

1 reserve would be the \$39 million. We are in -- trying to  
2 finalize our negotiations and our borrowing base negotiations  
3 with the DIP lenders to actually file a replacement financing  
4 motion this week. So, that's one of the reasons why we didn't  
5 want to simply continue this. We did continue it previously so  
6 we could try to work through all of the accounting issues. The  
7 one issue that, unfortunately, Your Honor, we thought that  
8 there had been an understanding with the follow-on purchasers,  
9 or Mr. Lapowsky did. That appears not to have happened. There  
10 does appear to be willingness, at least, on the part of C&S and  
11 AWG and the follow-on buyers to go through, in short order, and  
12 verify that the amounts that are outstanding are the amounts  
13 that we're outstanding as of the 23rd. They're not prepared to  
14 do this today, Your Honor. Unfortunately. What I'd like to  
15 suggestion, Your Honor, is if we could have, perhaps, a short  
16 continuance of something like a week on this so that we can try  
17 to resolve at least that issue.

18 THE COURT: Well, when is your next hearing?

19 MR. WYNNE: Our next hearing is the 23rd, Your Honor.

20 THE COURT: Well, why don't we continue it until  
21 then?

22 MR. WYNNE: Your Honor, the problem is that we may  
23 not have a resolution then with our -- with our takeout  
24 financiers, and as Mr. Stenger testified, we're trying to have  
25 a replacement loan motion heard on January 5th, so that we

1 would not be put in the position of having to go forward with a  
2 Core-Mark sale, and we do have to deal with all of the bidders  
3 for Fleming Convenience for the Core-Mark division between now  
4 and then, which is why we wanted some certainty that we thought  
5 we would be able to achieve the replacement DIP financing.  
6 That's why it all interacts.

7 THE COURT: Well, if you can get the banks to agree  
8 that this is a separate reserve I'll reduce it to 40 million.

9 MR. WYNNE: Your Honor, I don't -- I'm not sure why  
10 they would agree to simply lose on a priority issue that, you  
11 know, they've not briefed, they've not -- there's not been any  
12 evidence to it, and why they would simply agree to that. What  
13 I --

14 THE COURT: Otherwise I'll continue it to the 23rd.

15 MR. WYNNE: Your Honor, is there any time in-between  
16 now and the 23rd?

17 THE COURT: No. And I have another -- I'm going to  
18 recess. I'll hear the rest of your matters, if I have time, at  
19 the end of the one o'clock today. I have an 11:30, 12:30 and  
20 one to hear -- well, you're one.

21 MR. WYNNE: We're one o'clock, so we'll come back  
22 after one o'clock, Your Honor?

23 THE COURT: All right.

24 MR. WYNNE: Okay.

25 THE COURT: We'll stand adjourned.

1 (At this time other matters were heard)

2 MR. WYNNE: Through the agreement, we don't have  
3 final approval from the committee, which we need, and also the  
4 numbers are going to be verified by C&S and AWG, which is part  
5 of the reason why we would seek to submit this by Friday --  
6 hopefully before Friday.

7 The objecting parties would agree, as would we, that  
8 we would reduce the reserve to \$39 million, plus add  
9 approximately \$1 million, which could cover some interest  
10 accrual, so it would be a \$40 million reserve. That is subject  
11 to C&S and AWG confirming that the amounts that we have on our  
12 Exhibit A would be a cap on the note amounts due as of August  
13 23rd. So, we'd have a fixed date that Exhibit A list, if that  
14 would have to be adjusted, obviously, that would be adjusted,  
15 but assuming the numbers we have today.

16 THE COURT: Okay.

17 MR. WYNNE: We would agree, as would they, there was,  
18 apparently, some -- part of the concern was there was some  
19 references that the committee had made with respect to  
20 reservation of rights, with respect to the reserve that caused  
21 some concerns at the sale hearing, and the committee, subject  
22 to their final approval, has agreed that we would agree with  
23 the note holders and the banks that the reserve -- this \$39  
24 million reserve is for both the banks -- the pre-petition and  
25 the DIP lenders, and the note holders, subject to reduction by

1 settlements, but that it is not something where the committee  
2 has reserved rights to seek pari passu treatment. The  
3 committee's reservation, as I understand it, was really aimed  
4 at if they -- if the setoff claimants did not have something by  
5 way of secured setoff rights, or something, they would be on a  
6 level playing field with other unsecured creditors. They didn't  
7 want to have them elevated if the Court didn't find that they  
8 had a claim to specific setoff rights analogous to a secured  
9 creditor. So, I think with that statement in the order we  
10 would be fine.

11 Third point, Your Honor, is that the, approximately  
12 \$35 million released from the reserve, we would agree to seek  
13 to have that paid over to the banks, and that would go to the  
14 pre-petition lenders, because I believe the DIP lenders -- all  
15 the letters of credit, to waive outstanding our cash  
16 collateralized. So, it's really it would just be that we would  
17 agree to have that paid down to the pre-petition lenders. A  
18 fourth point, Your Honor, with respect to -- we're also going  
19 to endeavor to conclude the settlements that have been pending  
20 with a bunch of Mr. Lapowsky's clients, the documents have been  
21 floating around on 18 of the 21. We're going to try to attempt  
22 to conclude those by Friday, and hopefully we will, and Mr.  
23 Lapowsky will be able to sign off on this, and there's an  
24 additional client of his that we have a settlement that we've  
25 discussed in the interim, that we may present. We've presented

1 it to the lenders and to the creditors' committee, and we may  
2 submit that by way of a separate stipulation or settlement  
3 motion, depending upon what that involves.

4 I believe that that are the terms of it. We would  
5 need to have Mr. Lapowsky sign off on the order, assuming that  
6 we could submit it on Friday. If we don't get committee  
7 approval, I think we have tentative lender approval to this.  
8 If we don't get the committee approval -- we haven't been able  
9 to reach all the committee members to do that, we would then -  
10 - or if Mr. Lapowsky's clients, who he has not been able to  
11 reach on all the points of these agreements either, then we  
12 would inform the Court, on Friday, that we didn't have an  
13 agreement, and ask the Court to reschedule this for hearing.  
14 We would ask the Court, leave it on for the 23rd, and we would  
15 seek, if something opened up on Friday, and if we were able to  
16 seek a hearing date before then, we would ask the Court on  
17 Friday.

18 THE COURT: All right.

19 MR. LAPOWSKY: Your Honor, Robert Lapowsky for  
20 various retailers. Just a couple of clarifications. The --  
21 Mr. Wynne had said that the committee was signing off, in other  
22 words, not going to be asserting any priority rights in the  
23 fund. What we had discussed was having the order affirmatively  
24 state that the only claimants to the fund would be the setoff  
25 claimants, the DIP lenders and the pre-petition banks. So, you

1 remember I had the concern about an unlimited universe of  
2 potential claimants. That was one thing that we said we were  
3 going to try to resolve in this order.

4           The second thing is, that the money that would get  
5 paid to the banks -- to the pre-petition banks, roughly \$35  
6 million, they would agree that to the extent they had any  
7 priority in the fund, that money would reduce dollar for dollar  
8 the amount of that priority.

9           And then, lastly, just to reiterate, because this is  
10 important to me, we have an agreement that since I have not --  
11 not only not spoken about some of these points with my clients,  
12 I haven't spoken with any of these -- about any of these points  
13 with my clients. That if, for any reason, I'm unable to sign  
14 off on the order by Friday, then no order would be submitted,  
15 no order would be signed, and then the mater would be carried  
16 to the 23rd.

