to the bank's interest, it is true that the
17 Committee would not be paid from the proceeds of the bank
18 groups collateral for undertaking that cause of action. To the
19 extent that's what Mr. Lampl is suggesting, he's correct.
20 With respect to events of default, in the event that
21 the claims of the bank group is challenged, I continue to look
22 --
23 THE COURT: But you're not a party to the post
24 petition financing. Your challenge is irrelevant to a default.
25 MR. FREEDLANDER: That is correct, Your Honor, and I

1 don't see in this list of defaults, which is --
2 THE COURT: You can't default under it, you're not a
3 party to it.
4 MR. FREEDLANDER: We're not -- we don't have
5 contractual privity with the lending institutions, all we are
6 is a party in interest by virtue of the rights the code vests
7 in us. Now, there are certain provisions that prohibit the
8 Debtor from challenging the claims of the lending institutions
9 but not the Committee.
10 And, Your Honor, with respect to the Committee's
11 rights and duties and obligations, you've entered orders today
12 authorizing the retention of my firm and the Stroock firm and
13 we also have pending an application to retain KPMG as our
14 financial advisor. I can report to the Court that I believe
15 that we, as representatives of the Committee and the Committee
16 itself, have been very diligent in undertaking to understand
17 various issues in this case, in particular value, which is part
18 of this case.
19 THE COURT: Yes, but that's not the issue of
20 objecting to the banks position.
21 MR. FREEDLANDER: Well, there are really two issues,
22 Your Honor. One is, whether their liens are properly perfected
23 and they've provided us --
24 THE COURT: And, that's what eliminates your funding,
25 is if you challenge that.

1 MR. FREEDLANDER: Well, but it goes beyond that as
2 well, Your Honor.
3 THE COURT: You're saying, let's deal with that.
4 MR. FREEDLANDER: As to that, in the event we were to
5 challenge the perfection of the bankruptcy liens, we're not
6 going to be paid for undertaking that work. The due diligence
7 behind it, we will be paid our fees from the proceeds of the
8 bankruptcy collateral, that's correct.
9 THE COURT: So, if you're smart, you'll do the due
10 diligence up to the day you filed --
11 MR. FREEDLANDER: If we're smart and I believe we
12 are, we'll do our due diligence and they'll pay us for our due
13 diligence. We have boxes and boxes of materials that allegedly
14 evidence the perfection of their liens and we have begun to
15 undertake the process of that investigation. When I say boxes
16 and boxes, I mean, boxes and boxes.
17 So, the perfection issue is something that every
18 committee takes a look at and -- as to the other issue, whether
19 the bank group has received preferential payments or whether
20 they're over collateralized or under collateralized, those
21 issues in my mind, are at the essence of this restructuring.
22 And the Committee, by virtue of the DIP order that this Court
23 entered, has a right to investigate.
24 It likewise has a right to challenge the security
25 that the banks have and the value of the banks collateral.

1 Again, if we undertake that challenge, we're not going to be
2 paid for the prosecution of any action that the Committee
3 files, but nevertheless, in terms of the due diligence, which,
4 again, Your Honor, we're undertaking as we speak, that's
5 something that we will be paid for and we will do.
6 And, I've got to tell you, Your Honor, in terms of
7 the politics of how cases work as Mr. Lampl has mentioned, my
8 firm and the Stroock firm and KPMG and all the professionals in
9 this case, were not at all about this case, or about the case
10 after that and the case after that. So, we really have, number
11 one, we have duties and obligations as are set forth under the
12 bankruptcy code and the laws interpreting the bankruptcy code,
13 but beyond that we as professionals look not to this case, but
14 to the next case and the case after that, doing work on behalf
15 of committees on a regular routine basis. And our job is to be
16 diligent in what we do and we have every intention of doing
17 that.
18 THE COURT: So, you're telling me if you find an
19 action that you have to pursue, even if you don't bet paid,
20 you're going to pursue it?
21 MR. FREEDLANDER: It's -- Your Honor, we have no
22 choice but to for several reasons.
23 THE COURT: I'm just telling you, you're telling me
24 you're going to pursue it if --
25 MR. FREEDLANDER: We have to, we have to. As both a

