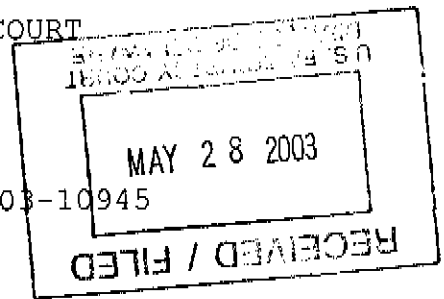


UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE



IN RE:

Case No. 03-10945

FLEMING COMPANIES, INC.,  
Et al,

Debtor,

. 824 Market Street  
. Wilmington, Delaware 19801  
. May 6, 2003  
. 12:59 p.m.

TRANSCRIPT OF OMNIBUS MOTION HEARING  
BEFORE HONORABLE MARY F. WALRATH  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor:

Pachulski, Stang, Ziehl, Young,  
Jones and Weintraub  
By: LAURA DAVIS JONES, ESQ.  
CHRISTOPHER J. LHULIER, ESQ.  
919 North Market Street  
Wilmington, DE 19899

Kirkland & Ellis  
By: RICHARD L. WYNNE, ESQ.  
GEOFFREY RICHARDS, ESQ.  
ANDREW R. RUNNING, ESQ.  
STEVEN R. KOTARBA, ESQ.  
SHIRLEY CHO, ESQ.  
777 South Figueroa Street  
Los Angeles, CA 90017

Audio Operator:

Sherry A. Johnson

Proceedings recorded by electronic sound recording, transcript  
produced by transcription service.

---

J&J COURT TRANSCRIBERS, INC.  
268 Evergreen Avenue  
Hamilton, New Jersey 08619  
E-Mail: [jjcourt@optonline.net](mailto:jjcourt@optonline.net)

(609) 586-2311 Fax No. (609) 587-3599

*JMP*

For Various PACA claimants  
and other interested parties: Law Office of Richard Cross  
By: AMY EVANS, ESQ.  
1201 North Orange Street  
Wilmington, DE 19899

For AFCO: Tybout, Redfearn & Pell  
By: SHERRY FALLON, ESQ.  
Suite 1100, 300 Delaware Avenue  
Wilmington, DE 19899

For HALCO: Phillips, Goldman & Spence  
By: ROBERT GOLDMAN, ESQ.  
1200 North Broom Street  
Wilmington, DE 19806

For Marigold and others,  
Schwan Food: Morris, James, Hitchens, Williams  
By: STEPHEN M. MILLER, ESQ.  
CARL N. KUNZ, ESQ.  
222 Delaware Avenue  
Wilmington, DE 19899

For Hershey Food: Klehr, Harrison, Harvey,  
Branzburg, Ellers  
By: MORT BRANZBURG, ESQ.  
260 South Broad Street  
Philadelphia, PA 19102

For Trans America: Connolly, Bove, Lodge & Hutz  
By: GWENDOLYN LACY, ESQ.  
1220 North Market Street  
Wilmington, DE 19801

For ACE USA: White and Williams, LLP  
By: MARC CASARINO, ESQ.  
LEONARD GOLDBERGER, ESQ.  
824 North Market Street  
Wilmington, DE 19801

For Exxon Mobile Oil: Potter, Anderson & Corroon  
By: ELIHU E. ALLINSON III, ESQ.  
1313 North Market Street  
Wilmington, DE 19899

McDermott, Will and Emery  
By: JAMES SULLIVAN, ESQ.  
New York, New York

For J.P. Morgan:

White and Case  
By: ANDREW P. DeNATALE, ESQ.  
1155 Avenue of the Americas  
New York, New York 10036

Greenberg, Traurig  
By: SCOTT D. COUSINS, ESQ.  
Wilmington, DE 19899

For Dawn Food Products:

Connolly, Bove, Lodge & Hutz  
By: KAREN C. BIFFERATO, ESQ.  
1220 Market Street  
Wilmington, DE 19899

For the Committee:

Milbank, Tweed, Hadley & McCloy  
By: DENNIS DUNNE, ESQ.  
1 Chase Manhattan Plaza  
New York, New York 10005

Pepper, Hamilton  
By: ROBERT HERTZBERG, ESQ.  
100 Renaissance Center  
Detroit, MI 48243

Pepper, Hamilton  
By: ADAM HILLER, ESQ.  
DAVID M. FOURNIER, ESQ.  
1201 Market Street  
Wilmington, DE 19899

For General Mills:

White and Williams  
By: CHRISTIAN J. SINGEWALD, ESQ.  
824 North Market Street  
Wilmington, DE 19801

For Southbridge Plaza:

McCarter and English  
By: KATHARINE MAYER, ESQ.  
919 Market Street  
Wilmington, DE 19899

For Welch's Hammer Corp.:

McCarter and English  
By: PAUL J. DOUGHERTY, ESQ.  
919 Market Street  
Wilmington, DE 19899

For XC Specialty Ins.:

Duane, Morris  
By: RICHARD W. RILEY, ESQ.  
1100 North Market Street  
Wilmington, DE 19801

|   |  |
|---|--|
| For Del Monte Corp.:  | Reed, Smith<br>By: KURT F. GWYNNE, ESQ.<br>1201 Market Street<br>Wilmington, DE 19801                            |
| For American Greetings:   | Zuckerman, Spaeder<br>By: THOMAS MACAULEY, ESQ.<br>919 Market Street<br>Wilmington, DE 19899                     |
| For United Food & Commercial<br>Workers Union, A. Nickles<br>Bakery Superior Dairy: | Heiman, Aber, Goldlust & Baker<br>By: SUSAN E. KAUFMAN, ESQ.<br>702 King Street<br>Wilmington, DE 19899          |
| For DEC Investments:  | Buchanan, Ingersoll<br>By: MARGARET MANNING, ESQ.<br>1300 North Broom Street<br>Wilmington, DE 19899             |
| For Sam Lee/GECC:   | Piper, Rudnick<br>By: C. KEVIN KOBBE, ESQ.<br>6225 Smith Avenue<br>Baltimore, Maryland 21209                     |
| For Linda K/New Plan Excel:   | Ballard, Spahr, Andrews,<br>Ingersoll<br>By: WILLIAM KELLEHER, ESQ.<br>919 Market Street<br>Wilmington, DE 19801 |
| For New Plan Dev. Co.<br>Prim, Hawkins, Majestic:                                   | Ballard, Spahr<br>JEFF MEYERS, ESQ.  |
| For Graf, Farris et al:   | Werb & Sullivan<br>By: DUANE D. WERB, ESQ.<br>300 Delaware Avenue<br>Wilmington, DE 19899                        |
| For Farris et al:   | Martyn & Associates<br>By: HARTLEY MARTYN, ESQ.<br>IDEN MARTYN, ESQ.   |
| For Fleet Capital Leasing:  | Ashby and Geddes<br>By: REGINA A. IORII, ESQ.<br>222 Delaware Avenue<br>Wilmington, DE 19899                     |

For Caito Foods: William W. Erhart, P.A.  
By: WILLIAM W. ERHART, ESQ.  
302 King Street, Suite 800  
Wilmington, DE 19899

For Unilever: Herrick, Feinstein LLP  
By: DAVID BASS, ESQ.  
2 Park Avenue  
New York, New York 10016

For Turnpike Crossings: Stevens and Lee  
By: THOMAS WHALEN, ESQ.  
300 Delaware Avenue  
Wilmington, DE 19801

For Sara Lee Company: David L. Finger, P.A.  
By: DAVID L. FINGER, ESQ.  
One Commerce Center  
1201 Orange Street  
Wilmington, DE 19801

For Kroger Company: Ashby and Geddes  
By: CHRISTOPHER SONTCHI, ESQ.  
222 Delaware Avenue  
Wilmington, DE 19899

For US Trustee: Office of the United States  
Trustee  
By: JULIE COMPTON, ESQ.  
844 King Street  
Wilmington, DE 19899

For Deloitte and Touche: Kramer, Levin, Naftalis & Frankel  
By: ROBERT SCHMIDT, ESQ.  
919 Third Avenue  
New York, New York 10022

For Canadian Pacific: Morris, Nichols, Arsht, Tunnell  
By: DANIEL BUTZ, ESQ.  
1201 North Market Street  
Wilmington, DE 19899

For Blair Reality, et al: Archer and Greiner  
By: JOHN FIORELLA, ESQ.  
One Centennial Square  
Haddonfield, New Jersey 08033

For West Coast Properties: RALPH EDDIN

For DEIC Investments:

Husch, Eppenberger  
By: MARK BENEDICT, ESQ.

I N D E XPAGEWITNESSES FOR THE DEBTOR:

|                                    |    |
|------------------------------------|----|
| TED STENGER                        |    |
| Direct examination by Mr. Running  | 40 |
| Cross examination by Mr. Sontchi   | 75 |
| Cross examination by Mr. Sullivan  | 87 |
| Cross examination by Ms. Bifferato | 88 |

1 THE CLERK: Be seated.

2 THE COURT: Good afternoon.

3 MS. JONES: Good afternoon Your Honor, Laura Davis  
4 Jones of Pachulski, Stang, Ziehl, Young, Jones and Weintraub on  
5 behalf of Fleming Companies and related debtors.

6 Your Honor, I thank you for letting us start a little  
7 bit late, we were able to resolve a lot of issues or clarify  
8 issues that folks raised right here at the courthouse, and we  
9 appreciate you giving us that time.

10 Your Honor, if I could refer the Court to the amended  
11 notice of agenda, and just kind of walk through the -- with the  
12 Court through the agenda. A number of the matters are being  
13 continued, a number I think are resolved, and a couple remain  
14 open.

15 Your Honor, with respect to matter one, which was our  
16 motion with respect to the payroll, Your Honor, recalls that  
17 we've been coming back to this one, hearing after hearing, at  
18 the first day we had filed a motion that was fairly  
19 comprehensive, had a lot of benefits included. The Committee  
20 and others had asked us for more time to look at various  
21 issues, and we have continued to continue the hearing with  
22 respect to some of the issues, including the senior executive  
23 retirement plan, the executive relocation program, the  
24 severance program, the Air High program, the incentive  
25 programs, the Fleming pension plan and Core-Mark pension plan,



1 and the match aspects of the 401K.

2 We are again Your Honor continuing those over until  
3 the June 4 hearing, while people continue to discuss and deal  
4 with those issues.

5 But Your Honor, there was one matter that has come to  
6 our attention from the company, and that is with respect to our  
7 current employees and their sick time, if you will. In our  
8 initial motion, as we filed it, there was a defined term called  
9 vacation benefits, that was encompassed in the term employee  
10 paid time off.

11 And that employee paid time off included not only  
12 those vacation benefits, but also the sick days and personal  
13 days, of our current employees.

14 When the order was drafted, approving the motion, it  
15 only referred to the vacation benefits term, and not the  
16 employee paid time off term.

17 It was explicitly described in the motion, that we were  
18 seeking to honor our sick time of our employees, in the  
19 ordinary course as we go forward, throughout the case. And  
20 Your Honor what we'd like to present to the Court today, is  
21 just a second supplemental order, that does two things, one  
22 does recognize the paid time off obligations, and two, does  
23 continue the matters that I just mentioned on to the June 4th  
24 date.

25 THE COURT: All right. Does anybody wish to be heard

1 on that then?

2 MR. HERTZBERG: Your Honor, I wish to see the order  
3 before it's submitted.

4 THE COURT: All right. Then it can be handed up  
5 after the Committee's reviewed it.

6 MS. JONES: Thank you Your Honor, Your Honor we did  
7 leave one blank in that order, and that was with respect to the  
8 objection deadline for the hearing on June 4, we can select a  
9 date pursuant to the local rules, Your Honor, or we can ask the  
10 Court to insert the order.

11 THE COURT: I'll fill it in.

12 MS. JONES: Thank you very much. Your Honor, there  
13 was one other issue that was raised with me, literally two  
14 minutes before this hearing started, and that was by the INA  
15 and Ace Insurers, Your Honor may recall at the last hearing we  
16 sought approval to continue our workers compensation program,  
17 and paying on our pre-petition claims.

18 They have raised right before this hearing, to talk  
19 about whether that includes what we continue to settle, pre-  
20 petition workers comp claims. Your Honor, just I don't have  
21 the right people here, and don't even have time to deal with  
22 the issue, but they did ask me to put it on the -- to bring it  
23 to the Court's attention and tell Your Honor that we're  
24 discussing the matter.

25 THE COURT: Well, you can discuss it. We'll deal

1 with it at the continued hearing.

2 MS. JONES: Thank you Your Honor.

3 MR. VANDENHEUVEL: Your Honor, may I speak?

4 THE COURT: Who are you?

5 MR. VANDENHEUVEL: I'm George Vandenheuvel, I'm an  
6 employee of Fleming, and I'd like to talk about the severance  
7 pay, I'll try to keep my statement short.

8 THE COURT: Well, what about the severance pay, it's  
9 not being heard today.

10 MR. VANDENHEUVEL: Okay, then I'll wait until June  
11 4th. So I don't waste your time.

12 THE COURT: All right, is that --

13 MS. JONES: That's correct Your Honor.

14 THE COURT: -- one of those matters continued, okay.

15 MS. JONES: Yes, sir.

16 MR. VANDENHEUVEL: Thank you, may I be excused.

17 THE COURT: You may.

18 MR. VANDENHEUVEL: Thank you.

19 MS. JONES: Your Honor, matter two. The application  
20 for the retention of Gleacher and matter 3, our motion with  
21 respect to Refrigerated Transport Express, both those matters  
22 have been continued Your Honor, to the May 19th hearing.

23 Matters 4, 5, 6, 7 --

24 MR. HERTZBERG: Your Honor, can I ask a question on  
25 matter 2 you said it was continued, to the May 19th. Under the

1 status of the agenda, you indicate --

2 THE COURT: Counsel, you can't be heard and you have  
3 to identify yourself for the record, so.

4 MR. HERTZBERG: I'm sorry Your Honor.

5 THE COURT: Please.

6 MR. HERTZBERG: Under the agenda it indicates Your  
7 Honor under status that it was being adjourned to June 4th, are  
8 we now changing it to May 19th?

9 MS. JONES: Your Honor, I apologize, it is the June 4  
10 date, counsel is correct.

11 THE COURT: All right.

12 MS. JONES: Your Honor, I should also point out to  
13 the Court, to the extent that we have not filed papers that  
14 indicate this yet at this point, Your Honor, we have the  
15 privilege of having brought Blackstone into the case, we -- the  
16 debtors have decided to employ Blackstone to help us through  
17 this process. We have not yet filed the application to employ  
18 them, which we will do and we will put on appropriate notice.  
19 And Your Honor they will be replacing the services of Gleacher.  
20 But Your Honor, we need to work through the issues, and that is  
21 why we have continued the matter.

22 THE COURT: All right.

23 MS. JONES: Your Honor, matters 4, 5, 6, 7 and 8 are  
24 all retentions of various professionals, for the debtor. All  
25 of which Your Honor, I believe we have now filed certificates

1 of counsel.

2 With respect to the Kirkland and Ellis matter, number  
3 8, the US Trustee had some issues that it raised, both in  
4 connection with the application as originally filed, and then  
5 the supplemental application -- or affidavit of Mr. Sprayregen,  
6 a partner in the firm with respect to relationships with an  
7 interest and interest of -- an interest of a creditor in the  
8 case, an issue actually that Your Honor has heard before, in  
9 connection with the Stations Holding matter where we were able  
10 to resolve that issue, Your Honor we actually followed that  
11 exact same plan.

12 THE COURT: I saw the supplemental affidavit.

13 MS. JONES: Yes, ma'am. And we've resolved our  
14 Trustee's concerns in that regard, by following the direction  
15 we took in the Stations Holding case, which was for to the  
16 extent there could be any --

17 THE COURT: I understand and I saw that but what  
18 about the fact that some of the Kirkland and Ellis people have  
19 a shareholder interest in a potential purchaser? Some of the  
20 retail stores?

21 MS. JONES: Your Honor, I'm going to let Mr. Richards  
22 address that. I think he's been looking at the issue.

23 MR. RICHARDS: Thank you, good morning Your Honor,  
24 Geoffrey -- actually good afternoon Your Honor, Geoffrey  
25 Richards from Kirkland and Ellis, Your Honor, that is correct

1 that there are individuals at the Kirkland firm, that do hold a  
2 de minimus interest in an entity that is a major shareholder of  
3 an entity that has submitted a bid for the -- for certain of  
4 the debtor's assets.

5 As we've made clear in our papers, we are Kirkland is  
6 not working in connection with that -- with that bidder,  
7 rather. In fact Kirkland is not doing any work in connection  
8 with that transaction, in any way, shape or form.

9 THE COURT: Who is?

10 MR. RICHARDS: The firm of Pachulski, Stang Your  
11 Honor.

12 To the extent that other bids are submitted  
13 Pachulski, Stang is handling that entire process. Kirkland and  
14 Ellis is not involved in any way, shape or form with respect to  
15 that transaction.

16 MS. JONES: I can confirm that Your Honor.

17 THE COURT: Well the affidavit simply says that you  
18 were no longer representing the potential buyer. Is this  
19 satisfactory to the US Trustee?

20 MS. COMPTON: Yes, Your Honor, we've had substantial  
21 discussions about this, and many of my questions were answered  
22 satisfactorily. So we don't have an objection to it.

23 MS. JONES: Your Honor, I would also point out that  
24 there have been long standing outside corporate counsel, who  
25 had been dealing with the transactional issues, if you will.