17           THE COURT: I think that's understood if all the  
18 parties don't agree, then nothing is submitted.

19           MR. WYNNE: I thought I was clear. There is just one  
20 thing, and Mr. DeNatale's raising, and we'll deal with this  
21 later, and I don't think Your Honor needs to, necessarily, get  
22 into it, but the lenders have not agreed that, with respect to  
23 the priority, that's why they're getting paid down the \$35  
24 million, but we'll have to discuss that after. I think Mr.  
25 Lapowsky didn't understand one part of it, or maybe doesn't

1 agree with one part it.

2 THE COURT: All right.

3 MR. WYNNE: We'll either have an agreed upon order on  
4 Friday, Your Honor, or we'll seek to have a continued hearing.

5 THE COURT: All right.

6 MR. LAPOWSKY: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MS. MANDEL: Lena Mandel, again, for the committee.  
9 I think slightly contradictory statements have been made with  
10 respect to the committee's position, so I just want to clarify  
11 it. The committee's position is that to the extent Your Honor  
12 finds that the setoff rights have not been extinguished by the  
13 sale, and they, in fact, exist and constitute secured claims,  
14 then the committee does not claim any priority over such  
15 secured set of rights. However, if Your Honor decided that the  
16 setoff rights have been extinguished, the committee's position  
17 is that the setoff claimants have no rights senior or superior  
18 to the rights of general, unsecured creditors to the fund in  
19 question.

20 MR. BENEDICT: Your Honor, if it please the Court,  
21 Mark Benedict for AWG. I think that the recitation that the  
22 debtor has stated is acceptable to AWG. As of August 23rd, and  
23 just for clarity sake, which I think it is clear that if  
24 there's any accruing fees or interest after August 23rd, we're  
25 not waiving the right to collect anything that arises after

1 August 23rd.

2 THE COURT: Right.

3 MR. BENEDICT: Thank you.

4 MR. WYNNE: Your Honor, could we stipulate that goes  
5 to -- for C&S too, to save C&S's counsel from also joining --

6 THE COURT: Yes. Do I need to hear anymore? There's  
7 either a deal, which I'll get on Friday, or there isn't.

8 MR. KUNZ: That's fine, Your Honor. Carl Kunz. I  
9 just want to make sure I get a copy of the order when it's  
10 circulated.

11 THE COURT: All right.

12 MR. RILEY: Your Honor, Richard Riley. I wasn't  
13 involved in any of these negotiations. I joined in to Mr.  
14 Lapowsky's objection. My objection is still on there, so I  
15 would like to see the order and be involved in any of the  
16 settlements going on.

17 THE COURT: All right.

18 MR. RILEY: Thank you.

19 THE COURT: All right. Well, I'll expect a  
20 certification that deals with everybody who's here today, or  
21 I'll see you on the 23rd. There were three matters that I  
22 understood are left. When can we hear them?

23 MR. WYNNE: Number 30, the estimate of the numbers --  
24 Number 30, we thought it would take approximately 15 minutes.  
25 Number 34, I'm seeing two hours. Thirty-seven also 15 to 30



1 minutes, and the Hagenbarth matter, an hour to an hour and a  
2 half. And that -- what agenda item is Hagenbarth? Oh, it's  
3 the one o'clock agenda. Excuse me.

4 THE COURT: All right. Well, I have tomorrow  
5 afternoon free. Are the Hagenbarth parties available?

6 MR. SUDELL: Your Honor, William Sudell. I think Mr.  
7 Williams and I are in agreement that we think about an hour for  
8 the remainder of the evidence, maybe less, but we don't know --

9 THE COURT: All right.

10 MR. SUDELL: -- whether you would want argument or  
11 not.

12 THE COURT: I don't know. I'll wait until after I  
13 hear the evidence. Why don't I put you on at one o'clock  
14 tomorrow, is that good?

15 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

16 MR. SUDELL: Thank you.

17 MR. WYNNE: Your Honor, we also have an agreed order  
18 on Number 64, that everyone had signed off on. If I could hand  
19 that up, Your Honor, it's revised?

20 THE COURT: All right.

21 (Pause)

22 THE COURT: All right. All right. I'll enter that  
23 order then. Well, are all the parties here with respect to  
24 Number 30?

25 MR. WYNNE: Yes, Your Honor.

1 THE COURT: Let's see if I can finish that before  
2 five.

3 MR. WYNNE: Your Honor, there were some issues on 34  
4 with respect to scheduling, that I think some of the parties  
5 wanted to address, perhaps, first.

6 THE COURT: Okay.

7 MR. LAPOWSKY: Your Honor, Robert Lapowsky, Stevens  
8 and Lee.

9 MR. WHALEN: Your Honor, Tom Whalen, of Stevens and  
10 Lee, with us today is Dan Flanigan of the law firm Polsinelli  
11 Shalton and Welte, a member in good standing in the bar -- in  
12 the courts in Missouri, and I'd like to move his admission pro  
13 hac vice, and we will follow-up with the appropriate paperwork  
14 tomorrow.

15 THE COURT: All right. He will be heard.

16 MR. FLANIGAN: Your Honor, appearing for Chouteau  
17 Development, I35 Development, LLC, we have three witnesses in  
18 here from Kansas City, and one of them -- two of them really,  
19 but one of them especially, has problems for tomorrow and we  
20 would hope to get this on today.

21 THE COURT: Well, I can't stay after five, so I don't  
22 know how I can hear it. But, what are the witnesses going to  
23 tell me? Is it your position that I don't have jurisdiction?

24 MR. FLANIGAN: Yes, Your Honor. Plus if you do think  
25 you do have jurisdiction, then we need to tell you a story

1 about other reasons that you should not grant this application,  
2 including 365(E)(1) and including the fact that the debtors  
3 admitted it's a non-assumable, non-assignable contract, and  
4 we're also going to ask you for -- if you're going to give them  
5 any relief that they request to give us immediate relief that  
6 they request to give us immediate relief from stay under 362(F)  
7 of the codes so that we can go out and stop them from doing  
8 that.

9 THE COURT: Well, let me hear from th debtor what  
10 modified order you thought was appropriate?

11 MR. PARIS: Your Honor, essentially, the modified  
12 order takes out of the order that was submitted. The specific  
13 approval of bid procedures and the auction procedures.  
14 Although we still intend to follow those procedures we don't  
15 see it as being necessary for the Court to order that. We are,  
16 simply, asking you for freedom under 363(D)(1) to exercise our  
17 rights to cause the liquidation of the Chouteau Company and  
18 those -- auction will be followed in due course.

19 THE COURT: Well, that's not what you actually asked  
20 for in your motion.

21 MR. FLANIGAN: Your Honor, and it's still is a  
22 backdoor adjudication of all the basic issues. They just  
23 handed me a copy of their new proposed order, ordered that  
24 Fleming is the owner of the controlling interest in Chouteau,  
25 LLC is authorized, and that's on behalf of Chouteau, Your

1 Honor, is authorized to execute and deliver the purchase  
2 agreement with Rushmore Chouteau. That involves an  
3 adjudication that they have the right to do that, and  
4 implicates all of these jurisdictional issues, ordered that  
5 Fleming is the owner of the controlling interest. Of course,  
6 controlling interest as to what is the issue of whether they  
7 can sell this property on behalf of Chouteau, is authorized to  
8 direct Rushmore or the successful bidder to make payment of the  
9 purchase price directly to Fleming. That's, of course, a  
10 matter of the LLC agreement. It's state law, and is for a non-  
11 bankruptcy tribunal --

12 THE COURT: Well, can I have a copy of the modified  
13 order?

14 MR. FLANIGAN: May I also point out, Your Honor, the  
15 order purports to be effective immediately, and I don't believe  
16 this is one of the types of orders that can be effective  
17 immediately.

