UNITED STATES BANKRUPTCY COURT

DISTRICT OF MAINE

IN RE: PEGASUS SATELLITE TELEVISION, INC., ET AL., Debtor.)	)))	Case No. 04-20878(11) December 12, 2004 Portland, Maine

TRANSCRIPT OF HEARING IN RE

PARTIAL SUMMARY JUDGMENT

BEFORE

THE HONORABLE JAMES B. HAINES, JR.

APPEARANCES:

For the Debtor-in-Possession	:	Leonard Gulino, Esq.
For the Debtors	:	Ellen Moring, Esq.
Unsecured Creditors Committee	:	Jacob Manheimer, Esq. Russell Reid, Esq. David Botter, Esq.
For Wilmington Trust	:	Kristopher Hansen, Esq. Gayle Allen, Esq. Brett Lawrence, Esq. J. Lefkowitz, Esq.
Steering Committee of Senior Secured Creditors	:	Benjamin Marcus, Esq. Andrew Rosenberg, Esq. Elizabeth MacColl, Esq.

For Davidson-Kemper	:	P. Crosby, Esq.
For Bank of America	:	R. Ryan, Esq.
Recording Equipment Monitor	:	Julie Winberg

INDEX OF WITNESSES

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS

No witnesses were presented on the record.

INDEX OF EXHIBITS

EXHIBIT:	MARKED	ADMITTED

No exhibits were presented on the record.

HEARING COMMENCED (DECEMBER 16, 2004, 1:03 P.M.)

BAILIFF: United States Bankruptcy Court is in session, the Honorable Jim Haines presiding. Come to order and be seated.

THE COURT: Good afternoon. We're here in Pegasus Satellite Television and administratively consolidated cases for a hearing on motion for partial summary judgment brought by the lenders who are engaged in a contested matter seeking payment of disputed portions of their secured claims. Let me get appearances, if we may, for the courtroom.

KRISTOPHER HANSEN, ESQ.: Good morning, your Honor, Kris Hansen with Stroock firm on behalf of Wilmington Trust. I'm joined by my co-counsel, Gayle Allen of Verrill and Dana, and Brett Lawrence, also of the Stroock firm.

THE COURT: Thank you.

ANDREW ROSENBERG, ESQ.: Good afternoon, your Honor, Andrew Rosenberg, Paul, Weiss, Rifkind, Wharton and Garrison, for the senior lenders. And I'm joined by my co-counsel, Ben Marcus and Elizabeth MacColl, also from Paul, Weiss.

THE COURT: Thank you.

RUSSELL REID, ESQ.: Good afternoon, your Honor,

Russell Reid on behalf of the official committee of unsecured creditors, and I'm joined here today by my co-counsel, Jack Manheimer.

THE COURT: Thank you.

LEONARD GULINO, ESQ.: Len Gulino for the debtors in possession.

THE COURT: Thank you. And on the phone I understand--let's see, we have Ms. Kata on for the steering committee?

MS. KATA: Yes, good afternoon, your Honor.

THE COURT: Good afternoon. Mr. Botter is on for the unsecured creditors committee?

DAVID BOTTER, ESQ.: Yes, good afternoon, your Honor.

THE COURT: Good afternoon. Mr. Lefkowitz is on for Wilmington Trust?

J. LEFKOWITZ, ESQ.: Yes, your Honor, good afternoon.

THE COURT: Good afternoon. Ellen Moring for the debtors?

ELLEN MORING, ESQ.: Yes, your Honor. Good afternoon.

THE COURT: Good afternoon. Mr. Crosby for Davidson-Kempner?

P. CROSBY, ESQ.: Good afternoon, your Honor.

THE COURT: Good afternoon. Mr. Ryan for Bank of America?

R. RYAN, ESQ.: Mr. Ryan for Bank of America, yeah.

THE COURT: And we have Dan Chandra [phonetic]?

DAN CHANDRA: Good morning, your Honor.

THE COURT: Beg your pardon?

MR. CHANDRA: Good morning, your Honor.

THE COURT: Good morning. And you're appearing for whom?

MR. CHANDRA: Bren-Quid Advisors [phonetic]. We're also a creditor.

THE COURT: All right. Thank you. Very good. All right. I've been through papers, and I'm ready to hear argument, and I guess we'll start with Mr. Hansen. Unless there's anything anyone has by way of preliminaries? Seeing none, go right ahead, sir.

MR. HANSEN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. HANSEN: Kris Hansen on behalf of Wilmington Trust. Your Honor, we believe that the record is quite complete with respect to the motion for partial summary judgment. Obviously, before your Honor is a motion and a

Rule 56(b) statement from Wilmington Trust. You have opposition from the committee and you have our reply brief and our 56(c) statement in opposition to the committee's 56(b) and our supplemental 56(b) statement. I'd like to start with the issue of voluntariness. We have obviously moved for partial summary judgment on two issues, both--the first being that the sale, the global settlement and the prepayment of Wilmington Trust's debt was voluntary and not involuntary or forced on anyone, and, second, that Wilmington Trust experienced a risk of loss during the course of the debtor's Chapter 11 case up to the point at which the global settlement was approved by the Court. And again, I'd like to start with the voluntariness point. To begin, it requires a small amount of background for the Court because I assume that the Court, like myself, initially questioned why the issue of voluntariness even came up having had the global settlement approved by the Court upon a 9019 motion and under Rule--Section 363 of the Bankruptcy Code. And really what it is is that the committee has unearthed a few cases which stand for the proposition that where a secured lender in essence pays itself back through its own actions, it cannot then claim entitlement to a prepayment premium, and I'm not gonna argue the applicability of those cases today, we'll leave

that for a future evidentiary and law hearing that we'll have later. But it's applicable presently for the purpose of understanding why the voluntariness issue has come up. In those cases you have lenders who have moved for authorization to lift the automatic stay to liquidate their collateral, they've liquidated it, they've paid themselves in full through that liquidation and then claimed entitlement to a prepayment premium, and a number of those courts have said under those circumstances, it's not really what the prepayment premium was inserted in the contract for. You're not getting the benefit of your bargain there. So the committee, with those cases in mind, has weaved together an argument that the global settlement which was presented before your Honor by the debtors, by the creditors committee, by DirecTV with the support of the two secured lenders, somehow wasn't voluntary, that it was in essence coerced by behind-the-scenes bank actions. And, therefore, that's tantamount to the situation that occurred in those other cases and we shouldn't be entitled to the prepayment premium. The problem is, and the reason why we've moved for partial summary judgment on the issue, is that to go through the discovery necessary to prove that, in fact, it was voluntary if reality is suspended for a second and people say, wait a minute, didn't we approve

this under 9019, wasn't it approved under 363, wasn't it approved under 105, wasn't it approved under 1146(c), didn't you stand here and tell me it was the product of arm's-length, good-faith negotiations? If you suspend your belief in all of those statements for a moment, you have to turn and say, well, how else would you prove that the global settlement and the prepayment were voluntary. With respect to the prepayment, that's easy. Not even the committee has enough hubris to say that that wasn't a fully voluntary act. The debtor came before the Court. They put a motion in on an emergent basis which was joined by the committee to prepay the banks. The parties then entered into a stipulation, and nobody disputes that the actual prepayment was voluntary. So the committee turns to the global settlement and says, well, but the settlement which liquidated the assets into cash which we then used to prepay wasn't voluntary. And to get there from a discovery perspective, unfortunately, the lenders would have to go and obtain documentary discovery and take depositions of an awful lot of folks who were present at an awful lot of meetings where the settlement was hammered out where we weren't there, so we don't know what happened behind those closed doors. And there would be a litany of witnesses to be paraded before the Court in connection with the

evidentiary hearing who we would have to then put on the stand and say, did you feel coerced at any point in time, you know, and here are your documents, here's all the term sheets that you circulated, were the banks ever privy to any of those. A lot of stuff that we'd have to go through. So Wilmington Trust looked at the situation and said, that's a big waste of estate assets, and that's an awful lot of a waste of time for this Court to have to go through when it's so patently clear that the settlement was a voluntary act entered into by the parties, especially in light of the fact that the Court during the course of the case had made a statement to the parties that it would be difficult for the debtors to litigate their way out of a Chapter 11 case. You know, heeding those words, the parties got together and they forced a settlement, and they came back. Now--

THE COURT: I don't give those words that much credit, but let me ask you, doesn't the committee also argue, though, the that facts and circumstances, particularly as the fiduciary, gave the debtor no choice but to prepay, so thus taking it apart from the global settlement. Because their argument is as a fiduciary, the debtor had no choice but to prepay because otherwise there would be interest to be paid over time.

