

UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

IN RE: . Case No.: 03-10945 (MFW)  
. .  
. 821 North Market Street  
FLEMING COMPANIES, INC. et al. Wilmington, Delaware 19801  
. .  
Debtor, .  
. Date: October 20, 2003  
. . . . . Time: 2:14 p.m.

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

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1 THE COURT: Good afternoon.

2 MS. JONES: Good afternoon, Your Honor. Laura Davis  
3 Jones of Pachulski, Stang, Ziehl, Young, Jones & Weintraub on  
4 behalf of Fleming Companies and related debtors. Your Honor,  
5 if I may refer the Court to the amended notice of agenda for  
6 today's hearings, matters one through 18, Your Honor, are  
7 continued and the dates are listed in the status to the dates  
8 that they are to be continued to. Your Honor, there is one  
9 housekeeping matter with respect to number 18 and that is the  
10 motion of DDB Limited Partnership to compel allowance and  
11 payment of administrative expense claim. That got continued  
12 over to the hearing on November 25. the DDB's counsel just  
13 came to me and asked if we could shorten the response deadline.  
14 We had it listed pursuant to the local rules that we would  
15 respond by November 18. He asked if we could respond by  
16 November 11 and we're agreeable to do that, Your Honor.

17 THE COURT: All right.

18 MS. JONES: Your Honor, if we may, with the Court's  
19 indulgence, matter 66 is a complaint involving Wayne Berry and  
20 Your Honor may recall that today was supposed to be a  
21 scheduling conference. Both parties that are involved in this  
22 matter are on the phone and both are to be involved in a  
23 hearing in Hawaii shortly on a related matter. And Mr. Berry's  
24 counsel asked us if we'd be agreeable to take this out of order  
25 so that he could address it to the -- address the Court on this



1 and not miss the hearing that's pending in Hawaii. And we were  
2 agreeable to do that subject to Your Honor.

3 THE COURT: All right.

4 MR. LIEBELER: Your Honor, Eric Liebeler with  
5 Kirkland & Ellis appearing on behalf of the debtors. What's  
6 happened is we filed an adversary here in Delaware against Mr.  
7 Berry.

8 THE COURT: I'm familiar with the adversary.

9 MR. LIEBELER: Okay. He's also filed a complaint  
10 against Fleming and others in Hawaii. We're here today on a  
11 scheduling of status conference. We're amenable to setting  
12 dates. We do believe that the date that should first be set is  
13 a hearing date for the motion to dismiss that Mr. Berry has  
14 teed up in Delaware.

15 MR. HOGAN: Good afternoon, Your Honor, Timothy  
16 Hogan, special appearance on behalf of Mr. Berry. That's  
17 correct, Your Honor, I've got to be in the other case in a few  
18 minutes here in Hawaii. We believe that -- we disagree with  
19 debtor that we should be setting dates other than to have the  
20 Court resolve the motion. I'm not even sure it requires a  
21 hearing.

22 THE COURT: Well, I'm not sure it does either. Let  
23 me hear from the debtor why I shouldn't dismiss the complaint.

24 MR. LIEBELER: Actually, Your Honor, it's Mr. Berry  
25 that seeks to dismiss the complaint in Delaware so you're

1 asking me to argue Mr. Berry's position.

2 THE COURT: I'm asking you to tell me why I should  
3 not grant his motion to dismiss your complaint here.

4 MR. LIEBELER: Okay. Because clearly we were first to  
5 file on this subject matter in your courtroom.

6 THE COURT: Why should I decide an infringement  
7 action or copyright entitlement?

8 MR. LIEBELER: Because it's our contention, Your  
9 Honor, that it is a Core matter.

10 THE COURT: Respectfully, Core doesn't mean I have  
11 exclusive jurisdiction.

12 MR. LIEBELER: Correct. We believe you have  
13 concurrent jurisdiction.

14 THE COURT: Why should I decide -- why should I be  
15 the one deciding that?

16 MR. LIEBELER: Because we were the ones that were  
17 first to file the action.

18 THE COURT: But that doesn't mean I have to hear it.

19 MR. LIEBELER: No, it doesn't mean --

20 THE COURT: Why should I hear it?

21 MR. LIEBELER: The first to file rule generally holds  
22 as a general proposition that the first party to file in cases  
23 of concurrent jurisdiction is the case that should go forward.  
24 There's plenty of law out there on that precise point. That  
25 the cases that actually permit the second action to go forward

1 are much rarer than the first. The Metronic v. Pacesetters  
2 case in our brief is a good example of that.

3 THE COURT: Why should I? Given my workload, my lack  
4 of expertise in these areas, why should it not proceed in  
5 Hawaii where an action on the same facts, but not naming the  
6 debtor was in fact before your action was filed?

7 MR. LIEBELER: Well, if they actually did not name  
8 the debtors, Your Honor --

9 THE COURT: I know. I said that. But it involved  
10 the same facts. The debtor amended that complaint to add the  
11 debtor.

12 MR. LIEBELER: That's correct. Actually prior to  
13 that Mr. Berry came to Delaware to object to the sale to C&S  
14 and in so doing alleged that you should adjudicate the  
15 copyright infringement issues in an effort to stop the C&S  
16 sale.

17 THE COURT: Well, I'm not inclined to grant that  
18 request of his, either. Why should I decide this issue?

19 MR. LIEBELER: It's in the debtor's interest to keep  
20 the action in Delaware so that the debtors can do their  
21 litigation to the maximum extent possible in your courtroom.  
22 We have a serious resource conservation issue where we don't  
23 want to spread the debtor's resources all across the country  
24 trying to litigate far away from home. If you actually look at  
25 the interest in the case that's in front of the Court, of the

1 14 defendants, ten of them are on the mainland as opposed to  
2 being in Hawaii including, for example, C&S which is in Vermont  
3 and New York. From an economic standpoint in terms of where  
4 the case should be litigated for the convenience of the parties  
5 Delaware is a more convenient form than Hawaii.

6 THE COURT: Well, the plaintiff typically has the  
7 right to decide where to bring his action.

8 MR. LIEBELER: Right. And we are the plaintiff here,  
9 Your Honor.

10 THE COURT: Well.

11 MR. LIEBELER: We filed a dec relief claim.

12 THE COURT: Your action has asked me to declare that  
13 the complaint filed by Mr. Berry in Hawaii is without merit is  
14 actually what you're asking.

15 MR. LIEBELER: Actually, not quite, Your Honor,  
16 because what we did was we filed a dec relief action saying  
17 that we didn't infringe and then he amended a complaint on some  
18 other issue in Hawaii to bring the issue there. We did not  
19 file our complaint in response to his complaint. We filed our  
20 complaint in response to a flurry of, I don't know how many  
21 letters, 25, 30 complaints that he had with respect to our  
22 post-petition conduct. So it wasn't with respect to a  
23 complaint. It was with respect to a claim we believe he might  
24 make at some point.

25 THE COURT: Well, 28 section -- 28 UCS section 959

1 allows him to sue you on post-petition activity anywhere he  
2 wants.

3 MR. LIEBELER: Except that we sued him first, Your  
4 Honor, which we're permitted to do as well.

5 THE COURT: Right. But why should I be hearing your  
6 declaratory action?

7 MR. LIEBELER: For the convenience of the debtors and  
8 the parties to (2:21:27).

9 THE COURT: Except for Mr. Berry.

10 MR. LIEBELER: That's correct. That's correct. But  
11 to go the other way would give a great deal of convenience to  
12 Mr. Berry and very little to Fleming, C&S, Hex (phonetic), Cast  
13 (phonetic) and other companies that are on the (2:21:47).

14 MR. HOGAN: Your Honor, may I be heard? This is  
15 Timothy Hogan again.

16 THE COURT: Yes.

17 MR. HOGAN: First, Your Honor, there's no party to  
18 this proceeding that has any connection to Delaware with  
19 exception of Fleming through three of its subsidiaries. I  
20 object to the venue in my objection that I filed in 2446 that  
21 was never put before to the Court. And contrary to what  
22 counsel says I objected the Core jurisdiction in that objection  
23 as to his copyright claim. That was placed before the Court,  
24 but I don't believe it ever got into the docket, into the  
25 agenda. So that's the status of my objection as to Core.

1 There's also a Sherman Act claims in this case in Hawaii, Your  
2 Honor, that is not Core. I mean, specifically statutorily is  
3 not Core.

4 As to Mr. Berry, it says that in Fleming's own  
5 document they filed in their motion to oppose the motion they  
6 state at page nine the second paragraph, "The Core claims of  
7 each proceeding are the same." The calendar says I filed in  
8 July 22. They filed August 1. And under the first filed rule  
9 I was first. If they're the same case.

10 As to where the parties are, Your Honor, C&S is here.  
11 It's the only wholesale grocer in the state of Hawaii presently  
12 that does full line grocery. So they're here. Food Land is  
13 their major customer, they're here. The parties, individual  
14 parties, are all here. Fleming was here. Mr Berry is here and  
15 Hex is doing the freight for Fleming here. So the idea that  
16 this is somehow convenient for -- everyone else wants to go to  
17 Delaware simply so they can dispose of Mr. Berry and sweep the  
18 fact that they transferred -- hired its software in this asset  
19 purchase agreement. I understand that is a serious issue for  
20 the debtor's counsel, but it is not sufficient to waive Mr.  
21 Berry's right as the plaintiff in this proceeding to be the  
22 plaintiff here in Hawaii.

23 THE COURT: Anybody else wish to be heard on this?

24 MR. COBB: Good afternoon, Your Honor, Richard Cobb  
25 on behalf of C&S Acquisition LLC. Your Honor, I echo the

1 remarks made by Kirkland Ellis. C&S -- it is far more  
2 convenient for C&S to litigate in the state of Delaware than in  
3 the state of Hawaii.

4 THE COURT: Why?

5 MR. COBB: Your Honor --

6 THE COURT: You're not operating in Hawaii?

7 MR. COBB: Your Honor, I don't disagree, but our  
8 executive offices along with those individuals who are closely  
9 linked with the sale, who negotiated the sale, who are aware of  
10 what assets were actually transferred in the sale, and of  
11 course, we strongly disagree, completely with those remarks  
12 that were made by Mr. Berry's counsel.

13 All those individuals who will likely be at the  
14 epicenter of this complaint are all located in Brattleboro,  
15 Vermont, Your Honor, and I think it's judicial notice that  
16 Delaware is far closer to Brattleboro than is Hawaii.

17 MR. LIEBELER: Your Honor, Eric Liebeler again. On  
18 the actual issue of who was first to file it's absolutely clear  
19 that the complaint in Hawaii that Mr. Berry filed first  
20 deliberately avoided naming Fleming. He only named Fleming in  
21 that complaint after we filed a complaint against him in  
22 Delaware. For purposes of the first filed rule there's no  
23 question that we teed up that claim against him before he teed  
24 it up against us.

25 MR. HOGAN: Your Honor --

1 MR. LIEBELER: -- it's just absolutely clear that we  
2 deserve priority and the general proposition, the general rule  
3 is that we get the choice of forum in no circumstances.

4 MR. HOGAN: Your Honor, if I may be heard as to that  
5 issue. If the Court will allow me to supplement a one page  
6 declaration I will show that I did not sue Fleming because Mr.  
7 Capozzola represented them and ceased the infringement. I sent  
8 him an email, he responded to it on the 22nd, the day I filed  
9 the complaint. The next day they produced a report of Guiding  
10 Software that we believe shows clearly that all they did is  
11 copy the software back onto the computer, Your Honor. So as to  
12 point, yes, in fact, I had believed counsel, but in fact I do  
13 not believe that I was told the truth.

14 MR. LIEBELER: Your Honor, the reasons as to why Mr.  
15 Berry didn't sue Fleming in Hawaii first are beside the point.  
16 The fact is he didn't do it. Our complaint got to Court first  
17 and if you, for example, look at Pacesetters v. Metronic they  
18 were each teeing up against each other and the party that got  
19 to get to court first was the one that filed first. And that's  
20 what we did here.

21 THE COURT: Well, I don't think that means I have to  
22 keep the case and I'm not inclined to keep the case. I'm not  
23 going to decide a copyright infringement case. I'll dismiss  
24 it. There is a pending action that will adequately litigate  
25 these issues and decide the issues between the parties. There



1 is authority under Title 28 to permit Mr. Berry to proceed with  
2 that action since he's alleging only post-petition  
3 infringement. So I'll grant the motion to dismiss.

4 MR. LIEBELER: Very well, thank you, Your Honor.  
5 Your Honor, will the Court produce an order or should I submit  
6 an order?

7 THE COURT: You should submit a form of order.

8 MR. LIEBELER: Yes, thank you, Your Honor. Would it  
9 be permissible for me to be excused now, Your Honor?

10 THE COURT: You May.

11 MR. LIEBLER: Thank you, Your Honor.

12 MS. JONES: Your Honor, stepping back on the agenda  
13 matter 19, Motion of the Board of Trustees of the Leland  
14 Stanford Junior University for Relief from Stay. Your Honor,  
15 the parties have -- are still working at resolving this matter.  
16 What we've agreed to do is continue it to the November 4  
17 hearing, but hopefully we'll have a proposed order or also  
18 withdraw on the omnibus proposed order. We will submit it  
19 under a certificate of counsel.

20 THE COURT: All right.

21 MS. JONES: Matter 20, Your Honor, the Motion of  
22 Pictsweet Relief from Stay. The same is true there, Your  
23 Honor, we're discussing the terms of a stipulation. Hopefully  
24 we can submit it to the Court under certificate of counsel  
25 before the November 4 hearing, but if not we will adjourn this

1 to the November 4 hearing.

2 THE COURT: All right.

3 MS. JONES: The same is true with 21, Westchester  
4 Fire Specialty Insurance Company Motion for Relief from Stay.  
5 Your Honor, we've had a stipulation in Westchester's hands for  
6 a while; they are still reviewing it. They have asked us to  
7 continue this to the November 4 hearing while they continue to  
8 review. But hopefully, Your Honor, we'll be able to reach  
9 resolution and submit that under certificate of counsel.