18 (Pause)

19 MR. PARIS: Your Honor, the modification to the order  
20 was simply intended to address a concern that was raised by the  
21 -- by I35 that somehow this Court was reaching out too far to  
22 exercise its jurisdiction over property of Chouteau by  
23 approving the bid procedures. It wasn't necessary that the  
24 Court take that action and actually approve the bid procedures  
25 as we had requested in the original order, but if it is -- if

1 that's preferable to Your Honor I'll be happy to redraw the  
2 revised order and go back to the original order and we can  
3 proceed on that basis.

4 THE COURT: No. Their argument was that I don't have  
5 jurisdiction to authorize a sale of property that you don't  
6 own.

7 MR. PARIS: I understand that, Your Honor.

8 THE COURT: That a debtor does not own.

9 MR. PARIS: Yes. But their argument is fundamentally  
10 incorrect, because we are not asking you to order the sale of  
11 property not owned by the debtor. We are asking you to free up  
12 Fleming to exercise its property interests in the LLC.

13 THE COURT: Whatever that is.

14 MR. PARIS: Whatever that is.

15 THE COURT: You're -- in this order you're asking me  
16 to decide what your property interest is.

17 MR. PARIS: We're asking you for freedom to exercise  
18 those rights. If they have a problem with the exercise of the  
19 rights, then they have a contractual remedy for that, which is  
20 to bring an arbitration action in the State of Oklahoma, which  
21 they have not sought to do. The only reason we're --

22 THE COURT: Well, because they think they need relief  
23 from the stay to do that.

24 MR. PARIS: Well, they have not filed for relief from  
25 stay either, Your Honor. This motion has been on the calendar

1 for several weeks, and they haven't sought that either. Now,  
2 the issue is the only reason we're here, Your Honor, is because  
3 of this bankruptcy. If we were not in bankruptcy we would have  
4 just exercised our options, our rights to liquidate the company  
5 --

6 THE COURT: And you wouldn't have a court order  
7 saying you had that right to do that. If you want relief from  
8 the stay --

9 MR. PARIS: We're not seeking relief.

10 THE COURT: -- allowing them relief from the stay and  
11 go do whatever you think you have the right to do free of my  
12 deciding whether you have a right under the LLC to do that, and  
13 that's one issue.

14 MR. PARIS: Your Honor, we have a property interest  
15 in the LLC.

16 THE COURT: You have a 51 percent interest in the  
17 LLC.

18 MR. PARIS: Right. Which under Oklahoma code is the  
19 personal property of the member.

20 THE COURT: What do you want me --

21 MR. PARIS: That makes the property of this estate --

22 THE COURT: -- to do with that? Do you want me to  
23 allow you to sell that 51 percent interest? I would have  
24 jurisdiction over that.

25 MR. PARIS: Yes. And we also want you -- well --

1 THE COURT: Well, that's not what you've asked.

2 MR. PARIS: We want you to authorize us to do two  
3 things, to direct our managers to proceed in the due course  
4 under that agreement to liquidate the company, which is set out  
5 in Article 12 of the LLC operating agreement, and we want you  
6 to allow Fleming --

7 THE COURT: Well, do I have jurisdiction to interpret  
8 the LLC document to determine whether or not you have that  
9 right?

10 MR. PARIS: At a threshold level you must -- you do  
11 have that jurisdiction. It is a legal question that invokes  
12 the property interest of Fleming. It is a property interest  
13 under 541(A) of the code, property of the estate.

14 THE COURT: That does not mean I have to decide every  
15 issue relating to your property interest. For example, you may  
16 be a tenant, and I may not have jurisdiction to decide what  
17 your rights are or are not under that. In the context of  
18 assumption and assignment, yes, but in other contexts, no.

19 MR. PARIS: All we're asking for is for you to lift  
20 the prohibition that we have on exercising our rights.

21 THE COURT: What prohibition is there?

22 MR. PARIS: The prohibition that requires us to seek  
23 your approval under 363(B) for a sale of -- for us to use our  
24 rights and to release the mortgage that we have on the  
25 property. There's really two elements to this. There's the

1 mortgage that Fleming holds, that I35 has no interest in at  
2 all, that Fleming holds that 11 and a half million note secured  
3 by a mortgage on the property --

4 THE COURT: Now, what authority do I have to direct  
5 any buyer of that property to pay you directly?

6 MR. PARIS: You have the authority under the fact  
7 that when Fleming exercises its property rights in the LLC, the  
8 manager will proceed according to the terms of the contract,  
9 and according to the terms of Oklahoma law to wind up the LLC  
10 and Chouteau will be signing -- will be signing over the  
11 property to the buyer. And then the buyer can pay Fleming.

12 THE COURT: Haven't you skipped a lot of steps in  
13 asking me to enter this order?

14 MR. PARIS: I don't believe so, Your Honor. We have  
15 to have the freedom to be able to exercise our rights under  
16 that contract.

17 THE COURT: Under Section 959 of Title 28 you have  
18 that freedom. If you want to sue anybody, you can sue anybody  
19 for a post-petition event. If you're operating, anybody can  
20 sue you. The Bankruptcy Court doesn't have jurisdiction over  
21 every single issue involved in your case.

22 MR. PARIS: Right. I understand that, Your Honor.  
23 But --

24 THE COURT: You're not selling the 51 percent  
25 interest that you hold, you the debtor?



1 MR. PARIS: We are doing two things. We are  
2 releasing the note that Fleming holds, and the mortgage that  
3 Fleming holds on its own, and we are directing our managers to  
4 wind up the company -- the managers of the LLC to wind up the  
5 company.

6 THE COURT: That's --

7 MR. PARIS: And that is -- it is legal issue --

8 THE COURT: -- you think you're authorized to go  
9 ahead do that, why am I involved?

10 MR. PARIS: Because under 363(B)(1), in order for us  
11 to use our property we must seek -- that is outside the  
12 ordinary course of business, we must seek your authority. The  
13 statute is clear on that.

14 THE COURT: All right. They want relief from the  
15 stay to allow them to go ahead and exercise whatever rights  
16 they have under the LLC agreement?

17 MR. FLANIGAN: And if it was the sentence that Your  
18 Honor just spoke, that's understandable and acceptable, even  
19 though what they want to do is crazy, and I would -- if you'd  
20 let me make a coherent argument to you, I could convince you of  
21 that, but they go way beyond that and they have you,  
22 essentially, decide these other issues. And, in terms of me  
23 not filing a motion for relief from stay, and I don't admit  
24 that we have to have the stay, but you can betcha they will  
25 take the position in the next five minutes, that we do have to

1 have relief from the stay. This is a bait and switch deal.  
2 They filed this motion on November 18th asking the Court for  
3 approval to sell a non-debtors property. We filed a  
4 substantial objection to that, and low and behold, they changed  
5 the entire motion last Thursday night, and now, apparently, are  
6 going to proceed on some other basis. I think I'm entitled  
7 under 362(F), without notice in a hearing because they're going  
8 to auction this property off next Monday. And do you know  
9 what, Your Honor? With their attitude they may sell it  
10 tomorrow. Under the purchase agreement they don't have to hold  
11 an auction. So, I need relief to go Oklahoma, Missouri, and  
12 who knows where else I'll have to go to try and stop this, and  
13 they don't have any urgency to this motion. If Your Honor  
14 wanted to hear our stay relief motion, which, first of all,  
15 they've conceded that these issues are supposed to be  
16 adjudicated in a non-bankruptcy forum in their reply. So, why  
17 don't they just agree and stipulate to our relief from stay,  
18 and, all that would have to happen is Your Honor put off this  
19 sale, don't allow them to do the sale until we've had time,  
20 one, to get stay relief, and two, to go out and get an Oklahoma  
21 and Missouri court to hear us.

