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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
SOUND SHORE MEDICAL CENTER OF WESTCHESTER, et al.,	Case No. 13- 22840 (RDD)
Debtors.	(Jointly Administered)

DEBTORS' RESPONSE TO OBJECTION OF NEW YORK STATE NURSES ASSOCIATION TO DEBTORS' MOTION FOR AN ORDER AUTHORIZING APPROVAL OF A PRIVATE SALE OF THE ACQUIRED ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, SECURITY INTERESTS AND OTHER INTERESTS TO BUYER

Sound Shore Medical Center of Westchester ("**SSMC**"), and its debtor affiliates (each a "**Debtor**" and together, the "**Debtors**") in the above chapter 11 cases (the "**Chapter 11 Cases**"), hereby file this response (the "**Response**") to the New York State Nurses Association's ("**NYSNA**") objection to the Debtors' Motion (the "**Sale Motion**") for an Order approving, inter alia, (a) the sale of the Debtors' assets free and clear of all liens, claims, encumbrances and other interests, and (b) the assumption and assignment of certain executory contracts and unexpired leases, pursuant to the terms of an Amended and Restated Asset Purchase Agreement (the "**Purchase Agreement**") between the Debtors and Montefiore SS Operations, Inc., Montefiore MV Operations, Inc., Montefiore HA Operations, Inc, and Montefiore SS Holdings, LLC,

Montefiore MV Holdings, LLC, and Montefiore HA Holdings, LLC, (collectively referred to as "**Buyer**"). In support of the Response, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Debtors have reached a critical precipice in their efforts to save a vital safety net healthcare provider for the Westchester community. After a months long sale process, and as the record of these Chapter 11 cases clearly shows, the current transaction is the Debtors' only viable option short of closing its operations and liquidating its assets. The proposed sale (the "**Sale**") ensures the continued provision of critical healthcare services, will save hundreds of jobs, and will maximize recoveries to all of the Debtors creditor constituencies. Critical to the successful consummation of the Sale is that the parties adhere to the current timeline and that the Debtors can transfer their assets in accordance with the provisions of the Purchase Agreement, which expressly provide that the Buyer is not required to take any collective bargaining agreements. Accordingly, and as discussed more fully below, if this Court were to impose any requirement that the NYSNA CBA be included as part of the proposed transaction, the entire Sale is put at risk.

2. In its Objection, NYSNA asserts that the Sale of the Debtors' assets to Buyer should not be permitted on the grounds that (a) the Debtors have not complied with the provisions of section 1113 of the Bankruptcy Code, and (b) the Sale constitutes a *de facto* rejection of the Debtors' existing collective bargaining agreements (the "**CBAs**") with NYSNA and is inconsistent with the Debtors' purported successorship obligations under the CBAs. Both NYSNA's interpretation of the statutory framework and the CBAs are mistaken. The Sale can occur independent of the Debtors treatment of the NYSNA CBAs.

3. The Debtors are not seeking to reject or otherwise modify the CBAs. They are seeking to sell assets. Approval of a sale of assets is governed by section 363 of the Bankruptcy Code. Under section 363 of the Bankruptcy Code there is no requirement for a debtor to either assume or move to reject its existing collective bargaining agreement or otherwise comply with section 1113 of the Bankruptcy Code prior to a sale of assets. Thus, section 1113 is not implicated here.

4. Nor can the CBA be construed to impose any affirmative obligation on Buyer to assume the CBAs as a condition to the purchase. The Purchase Agreement does not in any way modify or abridge rights or obligations of the Debtors under the CBAs. Accordingly, as further demonstrated herein, NYSNA's Objection is without merit and should be overruled.

5. At the end of the day, as NYSNA indicates in its Objection, it makes no sense for NYSNA to seek to block the Sale. While NYSNA is seeking special treatment for its members, the ramifications of a failed sale process here are difficult to understate. Absent the proposed Sale, all of the current NYSNA employees, as well as the more than 1,600 non-NYSNA employees would find themselves without jobs and neither the employees, the unions, the Debtors' various creditors nor the surrounding communities and their residents will be better off -- the most beneficial outcome here for all will be if the proposed Sale proceeds as planned.