10 THE COURT: Okay.

11 MS. JONES: Number 22, Your Honor, is the same. This  
12 is a Motion of Transport International Pool, Inc. for Relief  
13 from Stay. Again, Your Honor, we're discussing the terms of  
14 the stipulation. Hopefully we can submit it under certificate  
15 of counsel before the November 4 hearing. If not, we will go  
16 forth on the November 4.

17 Matter 23, George Perry & Sons Motion for Turnover.  
18 That motions is being withdrawn, Your Honor.

19 Matter 24, the Motion of Standard Fruit & Vegetable  
20 doing business as Del Monte Fresh Produce to Compel. Your  
21 Honor, we're working that one out. We're working on the terms  
22 of the stipulation. We're hopeful again that we can submit  
23 that stipulation under certificate of counsel before the  
24 November 4 hearing. But if not, we will continue this to the  
25 November 4 hearing.

1 THE COURT: Okay.

2 MS. JONES: Matter 25, the Motion of Berger-Epstein &  
3 Associations to Compel. Your Honor, we resolved this matter.  
4 We submitted an order under certificate of counsel on Friday.  
5 It was after the amended agenda was submitted so I don't know  
6 if Your Honor has seen that yet.

7 THE COURT: I have not.

8 MS. JONES: Okay. Your Honor, there is an order  
9 pending before the Court on that. Your Honor, would you like  
10 me to hand you up an extra copy of that one?

11 THE COURT: No.

12 MS. JONES: Matter 26, Your Honor, the Motion of Dana  
13 Geyer Trustee for Allowance and Payment of Administrative  
14 Expense Claim. Your Honor, you may recall that this had two  
15 different issues. One was the real property tax issue. That's  
16 been resolved and I do have a stipulation I would submit to the  
17 Court with respect to the remainder which is the repair  
18 portion, damages. We agreed to continue that until November 4  
19 hearing.

20 THE COURT: Okay.

21 MS. JONES: If I may approach, Your Honor.

22 THE COURT: You may. And has the Committee seen  
23 that?

24 MS. JONES: Yes, Your Honor.

25 THE COURT: All right. Then I'll approve that

1 settlement.

2 MS. JONES: Thank you. Matter 27, Your Honor, the  
3 matter of Larry Culpepper for Relief from Stay to Allow State  
4 Court Proceeding. We have resolved that matter, Your Honor,  
5 and we're going to present a stipulation under certificate of  
6 counsel with respect to that.

7 THE COURT: All right.

8 MS. JONES: Matter 28, our Motion for an Order  
9 Approving Lease Termination Agreement Between Fleming and J&J  
10 Nelson.

11 THE COURT: I have entered orders on 28 and 29 and  
12 32. But just a note, don't send them twice.

13 MS. JONES: Your Honor, I guess that takes care of  
14 numbers 28 and 29. Thank you. Matter 30, Your Honor, the  
15 Motion of Grand Island Properties to Compel. We have resolved  
16 this matter and I do have a stipulation to present to the  
17 Court.

18 THE COURT: All right.

19 MS. JONES: If I may approach.

20 THE COURT: You may. All right, I will approve that  
21 settlement.

22 MS. JONES: Thank you, Your Honor. Thirty-one, Your  
23 Honor, the Motion of Renaissance Plaza Associates to Compel.  
24 Your Honor, we have resolved this matter as well. And if I may  
25 approve, Your Honor, I have a stipulation of settlement of this

1 matter.

2 THE COURT: You may.

3 MS. JONES: Your Honor, I'm looking at the  
4 stipulation and I am sensitive to the Court's guidance that you  
5 like to see separate orders and I'm seeing that the parties all  
6 signed this stipulation and that was so ordered at that bottom.  
7 I can show it to Your Honor and then we'll follow whatever Your  
8 Honor wants to do.

9 THE COURT: Why don't you file it under certification  
10 to the form of order then.

11 MS. JONES: I will, Your Honor. May I ask for that  
12 back?

13 THE COURT: You may.

14 MS. JONES: Thirty-two, Your Honor, as already  
15 indicated you signed. Thank you. Your Honor, 33 if I may, I'd  
16 like to pass that. It relates to number 48. Forty-eight is  
17 now fully resolved, but I thought we could address to it when  
18 we get there.

19 THE COURT: All right.

20 MS. JONES: Thirty-four, Your Honor, the Motion of  
21 CitiCapital Commercial Leasing. Your Honor, we have resolved  
22 this matter. We are proposing to submit a stipulation of order  
23 under certificate of counsel. If for some reason it's not  
24 completed prior to the November 4 hearing we will continue this  
25 to the November 4 hearing.

1 THE COURT: Okay.

2 MS. JONES: Matter 35, the Motion of Fox's Food to  
3 Compel. Your Honor, this matter has been resolved and I do not  
4 have a form of order yet with respect to that. We would submit  
5 that under certificate of counsel. If for some reason there is  
6 an issue, Your Honor, we will continue that to the November 4  
7 hearing. But as I understand it, Your Honor, that motion will  
8 be withdrawn.

9 MS. STITZER: Good afternoon, Your Honor, Ashley  
10 Stitzer on behalf of Fox's Foods. It's my understanding that  
11 all the parties did sign an agreement and we did file a notice  
12 of withdrawal of the motion to compel as well as the objections  
13 and the supplemental objections to the notice of potential  
14 substantive assignment. That was done about 12:00 today.

15 THE COURT: All right. So that can be marked as  
16 withdrawn and I'll look for the settlement stipulation to be  
17 filed under certification of counsel.

18 MS. JONES: Your Honor, I think that settlement  
19 stipulation was set up that it was not -- it did not seek court  
20 approval, but rather they were just going to dismiss their  
21 motion.

22 THE COURT: All right.

23 MS. JONES: Your Honor numbers 36 and 37 go together.  
24 They were the application of Bain with respect to their  
25 retention and also their fees. And Your Honor there was

1 supposed to be a status conference today between Bain's counsel  
2 and the US Trustee and I'll yield the podium.

3 MR. McMAHON: Your Honor, good afternoon. Joseph  
4 McMahon for the Acting United States Trustee. Your Honor my  
5 recall at the last hearing Bain committed the filing of a  
6 response to our objection and with that response attached to it  
7 were three affidavits. We've reviewed the affidavits and have  
8 advised Bain's counsel that we are preliminarily okay with  
9 those witnesses appearing telephonically at the next omnibus  
10 hearing or at sometime as the Court may direct to testify and  
11 that we will not be requiring depositions in connection with  
12 those affidavits. I've also advised counsel that we will be  
13 reviewing the affidavits in more detail and to the extent that  
14 we will not require that one or more of the witnesses appear at  
15 the hearing. We will make an effort to streamline matters.  
16 But as for that, Your Honor, we're prepared to go forward at  
17 the next omnibus hearing or at such time as the Court may  
18 direct.

19 THE COURT: How long will it take then do you  
20 anticipate?

21 MR. McMAHON: Your Honor, at most I'd anticipate a  
22 limited amount of cross examination. Perhaps 15 to 30 minutes  
23 most far side.

24 MR. DEJONKER: Your Honor, Jason Dejonker for Bain &  
25 Company. I agree with everything that Mr. McMahon has stated.

1 We are willing to go forward with this at the next omnibus  
2 hearing. However, I have just learned from my client that  
3 there may be some difficulty in having the main business  
4 witness for Bain & Company, Mark Kovack, available on the 4th  
5 of November because he's going to be flying back from London,  
6 England at that time. If we could potentially schedule this  
7 for a date other than November 4 it would be much easier for my  
8 clients to appear via telephone in order to allow for Mr.  
9 McMahon to cross examine if necessary.

10 MR. McMAHON: Your Honor, we would be agreeable for  
11 the next omnibus after that, whenever that might be.

12 MS. JONES: November 25 is the next day.

13 THE COURT: All right, is the 25th of November at  
14 9:30 okay with Bain?

15 MR. DEJONKER: Yes, Your Honor, that's fine with Bain  
16 & Company.

17 THE COURT: All right, I'll continue this until then.

18 MR. McMAHON: Thank you, Your Honor.

19 MR. DEJONKER: Thank you, Your Honor.

20 MS. JONES: Your Honor, that would then bring us to  
21 matter 38 which was the Motion for an Order Allowing  
22 Administrative Claims of Certain Terminated Salaried Employees.  
23 We have a status conference with Your Honor today on that.

24 MR. RICHARDS: Your Honor, good afternoon. Geoffrey  
25 Richards on behalf of the debtors reporting to, Your Honor,



1 that we've resolved some of the discovery issues, however some  
2 still remain. I've conferred with counsel for the movants and  
3 what we'd like to ask Your Honor to do is to set a hearing date  
4 at which point in time we think that we would need two hours of  
5 Your Honor's time to address some factual issues and also  
6 several legal issues that have been raised in the motion.

7           What we'd like to then do, Your Honor, is based on  
8 that hearing date we would work out a discovery and briefing  
9 schedule that we would submit to Your Honor by Friday? That we  
10 would submit to Your Honor within a weeks time and that the  
11 parties have been discussing and will continue to discuss ways  
12 in which we can resolve this so that we will not require the  
13 Court's hearing time on whatever date that Your Honor  
14 identifies for us.

15           MS. MERSKY: Your Honor, Rachel Mersky, local counsel  
16 on behalf of the claimants movants. We are working towards a  
17 settlement and hopefully this week will accomplish something  
18 that will avoid wasting more of the Court's time. But should  
19 we need to have a hearing would like to have a hearing date for  
20 two hours and Mr. Richards and I will submit a discovery  
21 schedule to the Court this week.

22           THE COURT: All right, well November 4 is not good?

23           MS. MERSKY: Pardon me, Your Honor?

24           THE COURT: November 4, is that any good?

25           MR. RICHARDS: Your Honor, I think that we'd need a

1 date later than that because what we've contemplated is the  
2 need to take several depositions and depending on what those  
3 initial depositions yield we may need some additional  
4 discovery.

5 MS. MERSKY: However, Your Honor, I think a near date  
6 would probably expedite the opportunity to remove this from  
7 your calendar.

8 MR. RICHARDS: Well said.

9 (Pause)

10 THE COURT: Well, the only time I have any period is  
11 the day before Thanksgiving, the 26h of November.

12 MS. MERSKY: Your Honor, well, I trust you may suffer  
13 I'll make myself there.

14 THE COURT: I'll start it at 9:00 a.m. How's that?

15 MR. RICHARD: Turkey is in Boston for me over  
16 Thanksgiving, Your Honor, so that'll be just fine.

17 THE COURT: All right. Special listing for this then  
18 on the 26th at 9:00 a.m.

19 MS. MERSKY: Thank you, Your Honor.

20 MR. RICHARDS: Thank you, Your Honor.

21 THE COURT: And you'll do the depositions and  
22 briefing accordingly.

23 MR. RICHARDS: Yes, Your Honor. Thank you.

24 MS. MERSKY: Yes, Your Honor.

25 MR. RICHARDS: And if I may yield the podium to Ms.

1 Jones.

2 MS. JONES: Your Honor, that brings us to matter 39,  
3 Morgan Stanley's Application for Allowance of an Administrative  
4 Expense Claim. Your Honor, the parties have agreed to continue  
5 this matter over to the November 4 hearing.

6 The same is true with number 40, our Motion to Amend  
7 an Order Waiving Certain Requirements Under Section 11 -- I'm  
8 sorry, 345(b). Your Honor, we are in discussions with the  
9 Trustee's Office on that and do seek to continue that to the  
10 fourth.

11 Your Honor, that would then bring us to the  
12 Hegenbarth Wisconsin Dealership's Motion for and Order Deeming  
13 the Dealership Agreements with the Debtors Rejected and  
14 Terminated. Today was supposed to be a scheduling conference  
15 with respect to that. I know Mr. Wynne is on the phone in  
16 connection with that matter.

17 THE COURT: Well, the movant or Mr. Wynne want to go  
18 forward?

19 MS. MILLER: Your Honor, Kathleen Miller on behalf of  
20 Hegenbarth. We've had conversations with Super Value's  
21 counsel. We believe that we would need between an hour --  
22 about an hour and a half to have this -- a hearing set for this  
23 and that's what we would like to request today and we also -- I  
24 believe there's probably two, three witnesses so we can get the  
25 discovery done quickly.

1 THE COURT: How many witnesses in an hour and a half  
2 are you going to have?

3 MS. MILLER: I think two, maybe three.

4 THE COURT: Very optimistic. Anybody else want to  
5 chime in?

6 MR. SUDELL: Your Honor, William Sudell for Super  
7 Value. I agree that we'll have two, maybe three witnesses and  
8 that perhaps we can get it done under an hour and a half. We  
9 are talking about arguments in addition to putting on  
10 witnesses. We will need to take depositions and perhaps after  
11 taking depositions we'll realize there's less in dispute  
12 factually than we currently think.

13 We were to be on today, but then realized Your Honor  
14 only had an hour. I don't think right now that this one is  
15 likely to settle so the one you just scheduled is. I guess the  
16 options might be the next omnibus, the one after that or the  
17 standby in effect on the 26th.

18 MS. MILLER: My co-counsel tells me that date is not  
19 the 26th. December 2 is not good for him.

20 THE COURT: November 26 is not good?

21 MS. MILLER: Yes.

22 Ms. Jones: Your Honor, the next omnibus date after  
23 that, just for informational purposes, is December 8.

24 MR. WYNNE: Your Honor, it's Richard Wynne. It's a  
25 little hard to hear, but I actually do think it probably is in

1 about the two hour range, hopefully, if that helps the Court  
2 with scheduling it.

3 THE COURT: Well, why don't I do this. Why don't I  
4 give you the 8th. And I think I can fit you in that. We have  
5 two hours for the omnibus, but the rest of the day I'll try and  
6 reserve time.

7 MS. MILLER: That's December 8?

8 THE COURT: December 8, yes.

9 MR. SUDELL: At what time, Your Honor?

10 THE COURT: Well, do you want to come in at 1:00  
11 rather than at 9:30? I can assure you'll get some time then.

12 MS. MILLER: Very good. Thank you, Your Honor.

13 MR. SUDELL: Thank you, Your Honor.

14 MR. STANG: Good afternoon, Your Honor, James Stang  
15 of Pachulski, Stang, Ziehl, Young, Jones & Weintraub. Your  
16 Honor, the next matter is the Miami Foodco Motion. There were  
17 two objections. The Miami Foodco objection was the subject of  
18 reply briefs. It isn't clear from the transcript whether you  
19 wanted oral argument on that. There are one or two points in  
20 their reply which was the last one filed that I'd like to  
21 comment on, but I would not argue any other points that were  
22 raised in our reply.