1 Who have stayed in place, and our firm is working with them.

2 And there has been no involvement by Kirkland and  
3 Ellis in the matter.

4 THE COURT: All right, well I will approve it then  
5 with those representations on the record. With respect to the  
6 long standing corporate counsel which is application number 4?

7 You filed a 320 -- you filed it as a 327(e) special  
8 counsel. Given the breadth of their representation of the  
9 debtor I think it should be a 327(a). They have a de minimus  
10 pre-petition claim which I think should be waived. I mean am I  
11 wrong that their retention is to represent the debtor in  
12 everything except bankruptcy matters?

13 MS. JONES: Your Honor, I'm -- I would like to pass  
14 on that, and come -- come back to the Court later in the  
15 hearing, and let me find out that information. Your Honor, my  
16 understanding is that they had primarily been involved with the  
17 Rand -- transaction and that there wasn't a whole lot else that  
18 they were doing, but I want to -- be very clear on that with  
19 the Court, before I give you a representation in that regard.

20 THE COURT: Well check that -- the application seems  
21 broader. With respect to your application I did not receive  
22 the affidavit of disinterestedness, I don't know why it's not  
23 in the binder.

24 And it was not submitted with the certificate of no  
25 objection. In fact the application wasn't submitted, with the

1 CNO.

2 MS. JONES: Your Honor, I will check into that if  
3 it's okay with the Court, we would submit our application along  
4 with my affidavit with a -- a proper certificate of counsel or  
5 certificate of no objection.

6 THE COURT: All right. With respect to Baker Botts,  
7 isn't there an issue regarding their representation of Deloitte  
8 and Touche, that was raised in connection with the Deloitte and  
9 Touche application but why wasn't it disclosed with respect to  
10 Baker Botts?

11 MS. JONES: Your Honor, I -- obviously cannot speak  
12 for Baker Botts, I can go back and look at their affidavit, and  
13 talk to counsel there, and ask them to do a supplemental  
14 disclosure for the Court, to the extent it's appropriate. And  
15 then submit it for the Court's consideration.

16 THE COURT: And they also disclosed that they're  
17 representing individually current directors and officers. Is  
18 this appropriate?

19 MS. JONES: Your Honor, one, they are -- we're  
20 seeking to employ them as special counsel under 327(e), two  
21 Your Honor --

22 THE COURT: On the same matters in which they're  
23 representing the current directors and officers?

24 MS. JONES: Your Honor, that I would need to have  
25 them clarify, because my understanding is that it was -- it was



1 a different -- different matters that they were handling but  
2 Your Honor, I would ask counsel at Baker Botts -- I can speak  
3 with them, and ask them to clear that up for the Court, and  
4 submit to you for submission.

5 THE COURT: All right, let's continue that as well  
6 then.

7 MS. JONES: Your Honor, may I put that on for the  
8 next hearing, but if we're able to get the information file  
9 supplemental affidavits.

10 THE COURT: Yes.

11 MS. JONES: Of disinterestedness and submit it to the  
12 Court.

13 THE COURT: You may.

14 MS. JONES: Your Honor, if I may step back for one  
15 moment, with respect to the employee wage order, the Committee  
16 has now reviewed the order, they have asked though that with  
17 respect to the paid time off obligations that we ask for that  
18 authority only till the next hearing, and that we would bring  
19 the matter up again, before the Court, at the next hearing.

20 And Your Honor, we would revise the order in that  
21 regard, and then submit it.

22 THE COURT: All right.

23 MS. JONES: Your Honor, I guess mechanically what I  
24 will do is submit all orders at the end of the hearing if  
25 that's -- that's best.

1 THE COURT: That's fine.

2 MS. JONES: Your Honor, I believe that brings us to  
3 matter 9, which is the motion of EFS National Bank, for relief  
4 from stay, Your Honor, that was to effectuate a setoff we're  
5 working through that issue, and making sure the Committee and  
6 others were fully advised, and we have continued that to the  
7 May 19 hearing.

8 Your Honor, matter 10, the motion by AFCO Credit  
9 Corporation, to vacate the stay, Your Honor, apparently the  
10 parties have been able to resolve this matter by stipulation,  
11 which we would submit to the Court. That does provide for a  
12 ten day notice period, if you will, to be given to the debtor  
13 and for the protections of AFCO, if I may approach Your Honor,  
14 and show you that stipulation?

15 THE COURT: You may. Has the Committee seen it?

16 MS. JONES: Yes, Your Honor.

17 MR. HERTZBERG: Yes, Your Honor. Robert Hertzberg we  
18 approved it Your Honor.

19 MS. JONES: Your Honor the --

20 THE COURT: Well it also provides for payments, not  
21 just a relief from the stay on the notice.

22 MS. JONES: Your Honor, if I may have the Court's  
23 indulgence for a moment.

24 (Pause)

25 MS. JONES: Your Honor, first of all Your Honor, I

1 would point out that this is a stipulation between the parties,  
2 and we have not asked for Court approval of the stipulation,  
3 but did want to let Your Honor know that the stipulation has  
4 been agreed to. And Your Honor, it does provide for adequate  
5 protection payments and then it does provide a -- a notice  
6 mechanism in case of a default. Counsel for AFCO is here, and  
7 can --

8 THE COURT: So are you going to submit it under  
9 notice?

10 A SPEAKER: Your Honor, the motion was returnable  
11 today and we can either convert this into an order if that's  
12 more convenient for the Court. Or we just did it in the form  
13 of a stipulation, would request that Your Honor so order it.

14 THE COURT: The Committee have any objection?

15 MR. HERTZBERG: No objection Your Honor.

16 THE COURT: To either procedure? Anybody?

17 MR. HERTZBERG: No Your Honor.

18 A SPEAKER: Perhaps the thing would be if Your Honor  
19 could just so order the stipulation since it's been executed.

20 THE COURT: Are these the monthly payments that the  
21 debtor had previously agreed to make?

22 A SPEAKER: Yes, Your Honor.

23 THE COURT: All right. Well I will approve the  
24 stipulation, but get me a form of order approving the  
25 stipulation.

1 MS. JONES: We can do that Your Honor.

2 THE COURT: But I'll so order the record for now.

3 MS. JONES: And Your Honor, we did want to represent  
4 to the Court on the record that the debtor is current with  
5 respect to AFCO, there is a payment due in May which we do need  
6 to make.

7 THE COURT: All right.

8 MS. JONES: Your Honor, matter 11 the application for  
9 an order authorizing the retention of Price Waterhouse Coopers,  
10 Your Honor may recall that I presented an interim order, at an  
11 early hearing, so that we could keep them working for the  
12 debtor.

13 Your Honor, there have been no objections to their  
14 retention, and indeed we spend time with the Committee, to make  
15 sure we addressed their issues, with respect to this. And Your  
16 Honor our intent would be to submit a proposed order, today,  
17 that would be identical to that which was attached to the  
18 motion as originally filed.

19 THE COURT: All right.

20 MS. JONES: Your Honor, that would bring us to matter  
21 12 which is the utilities, and I'm going to yield to Mr.  
22 Richards with respect to that.

23 MR. RICHARDS: Your Honor, very briefly with respect  
24 to the utilities, the last time we were before Your Honor we  
25 had several utilities that had objected to the procedures.

1 That the debtor sought to implement at that time. The Court  
2 entered an order with respect to all utilities other than those  
3 utilities who had objected.

4 With respect to those utilities that had objected,  
5 the bridge order remained in effect, until the debtors had an  
6 opportunity to work out a stipulation with the objecting  
7 parties.

8 Since that time Your Honor, we have worked with the  
9 objecting parties, and based on their agreement with us Your  
10 Honor, the bridge order with respect to those utilities will  
11 remain in place, until the next omnibus hearing date. As the  
12 debtors and those parties will work out a form of stipulation  
13 which the debtors expect to submit to the Court shortly.

14 THE COURT: All right.

15 MR. RICHARDS: So there's no further action that  
16 needs to be taken with respect to that at this time.

17 THE COURT: Okay.

18 MS. JONES: Your Honor, matter 13 is our critical  
19 trade motion, the number of people have asked that we take that  
20 up together with the DIP financing, so what I'd like to do is  
21 skip over that for a moment. And talk about the other matters  
22 that are on the calendar.

23 THE COURT: All right.

24 MS. JONES: Your Honor, matter 13A with our motion  
25 with respect to the rejection of leases, Your Honor will recall

1 we filed this back on April 2, at that time the motion covered  
2 a number of lease situations if you will. One leases that were  
3 vacated and ready to be surrendered, two leases that were the  
4 subject of a sub-lease, and where we had some notice issues, a  
5 lease from our perspective we didn't think that there had been  
6 sufficient notice. Three, ones that we had vacated, but we  
7 were not yet ready to surrender, and four ones that in  
8 retrospect we did not want to reject, and should not have been  
9 on the rejection list. That Your Honor resulted in a series of  
10 emergency motions, that were filed with the Court, before the  
11 April 21 hearing. But Your Honor luckily we were able to --  
12 that matter was continued over at the request of the Committee,  
13 and also in the interest of time at that hearing. And we have  
14 used that time significantly to talk with the various  
15 landlords, and try to work out our issues, and I think Your  
16 Honor I stand before you now with all of the landlord  
17 objections before the Court except one, resolved. And there is  
18 two that people came up to right before the hearing that I have  
19 answered for them, and I think as we go through the objections  
20 we'll work those through.

21           Your Honor, what we would go forward on today are  
22 those that we have vacated. And indeed are ready to reject.  
23 We have surrendered them, there were surrender letters sent out  
24 on April 25th, we then sent out -- resent the letters on April  
25 28th, by fax, and by Federal Express overnight, to the extent

1 we had keys, we surrendered keys, and all rent has been paid  
2 for a whole month of April. And our rejections we are seeking  
3 to be effective as of April 30.

4 Your Honor, may recall there was a lot of issue about  
5 the --

6 THE COURT: Yes.

7 MS. JONES: -- effective date of the rejection and  
8 because there were quite a few issues in that regard, we  
9 decided to just go ahead and pay the rents for April, and make  
10 it the effective date April 30th. And that resolved a lot of  
11 the discussions.

12 Your Honor, Brian Lake who is the manager of real  
13 estate and lease compliance is here in the courtroom, he is  
14 prepared to testify or to support an offer of proof if  
15 necessary, but I think what would make sense Your Honor, is if  
16 I walked through the objections and tell Your Honor where we  
17 are or which ones have been continued, I think we'll be able to  
18 work through it quite quickly.

19 THE COURT: Your amended agenda already says some  
20 were continued, so don't repeat that.

21 MS. JONES: Okay, Your Honor. Your Honor, if I look  
22 at page nine of the amended agenda, responses received sub-part  
23 a, Southbridge Plaza, that matter has been resolved.

24 THE COURT: Okay.

25 MS. JONES: Matter c, Keystone Operating Partnership,

1 that matter has been resolved.

2 Matter e, the Cessna Aircraft, we have a separate  
3 order on that Your Honor, and that has been resolved that we  
4 would submit.

5 Matter g, Your Honor, the Limited objection of  
6 Bradley Operating that would be -- that has been resolved and  
7 we present a separate order, with respect to that.

8 Matter h, Your Honor, TFJ Nominee Trust, and James  
9 Realty Your Honor we have resolved that matter, we will need to  
10 submit a stipulation to the Court, under certificate of  
11 counsel. Which stipulation we're going to have to show the  
12 Committee first. We have resolve that by the payment of \$9500  
13 which will resolve various issues regarding the surrender date  
14 of the premises and so forth.

15 THE COURT: All right.

16 MS. JONES: But we would submit a stipulation in that  
17 regard.

18 THE COURT: All right.

19 MS. JONES: Matter j, Your Honor, Canadian Pacific  
20 has been resolved.

21 THE COURT: It's continued -- all right.

22 MS. JONES: Your Honor, I apologize, on that one, we  
23 have agreed to continue that to the 19th.

24 THE COURT: J?

25 MS. JONES: Yes, ma'am.



1 THE COURT: Okay.

2 MS. JONES: Your Honor, the issue there is there is a  
3 partial sublease, that we need to deal with.

4 Matter k, Your Honor, has been resolved. Matter l,  
5 has been resolved. And the ones that I'm mentioning that are  
6 resolved, and I'm not mentioning a separate order, we will be  
7 presenting to the Court an omnibus order with respect to these.

8 Matter m, Stephen Spicer, we've agreed to continue  
9 that to the May 19th, hearing.

10 Matter o, has been resolved. Matter q, Your Honor,  
11 if I can have the Court's indulgence one moment.

12 (Pause)

13 MS. JONES: Your Honor, with respect to matter q,  
14 what we'd like to do is come back at the end of the hearing  
15 with respect to that counsel wanted to see our surrender  
16 letters, which we have provided them this morning. We faxed  
17 that to them, they acknowledge that they have received it, and  
18 they see the dates and so forth that we sent it. But they want  
19 to touch base with their client and due --

20 THE COURT: All right.

21 MS. JONES: -- due to their own scheduling  
22 difficulties, they have not been able to do that. Your Honor,  
23 also counsel, if I may step back, counsel has asked that with  
24 respect to matter a, Southbridge Plaza, Your Honor I show  
25 evidence that the April rent has been paid there, counsel has

1 said her client has not seen that yet. So she's asked me to  
2 represent that she reserves her rights, to bring any necessary  
3 365(d)(3) motion or what have you, if indeed that check is not  
4 received.

5 THE COURT: Well, between now and the time that the  
6 form of order is submitted, you should be able to confirm that  
7 the April rent was paid.

8 MS. JONES: Well, Your Honor, her lease was on our --  
9 order that we were going to submit at the end of the hearing  
10 today.

11 THE COURT: Okay.

12 MS. JONES: Your Honor, if it's -- satisfactory with  
13 counsel, what I'd like to do is submit that order, and  
14 obviously all her rights are reserved with respect to 365(d)(3)  
15 but Mr. Lake is here, and if called to testify would say that  
16 that is -- that check was issued.

17 MS. MAYER: Your Honor, Katharine Mayer on behalf of  
18 Southbridge, we are fine with the submission of the order  
19 today, we just wanted to -- there's nothing in the order that  
20 specifically either way, discusses the 365 issue, or  
21 administrative expense claims, and I just wanted for the record  
22 to reserve any right to file a motion if appropriate under 365,  
23 if the rent and expense --

24 THE COURT: Oh.

25 MS. MAYER: -- are not paid in full.

1 THE COURT: All right.

2 MS. MAYER: Thank you Your Honor.

3 MS. JONES: Your Honor, matter s, while denoted on  
4 here as continued to May 19th, this is one of the airplanes  
5 Your Honor, and Your Honor may recall that there were four  
6 aircraft that we were waiting for the Committee to review, and  
7 to set aside themselves with their advisors, we learned late  
8 yesterday that the Committee is satisfied with our rejection of  
9 the aircraft. So we would Your Honor, seek to present the  
10 order with respect to number s.

11 THE COURT: All right.

12 MS. JONES: It's actually encompassed in an order,  
13 that we will submit to the Court with respect to matter aa.

14 THE COURT: All right.

15 MS. JONES: Your Honor, matter t, we've agreed to  
16 continue to May 19th. Your Honor, matter b, is the one  
17 objection that I know of that is open, this is the objection of  
18 Howland and Associates, I understood from counsel that he would  
19 not be attending the hearing today and would not be sending  
20 local counsel. I guess one before I try to characterize his  
21 objection, I would ask to confirm that.

22 THE COURT: What's the name of the landlord?

23 MS. JONES: Howland, h-o-w-l-a-n-d.

24 THE COURT: Is there anybody here for that landlord?

25 MS. JONES: Your Honor, Mr. Rosenberg from the Lex

1 and Griffith firm in Warren, Ohio filed a one page objection,  
2 on behalf of Howland Associates, it's docket number 343, that  
3 was filed back on April 14, in which Howland asserts that  
4 rejection -- that rejecting the lease is not essential to the  
5 continued operations of the debtors and is not in the best  
6 interest of the debtor's estate and our creditors.

7 I spoke personally with Mr. Griffith along with Mr.  
8 Lake, and we all agreed that these are premises that have been  
9 closed since the fall of 19 --

10 THE COURT: Are you going to present a proffer?

11 MS. JONES: Yes, ma'am.

12 THE COURT: Of who?

13 MS. JONES: I was coming to that.

14 THE COURT: Of who?

15 MS. JONES: Brian Lake Your Honor.

16 THE COURT: All right.

17 MS. JONES: Who as I mentioned --

18 THE COURT: And he would testify --

19 MS. JONES: Is here in the courtroom. And Your Honor  
20 just again for the record, he is the manager of real estate,  
21 and lease compliance for Fleming Companies, as called to  
22 testify Mr. Lake would tell the Court that he was on the  
23 conversation before the last -- before the April 21 hearing,  
24 with me with counsel to Howland Associates, wherein we informed  
25 Howland Associates and Mr. Lake would so testify, that these --

1 this is a premises that has been closed since the fall of 1997,  
2 the rent is approximately \$200,000 per year, Mr. Lake would  
3 testify that this premises is providing no benefit to the  
4 estate, and indeed is a cash drain. He would testify that  
5 there's approximately 23 months left on the lease, that we have  
6 paid the rent, we being Fleming, have paid the rent through  
7 April 30, 2003. And Mr. Lake would finally testify that he  
8 believes it's in the best interest of the estate and the proper  
9 use of the debtor's business judgment, to reject this lease.