CASE BACKGROUND

6. On May 29, 2013, each of the Debtors commenced their respective Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"). On that same date, the Debtors filed the Sale Motion [Docket No. 17] seeking, inter alia, approval for the Sale, subject to higher and better offers.

7. On June 10, 2013, the United States Trustee for the Southern District of New York appointed the official committee of unsecured creditors (the "**Committee**") [Docket No. 67].

8. On June 21, 2013, the Debtors filed a Supplemental Statement in Support of the Sale Motion (the "**Supplemental Statement**") [Docket No. 103] reflecting the terms of a revised agreement between the Debtors and Buyer, pursuant to which the Acquired Assets would be sold by private sale in exchange for an increase in the proposed purchase price and certain other modifications, including an increase to the amounts comprising the executory contract and unexpired lease cure amount cap. The Supplemental Statement also included provisions governing the manner for the assumption and assignment of the Debtors' executory contracts and unexpired leases (the "**Assumption Procedures**").

9. On June 25, 2013, the Bankruptcy Court entered an Order, inter alia, scheduling a hearing (the "**Sale Hearing**") on the Sale Motion [Docket No. 119] (the "**Supplemental Scheduling Order**"), as modified by the Supplemental Statement.

10. On June 27, 2013, the Debtors filed the Amended and Restated Purchase Agreement (the "**Purchase Agreement**") reflecting the revised terms of the Sale. [Docket No. 123-2]

11. The Sale Hearing was held on August 2, 2013, and an Order approving the Sale was thereafter entered on August 8, 2013 [Docket No. 259], subject to the rights of NYSNA and 1199 SEIU United Healthcare Workers, East ("**1199**") to object to the sale on grounds relating to their respective collective bargaining agreements with SSMC and MVH.

12. Thereafter, NYSNA filed its Objection. 1199 has advised the Debtors and Buyer that it will not be objecting to the Sale.

THE PROPOSED SALE

13. The proposed sale of the Acquired Assets to Buyer is the culmination of an extensive and time consuming "marketing process" and considerable efforts undertaken by the Debtors and the Buyer in a very short time frame to reach an agreement. The Debtors' efforts to locate a strategic partner, following a long history of financial strain, commenced almost a year ago and continued until a definitive agreement with Buyer was reached. Working with their financial consultants, Alvarez & Marsal, LLP ("**A&M**"), the Debtors looked at the downstate market and sought to identify those hospital or healthcare systems that might have an interest and the financial wherewithal to partner with the Debtors. Throughout the process the Debtors also consulted with the New York State Department of Health ("**DOH**"), which would have to approve any contemplated transaction.

14. DOH advised that it would only accept an active parent arrangement, *i.e.* where the acquirer would commit meaningful financial and operational support to the transaction and the ongoing system. This requirement significantly limited the pool of likely partners. Additionally, given the not-for-profit hospital structure in New York, the list of potential acquirors was inherently limited and excluded almost all out of state prospects as the substantial majority of those are for-profit institutions.

15. The Debtors and A&M initially concluded that Westchester County Health Care Corporation ("**WCHCC**"), the owner of Westchester Medical Center, was the only likely candidate in the Westchester County, New York area. It did not appear that any other hospital or

system in the suburban region would have the financial ability, experience and strategic design to absorb the Debtors' operations. Although other hospital systems, including Yale New Haven Health Systems, NYU Medical Center, and North Shore LIJ Health System were also approached and provided with significant diligence materials, they ultimately passed on a prospective arrangement.

16. The effort being made was also known generally to the surrounding healthcare community at large. Thus, any other party certainly could have expressed interest, but did not. In November 2012, Sound Shore Health System and WCHCC entered into a memorandum of understanding which contemplated a full asset merger between the parties. Several months of extensive negotiations followed. However, the parties were unable to finalize a transaction with sufficient purchase consideration.

17. Following the failed negotiations with WCHCC, the Debtors re-engaged Buyer. After an intensive period of arms-length negotiations and extensive diligence conducted by Buyer against a backdrop of quickly depleting cash resources, the parties entered into the Purchase Agreement pursuant to which Buyer agreed to purchase from the Debtors substantially all of the Debtors' real property and operating assets (the "**Acquired Assets**"), free and clear of liens, claims and encumbrances (except as expressly assumed) based largely on appraised values. It was initially contemplated that the Sale would be subject to a competitive bidding process and Buyer would be designated as the so-called stalking horse bidder. However, following discussions among the parties, the Debtors, Buyer and the Committee reached an agreement to restructure the sale as a private sale, in exchange for an increased Purchase Price and amendments to certain aspects of the cure provisions and other provisions of the Purchase Agreement.