23 And then the Minkin objection has not been argued at  
24 all. If you limited me on Miami Foodco, as I expect you will,  
25 it'll take about five minutes, Minkin might take 15 or 20.

1 THE COURT: Well, let's push this to the end and I'll  
2 hear the argument then and I think there's some matters that  
3 will go a lot quicker.

4 MR. STANG: All right, thank you.

5 MS. JONES: Your Honor, matter 43 is our Motion to  
6 Reject Leases. I'll let Mr. Lhulier address this matter with  
7 the Court. We have now fully resolved this matter.

8 MR. LHULIER: Good afternoon, Your Honor, Chris  
9 Lhulier for the debtors. Your Honor, as Ms. Jones said we have  
10 resolved each of the four objections listed under number 43 on  
11 the agenda. But we've agreed to do any chases, remove any  
12 leases that are related to any of those objections, and present  
13 stipulations under certification of counsel dealing with each  
14 of those leases. And I have an order to present today without  
15 the leases addressed in these objections.

16 THE COURT: You may hand that up then.

17 MR. LHULIER: Thank you, Your Honor. May I approach?

18 THE COURT: Yes. All right, then I'll enter that  
19 order as unopposed.

20 MS. FALLON: Good afternoon, Your Honor, Sherry  
21 Fallon representing BC Warner Investments. We had filed an  
22 objection to the least rejection motion. We have resolved that  
23 with debtors as represented by Mr. Lhulier. However, the  
24 resolution is contingent on being paid and as of this time  
25 there's been no receipt of payment. I need to reserve my

1 client's rights to seek relief from the Court in the event  
2 payment isn't forthcoming. But other than that it appears that  
3 this matter is resolved and we will prepare a stipulation to  
4 submit.

5 THE COURT: All right.

6 MR. COWAWAY: Likewise, Your Honor, we have resolved  
7 our differences on behalf -- Bernard Cowaway, I'm sorry, on  
8 behalf of Sante Fe and CAM LLC, again we have not received  
9 consideration. Once that's paid we will happily walk away, but  
10 until so we reserve our right to come back to the Court to  
11 secure that as well. Thank you.

12 THE COURT: All right. Well, since I'm not rejecting  
13 the leases as to them until I approve the settlement and  
14 they're paid I guess I'll wait and look for the settlement.  
15 Stipulations to be filed separately.

16 MR. LHULIER: Thank you, Your Honor.

17 THE COURT: All right.

18 MR. RICHARDS: Your Honor, Geoffrey Richards again.  
19 Item number 44 on the docket is the Debtor's Motion for an  
20 Order seeking authority to sell certain of its own property and  
21 also to enter into assumption and assignment or rejection  
22 agreements. Briefly, Your Honor, I can tell you that the  
23 auction was held in Chicago on October 14, that the auction  
24 covered both owned, real property and income producing lease  
25 property, it included 13 parcels of owned real estate and 33

1 income producing lease properties.

2 THE COURT: How many lease?

3 MR. RICHARDS: I apologize, Your Honor, 33 income  
4 producing lease properties. Based on the marketing efforts  
5 that took place which I'll explain to Your Honor in a moment,  
6 the debtors elected to proceed with the sale of eight of the 13  
7 owned parcels and transactions on seven of the 33 income  
8 producing lease properties. And that the auction resulted in  
9 proceeds of approximately \$6.6 million.

10 What I'd like to do, Your Honor, if I may is to offer  
11 the testimony of Michael Sharp who is in the courtroom and  
12 available to testify as to the facts and circumstances  
13 surrounding the auction and the debtor's decision to proceed  
14 with the sale of these properties.

15 THE COURT: All right, does anybody object to  
16 receiving by proffer? All right, you may do so.

17 MR. RICHARDS: Thank you, Your Honor. If called to  
18 testify Michael Sharp would explain that he is more than 20  
19 years of financial operational and executive management  
20 experience related to businesses requiring turnaround and  
21 restructuring expertise. That Mr. Sharp has been with Alex  
22 Partners approximately one year and has been working on the  
23 debtor's bankruptcy case since shortly after their filing. Mr.  
24 Sharp would testify that his current position within the  
25 company is that he is responsible for all non-core real estate



1 and other asset dispositions for the debtors. And when Mr.  
2 Sharp uses the term non-core he means assets unrelated to the  
3 wholesale division of the company and the convenience business  
4 also known as Core-Mark.

5 Mr. Sharp, if called to testify would explain that  
6 his daily functions include the following. He identifies and  
7 evaluates assets for potential disposition. He works with the  
8 debtor's employees and external experts to determine the  
9 estimated value of those assets available for disposition and  
10 helps develop strategies to maximize the value to the estate.

11 Mr. Sharp would testify that today he has execute  
12 dispositions of more than 70 parcels of properties since the  
13 commencement of these cases.

14 Mr. Sharp would explain that he has a general  
15 understanding as a result of his experience in the debtor's  
16 case with the companies owned and leased real estate portfolio.

17 With respect to the auction efforts in particular,  
18 Your Honor, Mr. Sharp would explain that he oversaw the efforts  
19 of Keen Consultants, the debtor's real estate consultants, that  
20 were engaged to conduct a marketing campaign and a sale effort  
21 in connection with the properties covered by this motion. Mr.  
22 Sharp would explain that he has worked on a daily basis with  
23 Keen to ensure that the debtors achieve the highest recovery  
24 for the assets covered by the auction.

25 Mr. Sharp would also explain, Your Honor, that these

1 assets had been subject to the auction because they are no  
2 longer necessary to the continued efforts of the debtors and  
3 that they've achieved a significant cost savings for the estate  
4 if the debtors were able to spinoff, if you will, Your Honor,  
5 these assets from the estate. In particular, Your Honor, these  
6 properties consist of vacant land, closed retail locations and  
7 sandwich leases not selected by C&S as part of the C&S Asset  
8 Purchase Agreement.

9           Mr. Sharp would explain that the overwhelming portion  
10 of the assets covered by the auction pertain to the debtor's  
11 retail business. And Your Honor may recall that at the  
12 incipient stages of this case the debtors sold substantially  
13 all of their retail operations in several transactions.

14           Having spunoff the retail division and having sold  
15 substantially all of their wholesale assets to C&S, Mr. Sharp  
16 would explain that there is no longer a need to retain these  
17 properties as assets of the estate especially given the annual  
18 carrying cost of approximately \$14 million. And therefore,  
19 Your Honor, the debtors decided to embark on a marketing effort  
20 to sell these properties. The marketing effort began in early  
21 August of 2003. Keen distributed marketing materials to more  
22 than 32,000 targeted retailers, wholesalers, investors, and  
23 brokerage firms. And Mr. Sharp would then further explain and  
24 testify that pursuant to the bid procedures the debtors held  
25 the auction in Chicago on October 14.

1           The auction was conducted by Harold Boardwin  
2 (phonetic) of Keen Consultants and Kirkland & Ellis and Mr.  
3 Sharp would explain that he was present for the entire duration  
4 of the auction.

5           Mr. Sharp would testify that given the nature,  
6 location and condition of the properties that there was a  
7 limited interest in the properties and at the conclusion of the  
8 auction the debtors, in conformity with your requirements set  
9 forth in the bidding procedures, consulted with the Committee,  
10 the Secured Lenders Professionals, both of whom agreed with the  
11 debtor's decision to identify as winning parties those entities  
12 identified on exhibits to the seller.

13           Briefly, Your Honor, there are three categories of  
14 winning bidders, if you will, at the auction.

15           THE COURT: Well, do you want to submit the form or  
16 order so I have some familiarity with --

17           MR. RICHARDS: Of course, Your Honor. If I may  
18 approach with the black line.

19           THE COURT: Yes.

20           MR. RICHARDS: Thank you. The black line, Your  
21 Honor, reflects comments that have been received as a result of  
22 circulating the order to the proposed purchasers as well as  
23 assignees and other parties affected by the auction. In  
24 addition, we have circulated it to the Secured Lenders of the  
25 Committee and the US Trustee. We have received comments from

1 several parties and the order reflects the incorporation of  
2 those comments.

3 THE COURT: Okay.

4 MR. RICHARDS: So, Your Honor, as I was saying that  
5 the categories of winning bidders are broken down into three  
6 categories. There are purchasers of real estate, there are  
7 assignees, and there are also landlords under terminated  
8 leases. And, Your Honor, if you'd like I can provide more  
9 detail on those three categories. But briefly I can say that  
10 as to assignees, the debtors identified those parties that it  
11 made the most economic sense to assume and assign the leases to  
12 and Mr. Sharp would explain that under some of the terminated  
13 -- under the terminated leases the deals that the debtors were  
14 able to arrange resulted in the highest and best recover to the  
15 estate. And in particular, Your Honor, there is one property  
16 covered by this auction that produced enough proceeds to the  
17 estate of North of \$1.75 million based on an arrangement, in  
18 that situation actually, Your Honor, between the sub-tenant who  
19 was seeking to terminate the sub-lease and the debtors who  
20 agreed to terminate the head-lease.

21 Your Honor, the remaining issue is really a good  
22 faith issue and we've contacted all of the winning bidders that  
23 we've identified to appear either in person or telephonically  
24 given the small dollar value of some of the transactions. A  
25 number of the parties, I think, found the trip to Delaware

1 would have been an economic burden. But I can explain, Your  
2 Honor, that if called to testify Mr. Sharp would explain the  
3 following. That the winning parties are third parties  
4 unrelated to the debtors, that the winning bids are the result  
5 of arms length negotiations and an open auction process in  
6 which all bidders were permitted to participate and --

7 THE COURT: Could the parties on the phone, please  
8 mute their phones? Could the parties please mute the phone,  
9 those participating by phone. All right, you may proceed.

10 MR. RICHARDS: Thank you, Your Honor. And that Mr.  
11 Sharp would also testify that the debtors believe that all  
12 winning bidders are good faith purchasers entitled to the  
13 protections of Section 363(m). And as I said before, Your  
14 Honor, we believe winning parties are either present in the  
15 courtroom or on the phone. And again, Your Honor, some may be  
16 present telephonically given the low purchase price involved in  
17 some of the real estate that has been sold.

18 Your Honor, there were four objections that were  
19 received.

20 THE COURT: Have you finished the proffer?

21 MR. RICHARDS: Yes, I have, Your Honor. My  
22 apologies.

23 THE COURT: Does anybody wish to cross examine the  
24 witness? All right, I'll accept the proffered testimony then.

25 MR. RICHARDS: Thank you, Your Honor. Before Your

1 Honor -- Your Honor, I can do one of two things. I can go  
2 forward and address the objections unless Your Honor has any  
3 particular questions.

4 THE COURT: Have they been resolved?

5 MR. RICHARDS: Your Honor, I believe that three of  
6 the four objections have been resolved. And let me explain to  
7 you how I think we have resolved them. With respect to Stanley  
8 Station, Your Honor, this was a landlord who had objected. We  
9 understand that the landlord has agreed to withdraw it's  
10 objection since it was the winning party at the auction.

11 THE COURT: Okay.

12 MR. RICHARDS: I don't know if Stanley Station is  
13 here.

14 MS. CASHMAN: Madison Cashman for Stanley Station.  
15 That is correct, Stanley as the landlord was the winning bidder  
16 at the auction and has agreed to withdraw the objection, of  
17 course, subject to the entry of the order approving the sale.

18 THE COURT: All right, thank you.

19 MR. RICHARDS: Thank you, Your Honor. The second  
20 objection was from Village Marketplace. They objected to the  
21 sale based on a cure amount. We understand that the lease is  
22 being rejected, that there is a stipulation to which the  
23 parties have agreed to and therefore the objection which was  
24 cure in nature we think is moot as a result of our intention to  
25 reject the lease.

1 Your Honor --

2 THE COURT: Wait a minute.

3 MS. STITZER: Good afternoon, Your Honor, Ashley  
4 Stitzer on behalf of Village Marketplace Investors. That is  
5 correct. It's my understanding that there is a stipulation  
6 that's been circulated. I understand that my client has signed  
7 it although I haven't seen a signed copy from the debtors. We  
8 can submit that at another date.

9 THE COURT: All right, I'll mark that as resolved  
10 then.

11 MR. RICHARDS: The third item, Your Honor, was an  
12 objection by Wachovia. This objection has been resolved by the  
13 debtor's agreement to pay \$4441.91 in cure upon assumption and  
14 assignment of the lease to Nottingham Properties and the  
15 debtors have also agreed to escrow \$15,000 to cover possible  
16 repairs to the leased premises. Fleming and the landlord have  
17 agreed to work in good faith to agree upon the nature and cost  
18 of the repairs in an amount not to exceed \$15,000. And any  
19 amounts remaining from such escrow will revert to the debtors.  
20 The landlord and the assignee have also agreed to cooperate  
21 with the debtor's efforts to recover costs of any agreed upon  
22 repairs from the current sub-tenant Big Lots. And based on  
23 that, Your Honor, the objection of Wachovia has been resolved.

24 THE COURT: All right.

25 MR. RICHARDS: Your Honor, the last objection was

1 from the City of Garland, Texas. This is a taxing authority.  
2 This objection came in late in the week, Your Honor. Briefly,  
3 the city of Garland is saying -- is asserting that they have a  
4 lien on certain of the debtor's assets and as a result they are  
5 entitled to be paid out of the sale proceeds. Your Honor, we  
6 have not had time to go through the claims reconciliation  
7 process. We do have a provision in the order that says that  
8 liens attached to the sale proceeds with the same validity,  
9 priority and extent as they existed on the property prior to  
10 the sale and as a result we think that addresses the city of  
11 Garland's objection under Section 363(f), I believe.