10 THE COURT: All right, I'll overrule the objection of  
11 Howland Associates, on that proper testimony.

12 MS. JONES: Thank you Your Honor. Your Honor that  
13 would bring us to matter aa, which I've already started, these  
14 are the aircrafts that I mentioned before, Your Honor they  
15 would be two orders that we would submit. One for the GE  
16 aircraft and then for the two other aircraft and Your Honor we  
17 have already submitted or will be submitting a separate  
18 stipulation with one of -- I think we already submitted it,  
19 with respect to one of the other aircraft. So. All four  
20 aircraft Your Honor that the debtors have now moved to reject.

21 THE COURT: All right.

22 MS. JONES: Your Honor, bb, and cc, are represented  
23 by the same counsel. Your Honor, we have resolved these two  
24 again Your Honor, we have to circulate a stipulation to the  
25 Creditors Committee, and submit it to the Court. Again,

1 together Your Honor there would be a payment of \$9500 in total  
2 to resolve the issues that are outstanding by all of these  
3 landlords with the debtors.

4 THE COURT: All right.

5 MS. JONES: And Your Honor we would submit that  
6 stipulation under certification of counsel.

7 THE COURT: All right.

8 MS. JONES: To the Court.

9 THE COURT: That's fine. That resolves all the  
10 objections to the motion then?

11 MS. JONES: Your Honor, there was one other matter,  
12 and I don't know if the gentleman is on the phone or not, but  
13 Ralph Eddin had asked me to make the representation on the  
14 record with respect to property of Frye's Food and Drug Stores.  
15 He had asked me to represent on the record that nothing that we  
16 have done by these motions affects the leases of -- dated March  
17 25, 1963 with Frye's Food and Drug Stores or -- any of the  
18 related companies. Your Honor, we have filed nothing with  
19 respect to that lease, and I will confirm for counsel or for  
20 the representative of West Coast Properties that nothing we're  
21 here doing today, affects that particular property.

22 THE COURT: All right.

23 MR. WHALEN: Good afternoon Your Honor, Tom Whalen  
24 Stevens and Lee.

25 MR. EDDIN: Hello.

1 THE COURT: Please speak louder. And into the  
2 microphone.

3 MR. EDDIN: Hello, my name is Ralph Eddin, good  
4 morning, Your Honor.

5 THE COURT: Well, who -- who are you again on the  
6 phone?

7 MR. EDDIN: Ralph Eddin, I am the general manager of  
8 West Coast Properties.

9 THE COURT: Okay. Yes. And you -- you heard the  
10 representation of the debtor that this motion does not affect  
11 your property?

12 MR. EDDIN: Well -- I heard part of it you know, Your  
13 Honor we are the victims of Fleming intentional negligence, in  
14 this matter. We have no information about the case, we had to  
15 search through the records of the business library here in --  
16 California, in order to get the legal counsel of Fleming, until  
17 finally we find out they were sending it to the wrong address.

18 The first time we know about this case is on April  
19 22nd, when we received the motion, and still did not Fleming is  
20 sending that -- the documents to the wrong address you know.  
21 What you show on your motion exhibit A-1 page three our address  
22 is the wrong address ma'am.

23 THE COURT: All right, well I'll direct counsel for  
24 the debtor to contact you what is your phone number?

25 MR. EDDIN: Our phone number is area code 818-998-

1 0562, but I am in Prescott, Arizona now, the telephone number  
2 is area code 928-717-1200, extension 102. Frye's is the  
3 company who leased the premises to Fleming Your Honor. And the  
4 vice president of Frye's is meeting me next week, to assess the  
5 damage that Fleming left the store on the April 10th, 2001, and  
6 they left it in ruins, they optioned the equipment and they  
7 never responded to us to fix anything in the store, Frye's has  
8 taken the responsibility for payment now, and --

9 THE COURT: Mr. Eddin, let me interrupt you.

10 MR. EDDIN: Sure.

11 THE COURT: Your lease is not being decided here  
12 today. If you have any claim against the debtor you should  
13 file a motion, to that effect.

14 MR. EDDIN: Okay. But -- the lease shouldn't be  
15 rejected back to Frye's who gave it to Fleming?

16 THE COURT: It is -- well the debtor has not filed a  
17 motion for that.

18 MS. JONES: Your Honor, and if --

19 MR. EDDIN: Oh.

20 MS. JONES: -- it would assist the Court, we have had  
21 lengthy discussions with Mr. Eddin, both my partner Mr. Stang  
22 and my colleague Mr. Lhulier, and also other members of our  
23 firm, and of the Kirkland firm. Your Honor, we will endeavor  
24 to contact Mr. Eddin again, and try to walk through the  
25 process. We have encouraged the retention of counsel as well.



1 But Your Honor nothing we're doing today affects that property.

2 THE COURT: All right. All right, there is nothing  
3 before me today Mr. Eddin.

4 MR. EDDIN: Okay.

5 THE COURT: On your lease.

6 MR. EDDIN: Yes, as long as you know Frye's assumed  
7 the responsibility according to the lease agreement, with  
8 Frye's we are okay, ma'am. We are not going to go after  
9 Fleming any more, you know because Frye's -- we have three  
10 guarantees from Frye's and their mother company, Dillon and the  
11 Kroger Company to take over you know this sublease from --

12 THE COURT: All right, all right, then there's  
13 nothing before me.

14 MR. EDDIN: Okay, ma'am.

15 THE COURT: Thank you.

16 MR. EDDIN: Thank you.

17 THE COURT: Anybody else?

18 MR. BENEDICT: If it please the Court Your Honor,  
19 Mark Benedict with Husch and Eppenberger, on behalf of DEIC  
20 Investment and Shield Investment.

21 THE COURT: Yes.

22 MR. BENEDICT: I just wanted to confirm I did not  
23 have an opportunity to see a fax of the amended agenda, that  
24 it's my understanding from my associates conversations and Mr.  
25 Stang, that our leases were listed in docket item 13d, which is

1 the emergency motion to withdraw certain leases from the list  
2 to be rejected. And I believe that Mr. Stang confirmed with my  
3 colleague Marcus Help, that those leases have now -- are not in  
4 the order that's to be submitted to the Court today, and the  
5 motion has been withdrawn with respect to those leases.

6 THE COURT: Is that correct?

7 MS. JONES: Your Honor, if I could just ask which  
8 properties that is, and we can verify it before we submit the  
9 order.

10 MR. BENEDICT: Yes. This is 5100 Kansas Avenue, in  
11 Kansas City, Kansas. And 5200 Kansas Avenue, in Kansas City,  
12 Kansas, it is the refrigerated warehouse in Kansas City,  
13 Kansas, that Midwest Distribution Center.

14 MS. JONES: Yes, sir, I seem to recollect that we  
15 have put that matter off, but I will double check it before we  
16 submit the order.

17 MR. BENEDICT: Thank you.

18 THE COURT: All right, anybody else on the leases?

19 MR. WHALEN: Good afternoon Your Honor, Tom Whalen of  
20 Stevens and Lee, here on behalf of Turnpike Crossings I, LLC,  
21 we didn't file a formal objection, Your Honor, but we have been  
22 working with the debtors regarding our lease.

23 We're okay with the rejection as of April 30th,  
24 however they indicate they sent a check April 30th, my client  
25 hasn't received it, so we'd like to reserve our rights in the

1 case that the amount is incorrect or --

2 THE COURT: With respect to the April 30 rent?

3 MR. WHALEN: Payment -- and the --

4 THE COURT: All right.

5 MR. WHALEN: And the April portion of the taxes.

6 THE COURT: All right.

7 MR. WHALEN: Thank you Your Honor.

8 MS. JONES: Your Honor, I -- one, the debtor is fine  
9 with that, and two Your Honor, we did confirm for counsel Mr.  
10 Lake, he's going to go make a phone call during this hearing  
11 and confirm that the check was sent.

12 THE COURT: Okay.

13 MS. JONES: So Your Honor, if there's an issue we'll  
14 bring it back to the Court.

15 THE COURT: All right. That's all with respect to  
16 the motion to reject leases then?

17 MS. JONES: Yes.

18 THE COURT: All right, then I will approve that.

19 (Pause)

20 THE COURT: all right.

21 MS. JONES: Your Honor, Mr. Lhulier just confirmed  
22 for me that the Kansas properties are not on that rejection  
23 order, that will be submitted.

24 THE COURT: All right.

25 MR. BENEDICT: Thank you.

1 MS. JONES: Your Honor --

2 THE COURT: What's next?

3 MS. JONES: -- can we have the Court's indulgence for  
4 one moment.

5 (Pause)

6 MS. JONES: Your Honor, on matter 14, the application  
7 to retain FTI, I understand the Committee has resolved all the  
8 issues that it has with respect to that application. But  
9 there's one more issue that they want to address to if we may  
10 pass that to the end of the calendar, Your Honor. Hopefully we  
11 can clear that up.

12 THE COURT: Okay.

13 MS. JONES: Your Honor, matter 15, the application to  
14 retain Ernst and Young, Your Honor I talked about it at the  
15 early hearing about presenting an interim order to retain them,  
16 and I thought I presented it, but Your Honor it is not showing  
17 on the docket.

18 So I stand here today with both that interim order  
19 that I thought I had presented to the Court, and I represented  
20 that we would, as well as a final order, and at this point Your  
21 Honor with the Caito Foods objection having been withdrawn, as  
22 we told the Court some time ago, but also with the Committee  
23 now having had the time to address the issues with respect to  
24 Ernst and Young, and I understand being fully satisfied in that  
25 regard, I would seek to submit the final order with respect to

1 this.

2 THE COURT: All right, anybody else wish to be heard?

3 MS. JONES: Your Honor, we want to make sure that Ms.  
4 -- that the Trustee has seen the form of the order, that's  
5 being submitted so I'm going to wait to the end of the hearing  
6 to submit that Your Honor.

7 THE COURT: All right.

8 MS. JONES: Your Honor, skipping over financing for  
9 just a moment. Your Honor, matters 17, the retention of  
10 Deloitte and Touche, there's been a lot of discussions with the  
11 US Trustee, on that one.

12 And Your Honor I think we have made a great amount of  
13 progress, but we have agreed to put this on -- over to the May  
14 19 hearing to present it to the Court.

15 THE COURT: All right.

16 MS. JONES: Your Honor, likewise matter 18, the  
17 motion of Phoenix Foodco Investors, Your Honor, this is with  
18 respect to an unpaid administrative lease obligation or an  
19 assertion in that regard.

20 Your Honor, we did file an opposition and the parties  
21 have agreed to continue this matter, over to the 19th of May,  
22 when hopefully before then we can work it out.

23 THE COURT: All right.

24 MS. JONES: Your Honor, with that I would yield to  
25 Mr. Wynne, with respect to the critical trade, and the DIP

1 motion.

2 THE COURT: Okay.

3 MR. MACAULEY: Your Honor, Tom Macauley on behalf of  
4 the landlords in number 18, just -- just to let you -- let Your  
5 Honor know, there is -- we discovered there were a couple of  
6 other unpaid lease obligations, and we're going to supplement  
7 the motion, and hopefully work it out and if not have them  
8 heard on the 19th.

9 THE COURT: All right.

10 MR. MACAULEY: Thank you.

11 MR. WYNNE: Thank you Your Honor, Your Honor there  
12 have been substantial negotiations from the last hearing to  
13 this, as well as fairly substantial changes at the debtor. I  
14 think that the we had filed a declaration of Mr. Ted Stenger  
15 who is the Chief Restructuring Officer, more to let parties and  
16 the Court know about the substance of the testimony that we  
17 intended to offer today, by Mr. Stenger.

18 In addition, the debtor's former Chief Financial  
19 Officer and head of procurement had left the company and those  
20 positions have been filled along with many others, by  
21 professionals from Alex Partners.

22 What I would actually like to do, I believe that  
23 we've resolved a number of the objections to the financing, and  
24 potential ones to the critical trade vendor program, which  
25 really go hand in hand together.

1           And we -- we did have an amended order on the  
2 critical trade program that we filed last week, that also  
3 addressed some of those objections. We have one more  
4 modification that the Committee requested, that debtors have  
5 agreed to, that I think is minor and to the benefit of the --  
6 holders of the critical trade program.

7           But especially given the time Your Honor, what I was  
8 hoping to do, was to call Mr. Ted Stenger, the Chief  
9 Restructuring Officer, and have him walk through the debtor's  
10 current financial situation, go through the programs.

11           THE COURT: All right.

12           MR. WYNNE: And where the debtor is.

13           THE COURT: All right, do it.

14           MR. WYNNE: Call Mr. Stenger, and -- Your Honor, my  
15 colleague Mr. Andrew Running will be --

16           THE COURT: All right.

17           MR. WYNNE: -- examining Mr. Stenger.

18           THE CLERK: Would you state your full name, spelling  
19 your last name, please.

20           THE WITNESS: Ted Stenger, S-t-e-n-g-e-r.

21           TED STENGER, DEBTOR'S WITNESS, SWORN

22           THE CLERK: Please be seated.

23           THE WITNESS: Thank you.

24           MR. RUNNING: For the record, my name is Andrew  
25 Running, with Kirkland and Ellis.

DIRECT EXAMINATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

BY MR. RUNNING:

Q Mr. Stenger are you the Chief Restructuring Officer and a principal of Alex Partners?

A Yes, I am.

Q Could you briefly summarize for the Court your professional background?

A I've been working with Alex Partners for about 13 years, before that I was in the corporate finance group of Ernst and Young.

With Alex Partners, I have been most recently serving as the treasurer of K-Mart, which I resigned effective yesterday.

Prior to that I worked as the chief operating officer of American Rice. Also worked as an advisor to the Leslie Faye Companies, and their reorganization. Done a number of worked with a number of clients in out of Court situations, over these past 20 years.

Q Are you a certified insolvency and restructuring accountant?

A Yes, I am.

Q Are you a certified public accountant?

A Yes, I am.

Q Were you recently recognized as an expert in the subjects of the valuation of corporate assets in distress situations in



1 the K-Mart bankruptcy?

2 A Yes.

3 Q Could you briefly summarize for the Court your involvement  
4 in the negotiation of the DIP facility?

5 A Yes, I can. Your Honor, I became involved with the  
6 company a couple of two weeks ago. My firm's been involved for  
7 about the same period of time. We were not present at the  
8 beginning of the process, which began prior to the company's  
9 bankruptcy filing, to meet with different debtor -- different  
10 providers of DIP loans.

11 However, based on talking to management of the  
12 company, as well as the prior advisors to the company, I have  
13 first hand knowledge now of those discussions. We met with  
14 four financial institutions, who are very active in providing  
15 Debtor in possession loan facilities.

16 THE COURT: Is this we, as in you? Or the debtors  
17 pre-petition?

18 THE WITNESS: The debtors pre-petition and post  
19 petition Your Honor.

20 THE COURT: Before your involvement?

21 THE WITNESS: Correct.

22 A And that included some due diligence with four of the  
23 providers. I'm including by the way Your Honor, the Deutsche  
24 Bank JP Group, as one of the four.

25 But the company did move far enough along that one of

1 the other financial institutions was provided a work fee, to do  
2 substantive due diligence. They did that. Based on the  
3 proposal that firm submitted. As well as the proposal from the  
4 JP Morgan Deutsche facility.

5 The management of the company and its advisors  
6 concluded that the Morgan JP Deutsche facility would be  
7 superior.

8 Q Did you concur in that judgment?

9 A Yes. I did see the information that was provided by the  
10 other if you will, lead candidate of the two.

11 Q Now, why is --

12 MR. SONTCHI: Yy. Objection. Your Honor,  
13 Christopher Sontchi on behalf of the Dial Corporation, a  
14 creditor company which is a reclamation claimant, my objection  
15 is I'm not versed to the text of the answer regarding DIP  
16 financing, but I think Your Honor laid forth, I think that's  
17 hearsay, because this is -- this gentleman was not present for  
18 any of those discussions or decisions. My second objection as  
19 to this particular question, and confusion as to whether this  
20 gentleman is being presented as a fact witness or an expert  
21 witness, he is serving as an officer of the company, but he's  
22 being asked whether he concurs professionally or expert wise,  
23 in judgment made by the company prior to his retention.

24 THE COURT: Is this a fact or an expert opinion being  
25 rendered?

1 MR. RUNNING: It's an expert opinion, he has  
2 expertise in -- in arranging for post petition financing  
3 arrangements, and -- he's reviewed the history of the  
4 negotiations, and the terms being proposed, and he's offered  
5 the judgment that it's the best available.

6 MR. SONTCHI: Your Honor, I object to that. He's --  
7 he's being offered -- his testimony is being offered, he's an  
8 officer of the company, he's -- here to lay a factual  
9 foundation as to the basis for this motion. He can't both  
10 serve as a fact witness, and an expert witness. In effect he's  
11 being asked to serve as an expert witness on the very facts  
12 that he's testifying to.

13 MR. RUNNING: That's not true. Officers and  
14 employees of a party can offer expert opinion, by federal rules  
15 of Court are clear on that.

16 You don't have to be an independent consultant to  
17 offer an opinion.

18 THE COURT: An expert opinion?

19 MR. RUNNING: That's right.

20 MR. SONTCHI: So, he's providing an expert opinion in  
21 connection with the very facts that he's testifying to, he's  
22 both a fact witness and an expert witness.

23 I object to that Your Honor. I don't think that's  
24 proper.

25 THE COURT: I don't think there's a proper foundation

1 for him to be testify as an expert witness if he has not  
2 compared this to what is otherwise available out in the market  
3 place. He's done nothing more than review what the debtor did,  
4 to determine that this looks like the best deal.