MR. HANSEN: Well, the--yes, your Honor, the committee has raised that point for the debtors. The debtors have not responded, obviously, to any of our motions either for the prepayment premium or summary judgment, but--

THE COURT: The debtor doesn't have a dog in this fight.

MR. HANSEN: Exactly. But with respect to that point, the debtor could have done a lot of things with the cash once it received it from the sale of its assets. It could have gone--there were many places that it could have invested it. I guess they made the decision that they couldn't get as large of a return by investing that large of a pot of cash as they'd have to pay out to the banks in terms of our interest and the interests of the senior lenders, so therefore as a fiduciary they had to pay it to us. There's lots of things that they could have done with it, and I've seen an awful lot of cases where assets get liquidated, the cash sits in a pot. It gets invested in various formats while the rest of the parties to the case figure out how are we going to work this all out in a plan of liquidation. They could have put a plan on the table pretty quick, also providing for the sale of the TV station assets and doing something with that cash, too. And so,

yeah, there was a desire to cut off the accrual of interest that the banks had pursuant to the cash collateral order that was being paid on a monthly basis in the case, something that they voluntarily entered into and negotiated with us. So I guess the question of whether the prepayment itself was voluntary, I would say that the fiduciary obligation of the debtors to prepay it is a little bit misleading, because they could have done--they could have invested that cash in a lot of different types of marketable securities, and may or may not have been able to get an equivalent rate of return as that to which they were paying on the bank debt, plus the bank debt only represented about half of the proceeds of the sale. So, you know, with the larger amounts of money to be invested, there may have been a larger return. But I think the key question that the committee has raised is whether the settlement itself was voluntary. And on that I really do believe, your Honor, it's Wilmington Trust's position, there can be no question with respect to it on a number of bases. First from a--just a straight factual standpoint, no genuine issue of material fact. Until we moved for prepayment, no one ever mentioned that there was coercion by the banks to have forced an involuntary global settlement. And, in fact, it was completely the opposite.

One after another of the parties to this case came before the Court and explained to the Court how each one of them had done such a wonderful job in negotiating such a great settlement and how they had exhausted all alternatives and had come in with the best possible deal that maximized value for the estate. You know, the committee's lawyer stood before the Court, their witnesses came before the Court, they all testified how they vetted alternatives through EchoStar and through Rainbow DBS, and how they worked very hard to get the settlement done. You know, those statements are irreconcilable with the position that, oh, by the way, actually we were really forced into that settlement by the banks and we felt so much pressure by the banks behind the scenes that we had no alternative but to settle. They're simply irreconcilable. And from a judicial estoppel perspective, it satisfies the first element. The second element of whether or not they benefited from the statements is pretty clear, too, because the Court approved the global statement [sic] in part based upon the good-faith, arm's-length negotiations between the parties that resulted in settlement. And when one digs down even into the committee time records, as we've shown the Court in our 56(b) and also in the things that we've supplied, the committee itself was drafting its own motion

to compel a sale in the event that the debtors did not join with them and DirecTV in the negotiations they had. They were drafting their own motion to intervene in the debtor's adversary proceeding to settle that litigation. And so-- and they only spent 2.1 hours reviewing this document that the banks created which they point to as such a--sending such a deafening message to everybody. If it was such a-- such a brutal piece of paper, one would think that the committee would spend a little more time with it, plus it asked for unprecedented relief. It asked to divorce a debtor-in-possession of its rights within its exclusive periods to force a settlement, and it also asks--

THE COURT: And--

MR. HANSEN: Yeah, I'm sorry, your Honor.

THE COURT: I was just going to say they might not have spent much time on it because they saw it and they went, ah, now we gotcha. We don't have to do any more vis-a-vis the lenders.

MR. HANSEN: I don't think that's the case, your Honor. As a matter of fact, they were in the throes of negotiating the settlement themselves when they got the document from us, and I think they probably said to themselves, we're working on the settlement, this has the equivalent effect of a popgun on a polar bear, and I don't

really need to pay attention to it, and they moved on. I view, you know, we can hear from the committee on that front, but I think a really telling aspect of the global settlement hearing was when D.E. Shaw, a committee member who ostensibly would have been advised of the crushing effect of the debtor--of the lenders' actions behind the scenes, came before the Court and over a couple of days challenged that global settlement with a desire to try and obtain some value out of the pie for themselves. They put countless arguments before the Court, all kinds of things that they threw against the wall. Never once did we hear from D.E. Shaw the one argument that might have had some merit, that this settlement was not voluntarily entered into, that it was not the product of good-faith, arm's-length negotiations, that it, in fact, was coerced by secured lender pressure from the outside and didn't result in the highest value possible.

THE COURT: That it might have had some legal merit or some factual merit?

MR. HANSEN: That might have had some legal merit, your Honor, if--were it true. It had no merit from a factual perspective, and I think that's why we didn't hear of it from D.E. Shaw. I think Shaw as a committee member came before the Court and made the

best arguments they could be no one on the committee ever came up with the proposition that they were under a crushing weight by--by the secured lenders. But that gets into a bit of speculation, and I think we need to move back to what was said before the Court, what are the clear facts before the Court, and what some of the Court's rulings were, because that plays into the question of judicial estoppel and law of the case, both of which we believe from a legal perspective foreclose the committee from arguing that the settlement was no longer voluntary--was not voluntary, that it was clearly a voluntary act, and in addition to those, just the simple facts again that there is no genuine issue here. This is a fabricated issue for the purpose of trying to defeat a prepayment premium motion, and again, that goes right into judicial estoppel. For judicial estoppel there has to be irreconcilable statements and there has to have been a benefit from the statement. Again, coming before the Court and arguing that the committee itself took the bull by the horns, if you will, and settled the situation with the debtors and with DirecTV and put it before the Court arguing by a couple of its counsel, not just one of them, that it was the best settlement under the circumstances, the best possible one. It maximized value and they had vetted all the

alternatives. That statement is irreconcilable with, "I was forced into this settlement and I had no choice." And the question of benefit for judicial estoppel purposes is pretty clear, too. Your Honor approved the global settlement at least in part because of its voluntary nature and because of its good faith nature. With respect to law of the case, we believe that's also applicable and we believe that your Honor ruled quite clearly that the settlement itself was entered into in good faith through arm's-length negotiations after vetting all possible alternatives and represented the best possible result for the estate at that point in time. And so we would rely on both of those legal doctrines to say the issue of voluntariness is clearly closed.

THE COURT: Isn't--isn't that conclusion that the deal was gonna fly under 9019, 363, 105, there--isn't that a conclusion that focused on the disposition of the rights of the estate versus DirecTV as opposed to concentrating on what the relationship was between the lenders and those who acted with the debtor in negotiating the settlement? I mean, isn't that--isn't that the real question when you approve a settlement of whether or not it's a fair settlement with the person you're settling with and whether it's voluntary in terms of coming to terms with the person

you're settling with rather than what other pressures may be--may exist behind the scenes?

MR. HANSEN: Your Honor would be correct were the settlement negotiated just between DirecTV and the debtor. It wasn't. It was negotiated, as the committee lawyers told you and as their witnesses told you, principally by the committee, the debtors and DirecTV, and those negotiations began between the committee and DirecTV and then folded in the debtor. So, in essence, it was as if the committee, they never filed the motion to intervene, but had they, they would have been a party to that litigation and therefore also would have been promoting the settlement. And, yes, the question of a settlement weighs on was it the best settlement under the circumstances, yes. Maybe they didn't have to say anything about pressure behind the scenes, coercion of why they entered into it, but I think we have to look at their words very carefully when looking at a partial summary judgment motion. They may not have said we were coerced or we were pressured, but when they told you that the settlement was negotiated principally by them, that it was entered into in good faith after arm's-length negotiations, those statements are just factually inconsistent with being coerced into something. I don't know how someone

negotiates at arm's-length and in good faith on a basis where they tell you we saw a situation, a rapidly eroding situation where the debtor had been repeatedly denied what it sought.