1 matter of law and as a practical matter because number one, as
2 a matter of law, if there are good, provable actions, we have a
3 fiduciary duty to undertake them unless there are other reasons
4 not to. Beyond that, in the event that we as representatives
5 of a creditor committee involving sophisticated creditor
6 constituencies, don't do what we need to do, then our lives as
7 representing these groups in cases of any size and substance,
8 our lives don't last beyond this case because we have
9 reputations to protect which are a lot more important in the
10 long run than whether we get paid for bringing a particular
11 cause of action or not, Your Honor.
12 So, I would suggest to you, number one, that we are
13 in the process of performing our due diligence, both the
14 Stroock firm working with my firm as well as KPMG, we've been
15 working with the Debtors, they have been cooperative. We may
16 or may not disagree at the end of the day, but nevertheless,
17 the spirit of getting to where we need to be in either setting
18 to fight or agreeing to some form of a consensual plan, we're
19 working together in that process and it remains to be seen
20 where we end up.
21 Number two, Your Honor, in the event we don't, at the
22 end of the day determine that there's a workable plan on a
23 fully consensual basis, then we will proceed to object, if need
24 be, to confirmation of a plan which I expect to be filed any
25 day and likewise, to the claims of the bank group in the event

1 it's appropriate. But standing before you today, Your Honor, I
2 can't tell you that we will object to a plan and I can't
3 likewise tell you that we intend to litigate with the bank
4 group. We're just not there yet.
5 THE COURT: So, your co-counsel agree that if you
6 find that you need something you'll pursue it?
7 MR. FREEDLANDER: Your Honor, my co-counsel can speak
8 for themselves.
9 THE COURT: That's what I'm asking them to do.
10 MR. ADAIR: Absolutely, Your Honor. As to --
11 COURT REPORTER: State your name please.
12 MR. ADAIR: I'm sorry, Wendell Adair, from Stroock
13 and Stroock and Lavan, counsel to the Official Committee. We
14 will leave no leaf unturned. And I will tell you that the
15 Debtor though their counsel and through -- has been very
16 cooperative. They have provided us with literally realms of
17 material. We're in the process of going through it. I fully
18 anticipate that if there is anything to be found we will find
19 it and we will use it to get what creditors deserve in this
20 case which is more than the peppercorn or half peppercorn that
21 is currently proposed and we'll do it in whatever way is
22 necessary to make it happen. Whether we ultimately get paid
23 for it or not, is not an issue.
24 THE COURT: Okay.
25 MR. LAMPL: Your Honor, just -- I'm not going to be

1 redundant, just catch a couple points made. Whether or not
2 these are fine counsel and they do a fine job and they're
3 extremely competent and they're looking to the next case which
4 by the way can cut two ways, and the politics of this stuff, I
5 have a client, you're not going to present my client and you
6 can't take away my statutory rights just glibly. I can go
7 through a lot more analogies, but there is no way they can
8 assert that they're going to adequately represent my client.
9 THE COURT: That's what you're here for.
10 MR. LAMPL: Exactly, and I don't want the order --
11 THE COURT: You've got litigation out there, don't
12 you?
13 MR. LAMPL: I have litigation there and I intend to
14 have litigation here, if it's appropriate. I don't know if
15 it'll be appropriate. I want to see the valuations and I don't
16 need the 15 boxes, I know exactly what I'm looking for and
17 we'll get it and there'll be a meeting of creditors and I'll
18 ask them for it and they'll either give it to me or they won't.
19 It won't be burdensome. It's the same stuff that's --
20 THE COURT: It's under 1109(p) you can appear and be
21 heard, so you're appearing and you're being heard.
22 MR. LAMPL: Right, but that order, the next time I
23 come and say I filed an objection to Fleet's claim, they're
24 going to say that order bars me from doing it because I don't
25 have standing.

1 THE COURT: It just says you can appear and be heard,
2 is all it says.
3 MR. LAMPL: If that's what you think the meaning is.
4 I think it's meaningfully participate in the case.
5 THE COURT: You can heard. That's what I understand
6 it to mean. That's what I've always understood it to be.
7 MR. LAMPL: I think it means to be an advocate and a
8 participant.
9 THE COURT: Well, I never believed that when I was
10 practicing.
11 MR. LAMPL: Well, you've often stood at that end of
12 it.
13 THE COURT: I know.
14 MR. LAMPL: And I was at this end.
15 THE COURT: I understand.
16 MR. LAMPL: And you identified with that end of it.
17 With all due respect, you're not catching where I'm coming
18 from. And this due process, this statutory right, can't be
19 stripped off of me. I don't see it as appropriate.
20 THE COURT: Well --
21 MR. LAMPL: And, if you deny my motion, that's fine,
22 I have created a record. I've done my best.
23 THE COURT: Well, I can't see a case ever getting
24 done if we have everybody and their brother coming in and
25 investigating and that's what we'd be opening the door to, and