18. Under the proposed Purchase Agreement, Buyer is not assuming any of the Debtors' collective bargaining agreements or any other obligations relating to the Debtors' employees. Nonetheless, the Purchase Agreement does provide that Buyer shall offer employment on a probationary basis to certain of the Debtors' employees who: (i) at the time the Purchase Agreement was signed were employed by the Debtors; (ii) in Buyer's sole discretion, meet Buyer's job qualifications as of the Closing and (iii) agree to resign from employment with the Debtors.

19. Significantly, the proposed Purchase Agreement also grants Buyer the right to terminate the Purchase Agreement in the event the Bankruptcy Court conditions approval of the sale on an assignment of the CBAs to the Buyer. Specifically, Section 10.1 of the Purchase Agreement provides that as a condition to closing, the Unions must not have objected to the sale order, and if objections have been filed, that they are either consensually resolved or overruled by the Bankruptcy Court. Accordingly, to the extent NYSNA's objection is sustained and the Buyer is required to assume the CBAs, the Buyer may opt to terminate the Purchase Agreement.

20. Section 10.1(w) also grants Buyer an option to terminate in the event the cure amounts for executory contacts and unexpired leases exceed $7 million (the "**Cure Cap**"). To the extent that any proposed assignment of the CBAs would result in the aggregate cure amounts exceeding the Cure Cap (exclusive of those amounts attributable to other executory contracts and unexpired leases), the Sale would be placed at risk. While the Debtors and Buyer could negotiate a reduction in the Purchase Price based on any additional cure costs, the right to terminate would nonetheless be triggered, to the detriment of the Debtors and all creditors.

21. As indicated at the Sale Hearing, the Debtors believe that the Purchase Agreement is fair and reasonable and in the best interests of the Debtors' estates, their creditors and all other parties in interest. The Debtors further believe that they contacted and thoroughly explored a potential arrangement with all hospitals and systems that might have had an interest in the Westchester geographical market. At the end of the day, Buyer's interest and proposal was the only real and viable offer. Even with continued marketing, the Debtors and the Committee do not realistically believe that a competitive bidder which can make a qualified bid would emerge. Buyer is the only realistic prospect for a sale in this case. Absent consummation of the proposed sale to Buyer, the Debtors would quickly exhaust their cash resources forcing an immediate closure of their facilities. It would mark the death knell of two hospitals and a nursing home.

22. Closure would impose a significant hardship upon the Debtors' community which will be forced to rely on alternative, less convenient sources of medical care. In addition, absent adequate time and funding to implement a formal closure plan approved by DOH, patient safety could be jeopardized. The Debtors' employees would also likely be terminated without the assurance of any immediate prospects for future employment. Such an outcome would be catastrophic to the Debtors' patients, employees and all creditors.

23. A sale on the other hand, would permit an orderly transition of the Debtors' operations to Buyer and allow for the continued delivery of healthcare services at the Debtors' sites under the Buyer banner to an underserved population, consistent with the Debtors' existing not-for-profit mission. Buyer also possesses the financial resources required to proceed with the proposed transaction and intends to invest significant capital subsequent to the purchase to renovate and modernize the facilities. Additionally, DOH has already indicated that it supports

the proposed transaction. With DOH's support, the receipt of any required regulatory approvals should be substantially easier to obtain.

RESPONSE TO NYSNA'S OBJECTION

A. Section 1113 is Not Applicable in the Context of the Proposed Sale

24. NYSNA's objection simply cannot be sustained because, at its core, it is based on a false assumption, namely that the Debtors are rejecting NYSNA's CBAs without first complying with the provisions of section 1113 of the Bankruptcy Code. This argument cannot be substantiated under the existing facts and applicable law.