THE COURT: But wouldn't it be an instance for judicial estoppel or law of the case if the committee was doing something now to unwind the sale? Because the representations that may have been made, whether or not they went to the relationship between your clients and the committee and the debtor and the DirecTV negotiation, the result that they're seeking isn't really inconsistent because they're saying, okay, we've got the settlement, now we're arguing about the proceeds. They're--the materiality points are different between this dispute and--and whether or not the deal should have been approved. They're not really seeking anything inconsistent from me in terms of the law of the case because they're not seeking to unwind the deal.

MR. HANSEN: Your Honor, I think that's un--I think that's a myopic view of it, I think--of the two doctrines. I think that judicial estoppel and law of the case are broader than that. I--we believe that judicial estoppel, you don't need a ruling precisely on the issue of, for example, unwinding the global settlement. A

party's--the case law in that area says that a party's statements in one respect, if they are controverted at a different point in time in the case, it's necessarily going to be for a different purpose. Okay, that's the point of judicial estoppel is the exigencies of the circumstances at the time the statement is made.

THE COURT: People argue in the alternative all the time seeking the same--the same end result, which is judgment in their favor, and they may contradict themselves in doing that.

MR. HANSEN: No--understood, your Honor. There are--there are times--clearly everyone argues in the alternative in seeking an affirmative motion. Judicial estoppel is different. Judicial estoppel says if at point A in the case when litigating point A you said one thing, if later in the case at point B you're saying something else, something that's different, that's driven by the exigencies of that case, you're not going to be permitted to promote that. It's not an alternative argument on the same theory which would say even if you deny this, we move for this. It's actually saying, when I stood before you asking for you to approve the global settlement, I told you it was volun--I told you it was -- I don't want to misquote what they said -- I told you it was

entered into after good-faith, arm's-length negotiations and that we were the prime negotiators of it, and that we saw a rapidly eroding situation that the debtor was involved in and we realized that it needed to be settled. When you say that at point A, now what we hear at point B out of convenience because it might ring--have some merit with respect to your next argument, you say, well, wait a minute, I can't really take that position here, 'cause if I do, I'm gonna lose a piece of my litigation here. That's not arguing the alternative, that's contradicting yourself. And the debtor--and the committee clearly contradicts itself when it says that they felt coerced in negotiating the global settlement today and a few months back told you that they negotiated the global settlement and that they did so after a lot of negotiations with a lot of parties. And--and, your Honor, we were never ev--Wilmington Trust, and you can see this from the time records, so it's not a--it's a fact, it's not something there's a dispute on, you can see it from the time records. Wilmington Trust attended two early meetings, settlement meetings, with the committee and with DirecTV. There were no resolutions reached at those settlement hearings, there were no offers made at those settlement conferences. After that, there were 15 additional meetings between the committee, the

debtors and DirecTV to work out the parameters of the settlement. We weren't present at any of those. There were also numerous telephone calls and other e-mail conferences, as you can see from Akin-Gump's time records, to hammer out the final terms of the settlement. Again, we weren't privy to any of those, and you can see that from our time records, too. And so I really do believe, your Honor, that it is absurd in the extreme that a party can stand before the Court and promote a settlement claiming that they were the driving force behind it and then come back to the Court in a different circumstance where it benefits them, clearly exigencies of the circumstance, and say, well, you know what? It may have been arm's-length, it may have been good faith, but at the same time we were coerced into it. And the inference that they make by saying that is we may have been able to get more value if we didn't have this pressure from the banks behind us. And clearly they were up against a deadline. Your Honor found that when approving the global settlement. Your Honor actually said regardless of what was to occur after August 31st and the testimony that was brought out in connection with the global settlement, I find that this settlement is reasonable, I find that it was entered into in good faith and it's the product of arm's-length

negotiations, sometimes with the fists at the end of those arms. Which shows that parties really got down and negotiated this thing out. And so, your Honor, that's--that is, in essence, the substance of our presentation with respect to voluntariness. There's a lot more in the papers, but I don't want to burden the Court with going through everything that we've said in the papers. I'd be happy to answer more questions on voluntariness if you had any.

THE COURT: You can go right onto the risk of loss issue.

MR. HANSEN: Thank you, your Honor. With respect to risk of loss, I think the issue's almost more clear. And to understand risk of loss, you first have to understand where Wilmington Trust was in the overall scheme of creditors. Wilmington Trust--the comfortable position that we found ourselves in prior to the bankruptcy filing, was structurally and contractually subordinate to over 400 million dollars of senior indebtedness and structurally subordinate to the 62 million dollar jury verdict in favor of DirecTV that included prejudgment interest in connection with the seamless marketing litigation, and structurally subordinate to any additional trade claims and all general unsecured claims at any of the operating company levels.

That's where our loan was issued. It was issued behind all of that debt at an intermediate holding company, and our security was a second lien on the stock of that intermediate holding company. Prior--then you have to say what's the debtor's main asset value? If you look at the debtor's asset value, as we have all found out from this case, it was in its subscriber base. The subscribers represented the overwhelming majority of the asset value of the debtors. And you have to look at the history of the case. Shortly before filing for bankruptcy, DirecTV, as the Court's very familiar with, terminated the DBS agreement and the member agreements along with the NRTC and terminated the member agreement effective August 31st. At that moment in time, the question becomes was there a risk of loss, because those terminations triggered the default under our credit agreement to which risk of loss is one of the factors to look and see whether or not a secured lender is entitled to default interest in a bankruptcy case, one of the so-called Shepley factors. So the question becomes at that moment in time was there a risk of loss. It doesn't have to be a certainty of loss, it doesn't have to be, yes, you would lose, there would be no repayment of your debt or partial repayment. It has to be a risk. That's why the factor is called that. Well, at that point

in time, what was the debtor left with? It had a three-month time line in place for the survival of its business because after August 31st, it had no ability to provide service to its subscribers and therefore had no ability to generate revenue from those subscribers or even keep them. And so its asset value prior to filing for bankruptcy, as your Honor found, would literally disappear after August 31st in the main. And so the question is was there a risk of loss at that point in time. You bet there was, because without a subscriber base to sell to generate all that money that the committee keeps saying, well, there was an offer on the table from DirecTV when those membership agreement and the DBS agreement were terminated, you could have just accepted that offer and have been done with it. Well--and been paid back in full. The banks had no power to accept that offer. It was up to the debtor. The committee didn't have the power to accept that offer. The offer was made to the debtor. The debtor rejected that offer when it filed for bankruptcy. Mr. Conlon, on behalf of the debtor, stood before your Honor and said, "We flatly reject the offer." Now, under the basic principles of contract law, the committee's statement that that offer remained open and it was never revoked is a bit specious because an offer remains open until it's accepted,

rejected, revoked before acceptance, or expires by its own terms. The offer was rejected, so, you know, I assume that DirecTV could have renewed the offer and the debtors could have accepted it at some point in time, that's right. But did it create a risk when they rejected the offer that we wouldn't get repaid? Again, the answer's yes, it created a risk because at that point in time when Mr. Conlon said, "We reject the offer," they were still on a three-month time line to do something with that subscriber base by August 31st. And what followed that? The debtor's all-out warfare with DirecTV to push the cornerstone litigation, suffering defeat after defeat after defeat before the Court while the banks sat in the back of the room and watched and listened. And the question again becomes was there a risk of loss when the debtor, who assured everyone that its cornerstone litigation was going to be the success in the case which salvaged its business, was continually defeated and continually crushed. Was there a risk? Yes, there was. And again, you go past that and you say, well, what happened while they kept losing, what happened when they were so unsuccessful in pursuing their cornerstone litigation and had rejected the DirecTV offer? What was going on? Wilmington Trust's view was that the risk was growing larger and larger as the case got

closer and closer to August 31st. Which is why it and the committee got together to try and have some settlement discussions with DirecTV, to see if there's anything that could be done. And so then the question becomes, well, once you started those settlement negotiations, didn't your risk go away completely because you knew DirecTV would always pay here? The answer is no. As those time records show, Wilmington Trust went to two meetings. We met once with the creditors committee and DirecTV at DirecTV's counsel's offices and talked about how disastrous the case was going and talked about maybe a way to try and get together and settle. And then after that there was a second meeting where the committee attended with all of its business people and counsel, financial advisors and everybody else was there except for the debtor. And at that meeting DirecTV came out with a new offer and put that on the table, and the creditors committee said, "It's not high enough, we're leaving," and everybody left the room. Wilmington Trust never again was at a settlement conference.