12 THE COURT: And you're not doing anything with the  
13 proceeds until that's decided?

14 MR. RICHARDS: Your Honor, we have also -- we have  
15 filed a motion as Your Honor may be aware to pay down the pre-  
16 petition banks. That motion is not being heard today. That is  
17 being continued to a different date. And based on the analysis  
18 that the debtors have provided in that motion the debtors  
19 believe that they will have more than sufficient funds on hand  
20 once the debtors pay down the banks to satisfy any outstanding  
21 trust claims, packet claims, or lien claims in connection with  
22 any liens that may attach to sale proceeds during the pendency  
23 of these cases. And for those reasons, Your Honor, we don't  
24 believe that the rights of the city of Garland, or for that  
25 matter, Your Honor, we had several taxing authorities in the



1 state of Texas who has objected to our sale of the retail  
2 division some time ago and we had an agreement with those  
3 taxing authorities to provide them notice of our intent to pay  
4 down the banks which we have done. So we believe, Your Honor,  
5 that all of those rights are being protected notwithstanding  
6 our desire to pay down the banks.

7 THE COURT: Anybody wish to be heard then for the  
8 city? Is the city participating by phone? All right with the  
9 debtor's representation that at least for the near future the  
10 funds are being retained and with liens to attach the proceeds  
11 I will overrule the objection then.

12 MR. RICHARDS: I'm sorry, Your Honor, I was just  
13 conferring with counsel for the banks. We would like a few  
14 more moments to take a look at the black lines if that's all  
15 right, and then once counsel has confirmed for me that he's  
16 agreeable to the form of order we'll submit to Your Honor a  
17 clear version if that's all right.

18 THE COURT: All right.

19 MR. RICHARDS: Your Honro, the next item on the  
20 agenda is the debtor's second motion pursuant to Section 365.  
21 I apologize, Your Honor, there was one other issue in  
22 connection with the real estate auction. Your Honor may recall  
23 that in connection with the debtor's motion to prohibit  
24 procedures there had been a request by the debtors to insight  
25 or induce bidders to participate in the auction by awarding

1 them a break up fee of up to \$15,000. Your Honor, I believe  
2 that issue was continued in connection with the hearing on the  
3 bid procedures order. What we have since done to fill Your  
4 Honor in is one of the two properties, the property in Peoria,  
5 Illinois, a subsequent buyer came in and submitted an offer  
6 that was higher and better than the offer that was initially  
7 submitted. The debtors have gone with that second offer. As a  
8 result I think counsel is here for the party who submitted the  
9 initial bid to seek payment of the break up fee. And I think  
10 that given the short amount of time we have today, Your Honor,  
11 it may make sense to continue this to a different day. The  
12 debtors do not object to the payment of the break up fee, but  
13 if Your Honor has any evidentiary concerns it may be best for a  
14 different day.

15 THE COURT: Well, who is the person seeking the break  
16 up fee?

17 MS. STITZER: Your Honor, Ashley Stitzer on behalf of  
18 O'Brien Properties, LLC. If you recall, Your Honor, O'Brien  
19 has a sale agreement in place back in May of 2003. We did file  
20 a motion to compel which is my understanding at the October 2  
21 hearing Your Honor denied that motion and agreed to, I guess,  
22 had the issues between the parties rolled into the sale motion.

23 O'Brien did perform its due diligence under the  
24 contract which laid the groundwork for the other bidders.  
25 Additionally, O'Brien's bid was the baseline price for the

1 price that was ultimately received by the debtors and the  
2 debtors agreed that the O'Brien agreement would be the stalking  
3 horse bid for the sale.

4 THE COURT: How much was your bid?

5 MS. STITZER: Five hundred thousand dollars.

6 THE COURT: And what was the winning bid?

7 MS. STITZER: Six hundred and ten thousand. Your  
8 Honor, additionally, O'Brien did incur costs after entering the  
9 agreement to maintain the property. Therefore, Your Honor, we  
10 submit that these actions benefitted the estate, that they were  
11 actual necessary expenses of the estate and directly  
12 contributed towards the estate. We did have some conversations  
13 with counsel for the debtors this morning. They indicated that  
14 they did not object to O'Brien seeking a break up on this  
15 particular sale and we would request that the order provide  
16 that O'Brien is entitled to the break up fee pursuant to the  
17 sale procedures motion and order. Additionally, Your Honor, we  
18 would request that the order provide that in the event that the  
19 sale does not close with the winning successful bidder that the  
20 O'Brien bid was the highest bid.

21 MR. RICHARDS: Your Honor, the debtors do support  
22 counsel's statements and we do support the payment of the break  
23 up fee.

24 THE COURT: As well as the authority to settle with  
25 O'Brien if the winning bidder does not close?

1 MR. RICHARDS: Your Honor, I believe that that was a  
2 requirement of the bidding procedures that the second place  
3 bids remain open and irrevocable. I think for up to 30 days.  
4 And certainly if the winning bidder were to back out we would  
5 need to confirm that a \$500,000 offer is what the debtors think  
6 is appropriate for the property and we would intend to proceed  
7 with that offer. We would not intend on reopening up the  
8 auction. So we would --

9 THE COURT: So is that a yes?

10 MR. RICHARDS: Yeah, Your Honor, that is a yes,  
11 actually.

12 THE COURT: Okay. Does the US Trustee wish to be  
13 heard on this request then?

14 MR. McMAHON: Your Honor Joseph McMahon for the  
15 Acting United States Trustee. I believe that the procedures  
16 that we put in place contemplate some type of notice with  
17 respect to the request to ask for a break up fee and at least  
18 I'm unaware of any documents filed indicating that O'Brien was  
19 going to be requesting a break up fee at this particular  
20 hearing.

21 With respect to that, Your Honor, I don't know how  
22 the Court would like to proceed with it, but perhaps the issue  
23 could be teed up for the next omnibus hearing after some  
24 requests have been put for the mentioned expense.

25 THE COURT: Well, do you want to do that? Do you

1 want to file specifically with respect to maybe backup for the  
2 expenses as well?

3 MS. STITZER: I apologize, Your Honor, I was  
4 conferring with counsel.

5 THE COURT: The US Trustee is requesting that this be  
6 put off to the next hearing so they can have some notice.  
7 They, I guess, were not prepared for your request.

8 MS. STITZER: That's fine, Your Honor, and he would  
9 like some backup documentation on the expenses that were  
10 incurred?

11 THE COURT: Yes. You need not provide it to me, but  
12 to the US Trustee.

13 MS. STITZER: Okay.

14 THE COURT: And with some delineation as to what the  
15 numbers are for the actual out of pockets.

16 MS. STITZER: Thank you, Your Honor.

17 MR. McMAHON: Thank you, Your Honor.

18 THE COURT: And whatever else you may want to submit  
19 in support of your request.

20 MS. STITZER: Okay.

21 MR. RICHARDS: And, Your Honor, just to clarify with  
22 respect to the break up fee. In the event that it turns out  
23 our winning bidder does not close that the break up fee to the  
24 extent it's awarded would be credited against the purchase  
25 price. In other words, to the --

1 THE COURT: Yes.

2 MR. RICHARDS: Okay. In other words, they won't be  
3 paid \$15,000 and then --

4 THE COURT: Well, confirm that with them.

5 MR. RICHARDS: Which we have, Your Honor.

6 THE COURT: Okay.

7 MR. RICHARDS: And they agree. The next item on the  
8 agenda, Your Honor, is item 45 which is the Debtor's Second  
9 Motion Pursuant to Section 365(d)(4). First you have an order  
10 of setting the time to assume, assume and assign, or reject  
11 unexpired leases of non-residential real property.

12 Briefly, Your Honor, this is the debtor's second  
13 request. The debtors are seeking an extension through and  
14 including March 31, 2004. The debtors believe this request is  
15 necessary for two principal reasons, Your Honor. Number one,  
16 under the debtor's purchase agreement with C&S the option  
17 period you may recall, Your Honor, is a six month action period  
18 that expires at the end of February. And it's at that date,  
19 the outside date, by which C&S can identify those properties  
20 which it designates to have the debtor assume and assign. We  
21 then need a short period of time to bring on a motion to assume  
22 and assign those agreements. And so that's why we need the  
23 March 31 date as to the properties covered by C&S. As to the  
24 debtor's remaining properties, Your Honor, those principally  
25 relate to the debtor's Core-Mark convenience division. And

1 Your Honor may have already heard that the debtors are  
2 exploring aggressively their strategic options with respect to  
3 that business which include a plan of reorganization as well as  
4 a potential sale. And the debtors believe that March 31, 2004  
5 provides them with the sufficient flexibility needed to  
6 accomplish whichever option provides the debtors with the  
7 highest and best result for the use of their assets.

8 Your Honor, I could make a proffer of Mr. Sharp if  
9 you thought it was necessary in support of the motion. We do  
10 have a number of objections, Your Honor. I think we have  
11 resolved a number of them.

12 THE COURT: Well, let's pass this if I'm going to  
13 hear objections. Let's pass this to the end.

14 MR. RICHARDS: Okay.

15 MR. LHULIER: Your Honor, Chris Lhulier for the  
16 debtors again. Number 46 on the agenda is the debtor's motion  
17 to reject leases and subleases. There is one objection filed  
18 which has been resolved, Your Honor. Again, with this one  
19 we've agreed to take the leases relating to that objection off  
20 of the order we present today and then document that deal. And  
21 I guess I should say the objection being resolved is subject to  
22 us memorializing, documenting the agreement we've reached. I  
23 do have an order to present today, Your Honor, that has the  
24 leases regarding Reinhart taken off of them.

25 THE COURT: All right.

1 MR. LHULIER: Your Honor, one other note. We've also  
2 modified the order to say that claims can be filed 30 days from  
3 entry of the order today. I think the order attached to the  
4 original motion required claims to be filed 30 days from the  
5 effective date of the rejection. So --

6 THE COURT: What is the effective date of the  
7 rejection?

8 MR. LHULIER: September 30. So that the new order  
9 allows parties 30 days from whenever the Court enters the  
10 order. We've done that actually with all of the rejection  
11 orders that we're presenting to you now.

12 THE COURT: All right. You can hand that up.

13 MR. LHULIER: Very good. Thank you.

14 THE COURT: All right, I'll enter that order as  
15 unopposed.

16 MR. LHULIER: Thank you, Your Honor. Your Honor,  
17 number 47 on the agenda is another motion to reject leases and  
18 contracts. There were four objections. The first objection is  
19 by Evergreen Enterprises. That's been resolved. Again, same  
20 situation. We've agreed to take them off of the order we  
21 present today. We're going to present a consensual order or  
22 stipulation under certification of counsel.

23 Your Honor, objections B and C are from IBM and  
24 Transamerica. We've reached a stipulation that deals with each  
25 of those two objections all in one stipulation. I have that to



1 present if Your Honor will take that today.

2 THE COURT: All right. You may.

3 MR. LHULIER: Thank you. Your Honor, can I show this  
4 to the Committee and hand it up after they've approved it?

5 THE COURT: You may.

6 MR. LHULIER: Your Honor, objection D is the  
7 objection of Discount Center. They've agreed to withdraw their  
8 objection in exchange for the debtors agreeing to pay any  
9 outstanding post-petition rent up to September 30 and also  
10 agreeing to pay any back advalorem taxes that may have come due  
11 post-petition and are appropriate to be paid. So Discount  
12 Center will remain on the order that I present to you today.

13 THE COURT: Okay.

14 MR. LHULIER: Your Honor, one other -- actually I  
15 should say two other notes. Parties haven't filed objections,  
16 but we've reached agreements with GE Capital Leasing. There  
17 was a mistake. Some of their contracts wound up on the  
18 proposed order of contracts to be rejected. We've agreed  
19 consensually with them to remove those contracts from this  
20 rejection order. I have a stipulation and order showing their  
21 consent to remove those leases from the order today.

22 THE COURT: All right.

23 MR. LHULIER: If I can show that to the Committee as  
24 well.

25 THE COURT: You may.

1 MR. LHULIER: And then, Your Honor, one other  
2 situation Xerox Corporation. We discovered the same situation  
3 with Xerox. There are two leases that were not intended to be  
4 rejected. We've been trying to contact Xerox to get the  
5 consent to take them -- those two leases off of the rejection  
6 order. We haven't been able to reach them yet. What I'd ask  
7 Your Honor if we could do is continue the motion as to those  
8 two leases in order to give us some time to gain their consent  
9 to remove them from the order.

10 THE COURT: You may.

11 MR. LHULIER: Thank you, Your Honor.

12 THE COURT: But just for future reference, given this  
13 and others, I don't know how you're going to get a retroactive  
14 order out of me in the future since it's clear that the debtor  
15 is not unequivocally rejecting leases by this motion.

16 MR. LHULIER: Understood, Your Honor.

17 THE COURT: All right.

18 MR. LHULIER: Your Honor, I have both stipulations  
19 and the order to present.

20 THE COURT: All right, I'll enter that order. As to  
21 those who did not respond or oppose it as unopposed and approve  
22 the two stipulations.

23 MR. LHULIER: Thank you, Your Honor. Your Honor, the  
24 order that I handed up does not expressly say that the two  
25 leases that I'm referring to --

1 THE COURT: Are deleted.

2 MR. LHULIER: -- for Xerox are to be continued. If  
3 you'd like I could interlinear in the order specifically which  
4 two leases we're referring to and just say that they're  
5 continued to November 4 or I can you what those two leases are.

6 THE COURT: Why don't you interlinear.

7 MR. LHULIER: Very good.

8 THE COURT: All right.

9 MR. LHULIER: Thank you, Your Honor. Your Honor,  
10 number 48 on the agenda actually is related to number 33.  
11 Number 33 is an Emergency Motion to Modify the Exhibit to the  
12 Motion to Reject Certain Leases. And I guess even before that  
13 there was a motion to shorten time that was filed along with  
14 the emergency motion to modify. So procedurally would ask Your  
15 Honor if we could go forward on the motion to modify to day.

16 THE COURT: You may.

17 MR. LHULIER: Thank you, Your Honor. Your Honor, to  
18 modify seeks to remove from the motion to reject two leases.  
19 Simply, Your Honor, when the schedule was being prepared there  
20 were two leases that appeared to be rejected that shouldn't  
21 have been on that schedule. When we discovered that those  
22 leases were there we prepared the motion, sent the materials to  
23 all interested parties and are asking now that the Court allow  
24 us to remove those two leases from the motion to reject.