25. The Debtors are before this court on a motion pursuant to section 363 of the Bankruptcy Code to sell substantially all of their assets in a transaction that will maximize recoveries for their various creditor constituencies, save numerous jobs and ensure that a vital safety net in the Westchester community remains a viable provider of healthcare services. The Debtors are not attempting to reject NSYNA's CBAs, nor have they made a motion to do so under Section 1113 or otherwise.[1]

26. Approval of the Sale Motion is governed by the provisions of section 363 of the Bankruptcy Code. Section 363 of the Bankruptcy Code does not condition a transfer of assets, free and clear, on the requirement that the Debtors assume or move to reject any executory contract or unexpired lease, including its existing collective bargaining agreements pursuant to section 1113. Section 363(f) of the Bankruptcy Code provides, in relevant part, that:

[1] It should be noted that the Debtors' collective bargaining agreement with Mount Vernon Hospital is scheduled to expire on August 31, 2013, prior to both the hearing on this matter as well as consummation of the Sale, while the Sound Shore collective bargaining agreement will expire on December 31, 2013.

> (f) The [debtor] may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

27. Whereas, Section 1113 of the Bankruptcy Code "controls the rejection of collective bargaining agreements in Chapter 11 proceedings." *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d. Cir. 1992) (*quoting In re Century Brass Prods., Inc.*, 795 F.2d 265, 272 (2d Cir.), cert denied, 479 U.S. 949 (1986), as clearly noted by Judge Gerber in connection with the sale of the Our Lady of Mercy Medical Center:

> Section 363 is devoid of any language making the ability to sell estate assets subject to the requirements of Section 1113. Likewise, Section 1113 is devoid of any language making compliance with it applicable to any determinations other than those relating to the assumption or rejection of collective bargaining agreements.

Transcript of Motion to Approve Sale of Substantially All of Debtor's Assets to Montefiore Medical Center Before the Honorable Robert E. Gerber, held on June 21, 2007, *In re Our Lady of Mercy Medical Center et al.*, Case No. 07-10609 (Bankr. S.D.N.Y. 2007) (the "OLM Transcript") @ 85:8-13.

28. The Debtors are not seeking to modify or reject the CBAs, expressly or otherwise, and there is nothing under non-bankruptcy law that would require them to make such election prior to a sale, just as a purchaser can elect not to assume a collective bargaining agreement in connection with an acquisition. *See NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 80 LRRM 2225 (1972); *Spruce Up Corp.*, 209 NLRB 194, 85 LRRM 1426 (1974), enforced, 529 F.2d 516,

90 LRRM 2525 (4th Cir. 1975). There are no provisions of the Bankruptcy Code that would otherwise alter this firmly held principal and courts in this district have routinely confirmed that neither section 363 nor 1113 of the Bankruptcy Code requires a debtor to satisfy section 1113 as a condition to an asset sale. *See e.g., Transcript of Motion to Approve DIP Financing and Use of Cash Collateral, Before the Honorable Robert E. Gerber*, held on April 26, 2007, *In re Aztec Metal Maintenance*, Case No. 06-12050 [Docket No. 153](Bankr. S.D.N.Y. 2007) at 10:19-23 (the "Aztec Transcript") (finding that a debtor may sell substantially all of its assets without also assuming and assigning its collective bargaining agreements); OLM Transcript (finding that "Section 363 of the Bankruptcy Code is devoid of any language making the ability to sell estate assets subject to the requirements of section 1113). Copies of the OLM Transcript and Aztec Transcript are attached hereto as Exhibits A and B respectively.

29. Additionally, the Debtors choice not to seek assumption or rejection of the NYSNA CBAs in no way constitutes a *de facto* rejection of the CBAs. As discussed in *In re Family Snacks*, the 8th Circuit B.A.P. found that the "Debtor was not required to reject the CBA prior to or in conjunction with the asset sale...", that the showing necessary to reject a CBA pursuant to section 1113 can be made "before, at, or after the asset sale, and... § 1113 should not be read to preclude the Debtor from doing so after the § 363 asset sale" 257 B.R. 884, 898 (B.A.P. 8th Cir. 2001). Should the Debtors choose to reject the NYSNA CBA's after the sale closes, they will then need to comply with the provisions of section 1113. *See id.* It follows, that if compliance with 1113 is required post sale, the sale itself cannot be deemed a de facto rejection.

30. In support of its Objection, NYSNA cites to *In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2d. Cir. 1992) and *American Flint Glass Workers Union v. Anchor Resolution*, 197

F.3d 76 (3d. Cir. 1999) for the proposition that the Debtors must comply with the provisions of section 1113 in the context of this sale. Both cases are legally and factually distinguishable from the instant case.