THE COURT: Well, the question is whether there's a risk of loss, not whether or not you were around while people are talking about the fact that you don't have one.

MR. HANSEN: And, your Honor, that sure plays into it because the question is was there a risk of loss, was that risk of loss reasonable to Wilmington Trust sitting behind almost 500 million dollars of senior debt. We didn't know what they were talking about in the room. We didn't know what was going on, and at that point--and when--the last time that we were at a meeting, the committee said, "Not good enough, we'll take our chances with the litigation." That's the last we heard.

THE COURT: But at--by that point, hadn't DirecTV said that the offer that we had on the table, which was, what 670 or something like that--

MR. HANSEN: Mmhmm.

THE COURT: --million, is the basis from which--it's the platform for any further negotiations, this is where we are. And--and then, I mean, tactically, people probably said all kinds of things in order to try to get that number up.

MR. HANSEN: Oh, absolutely, your Honor, absolutely. But by the same token, DirecTV stood in Court and said to your Honor, as of August 31, "We don't have to pay anything for these subscribers."

THE COURT: Sure.

MR. HANSEN: We can take those

subscribers ourselves.

THE COURT: But, you know, there's a risk of loss when you enter into the contract, and that's what you negotiate terms for, right?

MR. HANSEN: Oh, no question, your Honor.

THE COURT: And--and there's--

MR. HANSEN: That's why a default interest is contained in a document.

THE COURT: Exactly. And there's--you know, everyone was talking about a melting ice cube, but if--if it was melting but it was still plenty big enough to cool your drink, you don't have a problem, do you? You don't have a risk of loss.

MR. HANSEN: Well, the ques--and that's the--and that's the key question, your Honor. The key question is was that ice cube at any--at what point in time did it grow. Because when the case was filed and the offer was rejected, it sure was pretty small, and that's the day that I stood before your Honor and said, "This case is a melting ice cube."

THE COURT: You're saying they could never come back? I mean, that--

MR. HANSEN: Oh, no, sure. It--

THE COURT: --if that--if that condition lasted a

day and then all of the sudden the negotiations were on the table and you knew there was a floor set that--that you wouldn't lose that, I mean, you wouldn't--

MR. HANSEN: Oh, no, your Honor, Wilmington Trust completely agrees with that proposition.

THE COURT: Right.

MR. HANSEN: Absolutely. At the point that the global settlement was filed before the Court, a committee member itself challenged the global settlement, you know, that hearing lasted a few days. We were all predicting that your Honor would approve the settlement, but it wasn't certain until you approved it, but, sure, we felt a lot more comfortable when we heard that a deal had been reached and when we were finally delivered the papers in connection with the deal and we saw them. Sure, that made us a lot more comfortable. But the committee's taken the position that we never suffered a risk of loss, and that's just simply untrue. The question is did you ever suffer a risk of loss, and, sure, there's gradations of that. Your Honor says when you enter into a loan, there's a possibility that you suffer a risk of loss.

THE COURT: Well, what good does it do anybody in terms of moving this particular litigation forward if I say, well, you know, at some--at some point whether

it's an instant or a week between the date of default and the date of payment, yeah, there probably was a risk of loss somewhere in there and--but it's an intensely factual inquiry to determine exactly where it was an whether it was reasonable or not. I mean, what good are you going to get out of a partial summary judgment that says--it says nothing more than, yeah, I suppose you had a risk of loss?

MR. HANSEN: Actually, your Honor, we'd love that, and there's a few reasons why. First of all, you'd curtail an awful lot of discovery on those points and save this estate an awful lot of money, number one. Number two, from our legal position, the Shepley factors just ask whether there was a risk of loss. They don't say quantify it, magnify it. It didn't say anything. The Shepley factors with respect to whether you're entitled to default interest, which ultimately is just an equitable discussion which your Honor has to have with the parties and determine whether from an equitable basis the banks are entitled to default interest, one of those factors in determining equity is was there a risk of loss. And we just want to cut off from a summary judgment perspective unnecessary discovery on the point of was there or was there not a risk of loss. We say there was. The committee says there

wasn't. Why should the parties have to go through lengthy discovery when everybody knows, yeah, there was a risk of loss along the way.

THE COURT: But in order to get to the final result, don't we have to get back into all of the--all of the changes of circumstances as the fortunes ebbed and flowed up to the time of payment to determine how--determine exactly what it means in terms of the equities that there was a risk of loss. Because if I say, yeah, there was one and then ultimately it turns out that it--it came to be and endured for 24 or 48 hours, it's not gonna make a whole lot of difference in the result as opposed to if after we get down in the dirt and wrestle with all this we say, yeah, there was one that, you know, endured for 36 months, I mean, 3 months. I don't understand exactly what the utility is--

MR. HANSEN: Well, it would be--

THE COURT: --and exactly what discovery you're gonna cut off.

MR. HANSEN: Well, your Honor, two things. First would be were risk of loss the only factor you had to analyze to determine whether somebody was entitled to default interest, I'd agree with you. I disagree with you, though, however, because risk of loss is merely one factor

in a broad spectrum of those that you have to look at about the equities of a case. Other equities involve--

THE COURT: So you're going to be immersed in all this discovery anyway.

MR. HANSEN: Well, I--

THE COURT: So again, even if I have it your way, what's the utility of giving you what you ask on the risk of loss factor today? I just don't--I don't see where it--

MR. HANSEN: Well, your Honor--

THE COURT: --meaningfully advances the litigation or meaningfully curtails discovery, one of a number of factors which the importance of which depends on sort of the ebb and flow of events.

MR. HANSEN: Mmhmm. Well, your Honor, a couple of things on that point, and I--again, it wasn't a 24 or a 48-hour risk of loss. Obviously if we're going to get into it, we'll put on discovery which shows that it was a lot longer than that. And the question is, well, who do you have to take discovery of. The committee's gonna want to take depositions of all the bank group members, both for the seniors and the juniors to find out, you know, did you--did you feel like you were at risk during the case. The answer to that is unquestionably gonna be yes.

THE COURT: Oh, no question--

MR. HANSEN: Of course.

THE COURT: --you would advise them to testify truthfully but not otherwise.

MR. HANSEN: Exactly. And I just think, your Honor, that it's--there is discovery to be taken with respect to that. That's simply a waste, especially when you look back and say that the committee themselves and the Court called this thing a melting ice cube. I agree, how big was the cube, did you get paid back? You had no reason to be upset, there was no risk to you. But at the--at the global settlement hearing, parties got up before you, and your Honor found that the alternatives to the settlement were a liquidation of this estate with no sale of the subscriber base to DirecTV and not to its competitors 'cause they hadn't come to the case and put anything up. So what does that leave you with? The 75 million dollar television station assets, maybe 75 million dollars. They are working on the stalking horse bid with PCC. Is that enough to pay us back? No. So it comes back to the question of what were the statements that were advanced before your Honor, what were the statements that were made by the Court with respect to the risk of loss to creditors in the case.

THE COURT: Well, at that point if there had been no deal, it would have been a tragedy. But that doesn't--at that point going thumbs up-thumbs down is a lot different than the travel of the case where we know something was or wasn't cooking for a period of months before that, post default.

MR. HANSEN: Absolutely, your Honor.

THE COURT: Yeah.

MR. HANSEN: But I--but I don't--and I--and I guess what I'm saying, your Honor, there's no genuine issue of material fact between the parties about whether a risk of loss existed, and we're asking your Honor for partial summary judgment on that point because it seems to us a wasteful exercise in using estate assets to try and determine what that risk of loss was. It's a minor issue in connection with the overall equitable analysis of default interest. And we would just argue, your Honor, that it's really--it's just wasteful for the estate to have to go through it.