22 MR. PARIS: Your Honor, there is no requirement in  
23 the contract that we seek the approval of an arbitrator prior  
24 to exercising our rights to wind up the company. There's no  
25 requirement in Oklahoma law that we obtain a declaration from

1 the Oklahoma courts or a Missouri court that the company is in  
2 dissolution, and that we should, therefore, go forward and  
3 dissolve it. We are allowed to do this on our own. The reason  
4 there is --

5 THE COURT: Well, but you're relying on an ipso facto  
6 clause.

7 MR. PARIS: No, I disagree with Your Honor.

8 THE COURT: Why are you allowed to dissolve simply  
9 because you filed bankruptcy. Isn't that your basis?

10 MR. PARIS: Article 12 specifies the dissolution  
11 procedures for the LLC, one of which triggering event is a  
12 filing of a bankruptcy. However, I35 does not have the  
13 standing to assert that as a defense to our winding up of the  
14 company.

15 THE COURT: It doesn't have the right to assert that  
16 as a defense?

17 MR. PARIS: No. The case law that we've cited in the  
18 reply brief makes it clear that the section that they're  
19 relying on, which is 365(E)(1), only is assertable by a debtor.  
20 It is not assertable by the trustee. I mean --

21 THE COURT: It's assertable the defense by the debtor  
22 -- you're asserting it as a sword.

23 MR. PARIS: Excuse me. Assertable by I35. We're  
24 asserting it -- we're not asserting it as a sword, Your Honor.  
25 I mean, the parties agreed --

1 THE COURT: Sure you are.

2 MR. PARIS: -- when they entered into this contract  
3 that the LLC would be wound up if a party entered into  
4 bankruptcy. Now, that's a -- the ipso facto clause is a  
5 defense that's intended to protect debtors from other parties  
6 seeking to terminate their contractual relationships against  
7 the debtors wishes. Here, it is in the best interest of the  
8 debtors' estate, which I can show you by the evidence that  
9 we've put forward and by the person -- people I have here in  
10 the courtroom that will show you that this is in the best  
11 interest of the Court -- of the debtors' estate and, therefore,  
12 we ought to be able to go forward with that. Furthermore, the  
13 Third Circuit law, which we also cited in our reply brief shows  
14 that the section that they're relying on, 365(E), for the  
15 supposed ipso facto is not applicable in this situation.

16 MR. FLANIGAN: Your Honor --

17 MR. PARIS: It's only applicable in an assumption  
18 rejection situation, and even then it wouldn't apply because of  
19 the subsequent section 365(E)(2). It just doesn't work here.

20 MR. FLANIGAN: Your Honor, they've completely missed  
21 described the Waskob case, and I'd like to read you some  
22 passages from it, because the Third Circuit supports exactly  
23 our position. 365(E)(1) it self-executes. It doesn't say it's  
24 enforceable when the debtor wants it to be, and not when the  
25 debtor does not want it to be. It just says that those causes

1 are not enforceable. It says, "Notwithstanding a provision in  
2 an executory contract, an executory contract may not be  
3 terminated or modified." It doesn't say, just by the non-  
4 debtor party. It says may not be terminated or modified.  
5 Waskob, in that case, the Third Circuit held that a husband's  
6 bankruptcy filing did not effectuate a dissolution, because the  
7 wife, who was the non-debtor had, all along, treated the  
8 husband as a partner and continued to acknowledge the  
9 partnership. So, if the non-debtor party consents to the  
10 assumption, then 365(E)(1) is applicable.

11 I'll read four quick quotes from Waskob, "Because  
12 there is no evidence that Lea, the wife, did not consent to  
13 remaining partners with Victor during the period in which he  
14 had become a debtor." And the evidence would be since the  
15 bankruptcy filing we've treated Fleming consistently as a  
16 member, and they've acted like a member until November 18, when  
17 they made this dissolution claim.

18 "During the period in which he had become a debtor we  
19 hold that neither 365(C)(1), nor 365(E)(2)(A) precluded or  
20 limited the application of 365(E)(1). By their terms,  
21 365(C)(1) and 365(E)(2)(A) are applicable to executory  
22 contracts only when the non-debtor party does not consent to  
23 the assumption or assignment at issue. If they ever try to  
24 assume an assignment we will consent to it. Subsections 365(C)  
25 and 365(E)(2) will prevent a debtor in bankruptcy from

1 continuing to serve as a partner, however, only when a non-  
2 debtor partner does not consent to continue in the partnership  
3 of the debtor."

4           And, finally, "In light of these facts we find that  
5 Lea effectively consented to remain partners with Victor,  
6 despite his debtors status and, thus, the 365(C)(1) and  
7 365(E)(2)(A) do not apply. That being the case, we concluded  
8 that 365(E)(1) is fully applicable here, and therefore,  
9 Victor's bankruptcy filing did not result in the dissolution of  
10 the Legend's partnership." And if there -- if they happen to  
11 be right about that, then think what they're saying. They're  
12 saying that they admit it's a non-assumable contract, and yet,  
13 they want to take the most radical possible action under the  
14 contract, which is to take all acts in dissolution and sell his  
15 property without the consent. On a contract, not just that  
16 they haven't assumed, but according to them they cannot assume,  
17 and in terms of their theory, Your Honor, Section 6.6(K) I've  
18 already pointed out to the Court, but the clincher is 6.6(I),  
19 which requires 100 percent consent of all the LLC members to do  
20 any act in dissolution, liquidation of the partnership. So,  
21 the theory doesn't work on any level.

22           MR. PARIS: Well, in answering the Waskob argument,  
23 that quote that Mr. Flanigan read said exactly our point, which  
24 is that those -- that provision, 365(E) applies in the context  
25 of an assumption or a rejection. We're not in a context of an

1 assumption or a rejection. Also, we did not admit or concede  
2 that we cannot assume this contract. We said that the contract  
3 was not assignable, not that it wasn't assumable.

4 MR. FLANIGAN: There was no assumption or rejection  
5 motion in Waskob. It does not stand for that at all. Waskob  
6 was a removed case because the husband's executors took the  
7 position that the wife could not exercise an option to purchase  
8 because there had been a dissolution, and she'd lost her right  
9 because of the passage of time after the dissolution.

10 MR. PARIS: Your Honor, the bulk of 365 is directed  
11 at context of assumption or rejection starting with 365(A).

12 THE COURT: Well, but (E) doesn't deal with  
13 assumption assignment specifically, and 365 deals with  
14 executory contracts, generally.

15 MR. FLANIGAN: Your Honor, you'll find no case,  
16 whatsoever, allowing the debtor to take actions, especially  
17 actions that will harm another party to a contract when the  
18 contract cannot be assumed. This isn't a pending assumption or  
19 rejection situation. It's what they -- look, it's either  
20 365(E)(1), which invalidates the ipso facto clause and their  
21 whole theory is premised on that, or as the -- their admission  
22 that it's non-assumable, non-assignable. There is a case, In  
23 Re Tuttler, 165 BR 275, that prevented a trustee of a partner's  
24 bankruptcy estate from liquidating partnership assets, quoting,  
25 to allow the trustee to liquidate the underlying assets of the

1 partnership, would be to grant him management prerogatives  
2 where he has none. To have such management prerogatives the  
3 trustee would have needed to assume the contract. And, 12.1,  
4 Your Honor, if you'll look at it, actually says they're not a  
5 member anymore upon the occurrence of a triggering event. Yet,  
6 even though they're not a member anymore, even though they  
7 haven't assumed the contract, even though the contract is not  
8 assumable, even though 6.6(K) and 6.6(I) say there has to be  
9 100 percent consent for what they're doing, they want to do all  
10 this. And then they don't want me to have relief from stay to  
11 be able to do something about it.