5 MR. RUNNING: Well, he's reviewed -- well let me ask  
6 the follow up questions then.

7 BY MR. RUNNING:

8 Q Did you review as far as -- the proposed terms of the  
9 alternative financing arrangements with CIT?

10 A Yes, I did.

11 Q And did you find one of the two alternatives to be  
12 superior?

13 A Yes. I did, I found the JP Morgan Deutsche superior --  
14 the economics seemed to be about equivalent, one of the  
15 differentiating factors though, was as Your Honor is aware this  
16 is a priming loan, over the pre-petition secured credit  
17 facility. That's also agent by JP Morgan Deutsche, and I  
18 concurred with the management's assessment, that JP Morgan  
19 Deutsche would be in a position to facilitate this transaction,  
20 occurring in this priming loan occur, that has in fact been the  
21 case since I've been intimately involved with the DIP  
22 negotiations now, for a little over two weeks.

23 THE COURT: I still don't think there's a basis for  
24 an expert opinion on that.

25 MR. RUNNING: Okay.

1 THE COURT: I'll allow the testimony as a fact that  
2 he compared the two proposals.

3 MR. RUNNING: Okay.

4 BY MR. RUNNING:

5 Q Now, why is post petition financing needed?

6 A The debtor needs to obtain post -- excuse me. The debtor  
7 needs to obtain post petition financing because currently at  
8 this point well we've already received interim approval for 50  
9 million dollars. That 50 million dollars has already been  
10 spent by the company. And the business requirements of the  
11 company which are several full but, we spent 26 million dollars  
12 on the PACA trust, which -- has been established, and funded.  
13 We've also used those moneys to continue to buy inventory. We  
14 will need that going forward, as well as several other things,  
15 that are before the Court today.

16 And those things are we need to have the DIP loan  
17 approved, to have the liquidity that that will provide us, we  
18 need to have the critical trade vendor motion approved, because  
19 that will provide us with another shot of liquidity in the form  
20 of about 200 million dollars, of trade creditors support. And  
21 finally I think with those two things in place, we will get  
22 more participation in the second lien program, which will also  
23 provide us with additional liquidity.

24 All of those things all driven to the fact that we  
25 need to have additional product, to fill in the supply chain

1 holes that we have now. So that we're in a position to meet  
2 our customers expectations, as to our service capabilities.

3 And that has been trending down, and that needs to be  
4 -- and that needs to bottom out, which we hope it will this  
5 week, if we get these -- if we get the DIP approved and the  
6 critical trade vendor approved. And that'll give us a chance  
7 to move back up and become the kind of supplier that Fleming  
8 was to its customer base, both its wholesale and its  
9 convenience operations, before these dislocations from the  
10 liquidity problems.

11 Q Okay, I want to ask you some more detailed questions about  
12 the dislocations that have occurred, in the supply chain. Has  
13 funding been placed on credit hold by its vendors?

14 A Actually worse than that, since the beginning of the  
15 Chapter proceeding, Fleming has been largely paying on cash in  
16 advance, where we are forwarding to vendors, anywhere from  
17 three to 7 days before we receive the goods, cash payments for  
18 the full amount of those goods. Which has some debilitating  
19 impacts to the company, which is one we've used our cash to pay  
20 for goods, that we do not have in our possession and therefore  
21 cannot get to our customers. Two, because the inventory is not  
22 receipted, we can't put it into our borrowing base, and  
23 therefore are not able to use that to support borrowings under  
24 the debtor in possession loan facility.

25 Either the interim or the final item. That hopefully

1 will be approved today.

2 Q What is the magnitude of the inventory in transit that you  
3 just referred to?

4 A Company wide we have about 170 million dollars of cash  
5 that we have put forward to on an advance purchase basis, which  
6 is the same thing as 170 million dollars of inventory in  
7 transit.

8 Q And as a result has Fleming been forced to deplete its  
9 cash reserves?

10 A Absolutely.

11 Q Now, did Fleming have sufficient cash to maintain its  
12 inventory levels, constant, during this period, the post  
13 petition period?

14 A Yeah, during the post petition period if we had not been  
15 on the CIA program, we would have had sufficient liquidity to  
16 keep the inventory balances where they would have been  
17 immediately before the filing date.

18 Q But given the fact that you have to buy your inventory in  
19 transit now, have your actual inventory levels you have  
20 possession have gone down?

21 A Yeah, our inventory levels consolidated are down about 80  
22 to 85 million dollars, since we filed the case. And that again  
23 isn't including -- we've pushed the cash out, by the CIA  
24 inventory however, until it's in our distribution center, we  
25 can't service our customers with it.

1 Q Is the company's computerized or automated ordering system  
2 able to work on a cash in advance basis?

3 A No, Fleming's systems are like what you would typically  
4 see with any wholesale, retail, even manufacturing companies.  
5 They're not set up to make CIA payments in the normal course,  
6 they're certainly not set up to literally make hundreds of  
7 them, every day. As a result we are unable to use the computer  
8 systems to reconcile our invoicing, reconcile credits,  
9 payments, or receipting activity. As a result we have about 30  
10 people whose job has been converted from different areas of the  
11 company into reconciling basically our wire payments.

12 Q Has the use of this manual ordering system with these 30  
13 employees resulted in customer service problems?

14 A Yes. Absolutely. Because as a result of that we really  
15 lose visibility to the individual inventory items, that are on  
16 their way to our distribution centers. So as a result it's  
17 very difficult to us to make commitments through our customers  
18 as to what we can back order.

19 Q And is it also reduced the efficiency with which you're  
20 able to utilize your existing inventory?

21 A Absolutely.

22 Q How much trade credit does Fleming need to reactivate its  
23 automated system? How many days of trade credit?

24 A Basically what we need people to do at a minimum is to  
25 give us five days of trade credit. That allows us in the normal



1 course, to have a receipting activity at the distribution  
2 centers, which is automated, and then post up with the vast  
3 majority of our vendors send us EDI invoices for all the  
4 details. So we're basically able to use the computer to do the  
5 vast amount of the work.

6 Q Now, you mentioned that the use of this manual system in  
7 the reduction of the available inventory levels, have resulted  
8 in customer service problems. Have any customers left Fleming  
9 as a result of those problems?

10 A Customers have -- we have had some deterioration, the  
11 customers, I would attribute it not specifically to those  
12 manual problems, but to basically not having the inventory  
13 levels that we need, the company's been very focused on  
14 communicating and reaching out to its customer base.  
15 Particularly over these last four or five weeks. Having said  
16 that, the service levels in both our wholesale, and our  
17 convenience business, have not been consistent and certainly  
18 have been below what our customers expect and need, on a long  
19 term basis. So, as of last Friday, we've had approximately I  
20 believe 150 to 170 million dollars of annual losses, in our  
21 wholesale business, and about 230 million dollars of annualized  
22 customer losses in the convenience business.

23 Q Now, if the debtor in possession motion is granted, how  
24 would Fleming use the funds?

25 A Well, we'd use in a number of ways, all directed at the

1 end of the day of getting the supply chain fixed, getting  
2 enough inventory and getting it to our customers in expedient  
3 timely process as possible.

4           That part of the business needs to be stabilized  
5 which is the supply chain and the customers. What we would be  
6 doing is we need to use that to fund the critical vendor  
7 program. Which as I commented before is an integral part to  
8 our obtaining liquidity and credit support, from our vendor  
9 partners, we also will use it to fund a set aside a reserve  
10 account, related to Sarah Lee. And potentially others.

11           We will use it to continue and hopefully at an  
12 accelerated rate, continue buying merchandise inventory, so  
13 that we can fix the supply chain.

14 Q     What additional steps is management planning to deal with  
15 the liquidity problems that you've outlined?

16 A     Well we have another -- a number of issues that we're  
17 looking at in terms of what I would call self-help, but the two  
18 major ones are -- we are looking at the wholesale company  
19 distribution network. To find out if there are some PSE's that  
20 we should look to rationalize. So that the capital that is in  
21 those particular inventory and receivables can be most  
22 appropriate -- most highly utilized in making sure that the  
23 longer term customer relationships that we do have, in the  
24 network that we support, and keep.

25           That would be one. That process is ongoing, and will

1 conclude here in the next week or two.

2 In addition, we have looked at and have really  
3 scrubbed through the balance sheet, so we're looking at a lot  
4 of different process changes, particularly in the receivables  
5 area. To see if we can create liquidity that way, and improve  
6 the quality of our receivables.

7 Finally, we have and I believe these have been  
8 discussed in Court, we have a number of asset sales, that are  
9 moving forward.

10 Some of which are the sale of miscellaneous real  
11 estate properties, but predominantly there are several sales  
12 related to our retail store operations. Specifically there are  
13 two transactions moving forward now, which I think asset  
14 purchase agreements are under way, one of which may be already  
15 filed, or will be filed shortly with the Court for a group of  
16 stores in Minnesota, that will be sold on a going concern  
17 basis.

18 There is another group in California that we have a  
19 buyer who is now engaged with the Department of Justice in  
20 clearing some issues there, for overlay of their store network,  
21 and the stores they look to acquire.

22 So, we're initiating self-help, we're moving on the  
23 receivables, we're moving on the asset sales, we're being very  
24 focused also on disbursement management, so that to the extent  
25 we receive terms from our vendors, that we will be able to have

1 the liquidity in place, that day, when the payments due to  
2 honor that commitment.

3 Q Okay. Now, I want to turn to another subject, have you  
4 supervised an assessment of the value of the Fleming Company  
5 assets?

6 A Yes, I have.

7 Q And what type of valuation did you perform?

8 A Basically I would put it as a wind down analysis, which  
9 perhaps for the Court's benefit, Your Honor, often sees  
10 enterprise valuation, going concern valuation, and then at the  
11 farther other end of the extreme, liquidation analyses, that  
12 are often presented in these cases. This is a valuation  
13 approach that would be somewhat in the middle. What we've done  
14 is valued certain of the business operations, on a going  
15 concern basis, specifically I mentioned two sets of our retail  
16 stores are being sold as going concerns.

17 We looked at those deals, and where those are to  
18 assess those value. We also looked at our convenience store  
19 business, which the company acquired last year, for 390 million  
20 dollars.

21 That is the separate stand alone discreet enterprise,  
22 for --

23 Q Mr. Stenger, I want to -- I just wanted to get a general  
24 sense and then --

25 A Sorry.

1 Q And then I'll provide -- in fact I'll do it right now.

2 MR. RUNNING: May I approach Your Honor.

3 THE COURT: Yes, has that been premarked?

4 MR. RUNNING: Yes, it has.

5 THE COURT: All right.

6 Q I'm going to hand --

7 THE COURT: You can't be heard, so hand it and then--

8 MR. RUNNING: Your Honor, I've just handed to the  
9 witness and to the bench, exhibit 3.

10 Q Mr. Stenger can you identify this document?

11 A Yes, I can. This is an orderly wind down value analysis  
12 that was prepared under my direction for the assets of the  
13 Fleming Companies.

14 Q Okay. And why don't you -- why don't you -- you already  
15 started in this process, but why don't you take the Court  
16 through the steps in your analysis and explain the reasoning  
17 behind each step?

18 A Okay. I apologize Your Honor for kind of running off at  
19 the mouth there, before you had the document.

20 THE COURT: That's all right.

21 MR. RUNNING: And Your Honor if -- it's entirely --  
22 we have a -- we have a blow up of this, would you prefer to --

23 THE COURT: No, but give copies to any interested  
24 parties that want it.

25 MR. RUNNING: We have -- we have about 40 copies, so.

1 (Pause)

2 THE COURT: All right, you may proceed.

3 MR. RUNNING: Okay. And let me -- let me put it in a  
4 new question, I'll strike the last one.

5 BY MR. RUNNING:

6 Q Have you performed similar valuations of other distressed  
7 companies, over your 20 some year career?

8 A Yes I have.

9 Q And when do you consider it appropriate to perform this  
10 method of evaluation analysis?

11 A It's really a function of the assets and the business,  
12 that you're looking to estimate the value of. So, for example,  
13 in this situation, we're assuming that we have six to 12 months  
14 to work forward with the companies, so that we could have a  
15 wind down that's in an orderly basis. And that's what this  
16 reflects.

17 Q Okay, why don't we then start with the Core-Mark  
18 convenience business entry and explain the basis for the 390  
19 million dollar recovery amount you have on your exhibit?

20 A Okay. We have -- I have had a chance to get involved with  
21 management of the Core-Mark business, to some extent study  
22 their numbers. But more particularly looking at both the  
23 history of what they've been able to deliver, as a management  
24 team in terms of their numbers. As well as the impact that the  
25 recent dislocations of the supply chain have had.

1           Based on those, based on some expressions of  
2 interest, that the company has received unsolicited, from both  
3 strategic buyers and financial buyers, we've used an estimate  
4 here, of 390 which is equivalent to what the business was  
5 acquired for last year. I think that over the next two to four  
6 months this business will be stabilized again as to the supply  
7 chain, stabilized to the customer base. And move forward on  
8 basically what is a growth program that the Core-Mark business  
9 unit has which includes not only the historic operations that  
10 the company acquired last year, but post acquisition the  
11 company put the Fleming businesses took it's -- it's  
12 convenience store operations which were on the east coast of  
13 the United States, combined those with Core-Mark which was  
14 primarily a west coast operations, to create in effect the  
15 second largest national distributor for convenience. So, we've  
16 used I think the 390 estimate, because it's a known item, but I  
17 think that based on this other information that should be a  
18 appropriate number, although I think it ranges both above and  
19 below that.

20 Q     Okay. And the next entry is retail store sales and  
21 process. Could you explain how you reached 114 million dollar  
22 valuation that's reflected in exhibit 3?

23 A     Yes. As I testified a moment ago, we have two separate  
24 groups of retail stores. That we --the company has been  
25 marketing, for actually a number of months now, several at

1 least, we have one where we will be signing an asset purchase  
2 agreement, which should be submitted to them, the other is in  
3 DOJ review, the combination of those two basically adds up to  
4 about 115 million dollars.

5 And so that's where that number comes from.

6 Q All right, the next entry retail, going out of business  
7 proceeds, from closed stores?

8 A Right. The residual retail locations what we've assumed  
9 here, is that based on the company's prior experience, in terms  
10 of what they've actually GOB'd the retail stores for, we've  
11 assumed that those will be GOB on an orderly basis, there is  
12 some opportunity for those to actually be sold, on a going  
13 concern basis. Because there is interest, but for purposes of  
14 this analysis we assumed that they would not be sold, as going  
15 concerns, and not to be sold under a GOB.

16 Q Okay. I think at this point I'd like to --

17 MR. RUNNING: If I may approach again Your Honor.  
18 What I'd like to do is -- hand it up what was previously marked  
19 at the April 22nd hearing, as exhibit 1.

20 THE COURT: All right.

21 MR. RUNNING: Just to explain the differences in the  
22 two approaches.

23 THE COURT: All right.

24 MR. RUNNING: Previously handed out -- for people who  
25 don't have copies.



1 THE WITNESS: Your Honor, do you mind if I move  
2 those.

3 THE COURT: You can't be heard, you have to speak  
4 into the microphone.

5 THE WITNESS: Do you mind if I move those a little,  
6 over.

7 THE COURT: Yeah.

8 MR. RUNNING: I'll move them, where do you want them.

9 THE WITNESS: I just want them so -- so Your Honor  
10 can see them.

11 THE COURT: I've got the exhibit 1.

12 THE WITNESS: Oh, okay.

13 BY MR. RUNNING:

14 Q Okay, I'd like to call your attention to one difference  
15 between the two approaches, but first of all have you reviewed  
16 exhibit 1?

17 A Yes. I have.

18 Q And have you reviewed portions of Mr. Alex Greene's  
19 testimony during the April 22nd hearing, in which he explained  
20 exhibit 1?

21 A Yes, I have.

22 Q Okay. And Mr. Greene testified at page 23, of the  
23 transcript, that the 940, which is referring to the figure  
24 under Net Total, about -- about there. He said "the 940 number  
25 is a knock down number if you will, to reflect not quite

1 liquidation but on a severely discounted basis, what these  
2 asset values could represent" end of quote.

3           Just to be clear, you did not perform a knock down  
4 valuation is that correct?

5 A     That's correct.

6 Q     And why didn't you think it was appropriate to value the  
7 Core-Mark convenience business or the retail assets that we've  
8 already reviewed on a knock down or liquidation basis?

9           Because I think assuming that we have a little time, we  
10 would -- we would be selling those both as going concerns, both  
11 the retail group and the Core-Mark business, the company has  
12 put in -- over the last week, very proactively ways that we are  
13 supporting both the retail operations for which we have  
14 basically purchase offers on the table. Plus the Core-Mark  
15 business supporting their liquidity as very high priority, and  
16 obviously to the exclusion then of the retail locations that  
17 would be GOB'd, and to the detriment at some level of the  
18 wholesale operations.

19 Q     Okay. Well then let's next move to the wholesale  
20 operations, and I'd ask you to explain the methodology you  
21 used, at reaching these valuations for accounts receivable,  
22 inventory, inventory in transit, and fixed assets, and finally  
23 notes receivable. And then I'll ask you to contrast your  
24 approach with Mr. Greene's?

25 A     Okay. What we've done is looked at the wholesale

1 business, and said at this point in time until we've stabilized  
2 it, and have a very clear view of what the network needs to be  
3 going forward. Which may be right sized, or down sized, from  
4 the network that we have right now. But for purposes of this  
5 analysis and after in effect only being involved for two weeks,  
6 it would seem appropriate to me, at this point to look at that  
7 more on a liquidation basis, for the wholesale operations at  
8 this time. And that's in fact what was done here, with the  
9 accounts receivable, inventories and the fixed assets.

10 Q Now, why did you use a recovery rate of 40 percent for the  
11 accounts receivable as opposed to the Gleacher assumption of 35  
12 percent?