THE COURT: All right. Thank you.

MR. HANSEN: Thank you, your Honor.

MR. ROSENBERG: Good afternoon, your Honor. I only have one or two additional remarks to add to Mr. Hansen's. And it really deals solely with something

that your Honor mentioned, which is the bifurcation, so to speak, on the issue of voluntariness between the sale that you've heard from Mr. Hansen from already and the actual act of prepayment. And I think the one thing that there--there is no dispute in this room, I don't believe, that there was no coercion, so to speak, by the lenders or anyone else to the actual motion to prepay that was made by the debtors, the committee, they wanted to prepay. The only question at all I think is the one then that your Honor raised, the purely legal question. If it is in the best interest of the estate to do something, is that a voluntary act. And I think first the decision to prepay at that point was voluntary because a business judgment was clearly made by the debtors and the committee. As Mr. Hansen mentioned, there are other ways to invest the money. And, importantly, in the case of the senior lenders, our prepayment went down by fully one-third a month later. So they made the voluntary decision, I don't know how they calculated, what business judgments the debtor and the committee may have made to say better to make the emergency motion today to pay on September 17th and not--rather than wait until October 22nd when at least, at most, my group would be entitled to roughly 6.1 million dollars in prepayment amounts rather than 9 million,

9.3 million. So they made a--a voluntary business judgment that that was the day to do it, and they wanted to expedite it. Clearly voluntary. The other point is the fiduciary point, it's the best interests of the estate, therefore it can't be voluntary. And I think that idea has to prove too much because the--everyone always has a duty to someone. A director--a shareholder--a director always has a duty to shareholders to maximize value, to do the best things for the es--for its company. Under that theory, any time directors made a decision to sell and therefore--and then prepay their lenders, there could never be a voluntary prepayment to that instance.

THE COURT: There'd be no business judgment rule, because you--

MR. ROSENBERG: Correct.

THE COURT: --you wouldn't have any range of choices.

MR. ROSENBERG: Correct. So to get always--there is always a--there is always a duty to do the best thing, there's always a business judgment ruling. You make a decision based on the business judgment rule what's the best thing to do. A voluntary decision. And in this instance where, you know, as Mr. Hansen mentioned, our--the--there's a holding company and operating company

structure here, and the senior lenders are at the operating company which there's no dispute also is solvent by a huge amount. The directors of that company clearly made a decision for the benefit of their shareholders that, in their business judgment, it was best to prepay. That has got to be a voluntary act. It cannot possibly be said to excuse the payment of the prepayment amount to the senior lenders. I have nothing more to add, your Honor.

THE COURT: Thank you. Counsel?

MR. REID: Good afternoon, your Honor, Russell Reid on behalf of the committee. While the committee understands the motivation of the lender's filing of this motion, they are by their own admission, your Honor, attempting to foreclose the committee's ability to conduct discovery with respect to the risk of loss and the voluntary nature of the asset sale and the attendant prepayment. Procedurally there is no question that what they're trying to do today is put the cart before the horse, and doing so runs directly counter to the Supreme Court's instruction in the Anderson v. Liberty Lobby, Inc. [phonetic] case which holds that, "A party opposing a motion for summary judgment must present affirmative evidence even when the evidence is likely to be within the possession of the moving party so long as the party

opposing the motion has had a full opportunity to conduct discovery." Here the lenders have expressly refused to engage in discovery bearing on the issues that they've raised in their motion, and by virtue of what we believe is a very transparent appeal to save costs associated with the discovery, the lenders are seeking--are asking you to deprive the committee of the ability to present to this Court the facts that are necessary for this Court to conduct the very fact-intensive, case-by-case analysis the cases instruct us are necessary in order to determine whether the lenders are entitled to either default interest or prepayment penalties. For this reason alone, we believe that the Court cannot dispose of the two issues before it raised by the lenders but must compel the lenders to engage in good-faith discovery necessary to support the objection that we filed. That would be consistent with the Court's concern already enunciated today that, in fact, we are already going to have to embark upon discovery on the various other factors that play into both the imposition of default interest and prepayment penalties, and foreclosing our ability to conduct discovery on only two of these issues makes not only--makes not--does not make sense pragmatically, but certainly from a summary judgment standards standpoint runs afoul of the requirements

necessary for this Court to dispose of these issues in the record before it.

THE COURT: Well, yours is not a 56(f) defense, is it, that summary judgment motion?

MR. REID: No, your Honor, it is not. I mean, we're--we're making the point merely that they have--as their papers say, refused to engage in discovery on this point--

THE COURT: Yeah, but, I mean--

MR. REID: --ostensibly--

THE COURT: --if that's your argument, aren't you required to bring it within the contours of 56(f)? I mean, rather than just say, gee--I mean, every motion for summary judgment seeks to cut off discovery or litigation. I mean, that's--in essence that's what it's there for, that is the cart. And they say don't bother to hook up the horse 'cause there are no wheels on this thing.

MR. REID: Unfortunately, their motion that's before you is specifically premised on that very count. They are justifying bringing this before you on these two issues merely for, as they have magnanimously stated, they're going to save the estate money by making the decision for you that there's--there's nothing here that you need to--that we need to conduct discover upon, which I

think is different than the 56(f) requirement. And that that's the sole purpose or basis that they've presented to you for bringing this motion at this juncture in this dispute or contested matter. Even without the benefit of discovery, however, the committee has set forth in the undisputed facts facts that for purposes of summary judgment you have to accept as true and from which this Court must draw all justifiable inferences in favor of the committee that make it clear that, in fact, there are genuine issues of material fact with respect to both of these issues. The Court may have been struck by the amount of overlap between the parties' Rule 56(b) statements. But the parties are largely in agreement about the facts as they exist in the record before you. The inferences to be drawn from these facts as supported by the discovery that has not been taken is where the parties differ dramatically, we believe. With respect to judicial estoppel, I want to address that and law of the case briefly before getting to the merits of the two issues. The First Circuit requires egregious conduct by the parties in order for the doctrine of judicial estoppel to apply. There has to be palpable fraud, as the Payless case states, or playing fast and loose, as the Intergen [phonetic] case states. Or as has been repeatedly mentioned by the lenders

in their papers, an intentional self-contradiction. It's not, however, your Honor, enough for the party to take conflicting positions in different phases of the case. The two positions, as we're instructed by the case law, must be diametrically opposed, and that's not what we have here today. There's a clear distinction between saying that the asset sale is the only game in town, that the debtors have no choice but to accept that if there's going to be any recovery for the creditors. There's a difference between saying that and saying that the asset sale is the best alternative among several alternatives and the debtor should be compelled to take that particular one. There's a clear distinction between saying that the debtors and their unsecured creditors face substantial risks in the face of the 831 deadline, and that the--and that the initial--or in the face of that and the initial DirecTV offer, there's a difference between saying that and that from the moment that the secured lenders learned that the NRTC was terminating the member agreements effective August 31st, the lenders also knew there existed the DirecTV offer that was going to provide for their payment in full. In the context of determining whether the lenders are entitled to default interest in prepayment premiums, there's no question that the committee is not relying on a position

that's diametrically opposed to the position it took in connection with the asset sale. In fact, it's not making any different statements. The committee is completely on board with everything that's been cited both by the committee and by the lenders in their papers that we did, in fact, believe and represent to this Court that we thought this was the only deal, that this deal had to be accomplished in order for there to be a recovery for our constituency, and that it was the only way to prevent a loss in value of the estate or a total loss in value of the estate from our perspective. That, if nothing else, bolsters our argument that this was, in fact, an invol--not a completely voluntary action on behalf of the debtors. They were in a position and faced with a position where they, in fact, had no practical alternatives other than to accept this deal if there was to be any recovery on behalf of the estate.

THE COURT: But if the lenders' actions weren't the principal force driving the debtor's choice to embrace the inevitable, how can--should they be deprived of their prepayment interest? In other words, if they didn't accelerate and seek to collect, which I can understand equitably would cause problems for them seeking prepayment--

MR. REID: Right.