25 THE COURT: Does anybody wish to be heard on that

1 request? All right, I will allow the debtor to modify its  
2 motion.

3 MR. LHULIER: Thank you, Your Honor. Maybe I can  
4 hand -- I'll hand all the orders up at the same time.

5 Your Honor, number 48 then getting on to that is the  
6 actual motion to reject. There were three responses. The  
7 first response is a conditional objection. It's actually not  
8 an objection I think it's just a statement by one of the  
9 assignees to their position with respect to the rejection  
10 motion. So I don't know that there's anything that the debtors  
11 need to do or say for that one. I don't know if their counsel  
12 is here or wants to say anything further with respect to that  
13 statement.

14 THE COURT: Well.

15 MS. McMAHON: Michelle McMahon of Connolly Bove for  
16 the objector Associated Grocer Incorporated. We just wanted to  
17 confirm by putting a position out there for all potential --  
18 for the, I guess, any other potential parties. Notwithstanding  
19 the objection our 365(h) rights were reserved.

20 THE COURT: All right.

21 MR. LHULIER: Your Honor, the two other objections B  
22 and C are both -- B was actually withdrawn. There's a notice  
23 of withdrawal on the docket. I spoke to counsel for Weiner &  
24 Associates who said that he does not intend to press his  
25 objection. So he's also withdrawing his objection. I think in

1 one or both cases there was a misapprehension of what the  
2 debtors are trying to accomplish by this motion. So once we  
3 discussed that with them both have stood down from their  
4 objections.

5 THE COURT: Well, is it clear that you're not asking  
6 me to decide any rights between third parties?

7 MR. LHULIER: Well, I think so, Your Honor.

8 THE COURT: You are asking me to or are not asking me  
9 to decide rights between the landlord and others?

10 MR. LHULIER: Well, I guess what we're asking you to  
11 do is to confirm that the debtors are rejecting any type of  
12 monetary obligation that remains with respect to these leases  
13 that were assigned pre-petition. And what we don't think this  
14 order will do is affect any property interest that was assigned  
15 pre-petition.

16 THE COURT: That's not quite what you said in your  
17 motion, but why -- are you asking me to decide that issue, that  
18 it's not affecting or is that just your belief? I'm not making  
19 any ruling on that. In fact, it may under state law affect  
20 their rights.

21 MR. LHULIER: Yes, Your Honor. I guess as I was just  
22 saying what we had tried to accomplish by this motion was to  
23 affect the discharge ability of any monetary obligation that  
24 remains between the landlord and the debtors. We don't think  
25 that the effect of the order -- of the rejection should have

1 any effect on the property right interests of any assignee.

2 THE COURT: How can you say that? How do you know  
3 that?

4 MR. LHULIER: I guess we don't know that  
5 unequivocally, Your Honor, because it is a matter of state law.  
6 I guess what I would -- I guess what I can say is that the  
7 debtors would ask because the motion was served on all parties  
8 in interest including landlords if anyone disagreed what it was  
9 we were proposing and the order they had the opportunity to do  
10 that.

11 THE COURT: Well, that's different from giving me a  
12 basis for making any ruling. Whether somebody objected or not,  
13 what's the basis for me making this ruling?

14 MR. LHULIER: Your Honor, is it the order generally  
15 that's giving Your Honor -- that's concerning Your Honor or  
16 some specific language in the order?

17 THE COURT: Well, I'll enter an order allowing you to  
18 reject, period. But I'm not making any rulings as to what  
19 effect that may or may not have on other parties' rights.

20 MR. STANG: Your Honor, may I chime in for a moment?

21 THE COURT: Yes.

22 MR. STANG: This is a rejection of the contracts --  
23 the leases that were signed pre-petition and that as of the  
24 petition date we had a contractual -- we saw the contractual  
25 relationship with the landlords and we owed them rent, but the

1 property interest had already been conveyed. This is an  
2 assignment. Had already conveyed to the assignees. As to  
3 their property interest there's nothing executory remaining.  
4 The transfer was made --

5 THE COURT: And I'm not --

6 MR. STANG: -- we're not seeking to reject the  
7 debtor's side of that assignment. We're only trying to render  
8 our obligations to the landlords to be a dischargeable debt.  
9 And so when you said what's the basis for my determination that  
10 it has no impact, it's because as to the assignees there's  
11 nothing executory left.

12 THE COURT: My order's having no effect, period. If  
13 it's not executory I'm not making any ruling.

14 MR. STANG: The order does have specific language.

15 THE COURT: I know.

16 MR. STANG: Okay. Your Honor, if you would only  
17 approve this motion if that language was crossed out then we  
18 believe that we need to withdraw the motion in its entirety and  
19 renotice it. And the reason for that is that the assignees  
20 were told in the motion. What we're doing here or the order  
21 we're asking from the Court will say don't worry. And if we're  
22 going to come back and say you might worry that's not really  
23 fair to them to submit an order that is materially different  
24 from the one that was filed. And so we may have to try to  
25 figure out a way to skin the cat differently. What we're

1 trying to do is not interfere with the vested property rights  
2 of the assignees, but nonetheless render our contractual  
3 obligations to the landlords to a pre-petition obligation that  
4 will be discharged under the plan. If the only way to do that  
5 is to leave the assignees in doubt they may come in and object  
6 to what we're doing and there may be some kind of contingent  
7 claim that they'll have an opportunity to file.

8 Another way of doing this, which we discussed, but  
9 decided this would be more efficient is to do 180 assumptions  
10 and assignments to those assignees. Essentially doing again  
11 what we did pre-petition. Those raised issues of adequate  
12 assurance disputes and potential hundred cent cures that the  
13 debtor thought were less desirable than a rejection with some  
14 kind of comfort language for the assignees. But if your  
15 position is take out that paragraph regarding the effect on the  
16 assignees then we would like permission to withdraw the motion.

17 THE COURT: All right.

18 MR. STANG: All right, we should withdraw the motion?

19 THE COURT: Yes.

20 MR. STANG: All right.

21 MR. RICHARDS: Your Honor, if I may, the next item on  
22 the agenda is the debtor's motion for an order pursuant to  
23 section 365 approving the stipulation regarding an unexpired  
24 real property lease and sublease for 4576 Willow Road,  
25 Pleasanton, California and the rejection of that lease.



1 Briefly, Your Honor, the debtors seek to reject an  
2 unresidential real property lease and approve a stipulation  
3 between Fleming and its subtenant Quaker Sales and  
4 Distribution. Upon approval of the stipulation, Your Honor,  
5 Fleming will receive \$1.75 million from Quaker, up to \$100,000  
6 as reimbursement for amounts paid by the debtors for any  
7 rejection damages under 365 or 502(b)(6) as well as up to  
8 \$30,000 for any payments to be made under the prime lease on  
9 account of any pre-petition obligations.

10 Quaker has agreed to hold Fleming harmless in  
11 connection with any matters relating to rejection, termination  
12 of the sublease or any termination of the sub-sublease and  
13 Quaker has agreed to waive any right it has to pursue Fleming  
14 for claims relating to the rejection of the prime lease and  
15 rejection and termination of the sublease.

16 Your Honor, briefly there was an objection that was  
17 received from the landlord. It's our understanding that the  
18 landlord is not objecting to the motion of the stipulation, it  
19 simply wants to preserve its claims against the debtors and  
20 Quaker. Quaker has filed a response and, Your Honor, we  
21 believe that we have language that enables Quaker and the  
22 parties to preserve all of their rights in connection with the  
23 rejection of this sublease.

24 THE COURT: I didn't see any response by Quaker.  
25 When was that by?

1 MR. CARRIGAN: Your Honor, Daniel Carrigan for Piper,  
2 Rudnick for Quaker Sales and Distribution. It was filed on  
3 Friday, Your Honor.

4 THE COURT: Do you have a copy?

5 MR. CARRIGAN: The debtor has a copy.

6 MR. RICHARDS: Your Honor, may I approach with the  
7 copy?

8 THE COURT: Yes. All right. You're not asking me to  
9 decide the dispute between the landlord and Quaker?

10 MR. CARRIGAN: No, Your Honor, we just wanted to make  
11 it clear that the substantive claims that the landlord  
12 articulated in its response are disputed by Quaker and we  
13 believe by the debtor and we don't believe that there's any  
14 merit to it. However, the bottom line appeared to be that the  
15 landlord wished to preserve its right to make those claims in  
16 the future if they exist. And while we don't have objection to  
17 them doing that we want that reservation of rights to be  
18 reciprocal and to make it clear that we don't believe the  
19 claims exist at all.

20 THE COURT: All right.

21 MR. RICHARDS: Your Honor, we've included language in  
22 a revised order of which I'm sharing with counsel for the  
23 landlord to confirm that they don't have an objection.  
24 Essentially all of the parties are preserving their rights.

25 THE COURT: Okay.

1 MR. RICHARDS: May I approach, Your Honor, with a  
2 form of order?

3 THE COURT: You may.

4 MR. RICHARDS: And, Your Honor, we apologize for not  
5 including the reply in the amended agenda. It ended up being  
6 filed after the time that we had filed the amended agenda.

7 THE COURT: All right, I will enter that order then.

8 MR. RICHARDS: Thank you, Your Honor.

9 MS. JONES: Your Honor, if we can step back to number  
10 47. Mr. Lhulier had said that we would interlinear the order  
11 with respect to the continuances. That is already in the  
12 order, Your Honor, so no interlineation is necessary and if I  
13 could submit this back to the Court.

14 THE COURT: You may.

15 MS. JONES: Your Honor, with respect to the fee  
16 applications that are listed on the agenda, Your Honor, if I  
17 can quickly walk through the sum that we've agreed to continue  
18 and I can tell, Your Honor. With respect to number 50 there  
19 was a certificate of no objection filed. Fifty-one there also  
20 was a certificate of no objection filed.

21 THE COURT: With respect to all the fee applications  
22 I haven't had a chance to look at them and I'll simply continue  
23 them generally and if I feel a hearing is needed with respect  
24 to any I'll list it. Okay?

25 MS. JONES: Your Honor, I think the only one that we

1 did not, if I can tell, Your Honor, with respect to 52, Price  
2 Waterhouse, we had agreed to continue that to the fourth in any  
3 event. Fifty-three, Your Honor, Baker Botts. A representative  
4 of Baker Botts is on the phone. I have not been involved in  
5 those discussions. I believe there was an agreement with the  
6 trustee for more time on that and I just wanted to make sure  
7 that November 4 works consistent with their agreement.

8 MR. CASTILLO: This is Mark Castillo, Baker Botts,  
9 Your Honor. I believe that --

10 THE COURT: You got cut off. You believe that that  
11 is okay?

12 MR. CASTILLO: Yes, Your Honor.

13 THE COURT: All right. That's a yes.

14 MS. JONES: And, Your Honor, with respect to number  
15 54, Pachulski, Stang we have been talking with the Trustee's  
16 Office and we were going to ask Your Honor to continue that to  
17 the 4th in any event.

18 THE COURT: All right.

19 MS. JONES: Fifty-five, 56, 57, there were  
20 certificates of no objection. Fifty-eight, Your Honor, Ernst &  
21 Young, they have now filed an order under certificate of  
22 counsel with the Court. I'd point that out just because it's a  
23 little different.

24 Fifty-nine, Kirkland, Ellis, they also have been in  
25 discussions with the US Trustee and we were going to ask for

1 that to go to the 4th of November as well. And also number 60,  
2 Your Honor, Blackstone, they have been in discussions with the  
3 US Trustee and we're going to ask to go to the 4th of November  
4 as well.

5           Sixty-one, Your Honor, is a certificate of no  
6 objection. Sixty-two, Your Honor, I understand that the issues  
7 with Rider Bennett have now been resolved and they will be  
8 submitting a proposed form of order to the Court under  
9 certificate of counsel.

10           THE COURT: All right.

11           MS. JONES: Your Honor, 63, the class action motion  
12 for further injunctive relief, that has been continued to the  
13 November 4 hearing. Same is true with number 64. That class  
14 action compelling discovery is continued to November 4. The  
15 same with number 65. Sixty-six, Your Honor, has already  
16 addressed.

17           That would bring us, Your Honor, to matters 67  
18 through 81 in connection with the notices of assumption and  
19 assignment and I'm going to yield to purchaser's counsel in  
20 connection with those.

21           THE COURT: All right.

22           MR. BENEDICT: Good afternoon, Your Honor, Mark  
23 Benedict appears for Associated Wholesale Grocers and AWG  
24 Acquisition, LLC. They also appear by the local counsel  
25 Selinda Melnik. On the telephone is Bob Walker, the company

1 representative who had previously presented proffered testimony  
2 with respect to adequate assurances.

3           Your Honor, the agenda identifies a number of matters  
4 with respect to assumptions and assignments to AWG. I would  
5 direct the Court's attention to docket item number 67, docket  
6 item 70, docket item 77, docket item 78, and docket item 81.  
7 Each of those are AWG items. As we have done at prior  
8 hearings, Your Honor, today we are moving forward only on  
9 undisputed matters. We are not moving forward on any contested  
10 matters. So each of these items, there's either no objection  
11 or an agreement.

12           If I may approach the Court with a form of order.

13           THE COURT: You may.

14           MR. BENEDICT: Copies of the order were made  
15 available to other counsel prior to the hearing so that parties  
16 could review the Exhibit A. It's a fairly short Exhibit A this  
17 time, Your Honor. There are only two pages and 35 contracts.  
18 We have communicated with counsel for Reed Supermarkets which  
19 is item number 29 on our Exhibit A. They have identified that  
20 they would like us to continue the Reed Supermarkets to the  
21 November 4 docket rather than put that on this order. We have  
22 interlineated the copy that we've handed up to the Court. So  
23 we would not be moving forward today on the Reed Supermarket  
24 contract. Contract number 7306.

25           Also, we would like to direct your attention on page

1 two of the exhibit, item number 32. There is a contract, it's  
2 a lease with Steffersons, Inc. And that is identified as per  
3 settlement. We'd announced at the prior hearing that we had  
4 reached agreement with Steffersons. There's a few other  
5 Steffersons contracts that are in the pipeline that will be  
6 coming up and we did want to identify that to the Court.