12 MR. PARIS: I am not really sure what more I can say  
13 here, Your Honor. The contract clearly sets out dissolution  
14 provisions. There is no case that Mr. Flanigan has cited that  
15 says that the ipso facto clause argument can be raised by a  
16 non-debtor. It is intended for the protection of the debtor.  
17 We cited two cases for that principle, the Liberty Mutual case,  
18 and the Southern Pacific Funding case of the Ninth Circuit that  
19 we cited in our reply brief. The Waskob case, I believe, we  
20 disagree on what that case means and what that case stands for.  
21 We believe that it stands for the fact that, in the Third  
22 Circuit, the 365(E) prohibition is only applicable in the  
23 assumption and assignment context. Furthermore, by the  
24 operation of 365(E)(2), (E)(1) is rendered inapplicable in this  
25 circumstance where the contract is not assignable. You go back



1 to state law and you look at Oklahoma, which says, go back to  
2 the agreement, which then says that the contract is not  
3 assignable. It's a complicated issue, I agree, but I don't  
4 think that Mr. Flanigan in 135 can stand here and say that  
5 under -- that Article 12 is not enforceable because of the ipso  
6 facto clause. That turns the purpose of that on its head, and  
7 he's also wrong on the contract arguments, which I would be  
8 happy to get into. 6.6, it says that the managers must consent  
9 together, you need 100 percent consent of the members in order  
10 to sell the assets is clearly trumped by Article 12, which is a  
11 very specific, very detailed description of the dissolution  
12 provisions of the LLC, and it would make no sense at all, and  
13 it would render the mandatory dissolution provisions a nullity  
14 if you construe 12.3, which says, the managers shall act in  
15 dissolution upon a bankruptcy, among other triggering events.  
16 It would render that a nullity if you said, well, you also have  
17 to get permission from all the other members. That just  
18 doesn't make any sense.

19           Also, Section 12.1 spells out four ways that the  
20 company can be wrapped up that require dissolution. The first  
21 of which is a triggering event such a bankruptcy. That's what  
22 we're relying on. The second of which is the withdrawal of the  
23 member. The third is the expiration of the company, and the  
24 fourth is consent of all members. If consent of all members  
25 were required as he says under 6.6 then you wouldn't need any

1 of the other three at all. It would all just be the company  
2 shall be dissolved when all members consent. So, his reading  
3 of the contract would read the more general provision of 6.6  
4 over the more specific and detailed provisions of Article 12.  
5 It would render several provisions nullities in contravention  
6 to Oklahoma law, and this is an Oklahoma law contract, and  
7 those are things that the Court shouldn't do. And, this  
8 contract is not ambiguous. It doesn't require parole evidence  
9 to interpret this. These contract terms are clear on their  
10 face. You have a legal right in order to construe the  
11 contract, and a duty to do so.

12 MR. FLANIGAN: They are very clear on their face,  
13 Your Honor, and they don't even understand them. Article 12  
14 does not say what he's saying. Article 12 says the managers,  
15 in plural, must do all these things, which is perfectly  
16 consistent with partnership law and LLC law that managers have  
17 unanimity and a dissolution as well as at other times. Article  
18 12 doesn't say what they're saying at all. What they're trying  
19 to say is 6.1, which is the provision that says a majority in  
20 interest manager will control which applies to general  
21 operational management, and is overruled by 6.6 in two  
22 different instances applicable to this case. 6.6(I) is the  
23 very issue we're talking about. It says, you cannot liquidate  
24 the business of the company without unanimous consent of the  
25 members. What could be more clear. (K) says --

1 THE COURT: Well, I'm not going to decide the issue  
2 either way. This is not a matter for me to decide. I don't  
3 have jurisdiction over the real estate. If you think you have  
4 the rights, I'll allow the debtor to go ahead and pursue  
5 whatever rights the debtor believes it has and I'll  
6 concomitantly grant the other parties to the LLC the same  
7 right, relief from the stay, decide this in state court where  
8 it belongs.

9 MR. FLANIGAN: Thank you, Your Honor.

10 MR. PARIS: We'll submit a form of order for you,  
11 Your Honor.

12 THE COURT: All right. Run it by your objector.

13 (Pause)

14 MR. STANG: Ready, Your Honor?

15 THE COURT: Yeah.

16 MR. STANG: Your Honor, we are on Number 30, which is  
17 the debtors' motion to reject. There were two responses.  
18 NorthStar Refrigeration, which we would like to argue today,  
19 and we should have enough time to finish that, and the other  
20 one, which is being continued -- I think is AG -- Associated  
21 Grocers, which is being continued per the agenda letter.

22 THE COURT: All right. What's your argument, they  
23 say you have to buy the refrigeration equipment?

24 MR. STANG: Basically, what they say is that by  
25 virtue of our actions during the case we assumed a contract

1 whereby upon the sale of the Lacrosse Warehouse building we  
2 have to buy their refrigeration system, which they acknowledge  
3 in their opposition would be very expensive to remove, and even  
4 once removed would have very little value.

5           Your Honor, our position is that the contract was  
6 executory and it was entitled to be rejected, and even if we  
7 were to admit that actions we took during the case rendered the  
8 contract non-executory, in fact, the time for determining the  
9 executory nature of the contract is the date of the filing of  
10 the petition. We rely on Judge Ballek's ruling in Continental  
11 Airlines at 154 BR 172 in which she addressed the demands of  
12 some pilots to be hired by an airline because they had done  
13 something -- they had, potentially, agreed to continue working  
14 for, I think it was Eastern or Continental Holdings it was  
15 called, and that the date of the petition --

16           THE COURT: I'm, unfortunately, very familiar with  
17 the Continental Airlines case since I have it now, but I don't  
18 know how that applies --

19           MR. STANG: Well, because I don't think there was any  
20 dispute that the contract was executory on -- when we filed our  
21 bankruptcy petition.

22           THE COURT: All right. But the contract provides --

23           MR. STANG: They're claiming that it's non-executory.  
24 I'm sorry.

25           THE COURT: -- if you assume and assign the

1 warehouse.

2 MR. STANG: Well, we sold the warehouse, Your Honor.  
3 We had a fee interest in it.

4 THE COURT: When you sell the warehouse, that  
5 triggers the obligation to buy the refrigerated equipment.

6 MR. STANG: Right. And we think that the  
7 refrigeration agreement which contains the provision that  
8 they're talking about was an executory contract, which we have  
9 the right to reject. They suggest, and there's not much legal  
10 authority in their opposition, but they suggest in their prayer  
11 that somehow we assumed the contract during the bankruptcy  
12 proceeding. We have never filed a motion to assume this  
13 contract.

14 THE COURT: No, they're saying that your obligation  
15 matured, so it wasn't executory any longer.

16 MR. STANG: Well, if the contract isn't executory --  
17 it's a little hard to tell what they want in their pleading.  
18 If the contract wasn't executory, then we had a pre-petition  
19 contingent -- they had a pre-petition contingent claim. It's  
20 possible. Yet, in their prayer they're asking you to impose --  
21 not even fashion a motion to impose an administrative claim,  
22 but they're saying that we, somehow, assumed an administrative  
23 obligation of two and a half million dollars. Well, if the  
24 contract is executory, we get to reject it. It's a pre-  
25 petition claim. If the contract is not executory then it was a

1 contingent claim on the day of the filing. The contingency was  
2 our sale of the warehouse, and the fact that we sold the  
3 warehouse post-petition doesn't change the fact that it was a  
4 contingent claim as of the date of the filing.

5 THE COURT: Well, do you have any case law on this,  
6 either --

7 MR. STANG: Well, which way? I mean, I've got --

8 THE COURT: Either way.

9 MR. STANG: Well, the -- Your Honor, in Coast  
10 Training Company, a Ninth Circuit decision, 744 F.2nd 686, the  
11 Court considered an executory -- the Court considered the  
12 nature of a contract that was executory on the date of the  
13 filing, which became non-executory during the case.