THE COURT: --but if instead it was the actions of DirecTV that--that precipitated the move towards asset sale and the ultimate prepayment, and that the lenders' suggestion that the debtor go forward in light of the inevitability of bad things happening on August 31 if there was not a deal, how is that consistent with the notion that--that it was involuntary in the sense that equity would dictate they shouldn't get a prepayment premium?

MR. REID: Your Honor, the answer to that is the similarity between this case and that of Public Service Company of New Hampshire. We believe that there is a clear pattern here, as there was in that case, of the lenders making their--their wishes known that they wanted this, in fact--they want to be paid off, paid off in cash and that they did not want to be strung out with some type of plan with payments going into the future; that they, in fact, wanted this asset sale to go through and, in fact, they wanted to be paid--paid in full from the proceeds of that sale.

THE COURT: Well, I--

MR. REID: We have--I'm sorry.

THE COURT: --I understand that, but, first of

all, I didn't hear--there's nothing in the summary judgment record that says they took the position that they were unwilling to take payment over time from the debtor once they had the bag of money from the sale. But I'm looking at your objection to the motion, and one of the bullet points on page 4 says, underlined, bold, "The prepayment was involuntary because the secured lenders effectively forced the sale of the satellite assets." There's no single comment in any of the briefs that I find more unmoored from reality than that unqualified statement. It was DirecTV's actions, NRTC's actions, which I considered on the records before me at given times were lawful actions which forced the debtor's hand to sell the satellite assets. And if the lenders embraced that at some point, it was nothing more than chiming in from the peanut gallery in the face of the inevitable exigencies of this case. To say they forced, effectively forced the sale of the satellite assets is fantasy. I can't believe you're taking that position.

MR. REID: Your Honor, we have not stated in our papers a notion that they've embraced in opposition to them that there was active coercion here. It's not necessary for you to find that the lenders are bad actors here in order for there to be a--for us to establish that they, in

fact, impacted the sale by virtue of the demands that they were making admittedly from a position of strength that they were given by the DirecTV offer. Once the DirecTV offer was in place and that they knew that they were going to get payment in full by virtue of that sale, they, as any other party in interest in a similar position would have done, used that knowledge that all the parties in interest had in order to dictate, not necessarily coerce, but effectively use that position of strength throughout the case to compel the outcome that we believe the Court sanctioned on August 26th.

THE COURT: Well, if the debtor's in a car hurdling towards a cliff and there's no brakes, and the lenders eventually say--and there's no stopping the car, and the debtor--and the lenders eventually say, jump, okay, I don't think it's the lenders that caused the car to go off the cliff.

MR. REID: Well, but, your Honor, for purposes of the analysis that we're here before, not the sale, obviously as you pointed out earlier on today, that's not what we here to relitigate. But for purposes of the analysis on the default interest on the prepayment premium, it is necessary to look at all the facts and circumstances that bear on this issue, and we believe that not only the

actions of the secured lenders in making the various demands for prepayment and for payment in full through the asset sale, that coupled with the DirecTV offer and the mandatory prepayment provisions in these loan documents come together to form a situation where, in fact, there was not a--a choice to be made by the debtor. But, in fact, if there is any value to be preserved with the estate, that, in fact, they did have to accept a deal which necessarily triggered the asset disposition prepayment provisions of the loan documents and required that prepayment. Accordingly, there was a confluence of circumstances contributed to by behavior and actions taken by the secured lenders, not necessarily bad faith actions that were taken, but actions nevertheless on their part that converged to create a situation where the sale was in essence involuntary.

THE COURT: It's your--yeah, well, involuntary as a consequence of the lenders' action? I mean, is it your contention really that whatever the lenders had to say was really material--material, because we have to have a material fact, materiality is not something in a vacuum.

MR. REID: Correct.

THE COURT: It depends on the case. And in the

face of what DirecTV and NRTC had done and as a consequence of what they lawfully had done prepetition, what was going to happen on August 31, how could what the lenders do be material to--so--because--to the debtor's decision to acknowledge the reality of where things were headed on August 31st? Because that was gonna happen and the debtor had to do something about it, and we had days of testimony about how this was the only thing to do, and that was all as a consequence of power that was exerted to force that transaction by DirecTV, not by the lenders. How could what the lenders did or didn't say be material to that ultimate determination to dispose of the assets in this case on the acknowledged facts of this case as they appear in the summary judgment record?

MR. REID: Your Honor, it's material in that they--as they pointed out, there potentially were alternatives such as a plan that would provide a payout over an extended period of time, leaving--or ignoring basically the mandatory prepayment premium provisions that are in the loan documents. That's not what they were compelling to happen here in this case. And merely because a voluntary motion was filed to effectuate what had been demanded by the lenders throughout the course of this case during the negotiations, that does not mean that they did

not impact in a material fashion the way the proceeds of the asset sale were actually--were actually handled by virtue of the prepayment. There was not a restructuring of the--of the debt or an extended payout over a period of time. There was, in fact, an immediate payoff consistent with the demands of the secured lenders during the course of the case prior to the approval of the asset sale. And by virtue of that, they did impact what ultimately became the proceeds from the--from the asset sale by virtue of the demands that they had made throughout that process. And so--

THE COURT: Well, let me ask it this way, because when counsel was arguing for the creditors, he said, gee, you know, there's two parts of this. One is really effecting the prepayment and the other is the sale transaction.

MR. REID: Mmhmm.

THE COURT: And he said we must be here about the sale transaction because the prepayment motion was filed, you know, with the agreement of everybody and not opposed by anybody, post sale, okay. So that must not be what we're talking about. We must be talking about the voluntariness of the sale. And then--and then but I what hear you saying is, no, we're not talking about the

voluntariness of the sale, we're talking about the voluntariness of the prepayment.

MR. REID: Well, I don't think we can divorce any of them from one another. I think we have to look at the totality of the circumstances. But certainly an issue that was raised by the lenders in their initial papers -- curiously, it's not addressed directly in the motion for partial summary judgment -- was the fact that there are, in fact, mandatory prepayment premium provisions in these loan documents that are--come into play when there is a disposition of all the collateral, and basically what happened in this case pursuant to the global settlement and the asset sale. So such that while we effectuated that by--through a motion and order before this Court that there were, in fact, as they pointed out in their papers, provisions in the loan documents that mand--that required that to occur in the event that the global settlement and the asset sale occurred pursuant to the Court's order, such that there--I don't agree that necessarily just because a voluntary motion was filed to effectuate that prepayment that there wasn't--that that was, in fact, a voluntary event as well. I--and again, I think that that taken in connection with the asset sale combines to demonstrate the lack of voluntariness with rela--with respect to that

issue.

THE COURT: All right.

(PAUSE)

MR. REID: Your Honor, moving onto the issue of risk of loss?

THE COURT: Yes, go ahead.

MR. REID: The junior lender's argument ignores that at all times during the negotiations of the global settlement an offer was on the table from DirecTV that would pay off the secured lenders in full. As the Court's questions of Mr. Hansen indicate, it's--or recognize, there is certainly some question whether and to what extent a risk of loss was perceived and whether that perception was reasonable in any given point between the date the case was filed and the date the case--or the date that the sale order was actually put in place. Curiously in their papers they're actually stating that there was a risk of loss, a full risk of loss all the way through the actual prepayment in September which I think begs the question of how candid they're being with the Court about that actual perception, or at least the strength of that perception in any given period of time. Certainly after the global settlement was announced in July after it was set for hearing, after there was a hearing in August, after the sale--after--

after the closing occurred at the end of August, it certainly strikes me that at all of these times there are potentially different levels of risk of loss, they're somewhere different on the scale that this falls. And given the fact that given--at the same date that they were notified that the membership agreement was going to be cancelled that they also learned of this DirecTV offer, I think it certainly begs the question from its factual standpoint how they reasonably had a perception of risk of loss going forward. There's ample evidence in the record before you that they did, in fact, participate in initial meetings with the committee, DirecTV--and DirecTV over this offer, and it's clear from the way that the--from e-mails that are in the record and so forth that the common understanding among the parties to those initial meetings was this--that this was a floor offer. That going forward--what was on the table was enough to protect the senior levels and the junior lenders. But--and by virtue of that, there wasn't even a reason for them to continue to participate in these--in these negotiations. That was made clear by DirecTV's counsel, Mr. Krasnow, to Mr. Hansen in an e-mail that's in the record. What transpired after those first tow meetings, after Wilmington no longer actively participated, was a negotiation by which the