7           The remaining items here are items for which there  
8 have been no objection and with that being said, Your Honor,  
9 Your Honor, we have made a number of representations to the  
10 Court with regards to the adequate assurance evidence and that  
11 is, and I repeat again for the record, the adequate assurance  
12 evidence that we would be proffering in support of this order  
13 is limited only to those contracts listed on this order. We do  
14 not intend and we do not consider this testimony to be binding  
15 on any other contract parties to contracts which are not up  
16 today. So all of their rights to cross examine and challenge  
17 adequate assurances are all preserved and so we in no way  
18 intended to prejudice that.

19           With that being said, Your Honor, I would offer again  
20 Mr. Bob Walker who is on the telephone. His proffered  
21 testimony which we have now done on now four occasions for Your  
22 Honor. I don't intend to repeat it unless Your Honor desires  
23 me to. But Mr. Walker would testify again today as he has  
24 proffered at the prior three hearings, Your Honor.

25           THE COURT: All right, I need not hear it again.

1 Does anybody else wish to hear Mr. Walker's proffered  
2 testimony? All right, I'll accept the testimony proffered at  
3 the prior hearing.

4 MR. BENEDICT: Thank you, Your Honor.

5 THE COURT: And there being no objection I will  
6 approve the fourth supplemental order.

7 MR. BENEDICT: Thank you, Your Honor.

8 MR. CARRIGAN: Jim Carrigan, Your Honor, for  
9 SuperValu, Incorporated. With me appearing telephonically is  
10 William Evanoff my co-counsel from Sidley Austin in Chicago. I  
11 have for today a form of order to the third supplemental order.  
12 It pertains to only one contract which we're going forward with  
13 today. That is Lamberts Food Incorporated and I will give it  
14 to you if I may approach.

15 THE COURT: Yes. Which motion -- excuse me, notice  
16 are you relating to on the agenda? Do you have the number?

17 MR. CARRIGAN: I don't have the number. It relates  
18 to 71, 75 and 79.

19 MR. EVANOFF: It relates particularly to your agenda  
20 item number 71.

21 THE COURT: Seventy-one, all right, thank you. You  
22 may hand that up then.

23 MR. CARRIGAN: As to the second supplemental order  
24 which contained additional contracts debtors counsel submitted  
25 that on October 3 via certification of counsel, but I also have



1 another copy if you'd like me to hand that to you.

2 THE COURT: No, I don't think you should. I did have  
3 that pulled. I don't know why it wasn't entered. It wasn't in  
4 chambers, but I will check on that.

5 MR. CARRIGAN: Thank you, Your Honor.

6 THE COURT: All right, anybody which to be heard on  
7 the third supplemental order or Lambert's contract? All right,  
8 I'll enter that order by agreement then.

9 MS. JONES: Your Honor, one other scheduling matter I  
10 understand in connection with the GLN matters that were heard  
11 last time in terms of scheduling at the very end of the  
12 hearing. Mr. Lapowsky and others said that they had one other  
13 scheduling matter they wanted to raise with the Court.

14 MR. LAPOWSKY: Your Honor, this is Bob Lapowsky. We  
15 have reached an agreement on a scheduling order, but at the --  
16 as we were working through it we discovered that Mr. Burger  
17 from Kirkland who will be trial counsel for Fleming is  
18 unavailable on the date that we had picked for the hearing the  
19 last time we were in court. That was January 7. We, GLN and  
20 the related retailers and I believe the C&S and AWG are  
21 agreeable to moving that date assuming that it can be moved to  
22 a date that's not too far beyond January 7. We were hoping for  
23 something in the week of January 19. If we can get something  
24 in and around there then we'd have resolution on our scheduling  
25 order and we can submit it on consent.

1 THE COURT: Well, I can't give you the 19th, but I  
2 can give you January 13th.

3 MR. LAPOWSKY: I think that -- that's fine with me,  
4 but I think it might be a problem for Mr. --

5 THE COURT: I think we lost you, Mr. Lapowsky.

6 MR. BENEDICT: If it please the Court, Your Honor,  
7 Mark Benedict for AWG. One thing I wanted to remind the Court  
8 in scheduling this matter --

9 THE COURT: Well, I don't know if we have Mr.  
10 Lapowsky.

11 MR. LAPOWSKY: I just came back on. I got a --  
12 teleconference operator came on and I couldn't hear anything  
13 else.

14 THE COURT: All right, go ahead.

15 MR. BENEDICT: Yes, Your Honor. We had discussed at  
16 the last docket the fact that there were a number of retailers  
17 hence we may need more than one day because there'll be  
18 specific items approved with regards to each specific retailer  
19 and so we had talked about breaking them up in groups. I  
20 believe we had talked about breaking them up first with the AWG  
21 group which was GLN, Something More, LLC and Kimbles on one day  
22 and then I think that C&S had identified that they thought they  
23 needed two days for their groups of retailers. I'm just  
24 letting you know for scheduling purposes what the parties have  
25 discussed.

1 MR. LAPOWSKY: I think -- is that Mr. Benedict  
2 talking?

3 MR. BENEDICT: It is, Mr. Lapowsky.

4 MR. LAPOWSKY: I think that we're confusing two  
5 different hearings. We had certainly said what you just  
6 described as it related to the motions to assume and assign.  
7 On the motion to compel where my clients are the movants I  
8 think we had agreed that would be one day and then we were  
9 requesting scheduling no sooner than 20 days after whatever our  
10 hearing date is on the motion to compel for the motions to  
11 assume and assign and that's where had said we would break it  
12 up between AWG and C&S. And that is actually reflected in the  
13 form of the scheduling order that we've circulated. I don't  
14 think we ever asked for more than one day on the motion to  
15 compel.

16 MR. BENEDICT: I agree, Mr. Lapowsky. I'm merely  
17 identifying that there are related issues that the Court will  
18 need to try to identify for its docket.

19 THE COURT: All right, is the 13th not available?

20 MR. WYNNE: Your Honor, it's Richard Wynne from  
21 Kirkland & Ellis. Mr. Burger is not on the line, but I believe  
22 he is not coming back until the 12th. The 13th is probably not  
23 optimal. Is there anything that is in the week of the 19th or  
24 the week of the 26th?

25 THE COURT: No, there is not.

1 MR. WYNNE: Okay, so we would have --

2 THE COURT: How about the 14th? He can have two days  
3 to prep.

4 MR. WYNNE: That would be fine. Thank you, Your  
5 Honor.

6 THE COURT: All right, the 14th okay, Mr. Lapowsky?

7 MR. LAPOWSKY: Yes, it is, Judge.

8 THE COURT: All right, 9:30 and I'll reserve the day.

9 MR. LAPOWSKY: Yes. And just one other thing that I  
10 had wanted to put on the record. It's not part of the order,  
11 but it's a concern of mine and that is that we have a legal  
12 issue -- actually two legal issues that are involved here. The  
13 incurable default issue and the integration issue and I'm  
14 trying to keep track of what other matters might be going  
15 forward in Fleming that present those issues to the Court and I  
16 had originally asked that there be something put in the order  
17 about that. Mr. Wynne objected and I think rightly so. That  
18 he didn't want to have an order that required him to advise me  
19 when something was happening on fear that he would end up being  
20 in violation of a court order, but I did want to put on the  
21 record that Mr. Wynne has agreed to try to inform me if other  
22 matters are going forward they were going to present these same  
23 legal issues so that I can do whatever I may feel like I need  
24 to do to not have these issues decided before I get to court.

25 THE COURT: All right, I guess that's the statement

1 of the agreement?

2 MR. LAPOWSKY: That's correct, Your Honor.

3 THE COURT: All right.

4 MR. BENEDICT: If it please the Court, Your Honor,  
5 Mark Benedict for AWG. The reason I mentioned the three days  
6 is that Mr. Lapowsky -- the scheduling contemplates going  
7 forward on the integration issues, what Mr. Lapowsky believes  
8 are the threshold issues and then depending on how those  
9 proceed, Your Honor, we've noticed out these contracts for  
10 assumption and assignment, we're ready to take these contracts  
11 as soon as the Court gives us the time to let us take these  
12 contracts to assume them, assign them and perform them. And so  
13 we do need those follow on dates or at least we like to reserve  
14 the follow on dates simply because we know how busy Your  
15 Honor's calendar gets and if we wait until the 14th we probably  
16 won't be able to have the hearing within a very short time  
17 period thereafter.

18 THE COURT: Well, that is true. And what was the  
19 party's agreement? Twenty days after?

20 MR. LAPOWSKY: Yeah, the party's agreement, Your  
21 Honor, was that none of the motions to assume or assign would  
22 be scheduled sooner than 20 days after and then we would be  
23 asking for one full trial day for AWG and two full trial days  
24 for C&S assumption and assignment.

25 MR. BENEDICT: Essentially, Your Honor, the first

1 issue to address is whether the contracts can be assumed. The  
2 second issue addresses what are the cures and the adequate  
3 assurance issues. The discovery order that we have entered  
4 with Mr. Lapowsky by agreement does provide for discovery on  
5 all of the issues.

6 THE COURT: Well, all I can do is give you two days.  
7 I'll give you February 5th and 6th. Then we'll take it from  
8 there.

9 MR. BENEDICT: Thank you, Your Honor.

10 MR. LAPOWSKY: Counsel, are you intending, since I've  
11 got this order, are you intending that I insert that in the  
12 scheduling order for the motion to compel? If you're able to  
13 do that that would probably make the most sense.

14 MR. LAPOWSKY: I can do it, but the question is which  
15 one is it that's going forward? AWG or C&S?

16 MR. BENEDICT: AWG with go on the fifth and C&S on  
17 the sixth. And what time, Your Honor?

18 THE COURT: Let's start at nine.

19 MR. LAPOWSKY: Actually, it's my suggestion that both  
20 start on the fifth in case AWG finishes early if we have extra  
21 court time.

22 MR. BENEDICT: Stack them?

23 MR. LAPOWSKY: Maybe stack C&S in the afternoon of  
24 the fifth. My only concern with that, Judge, is witnesses. I  
25 would -- from my perspective I would rather have -- I would

1 rather know which one is going forward on which day so I don't  
2 have retailers coming in. These are small retailers all in  
3 Louisiana and Oklahoma that would have to come in to  
4 potentially just sit around for the day. If we knew that C&S  
5 was on the sixth the people that are coming in for C&S could  
6 travel on the fifth. They wouldn't have to come in on the  
7 evening of the fourth.

8 MR. COBB: Your Honor, Richard Cobb on behalf of C&S.  
9 I'm happy to accommodate Mr. Lapowsky on that point. I'd hate  
10 to lose any time before Your Honor because I know how precious  
11 it is, but we've been long enough trying to resolve this  
12 scheduling order and Your Honor knows how the passage of time  
13 can affect the need for trial bases so we'll apply to the Court  
14 at a subsequent hearing to pick up that extra date.

15 THE COURT: That's fine. But February 6 you'll start  
16 at 10:30.

17 MR. LAPOWSKY: Nine o'clock on the 5th and 10:30 on  
18 the 6th, Your Honor?

19 THE COURT: Yes.

20 MR. LAPOWSKY: Thank you.

21 MR. RICHARDS: Your Honor, if we could briefly turn  
22 our attention to 45. There are -- this is the debtor's  
23 365(d)(4) motion. We've resolved, I believe, all objections  
24 with the exception of three that I think Your Honor will  
25 plainly see are not really (d)(4) objections. But I can

1 quickly run through the objections, Your Honor, if I may.

2 MR. LAPOWSKY: Your Honor, may I be excused?

3 THE COURT: You may.

4 MR. RICHARDS: On the agenda, Your Honor, the first  
5 item is Renaissance Plaza Associates. This has been resolved  
6 by a stipulation and we will be submitting the stipulation to  
7 Your Honor.

8 Berger-Epstein, a stipulation withdrawing the  
9 objection was submitted on October 17 under certificate of  
10 counsel.

11 With respect to the objection filed by the Robsons, I  
12 believe counsel for the Robsons is here in the courtroom and  
13 we've reach agreement with counsel for the objectors.

14 MR. KUNZ: Your Honor, Carl Kunz, Morris James on  
15 behalf of Frank Robson and Ludmila Robson. Your Honor, the  
16 parties have agreed to resolve the objection in the form of the  
17 following and that is that the debtors will have or C&S will  
18 have until February 23, 2004 to make a determination about  
19 whether they were going to assume or reject that lease. If  
20 they are going to assume it we are fine with the extension  
21 through March 31. If they are going to reject it they'll give  
22 us notice of that and the rejection will be effective on the, I  
23 believe, the day after, the 24th of February, 2004.

24 THE COURT: All right.

25 MR. KUNZ: Thank you.



1 MR. BENEDICT: If it please the Court, Your Honor,  
2 Mark Benedict for AWG. As a point of clarification, item  
3 number C with regards to Frank C. Robson the third party  
4 purchaser on those particular leases is AWG not C&S. Those  
5 rights have been designated to AWG. So it's AWG who'll be  
6 making that designation by February 23rd.

7 THE COURT: All right.

8 MR. RICHARDS: Thank you, Your Honor. The next item  
9 is IRET Properties. Your Honor, I think that we have resolved  
10 this objection although I don't know if counsel for IRET is  
11 present. And counsel for IRET is present. We have agreed to  
12 include language in the order and we have agreed on the  
13 language to be included.

14 MS. IORII: Good afternoon, Your Honor, Regina Iorii,  
15 Ashby & Geddes, counsel for IRET Properties, L.P. Your Honor,  
16 we have agreed that the order will include language  
17 specifically for IRET that provides that the debtors or  
18 actually the third party in this case, C&S will make a  
19 determination whether this lease is to be assumed or rejected  
20 on or before December 31, 2003 and that date may not be  
21 extended except with the written consent of IRET Properties.

22 THE COURT: All right. Thank you.

23 MS. IORII: Thank you, Your Honor.

24 MR. RICHARDS: Thank you, Your Honor. The next item  
25 on the agenda is an objection by B.C. Warner Investments. Your

1 Honor, we apologize, this was improperly listed. This relates  
2 to another motion. This relates to a motion to reject and  
3 therefore is not included in the 365(d)(4) motion.