31. In *In re Maxwell*, following failed negotiations with its union, the debtor filed a motion seeking to sell certain of its assets under section 363 of the Bankruptcy Code and a separate motion pursuant to section 1113 of the Bankruptcy Code seeking to reject the union's collective bargaining agreement. The Bankruptcy Court granted the debtor's motion to reject the agreement and approved the proposed sale of assets. The District Court overturned the Bankruptcy Courts' decision which previously authorized rejection of the agreement, however, it affirmed the sale order. Implicit in that decision is that a sale may proceed absent an affirmative rejection of a collective bargaining agreement. Ultimately, the Second Circuit reversed the District Court and determined that the Debtors had in fact met the requirements of section 1113. While the Debtors are not currently seeking rejection of the CBA, Maxwell supports the proposition that rejection, if necessary to facilitate a sale of a Debtor's assets, is permissible under section 1113.

32. In *American Flint Glass Workers*, the debtor in possession had assumed the collective bargaining agreements and had purported to assign them to the purchaser of the debtor's assets. The bankruptcy court entered an order under Bankruptcy Code section 365 approving the assumption and assignment and providing that the debtor would be relieved of further liability under the collective bargaining agreements. *Id.* at 79. The Third Circuit concluded that the debtor remained liable on its contractual obligations under the collective bargaining agreements because it had shifted fewer than all of the obligations (although it did assign all of the rights) created by its collective bargaining agreement. *Id.* at 81. Thus

American Flint Glass Workers is inapposite here because the debtor in that case had assumed and assigned the collective bargaining agreements at issue. In contrast, here the Debtors have not assumed the CBAs (nor sought to assume them) and there has been no *de facto* assumption of the CBAs under the Bankruptcy Code.

B. The Debtor is Not Required to Obtain Buyer's Assumption of the CBAs Prior to a Sale of Assets and their Failure to Obtain Such Assumption Does Not Constitute a De Facto Rejection of the CBAs in Violation of § 1113

33. The succession clauses (the "**Succession Clauses**") contained in the CBAs do not require the Debtors to obtain an assumption of those agreements by Buyer. The Succession Clauses, which are contained in Section 16.05 of each of the CBAs, merely provide that "[t]his agreement will bind the parties and their corporate or operational successors or assigns."[2] There is no reference to any obligations arising upon a sale or other transfer of assets. Nor is there any obligation on the Debtors to ensure the continuity of existing employment terms for the NYSNA employees by requiring a purchaser or other transferee of the assets to assume the CBAs. Under applicable law, there is also no basis to infer such an obligation.

34. In support of its argument, NYSNA erroneously relies on the holding of in *In re Journal Register Company*, 488 B.R. 835 (2013). Contrary to the contractual provision in

[2] Collier on Bankruptcy notes that when a union objects to a sale under a "so-called 'successor' clause" purporting to bind a "successor" employer to a collective bargaining agreement, "a third-party purchaser will be obligated under an unrejected collective bargaining agreement only to the extent the agreement provides for successor liability or has been assumed by the purchaser." *See* 7-1113 Collier on Bankruptcy 1113.02(c) (footnotes and internal citations omitted) (emphasis added). Indeed, Collier acknowledges that while "[c]ourts and labor arbitrators have varied widely in their treatment of such clauses," determining whether the clause is "active" or "passive" is dispositive as to whether a court would sustain a union's objection and stay the transaction until the buyer assumes the collective bargaining agreement or the agreement is properly rejected under the Code. *Id.* The treatise acknowledges the fact-specific nature of this dispute, noting that "[a]rbitration decisions on such clauses have turned on the language in the clause, the bargaining history and the facts in each case. Language which affirmatively requires the original employer to secure the agreement of a purchaser to assume the agreement has generally been enforceable." *Id.* at 1113.02(c), n. 14 (citations omitted). But, "[w]here the language is passive, such as a supposedly self-enforcing statement that the agreement 'shall be binding upon successors,'" – as is the case here – "arbitrators have often found that such language does not create enforceable obligations." *Id.* (emphasis added).