13 A I can't comment on to why he used 35 but I certainly --

14 Q Okay.

15 A -- can comment as to why we used 40. The 40 was used in  
16 an ongoing business for these -- the recovery rates would be  
17 dramatically higher. And if we were to sell the business on a  
18 going concern basis, my expectations would be they would be  
19 dramatically higher.

20           However, since this assumes Your Honor that we will  
21 be closing the different distribution centers, when you close a  
22 distribution center the accounts receivable to your direct  
23 customers, often deteriorates, substantially. Unless you do it  
24 very elegantly. For purposes of this we've assumed that we'll  
25 get 40 cents on the dollar, which we think is very

1 conservative. We think that if we were to close all of the  
2 distribution centers, we would probably have recovery rates  
3 higher than that, but at this point in time 40 percent seemed  
4 to be a reasonable estimate for that.

5 Q And what was the basis for your inventory analysis?

6 A The inventory analysis is actually comports with the  
7 values that were arrived at by a third party appraisal company,  
8 that initially had been retained by the company. Was  
9 subsequently retained by the DIP lending group, and they have  
10 estimated that their appraisal is on a liquidation basis, sell  
11 to the walls, that the inventory recovery would be 59 to 60  
12 percent.

13 We used 60 percent for that.

14 Q All right, now I see you also valued inventory and  
15 transit, at 100 percent, could you explain why?

16 A Yeah, as I mentioned earlier Your Honor this is -- we have  
17 prepaid for inventory. In many cases it is not even on a truck  
18 yet, to ship to us. If we were to say let's put a hard stop  
19 and liquidate the wholesale business, obviously we'd send back  
20 all the trucks, we wouldn't ask them to fill the purchase  
21 orders they have, and would ask for our money back. So I would  
22 expect to get basically all the cash back.

23 Q Okay. Notes receivable, could you explain the basis for  
24 that valuation?

25 A Yes, notes receivable for are largely related -- almost

1 exclusively I think to our wholesale business, as is typical  
2 with some of our competitors, we will provide if you will,  
3 enabling loans to some of our customers, to initially stock  
4 their grocery store, and in some cases to cover the build out  
5 and various fixed assets, such as freezer displays, etc.

6           These notes go -- we have about 90 million of book  
7 value I think we have about a 120 gross, with a reserve of  
8 about 30 against that. What we looked at and to be honest this  
9 would require a very finite and detailed review, to really get  
10 a good handle on these.

11           Last year the company did market part of the  
12 portfolio, of loans. Last year they had an expression of  
13 interest that was about I think 95 cents on the dollar.

14           For about a little less than 30 million dollars of  
15 those notes. Obviously those would be the highest quality of  
16 that portfolio, but using that in kind of in -- more of a hard  
17 knock down, 35 percent for a total of 32 million seems very  
18 reasonable to us.

19 Q       What was your approach to valuing the fixed assets?a

20           The fixed assets was largely driven by appraisals, that  
21 were done, by real estate appraisal firm. We're using in this  
22 example, a 125 million, the appraisals on the owned real  
23 estate, come in at about 108 million dollars. So we've put in  
24 basically another 17 million dollars that would be realized  
25 from all the rest of the assets, which are leasehold

1 improvements, racking, conveyors, storage, and rolling stock  
2 largely.

3 Q Okay. And then lastly in the wholesale category,  
4 preference actions or avoidance actions? Could you explain  
5 your approach in reaching this valuation?

6 A Yes. Obviously we're very early in the case, so we have  
7 not performed, what I would call a -- a detailed analysis of  
8 preferences which we typically do and what we have done though  
9 is looked at the periods the disbursements made in the 90 day  
10 preference period.

11 We then also looked at how the accounts payable  
12 activity what the level of accounts payable was, in this same  
13 period, which was dropping, dramatically.

14 We've also then looked at some of the term changes,  
15 that occurred during the 90 day period, prior to the bankruptcy  
16 filing.

17 As Your Honor is probably aware, in February and  
18 March the company terminated its relationship with K-Mart, as a  
19 result of that and some liquidity concerns in the vendor  
20 community before actually that announcement, a number of  
21 creditors -- or a number of vendors, excuse me, made changes to  
22 terms. Which would typically indicate that the ordinary course  
23 defense, would not be able to be used, in as many instances as  
24 you might typically expect.

25 Having done those and looked at that investigation

1 and those facts, we then compared this to our prior experience,  
2 with large cases, particularly in this case, I would analogize  
3 it in some ways to Ameriserve where it is also food products  
4 distribution company, they serve a different market, but it is  
5 the same type of products in some ways.

6 We then looked at what the payments were in the 90  
7 day preference period, at Ameriserve. And what our overall  
8 recovery on preferences was in that case. That case was -- the  
9 various pieces of Ameriserve were closed and the rest of the  
10 estate was liquidated. My firm, Alex Partners has been  
11 retained and continues to be retained in that case, and one of  
12 the activities that we are doing is pursuing all the avoidance  
13 actions.

14 In that case we've recovered about 2.4 percent, of  
15 the total preferential of the total payments made during the 90  
16 day preference period.

17 For this analysis we're estimating that it's about 3  
18 percent, recovery. And the total amount of payments made  
19 during the preference period.

20 And that increase is due largely to the fact that we  
21 expect to see more term changes, and less ordinary course  
22 defense.

23 If we were ever to pursue those.

24 Q Now, applying the secured debt as shown on this exhibit,  
25 you reached an ultimate conclusion as to the excess of asset

1 value over secured claims, for the Fleming Companies?

2 A Yes sir.

3 Q And what -- what is your assessment of the excess of asset  
4 value over secured claims?

5 A Okay. That -- under the orderly wind down value as -- as  
6 discussed here, we would have an equity cushion of about 730  
7 million dollars. Over the secured claims, which would -- that  
8 cushion then being available for reclamation claimants, second  
9 lien vendors, as well as all administrative claimants, in the  
10 estate.

11 Q Okay. Let's turn to reclamation claims, next. You just  
12 referred to it. Have you done an estimate of the ultimate  
13 value of the reclamation claims submitted to the debtors?

14 A Yes, an analysis was prepared under my direction.

15 Q Would you summarize --

16 A For reclamation claims.

17 Q Would you summarize the work that was done on that  
18 project?

19 A Yes. What was done was we looked at all of the  
20 reclamation claims, that had been filed. We then reduced that  
21 for duplicates which were filed either across legal entities,  
22 or were just duplicates by the nature of the claim. That came  
23 up with approximately 220 million dollars of reclamation  
24 claims. That were filed in this case.

25 We've also included in that an estimate certain of



1 the claims were filed what I call a place holder, they were  
2 unliquidated. So the vendor didn't have -- had time to file a  
3 but didn't have time to do the analysis on their end, to  
4 actually file it with an amount.

5 So this includes an estimate also for those amounts.  
6 But based on that, that takes us to this kind of population of  
7 about 220 million.

8 Of that about 10 million of those are PACA claims.  
9 Which have also been submitted as PACA claims.

10 So that takes it down to about 210. We had actually  
11 done an analysis in looking at inventory terms as well as I  
12 think we've concluded with the out of period amounts as well as  
13 turns that are 165 estimate, is probably appropriate. Our  
14 actual range would be probably more in the 140 to 170 range.

15 Based on the analytics that were done last week, and  
16 the week before based on actual reclamation claims.

17 But I do understand that the company had estimated  
18 and provided to the Court an estimate of 165. Using a different  
19 method, we come up into a range that makes sense, relative to  
20 the prior estimate.

21 Q Let me just step back and referring to the two preliminary  
22 valuations, the April 22nd Gleacher evaluation and the one  
23 you've outlined for the Court today, could you just in summary  
24 identify the major differences between the two approaches?

25 A Yes. The first major difference is looking at the assets

1 and the business units, differently, in picking a different  
2 basis upon which to do the valuation. As I explained Core-Mark  
3 in the retail were done based on a going concern values.

4 We are somewhat similar in our approach to looking at  
5 the wholesale assets, in that we also looked at it in my  
6 analysis based on liquidating those assets and -- recoveries  
7 that would reflect that. Which are the 40 and 60 percent.

8 The major differences in terms of the analysis is  
9 that this one, whatever that exhibit is called.

10 Q Exhibit 1.

11 A Exhibit 1.

12 Q Exhibit 1.

13 A You know just in a numeric basis, shows that you know we  
14 end up you really need to subtract the 940 and the 659, to come  
15 up with an amount which I think is about 280 million of equity  
16 cushion. The analysis that I have prepared has that -- 734  
17 that's a difference of about 450 million dollars.

18 Of which 50 of that relates to how we treated in  
19 transit inventory, which was that we would return that and  
20 recover 100 cents on the dollar.

21 The Gleacher analysis assumed 65 cents on the dollar.  
22 The other is we have added because we had the benefit of  
23 working with not only the books and records of the company, but  
24 actually having visibility to other analyses, expressions of  
25 interest, we've included more of the asset pool that the

1 company actually has, in our numbers.

2           And I think that the biggest driver to this, is the  
3 going concern values for retail and for Core-Mark, which over  
4 the knock down values that were used, in the Gleacher analysis,  
5 are in our analysis approximately 250 million dollars more  
6 because we've looked one, not at the knock down value but at  
7 the going concern value. We would expect to get a premium over  
8 the actual collection of the assets individually.

9           So, those are the major differences.

10 Q   And does is it also true that the Gleacher analysis did  
11 not conclude preference claims as an asset class?

12 A   Yes. That is correct. Thank you.

13 Q   So that would account for another 125 million?

14 A   Absolutely.

15 Q   Now, based on the valuation approach, that you've  
16 testified to, both with respect to the assets of the Fleming  
17 Companies, and the ultimate value of the reclamation claims, is  
18 there a sufficient equity cushion to pay the reclamation  
19 claims?

20 A   Yes.

21 Q   I'd like to next ask you some questions about the pending  
22 motion for a critical trade vendor program. Could you describe  
23 the company's proposal in that regard?

24 A   Yes. We had submitted to the Court a motion, for a  
25 critical trade vendor program. Which includes 100 million

1 dollars that actually has three major components to it. The  
2 first component is to fund as was done, the PACA trust. Which  
3 was 26 million dollars.

4 The second major element of the critical trade vendor  
5 motion is we have taken 50 million of the 100, and developed a  
6 program whereby we will work with approximately 21 of our major  
7 critical vendors to develop a program whereby they will receive  
8 -- they will provide --

9 THE COURT: Excuse me will counsel who is on the  
10 phone, not type. Or at least move his keyboard away from the  
11 microphone.

12 Go ahead you can continue.

13 A Thank you. What we will be asking participants in the  
14 critical trade vendor program, that are part of the 50 million  
15 dollar program, is to provide the company with a credit limit,  
16 for Core-Mark, a credit limit for the wholesale business, which  
17 the company determines the amount of that credit limit. Then  
18 to provide us all of our customary trade terms, as they were  
19 prior to the bankruptcy filing.

20 For that the company will provide a payment equal to  
21 25 percent, of the credit limit provided.

22 Q So there would be a four to one multiplier for -- if you  
23 will, the leverage that would be obtained through trade credit  
24 liquidity?

25 A Yes. So on the 50 million dollars that we have allocated

1 to that program, we would expect to get 200 million dollars of  
2 trade credit support from this group of 21 vendors.

3 Q Okay. And then the third bucket?

4 A The third bucket is the residual which is 24 million  
5 dollars which the company is maintaining to address what I  
6 would call you know, maybe more emergency situations, or  
7 critical vendors in the sense that they are critical to the  
8 absolute day to day operations of the company, for one reason  
9 or another.

10 And that if we were not in a position to either pay  
11 some, all, immediately or over time any of those variables the  
12 pre-petition amount owed that that vendor would suffer either  
13 operating or financial difficulties that would not allow them  
14 to continue to support us in the way we need it, therefore  
15 resulting in more damage to the estate.

16 Q Okay. Now, have you -- have you reviewed this proposal  
17 with any critical vendors?

18 A Yes, I have.

19 Q Can you explain what you've been -- what you've done to  
20 test their reaction to the proposal?

21 A We have met with the trade Committee regarding the  
22 construct of the proposal. They were very helpful in providing  
23 their input, we then separately met with five major vendors, to  
24 the company, and actually put together the critical trade  
25 vendor documents that have been sent around with the motion,

1 which include the cover letter and the annex.

2           And I think that we got a lot of input, the company  
3 obviously had to make a lot of decisions along the way, as to  
4 what was an appropriate program, but I think it right now is a  
5 well received program, at least from the input we've been able  
6 to obtain.

7 Q     And based on that input, what is the likelihood of success  
8 of the program?

9 A     I think the program is likely to be successful, and we're  
10 counting on it to be successful.

11 Q     Will creditors benefit if the proposal is implemented?

12 A     Yes, they will.

13 Q     Explain how?

14 A     A couple of reasons. First off this -- these are some of  
15 the largest vendors we have, to the corporation. Both the  
16 convenience and the wholesale side.

17           They're putting trade credit into the business will  
18 do a couple of things. One we accelerate moving off of the  
19 CIA, and COD payment terms. With those vendors specifically,  
20 but also then with other vendors, are likely to follow.

21           That will prime our supply chain comp, and get us  
22 access to a lot more product, that we can pay over time.

23           The program is structured that we will then have when  
24 we get the inventory it'll be in our borrowing base already,  
25 because we have trade credit terms, that will then provide us

1 more access to liquidity through the DIP borrowing facility.

2 Over all, there is I think a benefit in a larger way,  
3 to the overall vendor community, which is that it is critical  
4 for this company particularly for the wholesale business, to  
5 get the liquidity and it only comes through trade support.

6 You know this is a business model, that requires  
7 trade credit support. Or it doesn't work. So by having 200  
8 million dollars of trade credit, get out in front, from these  
9 critical vendors, I believe it will give the other vendors, and  
10 it should give the other vendors more comfort, that more  
11 liquidity and adequate liquidity is flowing into the  
12 corporation.

13 Therefore they should be more comfortable  
14 participating in that same process.

15 Q Okay.

16 MR. RUNNING: Your Honor, if I may approach again the  
17 witness. Hand the witness a document.

18 THE COURT: Yes. How much longer you going to be  
19 with this witness?

20 MR. RUNNING: Just probably five minutes.

21 THE COURT: All right.

22 MR. RUNNING: Before I -- Your Honor, before I deal  
23 with exhibit 4, one other question.

24 Q Could you briefly review the criteria for inclusion in the  
25 critical vendor program?

1 A Yes, I could. I think as I mentioned Your Honor, we're  
2 going to be establishing separate trade credit limits for both  
3 our convenience store business, and our wholesale business.  
4 While there's a substantial overlap in the critical vendors, in  
5 that they serve both of those business units, there are some  
6 individual vendors and that is predominantly the -- convenience  
7 store which sells largely cigarettes, tobacco products, that  
8 are not a critical part of the wholesale business. So putting  
9 those vendors aside, which would be a small group, basically  
10 all of the vendors that are included in the trade credit  
11 program, we expect to do in excess of 110 million dollars, of  
12 annual volume this year, with those vendors.

13 They're also vendors who provide terms and  
14 conditions, so for example we have certain domestic suppliers,  
15 by way of example, cigarette companies, provide no trade terms.

16 So, they're not critical vendors. So, basically the  
17 cutoff was over 110 million in sales, and providing trade  
18 credit terms in the normal course, under the customary terms.

19 Q Okay. And now turning to exhibit 4, can you identify this  
20 document?

21 A Yes. Exhibit 4 is a financial forecast and analysis of  
22 receipts and disbursements, for a 16 week period, ending in  
23 mid-August.

24 Q Is this document prepared in the ordinary course of  
25 business of the Fleming Company?



1 A Yes.

2 Q And was it prepared by persons with knowledge of the  
3 subject matter as set forth in the document?

4 A Yes.

5 Q And is it retained in the ordinary course of business?

6 A Yes.

7 Q And is relied upon by management for purposes of financial  
8 forecasting and analysis?

9 A Absolutely.

10 MR. RUNNING: I move for admission of this as a  
11 business record Your Honor.

12 THE COURT: We'll save it till the -- till cross.

13 MR. RUNNING: Okay.

14 Q What does this forecast show Mr. Stenger?

15 A This is a forecast of our expectations through mid-August,  
16 for our net cash position. And we expect during that 16 week  
17 period, to generate about 92 million dollars of cash.

18 And at the same time stabilize the business, both the  
19 wholesale and the convenience store business. So that we're  
20 able to get the supply chain filled, we're able to then serve  
21 our customers at levels that they not only expect but deserve.

22 Q Does this forecast support the conclusion that creditors  
23 would benefit from allowing the business to go forward during  
24 the period of the analysis?

25 A Yes. I believe it does.

1 Q Now, what would be the impact on the debtors if the debtor  
2 in possession facility and the critical trade vendor programs  
3 were not approved?

4 A The company would be forced to make some very difficult  
5 decisions, very quickly, and those decisions would be without  
6 the liquidity provided by the DIP motion, without the critical  
7 vendor program being in place, which will drive our being  
8 hopefully successful in getting trade credit to support the  
9 business, without those things in place, we will not have the  
10 liquidity to rebuild the supply chain, across the both the  
11 convenience store and the wholesale business.

12 Therefore, would have to make some very difficult  
13 decisions, we would be absolutely supporting the convenience  
14 store businesses, that would absolutely be at the expense of  
15 the wholesale business, we would likely have to significantly  
16 downsize, and liquidate distribution centers, to basically fuel  
17 the stabilization of Core-Mark, and then hopefully get around a  
18 very small nut where wholesale distribution centers, which we  
19 think in some cases have value, both largely through our  
20 competitors, because of geography and overlaps, and would try  
21 to sell those on a going concern basically this would force us  
22 into selling off very quickly, and liquidating the wholesale  
23 business.