1 I think on that basis, I can't grant you motion. So, I will
2 deny the order. Okay. Next one, document number 302, 312
3 rather.
4 MR. SALZMAN: Your Honor, before I begin my
5 presentation, I was wondering if I might have 30 seconds to
6 confer with Mr. Silvestri?
7 THE COURT: Sure.
8 MR. SILVESTRI: John Silvestri for Frank Hanjagoris.
9 I just wanted to inform the Court that we began a discussion
10 outside and the objections may be resolved after I listen to
11 the presentation. Also, perhaps, from Mr. Freedlander.
12 MR. SALZMAN: Your Honor, if I may, this is the
13 Debtors' emergency motion to enter into an insurance premium
14 financing arrangement with Canawell, Inc.
15 Your Honor, if the Court may remember, the Debtor
16 attempting to anticipate this problem, filed a motion before
17 the Court in an endeavor to get the Court to approve the
18 Debtors going out and seeking insurance financing arrangements
19 from insurance company affiliates so as to enable them to
20 arrange that financing and perhaps obtain better financing
21 terms than would be available under the DIP. When the DIP was
22 entered into, in fact, it was contemplated that the Debtor
23 would obtain its insurance financing through such an insurance
24 financing agreement. We submitted a motion to the Court, Your
25 Honor, and we obtained an order approving the Debtors ability

1 to have that credit.
2 Alas, as is sometimes the case, when we went to the
3 insurance company, the insurance company affiliate to provide
4 the financing, they were dissatisfied with the order we
5 obtained. So, what we found it necessary to do was to go out
6 and file an emergency motion which essentially allowed us to
7 bring to the Court's attention and to the attention of other
8 parties in interest, the order that the insurance company
9 wanted in order to enter into insurance financing arrangements
10 with the Debtor and if I may approach, I'd like to provide the
11 Court with a copy of the order that was ultimately negotiated.
12 THE COURT: That is to this motion?
13 MR. SALZMAN: That's for this motion.
14 THE COURT: Okay.
15 MR. SALZMAN: Your Honor, I also provided a black
16 line of this order to Mr. Silvestri and if the Court were
17 inclined, I can provide the black line to the Court as well.
18 The black line is nothing more than a language insertion that
19 the DIP fiancier insisted that we insert once the insurance
20 company produced the language that they wanted, the DIP
21 financier want some small modification, recognizing that
22 interplay of the DIP financing order and this order as well,
23 but essentially, the black line did not involve what I believe
24 the Court would view as a material change to the order.
25 In essence, what I would submit to the Court, the

1 reason we are seeking this financing independent of the
2 financing available under the DIP loan facility, is really
3 quite simple. We believe that this will save us up to 3
4 percent on the cost of the money and as I submitted to the
5 Court earlier, when the Debtor negotiated the DIP financing, it
6 always contemplated it would be able to obtain this money
7 through an insurance company affiliate and obtain it cheaper
8 than it could obtain it from a traditional lender. And for
9 those reasons, Your Honor, we seek in furtherance of the order
10 the Court already entered, that the Court enter an order
11 approving the Debtors ability to enter into this agreement with
12 Canawell, it would be solely for the purpose of providing up to
13 $7 million dollars of financing to finance certain areas of the
14 Debtors coverage where it is in their best interest to obtain
15 the money from the finance agency.
16 No one other than Mr. Silvestri filed an objection to
17 this motion, Your Honor, and I don't believe -- I don't know at
18 this point whether Mr. Silvestri wishes to proceed with his
19 objection.
20 THE COURT: Okay.
21 MR. FREEDLANDER: Judge, if I may for just a moment.
22 Mark Freedlander, again, on behalf of the Official Committee of
23 Unsecured Creditors. Your Honor, Mr. Silvestri's objection
24 asks several questions of the Committee and although I don't
25 believe the Committee is at all answerable to Mr. Silvestri's