committee was trying to raise the floor, in other words, to maximize the recovery to the unsecured creditors. There was no longer a back and forth if the deal was gonna go below the $750,000 offer that fully protected the secured lenders. And by virtue of that, we believe that there was not a reasonable expectation of risk of loss by them going forward, particularly given or coupled with the fact that there was no other deal to be had. And that at the end of the day, the sale as we--as the committee stood before you and said in--on August 25th and 26th, this was the deal that had to be done, this was the only deal, there was no other deal to consider, and that coupled with the fact that they had always known that they had a floor offer that covered them we believe creates a fact issue with respect to the risk of loss that certainly without additional discovery on that issue should not be disposed of here today. Was the August 31st deadline a real deadline? Obviously we believe it was. Did the debtors face potential destruction of their business? Yes, the debtors did. And was the global settlement the best possible resolution for the estate? Again, we're not taking a contrary position. We believe that it was. But did DirecTV--did DirecTV ever take the offer on the table, the base offer that was going to put a--place them in a

fully paid position? And we believe that they did not. We believe that the evidence that's in the record before you was that that was always a base bid, that in all the negotiations that they participated in, that that was understood and that they believed--that all the parties believed that they were fully protected by that offer and that the only change in that offer was going to be an increase in the amount of recovery that was going to go to the unsecured creditors. That's supported by e-mail traffic between Mr. Hansen and Mr. Botter that's also in the record before you, and we think that that, frankly, that that's a--an undisputed point in our favor. But at a minimum, there is a fact issue here about which further discovery is merited if, in fact, the Court is--is willing to entertain this on a summary judgment standard. And on that issue, I did want to remark that we did only receive when I arrived here this morning this latest reply and the additional Rule 56(b) statement, and that to the extent that the Court is going to entertain those pleadings, we would like the opportunity to supplement the record. There is a declaration from Mr. Hansen that was added that we have not seen before with respect to the content of or what transpired at some of these early meetings which we would like to have an opportunity to counter with our own

declaration with respect to facts that we believe are germane to that determination.

THE COURT: Thank you.

MR. HANSEN: Your Honor, I have a brief reply.

THE COURT: Go ahead.

MR. HANSEN: Your Honor, a few of the things that Mr. Reid referred to are very troubling. He repeatedly said to your Honor that the secured lenders demanded prepayment. That doesn't appear anywhere in his papers, in his opposition, in his response. There--it doesn't exist, and the reason it doesn't exist is because it never happened. I stood before the Court and said there were many options that they could have done with the cash once they received it. We were cognizant of that. We never served a notice of default in this case. We never moved for prepayment. We never demanded prepayment. And if Mr. Reid is gonna ask for further discovery on that point to determine it, because you have to determine summary judgment on the facts that are presented before you, he needed to do that by affidavit. He did not. Uhm--he also referred to today's position of varying degrees of risk of loss, obviously building upon what your Honor and I had discussed. The committee's position in the papers that they've submitted is that there was never a risk of loss.

Not varying degrees. So they've contradicted themselves yet again, and once again, it has to be a determination on the evidence and the record that is currently before the Court. And I would just add finally that with respect to the risk of loss, a salient point that no one can forget in determining the spectrum here is that the committee's position was everyone always understood that the original offer was a floor and it was always open and always capable of acceptance. The meetings that we part--and we knew it because we were at the meetings with DirecTV, two early ones. The debtor wasn't there. The committee couldn't accept that offer and neither could we. The only party to whom that offer was made was the debtor, and it would have taken extraordinary legal relief to come before the Court to divorce the debtor from the opportunity of rejecting that offer and having the creditor constituencies accept it. That's all I have, your Honor.

THE COURT: All right. Thank you.

MR. ROSENBERG: Your Honor, I'll be even briefer. Just three quick points. Again on the--the point about, which Mr. Hansen has already echoed, on the point about us demanding to be prepaid and--I think where that is going is the Public Service case--I mean, clearly we never--there is no demand to be prepaid, it was never made. I think where

the committee was going was trying to talk about the Public Service case and trying to shoehorn into those where the lender said I want you to sell or do this 'cause I don't want a reorg and a piece of paper over time. This is not that example, your Honor. This is your car example, except the car is our collateral, and the choice is this. The car being driven over the cliff, we say, "Debtor, please don't throw our car over the cliff." There's no reorganization here. You know, your Honor's rulings made clear there could not be a reorganization here. It was just simply, "Please don't throw our car over the cliff," that's all we were telling the debtor. Second, on the mandatory prepayment on the motion which I heard the interesting statement that it was actually described as a voluntary motion to comply with a mandatory payment provision, which I thought was an interesting combination. The answer is the motion was clearly voluntary. They--it cannot be anything else. There--yes, there are mandatory prepayment provisions in the loan documents. Unfortunately in Chapter 11, you can't make a debtor comply with your loan document provisions, otherwise the debtor would be--it would be very difficult to be a Chapter 11 debtor. You know, it may be a motion, a separate motion at some point saying regardless of whether we receive these payments

voluntarily or involuntarily, the prepayment amount is still due and triggered by the loan documents, but the fact that there is a covenant in the agreement does not make the payment voluntary. The payment was--the motion was voluntarily made. There is absolutely no dispute. And it's funny, your Honor, sitting back and listening to your questions and, you know, the bulk of the argument from the two counsel doing most of the arguments, it really comes back again to your example. There's no coercion by the lenders that this--it's a business judgment decision. The debtor faced with the facts of this case did the best thing for this estate, and it is unclear to me how complying--doing what your business judgment is in the best for all the constituencies of these estates can possibly be deemed to be some coerced act by the lender that made a payment or transaction involuntary. It just--again, it proves too much. There would never be a voluntary action if actions taken in the best interests of a corporation, solvent or insolvent, automatically became involuntary because those were the best and right things to do. Thank you.

THE COURT: Thank you.

MR. REID: Your Honor, if I may?

THE COURT: Go ahead.

MR. REID: Just one brief point with respect to the prepayment premium. It's important for the Court to focus on the fact that the purpose of such provisions are to protect lenders from a situation where a borrower is trying to take advantage of a change in interest rates in order--by refinancing out or--and leaving the lender without the expectations that it contractually bargained for, and that's not the case that's before the Court here today. As the record demonstrates, the--we were left without any choices with respect to that issue, and we do feel like that that from an equitable standpoint makes clear that this was not a situation where this was a voluntary action on behalf of the debtor.

THE COURT: Thank you. All right. First let me say that I appreciate the work that counsel's done with their papers before the argument and with the argument as well. I've--I've considered the arguments in light of the summary judgment standard and am prepared today to grant in part and deny in part the motion for partial summary judgment. Again, I understand the summary judgment standard, that one's entitled to summary judgment if there is--if they can demonstrate an absence of genuine disputes as to material facts and that they're entitled to judgment as a matter of law. I also understand that there are cases

in which a--courts have made decisions either finally on the merits or in--with regard to summary judgment and they have said that this is an intensely factual inquiry, and generally speaking when something requires an intensely factual inquiry, it's not a good candidate for summary judgment. That being said, to take that proposition at face value would be to say that all cases involve facts and all facts require investigation and litigation, and therefore you never would have summary judgment. So in applying the summary judgment standard to any given case, one has to be aware of the case's overall context and to apply the standard in light of the summary judgment record as it reflects that context. And I'm not saying that I'm going beyond what the summary judgment record says, but I think that as much as counsel's arguments, the nature of the beast says a lot about what's material and what isn't. Frankly, with regard to voluntariness, the committee's suggestion that the prepayment was involuntary because the secured lenders effectively forced the sale of the satellite assets is untenable in this case. It's not supported by the summary judgment record, and the summary judgment record demonstrates no genuine issues of material fact with regard to that issue. The--it would be very difficult for, in the context of this case, for the secured