Journal Register, NYSNA's agreements with the Debtors do not contain an affirmative obligation or an "active duty" successors and assigns clause requiring that the Sale be conditioned on the assumption of the CBAs by Buyer. The "succession" clause in the CBAs is significantly more limited in scope.

35. In *Journal Register*, the Bankruptcy Court held that the publisher's failure to require the purchaser to adopt its collective bargaining agreements amounted to a unilateral alteration of its provisions in violation of Bankruptcy Code § 1113(f). *Journal Register*, 488 B.R. at 840. However, in that case, the 'succession' clause contained in the debtor's agreements with its several unions was far more extensive and provided as follows:

> This agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part thereof is sold, leased, transferred or taken over by sale, transfer, lease assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof . . ***In the event that the employer sells, transfers or otherwise assigns its operations it shall require as a condition of the purchaser [sic], transferee or assignee assume the obligations of this Agreement.*** In the event that the employer fails to require the purchaser, transferee or assignee to assume the obligations of this Agreement the employer . . . shall be liable to the local union and the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement.

488 B.R. at 837-38. (emphasis added)

36. The publisher failed to require assumption of its collective bargaining agreements by purchaser and purchaser expressly declined to be bound by the terms of those agreements. The unions, in turn, grieved the publisher's violation of the successor clause and objected to the sale on the grounds, *inter alia*, that debtors could not avoid compliance with the successor clauses without obtaining relief under § 1113.

37. Relying on *Agripac, Inc.*, No. 699-60001 (Bankr. D. Or. 1999), Judge Bernstein concluded that there had been a *de facto* rejection of the publisher's collective bargaining agreement due to the debtor's intentional breach of a material provision of the agreement, which was "tantamount to a rejection, or alternatively, a unilateral alteration of its provisions in condition of Bankruptcy Code § 1113(f)." *Journal Register*, 488 B.R. at 840.[3]

38. Ultimately, Judge Bernstein overruled the union's objection finding that (i) the successors clauses did not speak to the contents of the asset purchase agreement, and (ii) the collective bargaining agreements would expire before the sale could close, leaving nothing for the purchaser to assume in any event.

39. Thus, given the altogether different content of the Succession Clauses herein -- which constitute merely the first sentence of the above-quoted provision from *Journal Register* and *none* of the remaining operative language -- this court's holding in *Journal Register* plainly does not support NYSNA's Objection. Unlike *Journal Register*, the Succession Clauses herein are "passive" clauses and do not impose any obligation upon the Debtors to ensure assumption of the CBAs. Nothing in the CBA obligates the Debtors to condition the Sale on any such assumption of the CBAs by Buyer.

[3] Notably, the court did not rely on the other case cited by the unions, *In re Stein Henry Co.*, 1992 WL 122902 (Bankr. E.D. Pa. 1992), denying confirmation of the plan and finding a violation of §1113(f) in that case based on the employer's failure to require in the asset purchase agreement that the purchaser assume its collective bargaining agreement even though the union's agreement with the employer merely recited that it "shall be binding upon [the Debtor's] successor . . . and assigns." Judge Bernstein noted that the same judge who decided the *Stein Henry* case questioned his own broad reading of § 1113(f) the following year in *After Six, Inc. v. Philadelphia Joint Board (In re After Six, Inc.)*, 1993 WL 160385, at *2 (Bankr. E.D. Pa. (1993) ("Moreover, we also note that our broad reading of § 1113(f) in *Stein Henry* . . . may have been undermined to a certain degree by the subsequent decision in *In re Roth American, Inc.*, 975 F.2d 949, 955-58 (3rd Cir. 1992), which cautioned against reading that Code section too broadly.")