24 Q And would the creditors of the estate be harmed by that  
25 scenario?

1 A Absolutely.

2 MR. RUNNING: No further questions at this time Your  
3 Honor.

4 THE COURT: All right, let's take a break, and I'll  
5 hear my two o'clock hearing. All right. We'll stand adjourned  
6 for certain.

7 (Recess)

8 THE COURT: All right, does anyone wish to cross  
9 examine the witness?

10 CROSS EXAMINATION

11 BY MR. SONTCHI:

12 Q Good afternoon Mr. Stenger, my name is Christopher  
13 Sontchi, I'm with Ashby and Geddes, I represent Kroger Company  
14 and the Dial Corporation, who are creditors of the debtor.

15 A Excuse me, did you say Dial?

16 Q Yes.

17 A Thank you.

18 Q Mr. Stenger, did you review a declaration and sign and  
19 execute a declaration that was filed with the Court prior to  
20 today's hearing?

21 A Yes, I did.

22 Q Did that declaration attach the documents that have been  
23 marked as exhibit 3, 4 and 1, for purposes of today's hearing?

24 A I don't believe any exhibits were attached to the  
25 declaration.

1 Q Did those exhibits exist at the time the declaration was  
2 filed with the Court?

3 A Depending on which specific exhibit.

4 Q We'll go one by one. Exhibit 3.

5 A Please.

6 Q Which is your orderly wind down value, the debtor -- did  
7 that exist at the time your declaration was filed?

8 A A version of that existed.

9 Q Do you know why wasn't it attached to the declaration?

10 A Because we had not finished our work on it.

11 Q The conclusions that are set forth in your declaration are  
12 based on the same information that's the subject of exhibit 3,  
13 is that correct?

14 A I think some of the conclusions in there, yes, are based  
15 on exhibit 3.

16 Q Do you know -- has your analysis changed, between the  
17 analysis set forth in the declaration and what you gave under  
18 oath today?

19 A There have been some changes, but they're been fairly  
20 slight the overall picture hasn't changed.

21 Q Now, did exhibit -- well exhibit 1 existed at the time  
22 obviously, since it was submitted to the Court in April?

23 A Yes, sir.

24 Q Okay. Did you review that exhibit 1, and the testimony at  
25 -- of the April 22 hearing, prior to submitting your

1 declaration?

2 A I know I -- I did review exhibit 1, I'm not sure that I  
3 reviewed the deposition transcript. Or the testimony, excuse  
4 me.

5 Q Do you know when the debtors made the decision to  
6 terminate the services of Gleacher?

7 A Yes, I do.

8 Q When was that?

9 A It was not the Friday we just had, but the Friday before  
10 that.

11 Q So, in late April?

12 A Yes sir.

13 Q Who at the debtors made that decision?

14 A It was a decision made by I guess several of the  
15 management, senior executives, were consulted, but ultimately  
16 the final decision I believe was with the CEO, Mr. Peter --  
17 excuse me Your Honor, Mr. Peter Wilmot. And the Chairman of  
18 the Board, Mr. Archie Dykes.

19 Q Did you participate in making of that decision?

20 A Yes, I did.

21 Q And in what status did you participate, were you an  
22 officer of the company at the time?

23 A No, I was not. I was just an advisor to the company, and  
24 I provided basically advice on that.

25 Q When did you start working on this engagement?

1 A I started working on this about two weeks ago, little over  
2 two weeks ago, I think.

3 Q When did you become an officer of the debtor?

4 A Today.

5 Q And when did you resign from your officer position with K-  
6 Mart?

7 A Yesterday.

8 Q If I could draw your attention to what's been marked as  
9 exhibit 3, and ask you some questions about some of the numbers  
10 that are there.

11 First of all, sort of a global question, and with  
12 regard to your orderly wind down value, I take it that this  
13 wind down orderly wind down value assumes the sale of the Core-  
14 Mark convenience business, and some of the -- some of the  
15 retail -- excuse me, the retail operations on a going concern  
16 basis, is that correct?

17 A You're actually right it is Core-Mark and a portion of our  
18 retail stores would be sold as going concerns. Correct.

19 Q And the -- this analysis assumes immediately shutting down  
20 operations on the wholesale operations, and liquidating them?  
21 Or does it mean a six month wind down of the wholesale  
22 operations?

23 A For our assumptions here, what this assumes right now, is  
24 while not a hard start of doing it tomorrow. It assumes that  
25 we would in fact liquidate it over a period of time.

1 Q During that liquidation of the wholesale business would  
2 the company be purchasing more inventory? Or would you simply  
3 be liquidating what you already have in place?

4 A We would probably be for some bridge period, depending on  
5 which distribution center it was, practically speaking would be  
6 looking to purchase inventory, probably for those because -- as  
7 I think I testified some of the distribution centers will  
8 actually have if you will, kind of a going concern value,  
9 predominantly to some of our competitors, where this will fill  
10 out their regional distribution. So, my thought would be that  
11 we would purchase inventory to feed stock those, to maintain  
12 that value, which would be in excess of these numbers.

13 Q Now, these numbers that are set forth on this summary, do  
14 not indicate the -- cost if you will, of purchasing that  
15 inventory for the wholesale business, that you would be winding  
16 down? Nor purchasing inventory for the retail and the Core-  
17 Mark business, over the six to 12 month period while you market  
18 them as a going concern? Is that correct?

19 A Explicitly no. Implicitly they do in fact cover that.

20 Q How?

21 A For example, with the retail operations, and Core-Mark,  
22 this presumes that we would continue to feed those, with the  
23 idea that as we do that, business is stabilizing, we sell that  
24 inventory, we get those receipts back, we pay down the accounts  
25 payable. So that we have a going concern which would then be

1 realized when we actually sell the asset.

2 Which in this case, is in probably that second half  
3 of the six to 12 months.

4 Q All right, so for instance, Core-Mark 390 million dollars  
5 assumes that you will net out 390 million dollars in six to 12  
6 months, which would be net of whatever it would cost to keep  
7 Core-Mark operating, between now and then? Is that correct?

8 A Yeah, which would essentially be -- excuse me -- I'm  
9 sorry. Our expectation would be that we continue the  
10 stabilization of Core-Mark, Core-Mark has historically been a  
11 cash flow positive business. So during this holding period, we  
12 would expect it to actually generate cash. We don't include  
13 there being excess cash generated in here, but clearly that's  
14 what would happen on the way to achieving the -- the going  
15 concern sale of Core-Mark.

16 Q What did the -- what did the debtors pay for the Core-Mark  
17 business?

18 A 390 million dollars last year.

19 Q And when did that transaction close?

20 A I think it was late spring, early summer.

21 Q Has the debtor received any offers for the Core-Mark  
22 business?

23 A We've received -- I wouldn't call them offers, but  
24 expressions of interest.

25 Q Have any reached a letter of intent stage?



1 A No, they have not.

2 Q The store sales in processing the retail, I believe that  
3 the debtors filed -- may have been today, may have been  
4 yesterday, a motion to approve the sale of -- some of the  
5 Rainbow Foods Stores, would that be included in this line item?

6 A Yes, sir it would be.

7 Q Okay. Now that I believe that transaction includes an  
8 assumption, or you will, or a purchase of inventory?

9 A I believe that's correct.

10 Q Does that sound correct?

11 A Sir.

12 Q Okay. Is any of that inventory, i.e. the inventory being  
13 used for stores sales and processing GOB proceeds, from closed  
14 stores, included in the estimated net book value, of the  
15 wholesale inventory that's listed below?

16 A No, it is not.

17 Q It's not, okay. In coming up with the valuation if you  
18 will, as a going concern basis, on the GOB and the store sales  
19 and process, did you apply the same discount to inventory? As  
20 you did here, for your wholesale business? Or was it at a 100  
21 percent?

22 A No, we didn't use these same recovery rates. What we used  
23 were the recovery rates and the cost streams that the company  
24 has demonstrated in the past, as they've closed out stores.

25 Q With regard to the inventory in transit, I believe you

1 said that you in effect were positing a situation where you  
2 canceled the orders that were in place, said don't ship, and  
3 said give us our money back?

4 A Correct.

5 Q Okay, why did you value that at a 100 cents, where your  
6 other accounts receivable are valued at 40 percent?

7 A Because those would not be accounts receivable. Those  
8 would be purchase orders that we canceled, therefore the money  
9 would flow back to us as a canceled purchase order, as opposed  
10 to an account receivable.

11 Q Are you aware of whether any of those creditors might have  
12 setoffs that they would attempt to apply on the money that they  
13 were holding?

14 A No. This is done on a post petition basis, so assuming  
15 that they're current for example, if we did it today, we don't  
16 have anybody with setoffs, because we're in CIA with all of  
17 them.

18 Q You're in CIA with all of your vendors?

19 A Well, not all, but the vast majority.

20 Q With regard to your preference number, of 125 million,  
21 have you prepared or seen a formal analysis that J. Alex's has  
22 prepared?

23 A As opposed to a formal analysis what I've seen is some of  
24 my associates from Alex Partners have prepared work papers,  
25 that I had a chance to review, in Dallas. And that's what we

1 based our estimates on.

2 Q Okay. And was that done on a consolidated basis, or a  
3 debtor by debtor?

4 A No, it was done on a consolidated basis.

5 Q And what was the gross amount of dollars that went out the  
6 door in the 90 days?

7 A 3.9 billion.

8 Q And of that 3.9 billion what percentage did the debtors --  
9 or excuse the Alex Partners believe may be preferential?

10 A Basically because of the time constraints, typically we  
11 would do a detailed analysis, we didn't have that. I think  
12 what I testified to was then we looked at some analogous  
13 situations, used AmeriServe by way of example. And then did  
14 some fact finding and investigation but used basically about  
15 3.4 percent as a recovery of preferences against the entire  
16 pool of the 3.9.

17 Q So basically you took the 3.9 billion multiplied by 3.4  
18 percent, and that's what gets you to the 125 million?

19 A Yes, sir.

20 Q You didn't do any specific analysis as to any of the  
21 affirmative defenses that might be available to potential  
22 preference Defendants?

23 A As to specific ones, no. Because we didn't analyze it on  
24 a vendor by vendor basis.

25 Q How in the 90 days prior to the bankruptcy, if you know,

1 how much -- how much in the amount of inventory did the debtors  
2 purchase during that period?

3 A I don't know the answer to that.

4 Q Now, the 734 million dollars that you characterize as  
5 excess of value, that does not include the additional 100  
6 million dollars in DIP financing, is that correct?

7 A That's correct. It would also though, not include the  
8 inventory that we'd purchase with the 100 million.

9 Q Right.

10 A I.e. would create other assets with that 100 million.

11 Q Let me ask you about the critical trade vendor program,  
12 have any of your identified -- let me get the number right, is  
13 it 21 trade creditors?

14 A I believe it is 21. Yes.

15 Q Have any of them committed in writing, to participate in  
16 the program?

17 A I don't believe anyone has executed the documents.

18 Q Now, the five that you negotiated with, are any of those  
19 members of the Official Committee of unsecured creditors?

20 A Yes. Three of them are.

21 Q And which three?

22 A I think there's only three on the Committee. But I think  
23 it's Kraft, Conagra, and Nestles.

24 Q The cash flow analysis which was exhibit 4, that assumes  
25 that you'll get the 4 to 1 multiple that you were hoping for,

1 i.e. you take -- you pay off the critical trade vendors, and  
2 for every dollar of pre-petition claim you pay, you're going to  
3 get \$4 of post petition trade credit, is that right?

4 A With a -- it's generally speaking right, the payments that  
5 are made -- this presumes that we'll at the end of this period  
6 have about 250 million dollars of trade support, of which  
7 approximately 200 would be from the critical vendor program  
8 participants.

9 You did say something that I -- if I testified in  
10 this way, I will -- I mis-spoke, but the payments that are made  
11 will be calculated as 25 percent of the credit limit that the  
12 company asked for. Those proceeds at the end of the case, will  
13 be applied to pre-petition claims, and to the extent they  
14 exceed the pre-petition claim amounts, and the reclamation  
15 claims, and then admin claims.

16 Q At the end of the case, or --

17 A Yes.

18 Q Okay. So there -- they won't be receiving payments on  
19 critical trade vendor immediately?

20 A No, they'll be receiving the payments, consistent with the  
21 annex that's been filed with the Court, they will be receiving  
22 payments as we receive the benefit of product purchases under  
23 trade terms.

24 Q Okay. Where does the other 50 million dollars of trade  
25 support going to come from?

1 A The other 50 million dollars will be the continuation of  
2 other vendors outside of the critical vendor program,  
3 participating. It's our expectation that the second lien  
4 program will get a little more traction here this week, next  
5 and over this six week -- 16 week period, as well as we have  
6 vendors right now, who -- while it's a small group, are  
7 providing us with trade terms in the normal course.

8 Q What's your understanding of why Gleacher was services  
9 were terminated, by the debtor?

10 A I think -- well an assessment was made of for the  
11 investment banking activities that the company would expect to  
12 undertake, over the pendency of this case.

13 That we would need to have an investment  
14 bank/financial advisor available to us, that had a significant  
15 not only expertise but bench strength, and would have the  
16 capability to provide a number of different professionals to  
17 the company, and while Gleacher has a fine practice, it is a  
18 smaller job, and is somewhat resource constrained, as with  
19 respect to Chapter 11, and restructuring.

20 Having said that, we decided we needed to have  
21 another firm with more capability, and the decision was made to  
22 hire Blackstone.

23 Q Did it have anything to do with the testimony they  
24 provided at the April 22 hearing?

25 A That and other factors yes.

1 Q While you were at K-Mart did you participate in the  
2 decision to terminate K-Mart's relationship with Fleming?

3 A I was part of the negotiating team, I was the financial --  
4 lead financial person on that team.

5 Q And you were as an officer of K-Mart at the time?

6 A Yes, sir.

7 MR. SONTCHI: I have no further questions Your Honor.

8 THE COURT: Anybody else?

9 MR. SULLIVAN: Your Honor, this is James Sullivan on  
10 the telephone. I just have very, very one quick question if  
11 that's okay.

12 THE COURT: All right, could you speak up -- and  
13 identify yourself again?

14 MR. SULLIVAN: Your Honor, James Sullivan from  
15 McDermott, Will and Emery on behalf of Exxon Mobil.

16 THE COURT: All right, you can ask the question.

17 CROSS EXAMINATION

18 BY MR. SULLIVAN:

19 Q I just wanted to confirm that the Dunnigan business was  
20 not going to be part of the critical trade vendor program? Is  
21 that true?

22 A Yes, that is true.

23 MR. SULLIVAN: I have no other questions Your Honor.

24 THE COURT: All right, thank you.

25 MS. BIFFERATO: Good afternoon Your Honor.

1 CROSS EXAMINATION

2 BY MS. BIFFERATO:

3 Q Mr. Stenger, Karen Bifferato, on behalf of Dawn Food  
4 Products I just have a quick question or two. You had  
5 mentioned when you were talking about the critical vendor  
6 program, that approximately 50 million was earmarked for -- 21  
7 of the vendors? Is that correct?

8 A That is correct. Yes.

9 Q And are you aware of which creditors constitute that group  
10 of 21?

11 A Yes, I am.

12 Q Do you know if Dawn Food Products is one of the 21 in that  
13 group?

14 A It is not.

15 Q It's not, okay.

16 A Correct.

17 Q And then just to be clear, you testified that you have  
18 approximately 24 million reserve for emergency type situations,  
19 is that correct?

20 A That's correct.

21 Q But you're not necessarily expecting any trade support in  
22 exchange for those payments?

23 A That's correct.

24 Q Thank you.

25 MS. BIFFERATO: Nothing further.



1 THE COURT: Anybody else? Any redirect?

2 MR. RUNNING: No redirect.

3 THE COURT: Thank you you may step down.

4 THE WITNESS: Thank you Your Honor.

5 THE COURT: Perhaps we should hear from anybody who  
6 may still object?

7 MR. WYNNE: That's was what I was going to suggest  
8 Your Honor, we -- we do think that we've resolved a large  
9 number of the objections, but I think there are several that  
10 are still outstanding.

11 THE COURT: All right, anybody wish to be heard then?

12 MR. SONTCHI: Good afternoon Your Honor, Christopher  
13 Sontchi again, on behalf of Kroger and Dial.

14 Your Honor, our object is the same objection we've  
15 raised, I think on two, three, four, I can't even remember any  
16 more, previous hearings.

17 And it has to do with the reclamation issues. This  
18 is a priming lien, the 364(d) facility, under this facility.  
19 The reclamation claimants rights are not receiving any adequate  
20 protection. I think -- I'll get into what the debtors have  
21 talked about today, about an equity cushion, but I think the  
22 first and sort of foremost point, is that as an entity which  
23 has a right under the uniform commercial code, as modified by  
24 546(c) I think we have and all the other reclamation claimants,  
25 have a right that would rise to the level of a lien, or an

1 admin claim, that is being prejudiced by a priming lien, which  
2 is jumping ahead of that whatever claim that might be, without  
3 adequate assurance that either if it's an admin claim, that  
4 it'll be payable in full, and the case will be administratively  
5 solvent, or if it's a lien, we're not being provided with any  
6 adequate protection.

7 THE COURT: But doesn't the equity cushion provide  
8 that? And I'll use the terms loosely, adequate protection?

9 MR. SONTCHI: Your Honor, an equity cushion could  
10 provide adequate protection, that's true, and I -- I think  
11 that's the second part of what we heard today.

12 Obviously the debtors have put before the Court two  
13 different sets of testimony, as to what they believe the asset  
14 value of this estate is.