14 THE COURT: Right.

15 MR. STANG: And what the Court said -- and it was,  
16 essentially, grain was in transit, and it was in transit on  
17 during -- on the day the case was filed. Debtor received the  
18 grain post-filing, and the question was, should there be a  
19 payment for the grain as an administrative obligation. The  
20 debtor received the benefit of the grain post-filing. The  
21 Court said, it was an executory contract on the day of the  
22 filing, and the fact that you got the grain post-filing created  
23 an administrative obligation because the contract was  
24 executory.

25 Here, this was simply an obligation to buy something.

1 This was not -- the state didn't receive anything over and  
2 above what already existed. I mean, counsel will tell you that  
3 the building was enhanced in value by virtue of the  
4 refrigeration system, but there's certainly no evidence to that  
5 effect, and they put this in the context of an opposition to a  
6 motion to reject. If they think they've got an administrative  
7 claim they file a request for administrative claim and try to  
8 show the benefit to you. But, what they have is either an  
9 executory contract, which we can reject, or a pre-petition  
10 contingent claim. The contingency was you lost two and a half  
11 million dollars, or whatever the buy off schedule is --

12 THE COURT: Or an executor contract that was fully  
13 performed post-petition.

14 MR. STANG: Your Honor, we never assumed the  
15 executory contract. You can't have -- in this circuit we can't  
16 have an implied assumption of a contract.

17 THE COURT: No, you can have fully performed.

18 MR. STANG: Well, Your Honor, there was no --

19 THE COURT: What happens in those circumstances?  
20 That's what I'm looking for on case law.

21 MR. STANG: Then the contract --

22 THE COURT: I have an employment contract. I sign it  
23 the day before bankruptcy.

24 MR. STANG: Then the contract -- then the contract is  
25 no longer -- I'm sorry, Your Honor.

1 THE COURT: I have an employment contract. I sign it  
2 the day before bankruptcy. It provides that if I work for a  
3 year I get a bonus. I work for the 364 days post-petition, am  
4 I entitled to the bonus, or is that a contingent claim as of  
5 the day of the bankruptcy?

6 MR. STANG: It is a contingent claim -- wait, wait,  
7 wait. I'm going to answer your question.

8 THE COURT: Do you have case law that tells me --

9 MR. STANG: It's a contingent claim by virtue of the  
10 contract, but you get something for working 364 days, as an  
11 administrative claim.

12 THE COURT: What do I get?

13 MR. STANG: I don't know. It depends on what the  
14 fair value --

15 THE COURT: The bonus?

16 MR. STANG: Well, I don't --

17 THE COURT: That's what I want to know, do we have  
18 case law on it?

19 MR. STANG: Let me explain to you why I don't know.

20 THE COURT: I know what you're arguing. I know your  
21 argument. Is there case law on this?

22 MR. STANG: Well, the decision of the Ninth Circuit  
23 says, the contract is executory, notwithstanding the fact there  
24 was performance post-petition, the contract can be rejected,  
25 but you have an administrative claim for the benefit of the



1 grain you receive.

2 THE COURT: All right.

3 MR. STANG: That's what the case says.

4 THE COURT: What cases do you have --

5 MS. MERSKY: Your Honor, I think it's a much simpler  
6 matter. It's just like a post-petition purchase. Under the  
7 terms of the contract it specifically says, Paragraph 8, "Prior  
8 to the closing of the sale of the building, the customer shall  
9 purchase the system and the price specified in Section 12 for  
10 the year of the sale, unless the company consents to assignment  
11 of the agreement to the purchaser of the building, which  
12 consent shall not be unreasonably withheld." At every step of  
13 the proceedings NorthStar Refrigeration filed limited  
14 objections informing the debtor of Paragraph 8 saying, if you  
15 sell this warehouse, you've bought it. It's just like buying  
16 apples post-petition. If you buy them post-petition you have  
17 to pay them post-petitioner's administrative claim. Here the  
18 debtors bought the property. There is case law, although  
19 limited, to the concepts of an assumed contract that something  
20 could be deemed assumed and assigned. I don't think that is as  
21 applicable as a specific language of this contract, which says  
22 it wasn't deemed assumed and assigned, it was purchased.  
23 However, as previously provided to debtors' counsel, under --  
24 there's a general proposition that the -- for the idea that a  
25 contract can be deemed assumed when the debtor knowingly

1 accepts the benefits of an executory contract, that's In Re  
2 Provident Hospital and Training Association, 187 West law  
3 383355, as well as matter of Rita, Inc. --

4 THE COURT: What court decided that?

5 MS. MERSKY: These are District Courts in Illinois --  
6 Bankruptcy Courts in Illinois. There is no Third Circuit  
7 authority. however --

8 UNIDENTIFIED SPEAKER: Wait. There's no Third  
9 Circuit --

10 THE COURT: Didn't University Medical Center say that  
11 you can't deem a contract assumed and assigned?

12 MS. MERSKY: I don't think deemed assumed and  
13 assigned is the better argument. I think there is an argument  
14 that you can have -- because the debtor got all the benefit  
15 from this, they were able to sell the warehouse with the  
16 refrigeration unit filled with \$10 million worth of product,  
17 and the debtor hasn't put on a witness explaining what their  
18 business judgment was in rejecting this contract. However,  
19 should such a witness be produced there would be cross  
20 examination to show what exact benefit to the estate, which was  
21 \$10 million of product was sold as part of this deal, and the  
22 warehouse has refrigeration unit. The contract here was  
23 specific. The debtor, post-petition, made a purchase. That  
24 purchase was defined in the terms of the contract. Just like  
25 any other purchase post-petition you have an administrative

1 expense. You can't reject a contract for something you've  
2 already purchased.

3 MR. STANG: Your Honor -- I'm sorry. I'm sorry. I  
4 thought you were done, Ms. Mersky.

5 MS. MERSKY: I think, Your Honor, that debtors'  
6 counsel is confusing the issues, particularly when you're  
7 trying to compare a grain contract where something was in  
8 transit. Here there wasn't something in transit. It wasn't --  
9 it was a clear contractual obligation. The debtors made an  
10 affirmative decision to sell the warehouse. They could have  
11 rejected this contract prior to the sale. Those chose not to  
12 because it was to their economic advantage. They took the  
13 risk. They purchased this and now they have an executory  
14 obligation that has become ripe. It is now a purchased  
15 refrigeration equipment and the contract provides for the price  
16 under --

17 MR. STANG: Your Honor, you beat me to it. Not only  
18 University Medical Center, but also County's Contracting  
19 Construction Company --

20 THE COURT: All right.

21 MR. STANG: -- both say, there's no such thing as  
22 implied assumption. Secondly, I don't -- the opposition from  
23 NorthStar sets forth, in its own words, why we're rejecting  
24 this contract. We don't own the warehouse anymore. There's a  
25 refrigeration system there. That refrigeration system, by

1 their own admission is too expensive to remove, and once  
2 removed has no value. It's on the last page of their  
3 opposition. They have used our own words. If need be, Mr.  
4 Sharp is present. Mr. Sharp could testify to the same effect,  
5 but they've told us why, and that's what this is about.  
6 They're trying to find someone to buy the refrigeration system.  
7 The fact of the matter is, it's either executory, it's either a  
8 contingent claim, or -- and I really wasn't going to go into  
9 this, but just to -- if we wanted to muddy the waters a little  
10 further, they're almost claiming like they have a security  
11 interest in the property itself, by somehow -- there's this  
12 lien on our right to sell the building with a contract that, of  
13 course, was never recorded. It just seems that what they've  
14 got is, for them, a bad deal. They've got a refrigeration  
15 system they don't know what to do with. Super Value doesn't  
16 want it. We cant use it, and they've got a piece of equipment  
17 that's, by their own words, too expensive to remove and once  
18 removed of no value.