lenders to have materially affected the decision to sell because, frankly, in light of the prepetition actions of DirecTV and NRTC and the--their post-petition, which I consider in substantially entirely lawful activities, the debtor was left with no choice. We can--we can break down the voluntariness if we must and probably should into the asset sale issue and the actual prepayment. First of all, the prepayment was accomplished through a voluntary motion in this Court which reflected the debtor's business judgment. It was it would make more sense to pay then than to pay later, and they had that business judgment. It was unfettered in that the summary judgment record reflects no demands or actions by the secured lenders to force that prepayment at the time. The--with regard to the sale of assets, you know, it feels involuntary in this sense, that generally speaking a debtor has got a wide range of options from which it may choose by the exercise of its business judgment in a Chapter 11 case. In this case, as was made very clear throughout the case, that in light of the pre-bankruptcy actions of NRTC and DirecTV, the debtor was faced with an August 31 deadline. After the August 31 deadline, I think the potential outcomes were the settlement and sale not to have been effected, they went--they were either bad or very bad, or words to that effect

were in--were in the record. Now, generally speaking, when a debtor has to sell, a debtor's got a range of choices on how to sell and to whom to sell. But in this case, this debtor had no choice--well, it started off with maybe two choices, to sell to DirecTV or to EchoStar before August 31. It's uncontested in this record or in the record of the case in chief that the debtor had no choice but to get something down by August 31. And EchoStar dropped out. So the debtor, although as a fiduciary, there was only one thing it could do, which would be to get out of the jam it was in and save the value of its assets, it was forced to exercise its business judgment to effect a settlement and sale with DirecTV and nobody else because there were no other alternatives. Now, in that sense, that feels kind of involuntary and kind of forced, but in no way were material factors in that decision any insistences by the secured lenders that they do that and only that. Indeed, there was nothing else for the debtor to do, and the lenders may well have pointed that out to the debtor at some point if the debtor was slow to recognize it, and one certainly could take some of the statements of the debtors reflecting slow recognition of that reality, but I take it more that the statements of the debtor were more, one, a function of inertia from the pre-bankruptcy period, and,

two, a canny exercise in negotiation to the extent there was any leverage to be had, the debtors chose to exercise it as best they could. But, you know, if you look at the classic cases where the equities work against paying charges that are due under the documents to an over-secured lender, they're cases in which on the voluntariness issue the lender basically sets everything in motion to require that it be paid and paid early and then comes back and says you paid me early, I want my prepayment penalty. This case is nothing of that sort. It's almost as far from that situation as one could get, and the summary judgment record affirms that, in my view, there are no genuine issues of material fact with regard to voluntariness. With regard to risk of loss, I think by denying summary judgment is that I don't--I mean, there--if you cast it in terms of was there no risk of loss at any time post-petition at all ever, you would--it might be appropriate to enter summary judgment just to say, well, yeah, at some point in there there was a risk of loss, but I don't think there's any utility in making that statement and that determination because you may have established one maybe fleeting, maybe enduring risk of loss apprehension and reality post-petition on that basis, but there--every other instant between filing and payment is left for investigation as to

whether the risk existed and whether it was reasonable or not at all those other points of time. I mean, I think if I were to ask to enter summary judgment that there was risk of loss on day one, it was reasonable on day one, it endured and was reasonable so as to justify the charges at all times between then, sale and payment, that would be worth considering if it could be done. It can't be done on this record. And to make any lesser determination is an exercise in seeking partial or fractional partial summary judgment and it's something that I'm just not gonna bother with today, nor do I think the parties are entitled to it. So for those reasons, based on the summary judgment record, and I will say giving full weight to the opposition notwithstanding technical deficiencies in the opposition that were pointed out in the papers, summary judgment is granted on the voluntariness issue, it's denied on the risk of loss issue, and I'll ask counsel for the moving parties to prepare an appropriate form of order. Now, we move onto pretrial, and I guess--I think when we initially geared this up for hearings today and tomorrow, the idea was that we were actually gonna try the issues. Now we know what issues we're going to try and what one, anyway, we're not. And I guess what we need is from the parties a realistic assessment of what it's gonna take to prepare for trial --

and by the way, the best thing I can do for you all is to give you a trial date and hold you to it. I'll withhold any statement other than to say this purely economic disputes cries out for settlement, and maybe today's proceedings will have assisted in that. How much time do you expect you'll need from the committee's point of view to get ready for discovery and how much time do you think you'll need for trial? Mr. Reid?

MR. REID: Your Honor, I anticipate that the length of the trial probably won't be too terribly altered by today's ruling. I think we had originally contemplated one and a half days to two days, and I think that would probably still be a safe assumption, that we would carry over from one day, how much into the second, I can't say, but I think it would be helpful to have two days as we previously do. And with respect to preparation, I would say given that we've not really embarked upon anything at this point with respect to discovery, that would probably be consumed by--January will probably be consumed by that, so that I would--from our perspective we'd be looking at something in February, I would--I would assume.

MR. HANSEN: Your Honor, I agree with Mr. Reid. I think it would need a two-day trial. I do believe we've shortened the witness list dramatically by taking out the

voluntariness issue, so two days would be generous. I would ask that we start both of those days on the early side so that we can have full days for it, and I also believe that the month of January would be appropriate for us to exchange documents. We've sent, I believe, some documents already. We need to supplement that and then take our depositions, and be before your Honor early in February.

MR. ROSENBERG: Your Honor?

THE COURT: Yes?

MR. ROSENBERG: I agree with the schedule. I would just ask that when setting dates, and I was going to do this with counsel after, we've prepared a draft and not shown it to anyone of a pretrial--of a discovery stipulation, trying to work everything out. We could also have another date possibly before the trial dates but after the close of discovery because it is extremely likely that the senior lenders will be bringing a summary judgment motion at that point also on the issue of solvency, and--which may shorten the trial or eliminate our need to participate in it. So we would ask at least for an earlier date and also for any other type of evidentiary motions that any party may want to make earlier.

THE COURT: Right. I think, first, February 24th

is a date that's set for hearings on Pegasus anyway, and it might well prove of utility for that--that purpose. And then I'd like to give you two days in a row in early March, and it certainly might be worthwhile to consider--we could do it really on the heels of February 24th. Let me just see if it would make more sense--how about if we--how about if we used Thursday, February 3rd, for any motions that might be sought in connection with these proceedings and also just make that available for other Pegasus matters. And then--and then hold March 2 and 3 open for trial in this matter if it looks like it's going to trial. Does that fit with the general outlines and then specific schedules of counsel?

MR. ROSENBERG: That actually almost matches to a tee the draft scheduling stipulation that we had prepared. I think the earlier dates gives enough time for the Court to review our summary judgment motion if I did file it and other motions, too.

THE COURT: Let me ask--is that right? I think what I would ask is if counsel could just confer among one another and then determine that those dates are gonna work, and then embody them in a procedural order, a stipulated discovery order, and then just point--point towards those dates, file that order, and I will review it, and unless

there's something really surprising or inappropriate in it, which I don't expect from these counsel, I'll sign it and we'll be on our way. That works?

MR. REID: Very well, your Honor.

MR. ROSENBERG: Thank you, your Honor.

THE COURT: Is there anything else to come before the Court?

MR. HANSEN: Counsel raised a good point. Can we ask you to confirm to limit notice with respect to any pleadings we might have to a small group of folks? It's--I guess we want it limited to--it--we're the only parties in interest. No one else has intervened in this. It doesn't--it just doesn't make any sense to be abusing it by sending out a tremendous amount of notices.

THE COURT: Sure. I think that's a great idea, and if you'll just file a motion to limit notice on that, I'll act on it immediately.

MR. REID: Very well.

THE COURT: Good Thank you very much. We'll be in recess.

MR. HANSEN: Thank you, Judge.

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STATE OF MAINE)

) ss.

CUMBERLAND)

I, Patricia A. Burrows, transcriber, do certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in In Re: PEGASUS SATELLITE TELEVISION, INC., ET AL., Case Number 04-208782, held on December 16, 2004, at Portland, Maine.

_____ Date: December 29, 2004
Patricia A. Burrows, Transcriber