15 I note in their response they try to withdraw the  
16 previous testimony provided by their professionals, but I think  
17 Your Honor understands where that's coming from. We heard  
18 today that one of the reasons Gleacher was fired was because of  
19 the testimony they provided at the last hearing.

20 Your Honor, heard a lot of testimony today by Mr.  
21 Stenger, I think it's Mr. Stenger, I apologize -- if I got the  
22 name wrong.

23 And I think Your Honor should give that testimony  
24 very little weight. He was not approved as an expert and the  
25 fact that Your Honor never made that ruling, he was trying to

1 meld expert and fact testimony if you will, but for the fact  
2 testimony he had personal knowledge of virtually none of it, he  
3 was not an officer of the company until today. He's only been  
4 working on the engagement for two weeks. Virtually everything  
5 he testified to was information that was provided to him by  
6 third parties, who aren't available for cross examination  
7 today.

8           With regard to the -- the documents or the summary  
9 documents, that he's sort of based his analysis on, none of the  
10 background documents are in Court today.

11           None of the background documents have been provided.  
12 There's no I think the preference analysis is back of the  
13 envelope at best, there's been no detailed analysis as to what  
14 the preference claims are.

15           The Core-Mark business assumes that the debtors are  
16 going to continue to operate for six to 12 months, and be able  
17 to sell it for what they paid for it, a year ago. With no  
18 adequate explanation as to how they're going to fund between  
19 now and then, there's no adequate explanation as to how they're  
20 going to fund the GOB sales, from now to then. There is no  
21 line item for how they're going to fund the professional fees  
22 from now to then. It's -- it's a very I think sketchy analysis  
23 Your Honor, it's an analysis that's -- sort of a 30,000 feet  
24 analysis, if you will, and it's a convenient analysis in that  
25 it gets them where they need to go. Which is inconsistent with

1 what they've previously put before the Court.

2           So, I -- I think Your Honor should give very little  
3 weight to Mr. Stenger's testimony, Your Honor should rely on  
4 the testimony of Gleacher, which I think is more accurate, and  
5 if you look at the Gleacher testimony there is no equity  
6 cushion.

7           So there is no adequate protection. It's that  
8 straight forward Your Honor.

9           THE COURT: Well why isn't there adequate protection  
10 under the Gleacher?

11          MR. SONTCHI: Let me pull it up Your Honor. Sorry  
12 Your Honor, let me find it.

13          THE COURT: I mean there's 824 and secureds against -  
14 - including the reclamation. Against 940, and the net.

15          MR. SONTCHI: Right, and then you take out another --  
16 you have to add in another 100 million for the rest of the DIP.

17          THE COURT: Well, but don't you then have to add in  
18 100 million in inventory.

19          MR. SONTCHI: So you get 180 -- what do you -- a  
20 little confused then, you get 940 minus the 824, there's no --  
21 I think the -- problem there too Your Honor, although you add -  
22 - you could add inventory back into the top of it, if you add  
23 inventory back into the top, it's not at 100 cent inventory.

24          It's at 50 cents, so for 100 million dollars worth of  
25 DIP you get 50 million dollars worth of inventory, based on the

1 analysis.

2 THE COURT: Well.

3 MR. SONTCHI: Inventory, 50 percent. Certainly --

4 THE COURT: Or 65 percent if it's in transit, because

5 --

6 MR. SONTCHI: All right, okay. So it's -- it's a

7 number that is somewhere between --

8 THE COURT: You're still have a 120 cushion.

9 MR. SONTCHI: 120 million, to pay for the Sarah Lee,  
10 and -- Sarah Lee issues, to pay for the administrative costs of  
11 the debtor's estate, to pay for the professional fees.

12 THE COURT: Well, even if you --

13 MR. SONTCHI: And that assumes the 165 million dollar  
14 number on reclamation.

15 THE COURT: All right, anybody else?

16 MR. WERB: Good afternoon Your Honor, Duane Werb on  
17 behalf of Miles Market, et al, Your Honor I make reference to  
18 Mr. Stenger's testimony with regard to this Court's decision  
19 involving Sarah Lee, and the set aside of funds in the amount  
20 of 2.65 million that Your Honor ordered segregated at the  
21 hearing on Thursday May 1st of last week.

22 I rise before this Court with respect to other  
23 claimants who are similarly situated. For the Court's  
24 information, last week we filed an adversary complaint seeking  
25 class certification with regard to numerous other vendors, who

1 participated in this DSD program.

2           We appear before the Court today, out of concern with  
3 regard to the comments that we heard from Michael Scott the  
4 interim treasurer of Fleming, in which he indicated that based  
5 upon a preliminary analysis, performed by Fleming, that there  
6 were approximately 30 million dollars worth of other invoices  
7 to which were similar in nature to those of Sarah Lee, etc.

8           For the Court's information further, yesterday we  
9 filed a temporary restraining order, we have not yet heard from  
10 the Court, with respect to the setting of a date for that  
11 hearing.

12           However, we want to make sure that the approval of  
13 this particular DIP facility recognizes the importance that  
14 there are other claimants out there who we believe are entitled  
15 to property which is not part of this debtor's estate.

16           I've been advised by Mr. Wynne that the most recent  
17 copy of the order regarding DIP financing which I have not  
18 seen, makes reference to the fact that any property which is  
19 deemed to be held in constructive trust by claimants shall not  
20 be part of this particular order.

21           We will be moving forward with regard to this matter.

22           THE COURT: All right.

23           MR. WERB: Additionally late yesterday we filed a  
24 limited objection which addresses the concerns that I have just  
25 raised here. And the fact that in light of Mr. Scott's

1 testimony that we would be seeking a request here that the sum  
2 of 30 million dollars be set aside and segregated in  
3 anticipation of what may be valid claims that follow in this  
4 Court.

5           There's one other thing that disturbs me here, in  
6 terms of a conflict, early on we've heard from debtor's counsel  
7 Mr. Wynne that the DSD essentially involved one percent, of the  
8 debtor's revenue in this case, in business.

9           Contrast that with what we heard from Michael Scott  
10 last week, in which he acknowledged that the debtor's annual  
11 revenue appears to be between 12 billion and 15 billion dollars  
12 annually.

13           If we take and extract one percent, of 12 billion,  
14 that amount totals 120 million. If we extract one percent of  
15 1.5 billion we wind up with a 150 million.

16           So there's some very great concerns here, with  
17 respect to this divergence of opinion that we now have, with  
18 regard to potentially 30 million dollars worth of potentially  
19 constructive trust funds, as opposed to what may be as high as  
20 150 million dollars.

21           Hopefully in the days to come that matter will be  
22 clarified by the debtor and its professionals. But we will  
23 reserve all of our rights, with respect to our claimants moving  
24 forward in this matter.

25           Thank you.

1 THE COURT: All right, anybody else?

2 MR. KOBBE: Good afternoon Your Honor, Kevin Kobbe on  
3 behalf of Sarah Lee Bakery. We have a little bit of a cart and  
4 the horse problem Your Honor, because we don't yet have our  
5 temporary restraining order entered by the Court, we think we  
6 do have or at least we're very close, to having language that  
7 everyone agrees to on that order.

8 With respect to the DIP order, however, what we'd  
9 like to see is specific language included that specifically  
10 identifies the funds to be set aside, in connection with the  
11 Sarah Lee, Nichols Bakery superior adversary proceedings, and  
12 indicates that there's no lien that will be attaching to those  
13 funds, pending the outcome of the adversaries.

14 THE COURT: All right, I don't know if the language  
15 includes that or not.

16 MR. KOBBE: Well, let me address that Your Honor.  
17 Because we don't believe it does. And we're looking at  
18 paragraph six, which --

19 A SPEAKER: Paragraph 8 -- is what you're looking  
20 at. Make sure you have the correct language --

21 MR. KOBBE: We have the same language Your Honor. It  
22 is paragraph 8 of the final version that the Court has. And  
23 this refers to the liens not attaching to anything that by  
24 final order of the Court, is determined to be held by one or  
25 more of the debtors in actual or constructive trust, there are



1 other theories raised in the complaints, I can certainly see a  
2 situation where there is a settlement, I -- I guess the safest  
3 way for us to proceed, would be a situation where similar to  
4 what the PACA claimants have, where we have a specific  
5 paragraph at the end of DIP order that identifies the Sarah Lee  
6 adversary proceeding and indicates that the liens are not  
7 attaching to the funds that are being segregated in connection  
8 with that adversary proceeding.

9 MS. JONES: Your Honor, in fairness to the Court, it  
10 might be helpful if the Court had the final version of the  
11 black line, I do not think you have the absolute final version.

12 THE COURT: Well when did you file the absolute final  
13 version.

14 MS. JONES: Your Honor, these -- the final changes  
15 this morning, and it has not been typed.

16 THE COURT: Well I have what was filed today, so I  
17 don't know --

18 MR. WYNNE: I think -- I think Your Honor there was  
19 some clean up changes that were done after --

20 THE COURT: Well, I'd rather go with mine.

21 MR. WYNNE: I believe that paragraph has not changed  
22 Your Honor.

23 THE COURT: All right. All right, let me hear if  
24 there are any other objections.

25 MS. KAUFMAN: Your Honor, for the record Susan

1 Kaufman, on behalf of Superior Dairy and Alfred Nickles Bakers  
2 Inc. and I just want to incorporate the comments that my  
3 colleague just made on behalf of Sarah Lee.

4 THE COURT: All right.

5 MR. MEYERS: Good afternoon Your Honor, Jeffrey  
6 Meyers, Ballard, Spahr representing New Plan Excel Realty  
7 Trust, several other shopping center landlords, I have  
8 admittedly a somewhat parochial limited objection, it goes to  
9 paragraph 34, of the proposed order.

10 It appears to me a provision that gives the DIP  
11 lender a self-executing right to go into my client's leases and  
12 conduct a GOB sales.

13 It's our view that 365(d)(3) obviously requires the  
14 leases be honored, it's one thing to allow a debtor after a  
15 full hearing to conduct the type of sale that's not permitted  
16 under the lease, if it benefits the debtor and the entire  
17 estate.

18 It's another thing to allow a third party, in this  
19 case the DIP lender to have that right and to add insult to  
20 injury, it's a right apparently that would exist without a  
21 Court hearing, if there's a termination event.

22 It may be that my client's problems are going to be  
23 put off to another hearing, but I would either request  
24 confirmation of that or I would want Your Honor to consider our  
25 objection.

1 MR. WYNNE: Your Honor, we've agreed and the lenders  
2 have agreed to have the issue of the GOB sales continued to the  
3 May 19th, and the final version of the order does provide that  
4 those provisions in paragraph 34, 35, 36 of those -- are listed  
5 would not be approved by the -- we would not be seeking that  
6 the Court approve those at this hearing, but we would seek to  
7 have those procedures approved at the May 19th hearing. If we  
8 can't work something out with the landlords which we're hopeful  
9 to do.

10 THE COURT: All right.

11 MR. MEYERS: Fine, thank Your Honor.

12 MR. WERB: Your Honor, Duane Werb again, just for the  
13 purposes of clarification here. We would seek a request that  
14 the language that was requested by Sarah Lee's counsel Mr.  
15 Kobbe also address and include those future vendors and  
16 claimants to which this Court would determine were validly held  
17 funds were validly held, in a constructive trust.

18 THE COURT: Anybody else? All right. Does the  
19 debtor wish to address any of those? The Committee?

20 MR. HERTZBERG: Yes. Your Honor, Robert Hertzberg on  
21 behalf of the Committee.

22 THE COURT: Yes.

23 MR. HERTZBERG: I think the first thing the Court has  
24 to start with is what rights do the reclaiming sellers have.  
25 They stand before the Court in what appears to be a position

1 arguing that they have a lien that is entitled to adequate  
2 protection.

3 I think it's important to note that they have no  
4 lien, what they are entitled to under the statute, if they are  
5 able to show that they have a valid reclamation right, is one  
6 an administrative claim to a lien or if there's no equity, in  
7 the inventory, maybe nothing. To stand before the Court and  
8 argue that they're entitled to adequate protection of  
9 something, is the wrong jumping off point.

10 They do not they are not under any case law, or any  
11 statute entitled to adequate protection.

12 A priming lien is allowed to come forward over a  
13 reclaiming seller, they might be an unsecured creditor, they  
14 might be a lienholder, or they might be an administrative  
15 claimant, but they have proved nothing as to their rights as of  
16 today.

17 Therefore, the argument is -- is not a correct  
18 argument.

19 To argue adequate protection on a priming lien, is  
20 wrong. In regard to the argument --

21 THE COURT: Well, well but -- since you represent the  
22 unsecured creditors as well, 546 provides that I have to  
23 provide a reclaiming creditor with some protection, or return  
24 the inventory.

25 So, this event is occurring after the petition date,

1 which is the date on which I have to evaluate their claims.

2           Based on the debtor's testimony there is equity in  
3 the debtor's assets. We haven't done any marshaling or not,  
4 but -- if I accept the face value of the inventory there is  
5 even some value for reclaiming creditors there. So.

6           MR. HERTZBERG: Could be valued but we haven't had  
7 one reclamation claim approved.

8           THE COURT: Because the debtor wants to take time and  
9 set up a procedure.

10          MR. HERTZBERG: That's fine Your Honor, but adequate  
11 protection is not an issue that deals with reclaiming  
12 creditors.

13          Right now they have --

14          THE COURT: No, but whether you use the term adequate  
15 protection or you use the Court shall provide them with the --  
16 you know the following, in lieu of reclaiming the inventory.

17          MR. HERTZBERG: Let me give the Court --

18          THE COURT: I mean it's an adequate protection type  
19 of concept.

20          MR. HERTZBERG: Well, let me give the Court a  
21 hypothetical then. Let's say this Court was to order X  
22 creditor an administrative claim for \$10. A lender comes  
23 forward willing to lend the debtor money on a post petition  
24 basis, 364 lending.

25          That creditor who has an administrative claim doesn't

1 have a right to stand before the Court and say I'm entitled to  
2 adequate protection of my administrative claim.

3 THE COURT: No, but it is entitled to come in and  
4 object, and say don't give a lien, and don't take that DIP,  
5 because it is going to hurt my position, right now I could get  
6 paid.

7 MR. HERTZBERG: That's fine. If we get to that and  
8 we're not talking about adequate protection, of a lien right.

9 THE COURT: Well, it's a concept.

10 MR. HERTZBERG: Well it's -- stretching the concept  
11 of adequate protection, Your Honor. And if they want to argue  
12 then they are required to do the next step, which is to bring  
13 forth testimony to refute what Mr. Stenger has said today.  
14 There has not been one scintilla of evidence --

15 THE COURT: Well, they're suggesting that Mr.  
16 Gleacher refutes the debtor's own witness refutes what was  
17 established today.

18 MR. HERTZBERG: They didn't cross examine him, on  
19 that date.

20 THE COURT: Well, then his testimony stands there,  
21 they're relying on it.

22 MR. HERTZBERG: Under either way, you take exhibit 1,  
23 or you take exhibit 3, and there's equity in both positions.  
24 And they have not brought forth one witness to show that either  
25 exhibit is wrong for that matter.

1           So under either theory they haven't proven their  
2 case.

3           Second Your Honor, in regard to the ones claiming the  
4 right of trust, and the -- argument that there might be 30  
5 million dollars that he's going to show up with, before this  
6 Court at some other date therefore we should set aside for  
7 that. I suggest to the Court that's a stretch also. Until  
8 that is proven, and the right to a trust on additional money  
9 there is no requirement under the DIP order to set aside or  
10 state that that money will be held for that purpose.

11           THE COURT: Well there may be a requirement under the  
12 cash management order.

13           MR. HERTZBERG: I'm not going to address the cash  
14 management order Your Honor, there seems to be much confusion  
15 on what took place on the cash management order, I wasn't  
16 involved, I'm not going to attempt to address it.

17           But as to setting aside moneys that have yet to be  
18 shown to be worthy of a trust or anything of that nature, until  
19 they show that, there's no requirement to set aside in the DIP  
20 order at this point.

21           I just indicate to the Court as to the reclaiming  
22 sellers, what we have here is a situation of the -- we've  
23 agreed to allow the Committee and the debtor, and the post  
24 petition lender, has elevated them to a lien position on a pari  
25 passu basis, with a "new lender".

1           New lender being the trade link. This is a brand  
2 new, for value lien, they aren't entitled to this, but -- they  
3 are getting this under the order. To argue now that their  
4 rights are not being protected, is scurrilous at best.

5           I'd ask that the Court enter the DIP order, as  
6 proffered by the debtor in this case.

7           THE COURT: Thank you.

8           MR. HERTZBERG: Thank you.

9           MR. DENATALE: Good afternoon Your Honor, Andrew  
10 DeNatale, from White and Case, on behalf of the agents.

11           Your Honor, a couple of comments one with respect to  
12 the trust fund issue, the alleged trust funds that are subject  
13 to the Mr. Werb's complaint, those are at this point not fixed.  
14 The lenders are aware of them, and are discussing with the  
15 debtors the proper reserves under the borrowing base, so  
16 everyone recognizes that Your Honor may issue an order, with  
17 respect to that. And people will have to be prepared to  
18 respond.

19           With respect to the three adversaries that were  
20 subject to hearings on May 1st, and which there should be a  
21 trust fund established pursuant to Your Honor's ruling, with  
22 respect to those trust funds, we would urge the Court to leave  
23 the order the way it is, to the extent that those trust funds  
24 are ultimately determined to be valid trust funds, then the  
25 lien -- the lenders would not attach to that -- that escrow, to



1 the extent ultimately it's determined that the trust funds were  
2 not valid, claims were not valid, then the lenders liens would  
3 attach pursuant to this order, but the lenders would  
4 acknowledge now on the record that we will not take any action  
5 obviously until this matter is finally determined by a Court of  
6 competent jurisdiction, if it goes up on appeal, we'll await  
7 events.