19 MS. MERSKY: Your Honor, there's no claim that  
20 there's a lien in this statement of the argument. The argument  
21 is very clear. They bought it pursuant to their contractual  
22 agreement. They purchased it post-petition. They have a  
23 benefit, if they own this unit they can sell this unit. They  
24 can sell this unit whenever Super Value and Fleming elect to  
25 sell the warehouse, which is now, apparently, vacant. However,

1 at the time they sold this warehouse, the sold the warehouse as  
2 a major asset of the estate with significant inventory where  
3 they needed the refrigeration equipment. They needed the  
4 refrigeration equipment to sell it. They sold it. They bought  
5 it under the terms of the contract. They made the decision not  
6 to reject this contract. When they timely could have rejected  
7 it, they could have rejected it prior to the Lacrosse sale. As  
8 I said, at every step of the way this client has not sat on its  
9 rights. It did file limited objections.

10 THE COURT: Well, they could have rejected your  
11 contract before they sold the real estate, you admit that?

12 MS. MERSKY: Yes.

13 THE COURT: With no obligation to buy the equipment?

14 MS. MERSKY: That is correct, Your Honor.

15 THE COURT: There was no assumption of it before they  
16 sold the real estate?

17 MS. MERSKY: That is correct, Your Honor.

18 THE COURT: There can't be a deemed assumption in  
19 this circuit.

20 MS. MERSKY: But, Your Honor -- excuse me.

21 THE COURT: Is what your suggesting -- if what you're  
22 suggesting, isn't that a restriction on their ability to sell  
23 the real estate free and clear of the liens and interest?

24 MS. MERSKY: They could have sold the -- they could  
25 have rejected the contract and sold the real estate. The real

1 estate would have been sold, and Northwest (sic) would have had  
2 to deal with the situation. But they chose to sell the real  
3 estate with the enhanced value of the equipment and with over  
4 \$10 million worth of inventory, something they needed to do.  
5 They made a decision understanding that under the expressed  
6 terms of the contract they shall purchase it. It's a done  
7 deal. We also, however, in our prior pleadings, said we do not  
8 object to the assignment of this contract to Super Value.  
9 Super Value chose not to assume and assign it, so the debtor  
10 had an option and, in fact, they were weighing their options  
11 and they chose not to make a decision at the time. They sold  
12 with the enhanced value.

13 Now, as a result of the expressed terms of the  
14 contract, when the debtor buys something post-petition, it has  
15 an administrative obligation, the post-petition purchase under  
16 the expressed terms of the contract.

17 MR. STANG: I would just like to make one more  
18 comment and then Super Value's counsel would like to say  
19 something. I've been focusing, before, on deemed assumption.  
20 It sounds like what we have now is deemed a 363 motion to buy  
21 something outside the ordinary course of business. Ms.  
22 Mersky's suggesting that somehow by selling to Super Value a  
23 warehouse, which, by the way, we have no continuing interest.  
24 We have no ability to sell this warehouse now to someone else.  
25 That we somehow, by implication, got your authority to buy a

1 two and a half million dollar refrigeration system in a  
2 building that we had no proprietary interest in. I think  
3 that's, perhaps, even stretching more than the deemed  
4 assumption.

5 MR. EVANOFF: Your Honor, Bill Evanoff on behalf of  
6 Super Value. I may just want to allow you to, other than the  
7 factual questions to me, if necessary, but our position is,  
8 very much, along with what the debtors have just stated, that  
9 we don't believe there's any authority in this circuit for a  
10 deemed assumption and assignment. There was some language in  
11 these -- in the papers that actually suggested Super Value had  
12 taken assignments and should be paying for it. I think we're  
13 past --

14 THE COURT: Did you use it? Did you use the  
15 equipment?

16 MR. EVANOFF: I don't, factually -- I think that --  
17 the equipment was in there.

18 THE COURT: How much inventory did you buy that was  
19 in the refrigerators?

20 MR. EVANOFF: I don't have that. I don't have that  
21 data with me right now. But, Your Honor, the issue -- there's  
22 been a factual mis-statement of the timing of this. The sale  
23 of the warehouse occurred, and then there was a paper much  
24 later that was filed by NorthStar, which opposed the -- I  
25 believe it was in opposition to the rejection of the contract,

1 which was the first time the issues were raised. It was, in  
2 effect, objecting to the sale of the warehouse when the sale  
3 had already occurred. And, the sale had already been entered  
4 allowing the equipment to be transferred free and clear of any  
5 interests.

6 THE COURT: There's no sale of the equipment free and  
7 clear of any interest.

8 MR. EVANOFF: I'm sorry, of the warehouse.

9 THE COURT: Okay.

10 MR. EVANOFF: Which is what she has --

11 THE COURT: Is that correct? Did you file an  
12 objection to the sale of the warehouse?

13 MS. MERSKY: We filed a limited objection to the  
14 sale. We filed an objection to the supplemental notice of the  
15 potential assumption and assignment. Dockets Number 2549 and  
16 Dockets Number 3411. We also had numerous phone calls,  
17 including immediately prior to the closing of the warehouse, in  
18 which these issues were specifically raised and addressed, and  
19 my client could not -- was not -- with authority to object to  
20 the sale of the warehouse. That's a right the debtor had.  
21 They owned the warehouse. But we filed limited objections  
22 based upon the fact that if the warehouse was sold, just as in  
23 the contract that's been argued today, that the refrigeration  
24 equipment was either purchased or we consented should Super  
25 Value want an assumption and assignment of the contract, to



1 that assumption and assignment. Super Value clearly is not  
2 interested. As a factual matter there was \$10 million worth of  
3 product, I'll proffer, and we can produce testimony should that  
4 be necessary of product in the freezers and that the freezers  
5 were used until approximately three weeks -- four weeks ago.

6 THE COURT: Well --

7 MR. STANG: Your Honor, I think where this comes out  
8 is that Ms. Mersky may have a motion for an administrative  
9 claim --

10 THE COURT: I know.

11 MR. STANG: If she likes to bring one, I don't think  
12 she has the basis for opposing the Court's approval of a  
13 rejection motion.

14 MS. MERSKY: The frequency of the lawyer not wanting  
15 anyone to get the last word in and understanding of the time,  
16 Your Honor, I don't think there's anything to reject at this  
17 time, and I think if we didn't object to this rejection motion  
18 we, potentially, would have waived any claims. But here, I  
19 believe, that the contract is clear. There's been a purchase.  
20 There's nothing left to reject.

21

22 THE COURT: Well, I'll hold this matter under  
23 advisement. It's interesting. I want to see if there is any  
24 case law that helps me. Do the parties want to file any post-  
25 trial brief?

1 MR. STANG: Your Honor, could we have -- I don't  
2 know, what's today? Monday? Could we have until next Monday?  
3 I'm not saying we will, but --

4 MS. MERSKY: Your Honor, Mr. Stang and I will speak  
5 and either we will both file or neither of us will file.

6 MR. STANG: Well, no. I don't think we will do that.

7 MS. MERSKY: Well, we both retain the right -- excuse  
8 me. That was a mis-characterization. If Mr. Stang indicates  
9 that he intends to file I, obviously, will follow a response,  
10 and I assume if I file anything he would choose to respond.

11 THE COURT: All right.

12 MR. STANG: But we can agree until the next business  
13 Monday.

14 MS. MERSKY: Correct.

15 THE COURT: All right.

16 MR. STANG: Thank you, Your Honor.

17 THE COURT: Thank you. Can I resolve 37 in three  
18 minutes, or can we continue that to the next omnibus?

19 MR. STANG: Not in three minutes, Your Honor.

20 MR. ROSENBLOOM: Judge, we can try -- perhaps we can  
21 narrow it down to the --

22 THE COURT: Well, I've got to leave in three minutes,  
23 so -- we have incurable breach, adequate assurance of future  
24 performance, environmental issues, no benefit to the estate.  
25 What can be narrowed?