4 The next objection, Your Honor, is by Conewago  
5 Contractors. The objection in part was as to the debtors being  
6 behind on the payment of taxes and insurance coverage. The  
7 debtors have made those payments, they were sent out over night  
8 on October 17. We have the check number and the tracking  
9 number and we believe that those amounts have been received by  
10 the landlord and I don't -- I'm not sure if the landlord has  
11 any continuing objections based on the receipt of payment.

12 MR. MERCHANT: Good afternoon, Your Honor, Michael  
13 Merchant of Richards, Layton & Finger on behalf of Conewago.  
14 We do have a continuing objection in that up until this morning  
15 when we received those payments the debtors still were in  
16 default of the 365(d)(3) obligations. On that basis alone we  
17 believe the motion should be denied with respect to our lease.

18 To the extent Your Honor disagrees with us with  
19 respect to our outstanding objections we believe that there are  
20 factual issues involved with respect to those bases and we've  
21 agreed with the debtor that we'll file a motion to compel and  
22 that'll be heard on a separate hearing date.

23 MR. RICHARDS: Your Honor, briefly as to the debtor's  
24 delinquency in satisfying some of its obligations. Very  
25 briefly, Your Honor, as you may recall the debtors sold a

1 significant portion of their assets to C&S. Under our  
2 agreement with C&S there is supposed to be a payment of sums of  
3 money to us. There has been a delay in the processing of those  
4 payments. The debtors are still working out that issue with  
5 C&S but have nevertheless made the payments that are required  
6 under the leases. It really was a cash flow issue, Your Honor,  
7 for the debtors. They have made those payments and will see as  
8 we go through all of these, Your Honor, that the debtors have  
9 made payments and will continue to make those payments.

10 THE COURT: Well, how can I be sure you're going to  
11 continue to make the payments?

12 MR. RICHARDS: Well, Your Honor, I would suspect that  
13 if the debtors are delinquent in the payment of other amounts  
14 that those landlords will bring a motion to compel.

15 THE COURT: I don't want to see any more motions to  
16 compel and I don't want to see any 20 objections to your  
17 motions to extend. I'd like to put in the order that if you  
18 miss a payment the lease is rejected.

19 MR. RICHARDS: Your Honor, I think that would be  
20 overly restrictive. And I understand Your Honor's concern and  
21 Your Honor's frustration because you have seen these motions.

22 THE COURT: Yes.

23 MR. RICHARDS: I would express to Your Honor that the  
24 debtors have a number of properties which they're dealing with.  
25 The debtors have also personnel issues which they're dealing

1 with. The debtors have people leaving all the time.

2 THE COURT: The debtor is unable to comply with 365  
3 therefore I should not order you to comply with the code  
4 because you can't?

5 MR. RICHARDS: Well, Your Honor, in part it's also a  
6 function of getting money from C&S which --

7 THE COURT: If C&S wants these properties and doesn't  
8 want them rejected and wants to preserve its option to assume  
9 these shouldn't it make sure you get the money or that the  
10 money gets paid directly to the landlord?

11 MR. RICHARDS: Your Honor, I think that's right, but  
12 that's something that we as the debtor don't have any control  
13 over. What I would suggest to Your Honor is this. Is that to  
14 the extent that the debtors are delinquent on other payments  
15 that landlords can come in on emergency basis --

16 THE COURT: They have that right. They can always  
17 come in and they can come in on an emergency basis. What are  
18 you offering them?

19 MR. RICHARDS: Your Honor, what we're offering them  
20 is what the debtors can do which is to timely comply with the  
21 lease. This, Your Honor, is a problem --

22 THE COURT: But you're not saying you're going to  
23 come timely. You're saying you're going to timely comply, you  
24 haven't do date.

25 MR. RICHARDS: Your Honor --

1 THE COURT: And you admit that you have problems in  
2 doing so.

3 MR. RICHARDS: Your Honor, it is a problem that is  
4 outside of the debtor's control. We are doing everything we  
5 can to move as expeditiously and quickly as possible. The  
6 debtor has a significant number of leased properties that are a  
7 significant cash obligation of the estate.

8 THE COURT: Let's continue this and I'll hear my four  
9 o'clock. But I'm not satisfied with the debtor's performance  
10 to date on these and I don't think it's incumbent on the  
11 landlords, every landlord to come in here and tell you that you  
12 have to comply with 365. You have to comply with 365.

13 MR. RICHARDS: Your Honor, the debtor recognizes its  
14 need to comply.

15 THE COURT: Well, without a sanction I don't think  
16 the debtor does recognize its obligation to comply. And maybe  
17 you should talk with C&S or AWG or whatever other party you  
18 think is responsible. Let's take a break and I'll hear my  
19 three o'clock.

20 (Break)

21 THE COURT: What can we finish between now and five?

22 MR. RICHARDS: Your Honor, I think that we can get  
23 through -- as I said before we've resolved most of these  
24 issues. Perhaps what we can do, Your Honor, is work through  
25 the objections that I think we've resolved as quickly as we can

1 and then to the extent there are remaining issues we'll take  
2 them up with Your Honor and we'll try to hammer through them as  
3 quickly as we can. May I proceed?

4 THE COURT: Yes.

5 MR. RICHARDS: Thank you, Your Honor. Obviously  
6 Conewago raised an issue on 365(d)(3). Perhaps we can deal  
7 with that at the end because that's still an open issue that we  
8 need to address with Your Honor.

9 THE COURT: Yes.

10 MR. RICHARDS: Grand Island Properties, Your Honor, I  
11 believe has been resolved.

12 MS. MILLER: Good afternoon, Your Honor, Kathleen  
13 Miller on behalf of Grand Island Properties. Our concern was  
14 with the extension of time. We've talked to AWG and the  
15 debtor. They've both agreed that my client, the landlord, is  
16 free to speak with the sub-tenant to see if they can reach an  
17 agreement on a lease and with that they'll withdraw the  
18 objection to this motion.

19 THE COURT: All right.

20 MR. BENEDICT: If it please the Court, Your Honor, on  
21 behalf of AWG that's the substance of our agreement.

22 MR. RICHARDS: Your Honor, I believe counsel for  
23 Inversiones is here, but perhaps out in the hallway so we'll  
24 pass over that and we'll come back to that, Your Honor.  
25 Brigantine Town Center, I believe, Your Honor, has been

1 withdrawn. Your Honor, Warrensburg Venture -- Your Honor,  
2 counsel has informed that one of the checks that has been sent  
3 has not yet been received. They are agreeable with the entry  
4 of an order subject to timely -- subject to their receipt of  
5 payment of the rent that is due and the check that we have  
6 sent.

7 THE COURT: All right.

8 MR. RICHARDS: Okay. Your Honor, Dutton Mills is  
9 still open so I'd like to move that to the end. Goldstein  
10 management, Your Honor, I believe has been resolved, but  
11 counsel for Goldstein is here as well so I'll let counsel for  
12 Goldstein speak.

13 MR. MEYERS: In terms of the actual amount received,  
14 yes, and the concept, no.

15 MR. RICHARDS: Okay, so I'm going to put him for the  
16 end please, Your Honor. And then, Your Honor, the other two  
17 are also open, LPL Properties and Meridian Plaza. Your Honor,  
18 if I can take these up at this time. Briefly, Your Honor, LPL  
19 Properties of California is claiming that we have failed to pay  
20 for repair and maintenance of a parking lot. Your Honor, it's  
21 our understanding that the damage that they alleged having been  
22 done to the parking lot and therefore the repair obligation  
23 arose in October of 2002. So we believe this is a pre-petition  
24 repair obligation, Your Honor, and therefore is not something  
25 that is a post petition obligation. Nevertheless, LPL's

1 counsel is here and LPL, I believe, is agreeable to entry of an  
2 order extending our 365(d)(4) time because LPL has also filed a  
3 motion to compel compliance with the lease terms or in the  
4 alternative assumption and rejection of the lease. That motion  
5 has been scheduled for November 4 and I think with that  
6 understanding LPL's issues are resolved as to this motion.

7 MR. THOMPSON: Good afternoon, Your Honor, Christina  
8 Thompson of Morris James on behalf of LPL. What Mr. Richards  
9 said is correct. I just have a brief statement I'd like to  
10 read into the record. That's basically that we've resolved our  
11 objection with the understanding that the entry of the order  
12 today is without prejudice to LPL's right to request that the  
13 extension as to LPL be shortened and to request that the debtor  
14 comply with its repair obligations under its lease with LPL.

15 On Friday, October 17, 2003 LPL filed its motion  
16 seeking to shorten the time frame for assumption and rejection  
17 of its lease with the debtor and to compel compliance with  
18 section 365(d)(3). Hearing on that motion is scheduled for  
19 November 4. LPL believes that the debtor is in default under  
20 its lease and reserves the right to raise such arguments at its  
21 hearing on November 4. Thank you, Your Honor.

22 MR. RICHARDS: Your Honor, then the next one that I'd  
23 like to take up is Meridian Plaza. Your Honor, very briefly on  
24 Meridian Plaza they've identified bonus rent which becomes due  
25 on November 1 of 2003. Your Honor, we think that that part of



1 their objection is not timely because we haven't hit that date  
2 yet. We fully expect to pay whatever bonus rent is due and  
3 owing under the lease in accordance with our (d) (3)  
4 obligations.

5           The other objection of Meridian Plaza, Your Honor, is  
6 that there is a repair cost they allege of approximately  
7 \$265,000. This is based on a report dated August of 2002, Your  
8 Honor, and again, we assume that this is a pre-petition  
9 obligation that we are not required to perform under 365(d) (3).  
10 We have not seen any statement in the motion, Your Honor, that  
11 says that the property has deteriorated on a post-petition  
12 basis. And if there is, Your Honor, that would be an  
13 evidentiary issue that we would need to have Your Honor decide.  
14 But this is based on a pre-petition report and therefore we do  
15 not believe it's a (d) (3) obligation of the estate.

16           THE COURT: All right, let me hear from Meridian. Is  
17 there anybody here from Meridian Plaza? All right, I'll  
18 overrule the objection then.

19           MR. RICHARDS: Thank you, Your Honor. That brings us  
20 to, I think we have left, Conewago and Inversiones and Dutton  
21 Mills. And perhaps, Your Honor, the next one that we can --  
22 and Goldstein Management. I think those are the ones we have  
23 open. Perhaps, Your Honor, what we can do is we can take up  
24 the Dutton Mills objection, please.

25           THE COURT: All right, I'll hear from the objectors.

1 MS. DONOGHUE: Good afternoon, Your Honor, I'm Julie  
2 Donoghue from David I. Walsh & Associates and I represent  
3 Dutton Mill Joint Venture, L.P. Our argument is based on  
4 several factors all of which are basically the same. That we  
5 don't believe cause exists for a second extension of time for  
6 the debtors to assume and assign or reject the following  
7 unexpired real property leases. One of the things that we had  
8 primarily an objection about was the fact that the debtor  
9 continues to not timely make payments post-petition. I've had  
10 to file three different either an objection or a response. The  
11 first was on July 28 which was in response to the cure amount  
12 being set at zero. The debtor at that time had not paid cam  
13 charges and also unpaid taxes.

14 Again, I had to file a motion on August 28. This was  
15 in response to several of the notices that I received that the  
16 contracts were being assumed and assigned and I wanted to  
17 protect our position to say that we still had unpaid amounts  
18 due which were cam charges and again taxes.

19 And then this past Monday I had to file another  
20 objection to this second request for an extension of time based  
21 on the fact that for approximately seven weeks the debtors had  
22 not paid real property taxes which were in the amount of about  
23 \$40,660.32. Now on Friday I did receive a check for that  
24 amount, but this does not cure all of the objections that we  
25 still have.

1           Based on the fact that we know for a fact talking to  
2 counsel for the sub-tenant and also to the tenant himself that  
3 there has been an agreement reached with at least 37 retail  
4 grocery stores. This agreement is between Fleming and C&S. We  
5 know for a fact that several of the terms are very much set.  
6 They know the parties, they know the price, they have set forth  
7 at least five major terms.

8           MR. RICHARDS: Your Honor, if I may object, Your  
9 Honor. I think counsel is testifying as to certain facts. I  
10 don't know if there's a witness present. We strongly dispute  
11 the facts and we've discussed this. So if there is a witness  
12 who can testify to these facts we'd like the opportunity to  
13 cross examine --

14           MS. DONOGHUE: I can proffer at least an affidavit  
15 from the management for the real property for Dutton Mill which  
16 states that she has been told on at least two occasions by the  
17 sub-tenant --

18           THE COURT: Well, do you have an affidavit --

19           MS. DONOGHUE: Yes, I do.

20           THE COURT: -- or you have this witness here?

21           MS. DONOGHUE: No, she's not.

22           MR. RICHARDS: Your Honor, very briefly. I tried  
23 resolving this issue prior to this hearing. There is no  
24 agreement that is in place or negotiations that are underway.  
25 There is no agreement, to our knowledge, that has been signed.

1 We've confirmed this with the debtor's representatives as well  
2 as the debtor's employees. There is no such agreement in  
3 place. If there is an affidavit here, Your Honor, I believe in  
4 accordance with your prior rulings the affiant needs to be  
5 available in the courtroom so that I can examine the witness.

6 THE COURT: Yes. I can't accept an affidavit without  
7 a witness available.

8 MS. DONOGHUE: Okay, Your Honor.

9 THE COURT: Do you want to continue this until  
10 tomorrow though?

11 MS. DONOGHUE: That would be great, Your Honor.

12 MR. RICHARDS: Your Honor, I think that we can  
13 resolve it because --

14 THE COURT: How?

15 MR. RICHARDS: How? Well, Your Honor, is the witness  
16 going to be available tomorrow in the courtroom?

17 MS. DONOGHUE: Yes, she will. Your Honor she'll  
18 testify to the extent and also if we need to we'll get the sub-  
19 tenant.

20 THE COURT: All right, the witness can appear by  
21 phone.

22 MS. DONOGHUE: Thank you, Your Honor.

23 THE COURT: Why don't I continue the remaining  
24 objections until tomorrow at two.

25 MR. RICHARDS: Your Honor, will the witness be made

1 available for a deposition tomorrow morning?