1 client, I'll be happy to answer some of the questions that Mr.
2 Silvestri asked in his pleadings.
3 Not only, Your Honor, did the Committee undertake to
4 investigate the nature of the proposed financing of insurance
5 premiums, but likewise, the Committee reviewed the underlying
6 insurance that the Debtor now seeks to have financed and, in
7 fact, the Committee compelled the Debtors to go out to market
8 and seek to obtain more preferential terms from the underlying
9 carriers. So, the insurance package that's before you today
10 and, in particular, the financing of this insurance coverage,
11 has, in fact, been investigated by the Committee and the
12 Committee is convinced, Your Honor, that not only is the
13 coverage the best available under the circumstances to the
14 Debtor, but likewise, the proposed financing, Your Honor, is
15 number one, cheaper than what it would be under the
16 Debtor-in-Possession financing facility and, number two,
17 because it wasn't contemplated by the Debtors in the budgeting
18 with respect to the DIP negotiations if, in fact, this
19 insurance premium financing were to be denied, it may very well
20 be that the Debtors blow a covenant with the underlying
21 Debtor-in-Possession lender as a result of their not complying
22 with the budget which was negotiated in advance of the filing.
23 So, the Committee is fully comfortable, Your Honor, that this
24 proposal with respect to the financing of insurance premiums,
25 is an appropriate exercise of the Debtors business judgment.

1 MR. ADAIR: Your Honor, Wendell Adair on behalf of
2 the Unsecured Creditors Committee. The only reassurance that
3 we would like is to be reassured that as a result of the
4 entering of this order, that there is a commitment from Zurich
5 to provide the insurance on an ongoing basis for the
6 prospective term.
7 MR. SALZMAN: Your Honor, it is my understanding that
8 Zurich is going to provide the financing, there are still
9 details yet to be ironed out as to the exact pricing of that
10 and the finalization of the order, but we have provided the
11 Committee with the most up to date information we have and the
12 most up to date information we can provide.
13 But we fully expect, I guess to be as candid as we
14 can be, we fully expect Zurich to provide us with our insurance
15 and we have no reason to believe it won't happen.
16 MR. FREEDLANDER: And, Your Honor, Mr. Adair and I
17 don't mean to tag team, but we would expect that this order
18 would be conditioned upon the underlying insurers actually
19 undertaking to provide the coverage that we understand they
20 intend to provide.
21 THE COURT: Well, they're obviously not going to
22 finance something they're not providing.
23 MR. FREEDLANDER: I guess the point is, Your Honor,
24 if there were to be a substantial modification of terms of the
25 coverage, we would find that objectionable.

1 MR. SILVESTRI: The objection is withdrawn.
2 THE COURT: Okay. Anybody else?
3 MR. LAMPL: Your Honor, I just want to read something
4 to you, verbatim. Bankruptcy Rule 3012, valuation of security.
5 The court may determine the value of a claim secured by a lien
6 on property, in which the estate has an interest, on motion of
7 any party in interest and after a hearing on notice to the
8 holder of the secured claim and any other entity as the court
9 may direct. I just -- and be heard -- you've got to read it in
10 the context of what activity's involved. And, that all I have
11 to say, Your Honor.
12 THE COURT: Where are you reading that from?
13 MR. LAMPL: Rule 3012.
14 THE COURT: Okay. This order is related to document
15 number 312, right?
16 MR. SALZMAN: I'm sorry, Your Honor, 311. The
17 motion, I think, is 311.
18 THE COURT: I've got document number 312.
19 MR. SALZMAN: 312? Which motion are we talking about
20 Your Honor?
21 THE COURT: The insurance financing.
22 MR. SALZMAN: I believe that it is 312.
23 MR. FREEDLANDER: It'S 312, Your Honor.
24 MR. SALZMAN: I apologize.
25 THE COURT: Okay.

1 MR. SATHY: Your Honor, just one housekeeping matter.
2 With respect to the motion to reconsider, is there anything
3 that you would want the parties to submit with respect to the
4 disposition of that pleading? It's important from our
5 perspective and with respect to the documents, that that order
6 be entered sooner rather than later so that we can comply with
7 the terms of the DIP agreement?
8 THE COURT: In terms of what order be --
9 MR. SATHY: The order, I guess, denying the motion
10 to reconsider.
11 THE COURT: I don't know what you guys do in Chicago,
12 but I'm just denying the order.
13 MR. SATHY: Okay.
14 MR. ADAIR: Your Honor, with all due respect, that
15 would work in New York.
16 THE COURT: Okay.
17 MR. SATHY: Thank you, Your Honor.
18 THE COURT: Okay. Anything else? Okay, thank you.
19 Close the record.
20
21 *****
22
23
24
25

CERTIFICATION

I, ELAINE HOWELL, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____ Date: September 6, 2004

ELAINE HOWELL

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