1 MR. ROSENBLOOM: Okay. Judge, there really are no  
2 environmental issues, and we would ask the Court to hold the  
3 objectant to the objectant's alternative as set forth in  
4 Paragraphs 37 through 40 of their objection which, basically,  
5 is that if, in fact, this Court was to allow the assumption and  
6 assignment of this lease that their right to raise  
7 environmental objections under state law or federal law would  
8 be preserved in another forum. And we were perfectly amenable  
9 to have that and any other objection that they might have,  
10 other than bankruptcy type objections, i.e., consideration to  
11 the estate and adequate assurance of performance decided by  
12 Your Honor, and why should this Court have to decide  
13 environmental issues having their genesis more than 20 years  
14 before --

15 THE COURT: All right. But they have other issues.

16 MR. ADLER: Your Honor, John Adler.

17 THE COURT: You can't be heard.

18 MR. ADLER: John Adler with the debtor. That was an  
19 alternative that we mentioned in our pleadings, but we want  
20 this Court to determine the -- all the issues of default under  
21 365(B), including the environmental issues. We think it's  
22 appropriate to this Court to determine that question.

23 THE COURT: Well --

24 MR. ROSENBLOOM: Judge --

25 THE COURT: I will narrow it -- I don't think I want

1 to hear any environmental default issues. But, I will hear the  
2 others, the bankruptcy.

3 MR. ROSENBLOOM: And we're delighted to have Your  
4 Honor hear that.

5 THE COURT: Can -- when can we hear it?

6 MR. ROSENBLOOM: I can make a -- I think I have a  
7 minute and a half.

8 THE COURT: Or can you come back tomorrow?

9 MR. ROSENBLOOM: I have to be in the Federal  
10 Bankruptcy Court in New York at ten o'clock in the morning. If  
11 there is a way that I could get back here in the afternoon, and  
12 then the question that I have, Your Honor, is the quantum of  
13 proof that Your Honor would want on adequate assurance. And,  
14 let me just give Your Honor a preview. We've been in this  
15 space for nine years, and we paid all of our rent and all of  
16 our obligations on a pass through basis during this nine year  
17 period.

18 THE COURT: Well --

19 MR. ROSENBLOOM: We've attached --

20 THE COURT: I know. I really must go.

21 MR. ROSENBLOOM: I understand, Your Honor. I respect  
22 that.

23 THE COURT: Can we come back the 23rd of December or  
24 is it --

25 MR. ROSENBLOOM: We may, yes. Yes, we certainly can.

1 UNIDENTIFIED SPEAKER: Tomorrow afternoon is not  
2 possible? Was your calendar clear tomorrow afternoon, Your  
3 Honor?

4 THE COURT: Between two and four it is.

5 UNIDENTIFIED SPEAKER: You're in New York?

6 MR. ROSENBLOOM: I'm in New York. The quantum --  
7 you know, again, then, Judge, I come back to the quantum of  
8 whether Your Honor would want me to have my chief financial  
9 officer here on an adequate assurance level or do we rely on a  
10 10Q that reflects \$26 million of cash, \$88 million of  
11 capability under a borrowing facility, and a rent that is --

12 THE COURT: Well --

13 MR. ROSENBLOOM: -- one thirteen thousandth of the  
14 gross volume. One thirteenth thousandth --

15 THE COURT: I know.

16 MR. ROSENBLOOM: -- of a percent of the gross volume  
17 that comes out of that facility.

18 THE COURT: All right. Is the adequate assurance  
19 really the issue, or incurable breaches --

20 MR. ROSENBLOOM: That's one of the issues, Your  
21 Honor, and we pointed out in our objection that DiGiorgio has  
22 lost its major customer, representing 25 percent of its  
23 business. We pointed out in our objection, Your Honor, that we  
24 believe we're entitled to discovery on that question, and  
25 that's why I think Your Honor should set down a discovery

1 schedule and not hear the merits of this question tomorrow.

2 THE COURT: Well, neither of you are available  
3 tomorrow.

4 MR. ROSENBLOOM: Your Honor, I can make myself  
5 available, I think, telephonically --

6 THE COURT: That's not going to work.

7 MR. ROSENBLOOM: Not going to work, okay.

8 THE COURT: Not without -- there are going to be  
9 factual issues. I'll continue this to the 23rd unless the  
10 parties want it continued to a date certain in January. Didn't  
11 the debtor give up some dates in January?

12 MR. WYNNE: We moved some things around, and we moved  
13 -- we have January 5th still and we moved things to February  
14 5th and 6th, with respect --

15 MR. BENEDICT: We've opened up January 14th. I think  
16 you put two matters there and I think each of those matters  
17 represented to the Court to be two hours, Your Honor. Mark  
18 Benedict for AWG.

19 MR. WYNNE: I didn't know what you had on January  
20 14th in addition to those, Your Honor.

21 THE COURT: I have a matter at four, so this could  
22 probably -- I could give you from two to four on the 14th of  
23 January.

24 MR. WYNNE: That's fine, Your Honor.

25 MR. ROSENBLOOM: Your Honor, in far as discovery goes

1 on the question of adequate assurance performance, can we get  
2 some definition as to --

3 THE COURT: Well, the more you provide them, and  
4 satisfy them, the less I have to hear. Isn't that true?

5 MR. ROSENBLOOM: Well, that's fine, Your Honor, but  
6 we don't -- we cannot --

7 THE COURT: All right.

8 MR. ROSENBLOOM: This is -- there's something more  
9 than what's going on here. This is really not an adequate  
10 assurance issue.

11 THE COURT: All right.

12 MR. ROSENBLOOM: But, Judge, we can make our chief  
13 financial officer available for a deposition if he likes. We  
14 have our 10Q, which is a matter of public record. We have a  
15 recent borrowing date certificate that reflects not \$84 million  
16 of availability, but \$88 million of availability. What more --

17 THE COURT: Well, do you want to do this, do you want  
18 to submit an affidavit of your CFO, permit deposition of him,  
19 and to the extent that that obviates the need for the CFO to  
20 appear here, that could shorten the proceedings. You know, do  
21 a deposition cross examination.

22 MR. ADLER: Yes, that's fine. Yes.

23 THE COURT: All right.

24 MR. ROSENBLOOM: That's fine, Judge, and we will make  
25 him available.

1 MR. ADLER: Your Honor, what we would like, we'd like  
2 to submit a request that the -- that we get certain documents  
3 prior to the deposition.

4 THE COURT: All right. Well, why don't the parties  
5 try and work that out. If there is an issue, I'll hear you on  
6 the 23rd as far as any discovery, but I'm sure you can work  
7 those issues out.

8 MR. ROSENBLOOM: Thank you.

9 THE COURT: All right. We're done with

10 MR. ROSENBLOOM: So, we're carrying this, then, to  
11 the 23rd with a hearing on for the 14th.

12 THE COURT: Well, the evidentiary hearing will be  
13 January 14th. If there are any discovery disputes I'll hear  
14 them December 23rd.

15 MR. ROSENBLOOM: Thank you, Your Honor.

16 MR. ADLER: Thank you, Your Honor.

17 THE COURT: All right. We're done the omnibus?

18 MR. WYNNE: I believe we're done, Your Honor. Thank  
19 you, Your Honor.

20 THE COURT: All right. We'll stand adjourned.

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CERTIFICATION

I, DEBRA L. STOREY, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

  
DEBRA L. STOREY  
J&J COURT TRANSCRIBERS, INC.

Date December 17, 2003