2 THE COURT: No.

3 MR. RICHARDS: Well, Your Honor, there's a  
4 significant fact dispute here.

5 THE COURT: And you'll have a chance to cross examine  
6 her.

7 MR. RICHARDS: But I need to understand what the  
8 testimony is going to be ahead of time. I mean, there's a  
9 significant fact dispute where someone is telling us that an  
10 agreement exists. We have no agreement, none exists, it is not  
11 --

12 THE COURT: And you can cross examine or present your  
13 witness to say the opposite.

14 MR. RICHARDS: Can we also ask that the -- since  
15 there is this agreement that they produce a copy of the signed  
16 agreement in court tomorrow?

17 MS. DONOGHUE: Your Honor, it has not been signed  
18 only because of the delay of the debtor.

19 THE COURT: I don't want to hear this dispute today.  
20 I will hear it tomorrow at two in full.

21 MR. RICHARDS: Okay. And then, Your Honor, with  
22 respect to the other unresolved items are you suggesting that  
23 we continue those tomorrow?

24 THE COURT: Let me hear from the other objectors.

25 MS. DONOGHUE: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. BALDWIN: Your Honor, David Baldwin, Potter,  
3 Anderson & Corroon. We represent Inversiones Ramiro SA, one of  
4 the landlords in Sacramento. Nougat Markets is a sub-tenant of  
5 ours, Your Honor, or sub-tenant of the debtors and they have  
6 built a new market down the street. We think they're about to  
7 leave imminently so -- and they have not been paying us though  
8 they've been getting paid by Nougat Market as far as we  
9 understand. So waiting until early February or March is not  
10 going to really be satisfactory to us because we understand and  
11 we don't think it's disputed that the sub-tenant is going to  
12 vacate and leave the premises dark so we'll be irreparably  
13 injured.

14 We understand from talking to counsel for C&S that  
15 they will undertake to advise us by the end of November if not  
16 sooner to whom the contract, to whom the lease will be  
17 assigned, to whom they proposed to have it assigned. And if  
18 that's the case we would like to be able to be on the omni  
19 hearing date of December 8 to have that issue presented to the  
20 Court. We also would like it clearly understood from the Court  
21 that they need to continue to make new payments and if they  
22 don't make the payments that the contract would be deemed  
23 rejected right away.

24 THE COURT: All right, let me hear from the debtor on  
25 that.

1 MR. RICHARDS: Your Honor, we've conferred with the  
2 assignee. The November date is agreeable to us as that date is  
3 fine and I think counsel also raised 365(b)(3) issue that was  
4 raised by another party that if we work with the other two  
5 objections I think we've got to figure out a global solution to  
6 that issue.

7 THE COURT: Are you going to pay them currently?

8 MR. RICHARDS: Yes, Your Honor, we will. But the  
9 issue is if we don't pay a particular amount that the lease is  
10 deemed rejected. The reason that's an issue, Your Honor, we  
11 have 1800 leases. To date we've had approximately 20  
12 objections and the objections always come out of we'll work in  
13 connection with the (d)(4) motion. Your Honor, this is the  
14 second extension. We don't expect that we'll be back before  
15 Your Honor for a third, but most importantly, Your Honor, this  
16 is a huge lease portfolio and when you look at the fact that  
17 out of 1800 leases there is one percent of the leases.

18 THE COURT: The bankruptcy code says you will pay  
19 timely. It also says that you don't get -- it doesn't say you  
20 get extensions of time. It gives you one shot. You're past  
21 it.

22 MR. RICHARDS: Oh, it says that the debtor may apply  
23 to the Court for cause to extend.

24 THE COURT: Right.

25 MR. RICHARDS: And I think that based on the rulings

1 out of this district and a number of other courts that when a  
2 case of this size, with this complexity, given the number of  
3 moving pieces, given the fact that we have disposed of a retail  
4 division and a wholesale division which accounted for \$12  
5 billion of company revenue --

6 THE COURT: And conditioned on the debtor complying  
7 or evidence that the debtor is, in fact, complying with  
8 365(d)(3). You're not complying with 365(d)(3) by your own  
9 admission.

10 MR. RICHARDS: Your Honor, I would submit that in  
11 almost all instances we are, that a number of disputes that  
12 you've heard before, Your Honor, today relate to pre-petition  
13 issues, relate to pre-petition payments and as a result, Your  
14 Honor, we would submit that those are not (d)(3) issues. More  
15 importantly, Your Honor, to the extent that there is a  
16 disagreement between the debtor and a landlord over a payment  
17 amount, would you suggest that we simply defer to the  
18 landlord's judgment as to what the payment is if there's a  
19 dispute and then come back to Your Honor so you can turnover  
20 all those payments?

21 THE COURT: No, but I don't expect you to wait until  
22 the day before the hearing to make your 365(d)(3) payment.

23 MR. RICHARDS: And, Your Honor, I understand that and  
24 I accept that.

25 THE COURT: What sanction do you suggest that I



1 impose on the debtor for its failure to comply with the code?

2 MR. RICHARDS: Well, Your Honor, I would think that  
3 in several instances I suspect that for those payments where  
4 rent has been paid late the leases provide that there is an  
5 interest rate at which the debtors are required to pay based on  
6 the untimely payment of rent. I would think that that would be  
7 something that would be an appropriate type of sanction given  
8 the fact that the payment was not made timely by the debtor,  
9 but --

10 THE COURT: They also impose attorney's fees often.  
11 Do I have to pay or have the unsecured creditors pay these  
12 attorneys to file objections and show up at these hearings?

13 MR. RICHARDS: Your Honor, again, the debtors have  
14 undertaken their best efforts as best they can to pay all of  
15 the rent as in when it is due. And Your Honor, admittedly in a  
16 case of this size, of this complexity there have been leases  
17 that have not been paid timely. And the record reflects that,  
18 we're not disputing that. But I think, Your Honor, given the  
19 totality of the circumstances, the totality of the leases, the  
20 totality of the chaos that the debtors have undergone, I have a  
21 witness, Your Honor, in the courtroom who is very able and  
22 willing to testify as to the significant reduction in  
23 personnel, reduction in knowledgeable personnel, cash  
24 management issues that the company faces simply from the  
25 standpoint of being able to process checks between Dallas and

1 Oklahoma City where the company's two data processing centers  
2 are located. I can identify all of those things, Your Honor,  
3 but I understand that Your Honor is looking for a sanction.

4 THE COURT; Yes.

5 MR. RICHARDS: And Your Honor, the best sanction that  
6 I can identify is the debtor's will agree to timely pay the  
7 rent, that the debtors shall be required to comply with the  
8 terms of the lease and if the debtors have not paid timely that  
9 the landlords would be entitled to interest at the rate set  
10 forth in the lease and if the landlords want to seek payment of  
11 attorney's fees, Your Honor, then they can do that. But I  
12 think given again, the totality of the circumstances here, Your  
13 Honor, I think it's fair and incumbent to recognize that a  
14 company of this size, of this complexity, with the number of  
15 issues this company has faced in such a short period of time --  
16 and Your Honor, this issue has been in front of you in  
17 connection with the fee applications as an example simply from  
18 the standpoint of the number of issues that these debtors have  
19 faced and the amount of work that has gone on to these cases in  
20 the first four months is truly tremendous. And I would submit  
21 that Your Honor should take that into consideration when  
22 determining whether or not cause exist. And I would think  
23 given the facts here a cause does exist. We have a small  
24 portion of leases that have not been paid timely. But, Your  
25 Honor, the debtors will do everything they can --

1 THE COURT: Why should not with respect to this  
2 landlord say that it's rejected unless he's paid timely?

3 MR. RICHARDS: As to this landlord, Your Honor, if  
4 that's what you'd like to say then that's fine.

5 THE COURT: Surely the debtor can assure that one  
6 landlord is paid timely.

7 MR. RICHARDS: Yes, Your Honor, and paid timely in  
8 accordance with the terms of the lease so there may be a grace  
9 period or if there is the opportunity to dispute a payment  
10 under the lease. Whatever the lease provides we will pay in  
11 accordance with the terms of the lease.

12 THE COURT: All right, I will order it with respect  
13 to this objecting landlord.

14 MR. RICHARDS: Okay, so that was Inversiones, Your  
15 Honor.

16 MR. BENEDICT: Your Honor, thank you. Your Honor, if  
17 the Court is still looking for a sanction our client is  
18 \$116,000 behind in payments and we have had to retain counsel  
19 to file this objection and come in here and sit all day and  
20 those expenses would probably be a reasonable and measured  
21 sanction to the debtor's failure under the code.

22 MR. RICHARDS: And, Your Honor, the only point that I  
23 would make as to that is to the extent that people are filing  
24 objections or filing motions to compel payment, oftentimes we  
25 find out these amounts were wrong and it's a function of

1 dispute between the parties which the debtors work very hard to  
2 resolve. And I think it's --

3 THE COURT: I'm simply saying if you don't pay it  
4 timely for this landlord it will be deemed rejected. I'll deal  
5 with any requests for attorney's fees at a later time.

6 MR. RICHARDS: Okay, very well, Your Honor. Your  
7 Honor, I think that the same issue pertains as to --

8 THE COURT: Conewago and Dutton Mills? Will that  
9 satisfy the objecting parties?

10 MR. RICHARDS: I'm not sure about Dutton Mills, but  
11 perhaps with the other two parties I think that may satisfy  
12 their issues, Your Honor.

13 MR. MERCHANT: Your Honor, Mike Merchant of Richards,  
14 Layton & Finger again, on behalf of Conewago. That would  
15 satisfy my client.

16 THE COURT: All right.

17 MR. MEYERS: Good afternoon, Your Honor, Jeffrey  
18 Meyers representing Goldstein Management. We filed our  
19 objection based upon non payment of rent. We did receive a  
20 check in the amount of almost \$18,000 which is appreciated, but  
21 in our view we're still owed another \$16,000. Candidly, Your  
22 Honor, we're not really looking for a rejection, just looking  
23 to get paid so our view would be that if the debtor makes  
24 representation they will make a good faith effort to pay us in  
25 a timely manner that's good enough for us, but we do preserve

1 our rights to request attorney's fees should there be a motion  
2 to assume and assign.

3 THE COURT: All right.

4 MR. MEYERS: Thank you.

5 MR. FOURNIER: Your Honor, David Fournier on behalf  
6 of the Creditors Committee. Your Honor, I'm not here to stand  
7 as an apologist for the debtors with respect to 365(d)(3)  
8 obligations. I will note that with the substantial number of  
9 leases and less than one percent error rate, if you will, in  
10 compliance with their obligations --

11 THE COURT: Well, I'm not sure I can assume that it's  
12 a less than one percent error rate. Less than one percent is a  
13 little objective, but --

14 MR. MEYERS: My comments go to that point. I might  
15 suggest that with respect to the order that Court's going to  
16 enter that a contact person be inserted in the order or  
17 accompany the order when it's noticed on parties so that in the  
18 future if there is an issue that a particular landlord has with  
19 respect to what they believe to be a default in a (d)(3)  
20 obligation in the first instance, instead of coming to court  
21 and taking up the Court's time and incurring the expense, they  
22 can contact that person by email, perhaps and that way perhaps  
23 we can short circuit the process and ensure that landlords are  
24 treated fairly without potentially incurring expenses to the  
25 estate that really come out of my constituencies' recoveries.

1 THE COURT: That's a good suggestion. I think the  
2 debtors should designate and in future motions to assume and  
3 assign or anything dealing with the landlord secure issues,  
4 etcetera the debtor should designate a person who will respond  
5 to any landlord inquiries about those issues.

6 MR. RICHARDS: Your Honor, I think that's a good  
7 suggestion. What's not clear to me, is that a representative  
8 from the debtors or the Committee or?

9 THE COURT: I think the debtors.

10 MR. FOURNIER: I think it should be a business person  
11 if the debtor --

12 (Laughter)

13 THE COURT: Well, I think Mr. Fournier was  
14 volunteering to answer that call.

15 MR. RICHARDS: That's fine, Your Honor. And I did  
16 hear the comments that have been made by Goldstein Management  
17 and we very much appreciate their willingness to continue to  
18 work with us. We think that's very kind of them and we  
19 appreciate that. So Your Honor, I think that the only  
20 remaining objection is the objection of Dutton Mills which the  
21 parties will seek to resolve over the course of the next 18  
22 hours. And if we're not able to do so regrettably we'll be  
23 before Your Honor tomorrow at 2:00.

24 THE COURT: All right. What else do we have? Forty-  
25 two.

1 MR. STANG: We had the Miami Foodco matter, Your  
2 Honor. Number 42.

3 THE COURT: Can we do that tomorrow, too?

4 MR. STANG: That's fine, Your Honor.

5 THE COURT: Is that all that I have --

6 MR. STAND: There is a question though and I realize  
7 the clock is ticking. Again, there were two sets of  
8 objections. One from Miami Foodco, one from Minkin. I've been  
9 asked by the Miami Foodco lawyer to inquire as to whether the  
10 replies that were filed, ours about two weeks ago, theirs about  
11 a week ago, are sufficient to take matter under submission. I  
12 do have really no more than five minutes of comments on their  
13 papers which were the last filed. Minkin, there was no reply  
14 filed by the debtor and that would require, I think, a little  
15 more time.

16 THE COURT: I think I'll decide it tomorrow based on  
17 the pleadings and if you want to give any additional argument.

18 MR. STANG: Okay.

19 MR. RICHARDS: Thank you, Your Honor.

20 MR. STANG: Because it's relatively circumscribed  
21 perhaps I'll have to negotiate who goes first between me and  
22 Mr. Richards.

23 THE COURT: Well, I'll give you an hour at 2:00.

24 MR. STANG: I'm not going to volunteer to be the  
25 contact person to get priority, but we'll see what we can work

1 out.

2 THE COURT: All right, we'll stand adjourned.

3 \* \* \* \* \*

4 CERTIFICATION

5 I, KIMBERLY A. UPSHUR, certify that the foregoing is  
6 a correct transcript to the best of my ability, from the  
7 electronic sound recording of the proceedings in the above-  
8 entitled matter.

9

10 Kimberly A. Upshur Date: October 30, 2003  
11 KIMBERLY A. UPSHUR  
12 J&J COURT TRANSCRIBERS, INC.  
13