8           The -- the problem with respect to those particular  
9 trust funds, is if we do not attach the lien today, Your Honor,  
10 we are uncertain as to what intervening events may come along  
11 and defeat our rights, so we're not trying to be tricky or  
12 abusive, in any way, but we would -- simply ask that our lien  
13 be held in abeyance pending this Court's determination with  
14 respect to the ultimate outcome of those -- those funds that  
15 are being established in escrow.

16           THE COURT: Well your liens are not going to attach,  
17 to constructive trust money.

18           MR. DENATALE: Correct Your Honor, but we would have  
19 a contingent interest --

20           THE COURT: Period.

21           MR. DENATALE: -- subject to this Court's -- these  
22 escrows would be established as I understand it, if this Court  
23 ultimately determines that the -- Plaintiffs are entitled to  
24 the money, the moneys move over to the Plaintiffs at the end of  
25 the day, if Your Honor determines that in fact the Plaintiffs

1 did not prevail, and the money goes back to the debtor, we  
2 would want that money to come directly to the collateral pool  
3 if you will.

4 THE COURT: Well, my determination would not be they  
5 go back to the debtor, my determination would be --

6 MR. DENATALE: Either the trust funds or not.

7 THE COURT: -- the debtor has a property interest in  
8 them, in which case your lien attached to it.

9 MR. DENATALE: Correct, and then that -- that's --

10 THE COURT: Not then but now.

11 MR. DENATALE: Correct. Thank you Your Honor, that's  
12 what -- with respect to that, with respect to the the GOB  
13 procedures, again what the parties would ask is that we have a  
14 provision in the proposed order that does provide for any  
15 objections to those provisions and then this Court would decide  
16 to make a ruling on May 19th, with respect to the GOB  
17 procedures.

18 So nothing is before this Court today in that regard.  
19 One comment I'd like to make on the record, concerning the  
20 carve out, we have had some discussions about possibly  
21 escrowing the carve out amount if in fact there's ever a --  
22 liquidation of collateral here.

23 And the lenders or the agents have not agreed to fund  
24 an escrow, but obviously we're here before the Court to confirm  
25 that to the extent the agents do receive any proceeds, of

1 collateral whether or not they're then in possession of the  
2 proceeds of collateral, that they will fund the carve out to  
3 the extent that those proceeds and everybody would expect that  
4 they would be at least four million dollars plus the accrued  
5 and unpaid professional fees.

6 THE COURT: All right.

7 MR. DENATALE: The order also contains provisions in  
8 paragraph two for certain amendments to the agreements, and the  
9 way it turns out Your Honor is despite everybody's hard work  
10 the credit agreement is not 100 percent absolutely positively  
11 ready to be signed. I think that we have a few issues that the  
12 financial people are working out, some of these issues relate  
13 to budget issues, and also borrowing base calculations, and  
14 what we would anticipate Your Honor, is that within a few days  
15 we would be circulating to the Court, the Committee and the US  
16 Trustee, and we would file with the Court a black line, and I -  
17 - am reasonably confident that the changes if any will all be  
18 in favor of the debtor, because in fact I think we have the  
19 agreement in form, acceptable to us and the debtor's asking us  
20 to reconsider certain provisions, and we haven't really been  
21 able to fully conclude that, but what we would propose Your  
22 Honor is that we would approve the -- the final order as  
23 presented today, that we would file with a credit agreement  
24 today, with that final order. And within a few days a black  
25 line -- if the Committee or the US Trustee thinks for some

1 reason we've made some material adverse change to the debtor in  
2 the process we'll deal with that on the 19th, but we are  
3 relatively competent that these are just mechanical  
4 calculations relating to borrowing base availability, and  
5 baskets perhaps for certain other covenants, that do not rise  
6 to any material level and we -- would propose to deal with it  
7 that way.

8           One technical point that I am going to spring on the  
9 debtors, is that with respect to the definition of post  
10 petition obligations that it had been our understanding that  
11 treasury services are included in that, and frankly we -- there  
12 seems to -- there may have been a drop in that, we need to just  
13 tie that down, but I think if everybody understood Your Honor  
14 that the post petition obligations would include that.

15           I trust that there's no disagreement then we'll just  
16 make sure if it's not tied down, we will tie it down. And  
17 finally, with respect to the budget I want to note for the  
18 record that the agents will be working off of a more detailed  
19 budget, than the accounting period monthly budget that was  
20 referred to earlier, and that for purposes of paragraph 25, of  
21 the proposed order, that the budget -- that the agents will be  
22 working off of, is a week by week which has some more detail  
23 for monitoring and that the variances will be measured -- the  
24 variances referred to in paragraph 26, will be measured off of  
25 that particular budget.

1           And we would also note that the provisions of  
2 paragraph 21, provide essentially that nothing in the order or  
3 in the DIP financing, is intended to confer any rights upon  
4 third parties, except as expressly provided in the order. And  
5 in this regard, just note that the agents are prepared to fund  
6 against that budget, but we want to make it clear that we do  
7 not assume any responsibility to third parties, in connection  
8 with that budget, and -- any of the components thereof.

9           And that is it Your Honor, if you have any questions  
10 for us, we'll be happy to answer them.

11           THE COURT: Thank you. Debtor.

12           MR. DENATALE: Thank you Your Honor.

13           MR. WYNNE: Thank you Your Honor, Your Honor I'd like  
14 to briefly respond to some of the objections and to echo what  
15 Mr. DeNatale said, with respect to the trust fund issue, and I  
16 was really fervently hoping that we could have a hearing where  
17 we didn't discuss the cash management order.

18           I do believe that we have appropriately in paragraph  
19 8 said that any of the funds held by one or more of the debtors  
20 in actual constructive trusts, for any third party including a  
21 PACA trust claimant, a federal or state taxing authority, and  
22 that did take care of the state taxing authority objections  
23 that had been filed.

24           Or anything that this Court holds as not property of  
25 the estate, would be excluded from their liens. What I think

1 the lenders were concerned about was having specific language  
2 that takes Your Honor to issue a TRO for us to segregate funds,  
3 when Your Honor makes the determination as to whose funds they  
4 are, they're either as I believe the Court said, if they're the  
5 debtors funds, the liens attach today, if they're the other  
6 parties funds, they get paid over to those other parties.

7           And I was -- I believe that paragraph 8 does carve  
8 out any trust fund or property that's not property of the  
9 estate.

10           With respect to I think -- and I believe that that  
11 takes care of that issue, for any of the constructive trust  
12 claimants. I do believe that counsel when he was talking about  
13 the one percent, was a little confused, I think the one percent  
14 comment, and I don't think it was made by me, at the initial  
15 hearing had to do with the Century Stores situation, which is  
16 the group of franchisees, that that original paragraph in the  
17 order -- in the cash management order was meant to deal with.

18           In terms of the handwriting, crossed out over the  
19 Century Stores franchisor/franchisee relationship that the  
20 debtors have, where they operate these Century Stores, and I  
21 think the one percent number was in relation to that. I don't  
22 think it's relevant to the --

23           THE COURT: Well I don't remember what it is, and  
24 I'll rely on the testimony presented here, and at the last  
25 hearing.

1 MR. WYNNE: And -- but I don't think that that's an  
2 issue. With respect to today Your Honor, I think the Court  
3 while we certainly agree with the Creditors Committee and in  
4 our papers, that we're claiming creditors don't have a present  
5 right to a lien, we think that based upon the Court's analysis  
6 and that they do obviously have the right to object, that we  
7 did need to show while not -- we don't believe they're entitled  
8 to adequate protection, it's not yet a lien, it's an equitable  
9 remedy, we did think we had to show that their interests are  
10 protected, and in fact the interest of all the creditors are  
11 enhanced in advance by the program that we've got, with respect  
12 to the DIP credit facility. And with respect to the critical  
13 trade vendor program. And that's why we put on the testimony  
14 and why --

15 THE COURT: All right.

16 MR. WYNNE: -- the Alex Partners people have spent  
17 such a great amount of time and effort trying to really refine  
18 the testimony, and give the Court and the other parties the  
19 best that they could.

20 Obviously they worked with the financial advisors for  
21 both the bank group, and the Creditors Committee with respect  
22 to all of the financial testimony.

23 One thing that's important to note, that people I  
24 think are neglecting is that Mr. Greene who did do the work for  
25 Gleacher, with respect to the first analysis that was

1 presented, did testify that there were items that he excluded,  
2 both in terms of the avoidance actions, there were some  
3 property plant and equipment about 340 million dollars, and his  
4 term for this was this was "a knock down number" in terms of  
5 not quite liquidation but on a "severely discounted basis."

6           When we look at the appropriate ways to measure, even  
7 if we did have to do a full adequate protection analysis, if we  
8 were four months down the road, and the Court had determined  
9 that these reclaiming sellers were entitled to liens and we had  
10 to then do an adequate protection analysis, the appropriate  
11 analysis we think is reflected in the Phoenix Steel Corporation  
12 case from this district, which says that in order to look at an  
13 equity cushion and adequate protection you should look at the  
14 mean between liquidation value and going concern value.

15           And that is in essence what the orderly wind down  
16 value that Mr. Stenger has prepared. And that the Alex Partner  
17 people have prepared.

18           It is really the -- a blend between going concern  
19 value and the liquidation value, from the different aspects of  
20 the business. Believe that Mr. Stenger has demonstrated both  
21 his expertise and that he could be qualified and should be  
22 qualified as an expert, based upon his prior experience, and  
23 he's gone through category by category and explained the  
24 differences and there are actually --

25           THE COURT: Correct.



1 MR. WYNNE: -- more consistent than different, if you  
2 look at how would you best maximize these values, given the  
3 current situation that Core-Mark is a cash flow positive  
4 entity, one would expect that you would try to sell that on a  
5 going concern basis.

6 So we think that they're consistent and show that --  
7 that even if we had to prove adequate protection, that the  
8 testimony has done that.

9 With respect to the issue of being a fact witness, or  
10 an unretained expert, I didn't know what an unretained expert  
11 was, until I was made one on the witness stand, one day. And I  
12 found out that you can be a fact witness and both an unretained  
13 expert, and we would think that that is what Mr. Stenger is.

14 He has factual knowledge from his position, but he  
15 also has expertise. It's much like a treating physician, is  
16 really where I think the doctrine comes from, where a treating  
17 physician may have factual knowledge, but then also be asked  
18 for an expert opinion. And we think that Mr. Stenger qualifies  
19 in both.

20 THE COURT: Well did he do anything other than take  
21 appraisal testimony from people, and take numbers and apply  
22 recovery rates?

23 MR. WYNNE: I think he did a --

24 THE COURT: Or perhaps with respect to the recovery  
25 rates, but not with respect to the other assets?

1 MR. WYNNE: I think with respect to the other assets,  
2 he -- he analyzed, he went through work papers, and analyzed  
3 all of the categories of assets. With respect to --

4 THE COURT: The fixed assets he relied on appraisals  
5 for.

6 MR. WYNNE: The fixed assets he relied on third party  
7 appraisals, that's correct Your Honor.

8 Which I think is also what -- what Mr. Greene had  
9 looked at were third party appraisals, in terms of fixed assets  
10 the 108 million dollar valuation that he had used.

11 THE COURT: All right.

12 MR. WYNNE: Your Honor, that is really the summary.

13 THE COURT: All right.

14 MR. WYNNE: I know that it's getting late, and we've  
15 gone --

16 THE COURT: I had a three o'clock hearing.

17 MR. WYNNE: -- and you have another --

18 THE COURT: You have gone on too long.

19 MR. WYNNE: -- hearing so.

20 THE COURT: Thank you.

21 MR. WYNNE: Thank you Your Honor.

22 THE COURT: I'm satisfied based on the testimony to  
23 overrule the objections of both the constructive trust  
24 claimants, and the reclamation claimants. I think there is  
25 sufficient equity cushion here, to provide not using the

1 technical term adequate protection, but certainly to protect  
2 the interests of the reclaiming constructive trust creditors.

3           The language that I saw that was filed this morning,  
4 I think adequately protects constructive trust claimants, in  
5 paragraph 8, and I have no concern with granting a lien to the  
6 extent and only to the extent that the debtor actually has a  
7 property interest in the -- collateral that's being liened.

8           So I think that the language does not change that and  
9 I'm satisfied based on the lender's representations, that they  
10 understand that.

11           Even if I were to assume that the constructive trust  
12 were of a magnitude suggested by the testimony that I heard,  
13 I'm not prepared to accept statements of counsel either the  
14 debtor or counsel for the claimants.

15           But I'm satisfied based on the testimony presented  
16 that it could be upwards of 30 million dollars that again there  
17 is non-capitals, non-quotes adequate protection of those  
18 entities interests in the constructive trust funds.

19           With respect to the reclamation claimants the  
20 testimony I hear is it's estimated to be 165 million, I'll  
21 accept that. Again based on either exhibit 1, or exhibit 3,  
22 there is protection appropriate protection of those claimants  
23 rights, whether I determine at the conclusion of the  
24 reclamation claim procedure, to grant them a lien or to grant  
25 them an administrative claim I think there is sufficient equity

1 there.

2           The only concern I would have would be to the extent  
3 that under 546(c) I felt constrained to provide a lien that the  
4 DIP would preclude that.

5           And that I think might be a concern, can the lenders  
6 address that?

7           MR. DENATALE: Your Honor, the lenders -- the agents  
8 would consent to the lien provided it was junior, much like the  
9 trade creditor lien, and had the same essential terms and  
10 conditions which meant that it was generally silent, until the  
11 agents had exercised their remedies, and then there's a  
12 waterfall set forth, and we would just add them to the  
13 waterfall if the Court were so inclined.

14           THE COURT: Well, well why don't we do that, I forget  
15 the paragraph -- paragraph 45, is that? I just don't want to be  
16 precluded in the event I determine under 546(c) that that is  
17 the adequate or appropriate remedy for them.

18           MR. WYNNE: I think it's 45. We're looking -- I'm  
19 looking for it Your Honor. Your Honor, while we're finding  
20 that one, I did neglect to mention we had submitted the PACA  
21 order, under certification of counsel, one counsel has informed  
22 us today that they were left off of that, they just want to  
23 have their -- because that refers to PACA counsel, and lists  
24 out several different counsel, and Mr. Kurt Gwynne, no relation  
25 but G-w-y-n-n-e. Will need to be added to that.

1 THE COURT: Well I did enter it already.

2 MR. WYNNE: Perhaps we can just have that on the  
3 record, and we'll agree to treat them Mr. Gwynne as one of the  
4 PACA counsel, if that's acceptable.

5 MR. GWYNNE: That's fine with me.

6 THE COURT: All right, we'll accept the  
7 representation on the record.

8 MR. HERTZBERG: Your Honor, point of clarification on  
9 the changes. Paragraph 45, you are just changing so that the  
10 Court will have the right under it, to grant the lien in the  
11 event it chooses, but is not in any way determining priority or  
12 --

13 THE COURT: I'm not pre-determining it, but just -- I  
14 don't know 45 is the proper place to put it. I'll leave it to  
15 counsel to try and figure out where to put it. Just in the  
16 event --

17 MR. WYNNE: Your Honor, your paragraph 45 you're  
18 talking about where it starts the proceeds of any collateral.

19 THE COURT: Yes.

20 MR. WYNNE: The waterfall provision. And exactly  
21 what did you want to insert Your Honor, so we could insert it?

22 THE COURT: Well, it would be just -- and I'm not  
23 sure that's the paragraph but just in the event that the Court  
24 determines that the reclaiming 8 reclaiming creditor was  
25 entitled to a lien. This order doesn't preclude it, and --

1 MR. WYNNE: This order doesn't preclude it.

2 THE COURT: It would have the following priority.

3 MR. DENATALE: Your Honor, maybe what we can do is --  
4 we could work with counsel to mark it up, and I think maybe  
5 we'll just put it in the reclamation claims section, towards  
6 the end paragraph 59, 60.

7 THE COURT: Okay.

8 MR. DENATALE: At least it'll be -- as I'm looking at  
9 it.

10 MR. WYNNE: Your Honor, perhaps we could work that  
11 out while Your Honor takes the other matter.

12 THE COURT: All right.

13 MR. WYNNE: And then we could hand up an order.

14 THE COURT: All right, why don't we do that.

15 MR. WYNNE: Your Honor, I -- I think I was presuming  
16 that your approval also related to the critical trade vendor  
17 program, which was --

18 THE COURT: Yes.

19 MR. WYNNE: What we were treating together.

20 THE COURT: I'm treating it together too.

21 MR. WYNNE: Thank you Your Honor.

22 THE COURT: And I will also --

23 MR. WYNNE: And we'll submit --

24 THE COURT: -- approve that.

25 MR. WYNNE: We'll submit orders after your next

1 matter Your Honor on both matters.

2 THE COURT: All right. We'll stand adjourned then.

3 MR. WYNNE: Thank you Your Honor.

4 MR. DENATALE: Thank you.

5 (Court adjourned)

6 \* \* \* \* \*

7 **CERTIFICATION**

8 I, PATRICIA C. DUPRE, certify that the foregoing is a  
9 correct transcript to the best of my ability, from the  
10 electronic sound recording, of the proceedings in the above  
11 entitled matter.

12  Date: May 13, 2003

14 PATRICIA C. DUPRE

15 J&J COURT TRANSCRIBERS, INC.