40. Case law has long distinguished between active and passive successors and assigns clauses and consistently found passive clauses to be insufficient to impose affirmative obligations on debtors. *See e.g.*, *In re National Forge Co.*, 289 B.R. 803, 808 (Bankr. W.D. Pa. 2003) (holding that where a collective bargaining agreement contained a "strong successor clause," which required that "[t]he obligations of this Agreement shall be included in any and all agreements of sale, transfer, or assignment of all or substantially all of the assets" of the debtor, that the debtor was "compelled to seek rejection of the CBA prior to confirmation of the sale to eliminate a potential claim by the Union under the successor clause."); *In re Bruno's Supermarkets, LLC*, 2009 Bankr. LEXIS 1366 (Bankr. N.D. Ala. 2009) (confirming that where a debtor's collective bargaining agreement contained an "active duty" successorship clause requiring the debtor, as a condition of sale, to obtain purchaser's recognition of the union and assumption of all obligations under the collective bargaining agreement, a rejection of the agreement under section 1113 or modification of the clause would be necessary prior to sale); *In re Revco Drug Stores, Inc.*, Nos. 588-1305, 588-1308 through 588-1321, 588-1761 through 588-1812, and 588-1820 (Bankr. N.D. Ohio 1988) (overruling objection to sale by union arising from failure of debtor to require assumption on the theory that debtor had not agreed to condition any sale on purchaser's agreement to assume all extant collective bargaining agreements and could not be so required). Based on the foregoing, NYSNA's Objection is clearly without merit and must be overruled.

CONCLUSION

41. For all of the reasons set forth above, NYSNA's Objection should be denied and the relief requested in the Sale Motion should be granted. To hold otherwise would give the

Buyer a unilateral termination right which, if exercised, would likely lead to immediate closure and a breadth of devastating consequences which will affect the lives of thousands.

Dated: Great Neck, New York
August 26, 2013

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	Case No. 07-10609 (REG)
	Chapter 11
OUR LADY OF MERCY MEDICAL CENTER, et al,	(Jointly Administered)
Debtors.	New York, New York
	Thursday, June 21, 2007
	3:07 p.m.

TRANSCRIPT OF MOTION TO APPROVE SALE OF SUBSTANTIALLY ALL OF DEBTORS' ASSETS TO MONTEFIORE MEDICAL CENTER
BEFORE THE HONORABLE ROBERT E. GERBER
UNITED STATES BANKRUPTCY JUDGE

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(Proceedings commence at 3:07 p.m.)

THE COURT: All right. Our Lady of Mercy.

Mr. Oswald, do you want to come on up, please? And then, after you introduce yourself, I'd like to get appearances from others who think they're likely to wish to speak today.

MR. OSWALD: Thank you, Your Honor. It's Frank Oswald, with my colleagues Howard Magaliff and Jeff Traurig, Togut, Segal & Segal. We're bankruptcy counsel for the debtors.

Let me say on behalf of everybody here in the courtroom we very much appreciate the Court's indulgence in delaying the start of today's hearing. That time was spent productively, as the Court will hear shortly, and the parties were able to resolve several significant issues among the committee and the buyer and the debtors. And we're here today to seek the approval of the sale of substantially all the debtors' assets to Montefiore Medical Center, with the support of our committee.

I'll let the Court take appearances.

THE COURT: Yes, please.

MR. WESTON: Burton Weston, Garfunkel, Wild & Travis, special healthcare and litigation counsel, with my colleagues Phil Chronakis and Afsheen Shah.

THE COURT: Okay. Thank you, Mr. Weston.

MR. MINTZ: Benjamin Mintz, Kaye Scholer, counsel for

Montefiore Medical Center, with Arthur Steinberg.

THE COURT: Okay, Mr. Mintz.

MR. BUNIN: Your Honor, Martin Bunin from Alston & Bird for the creditors' committee, with Craig Freeman, Jason Watson, and David Wender.

THE COURT: Right.

MR. BROFMAN: Your Honor, Michael Brofman, Weiss & Zarett, Committee of Interns and Residents.

THE COURT: Okay, Mr. Brofman.

MR. BROFMAN: Thank you.

MS. MATZAT: Your Honor, Rosanne Matzat with Hahn & Hessen on behalf of HFG, the DIP lender.

THE COURT: Okay. Thank you, Ms. Matzat.

MS. CACUCI: Gabriela Cacuci from Corporation Counsel's office.

THE COURT: Ms. Cacuci, you have the fire department and taxing interests? Exactly which -- I know you have the fire department.

MS. CACUCI: We also -- I filed a withdrawal action in with my resignation of rights. We're representing the IDA and the IDA entities --

THE COURT: Okay, very good.

MS. CACUCI: But I withdrew with that reservation of rights.

THE COURT: Okay, thank you.

Go ahead, Mr. Oswald.

MR. OSWALD: Thank you, Your Honor.

Your Honor, in the interest of time, let me give a quick overview. We have submitted to the Court and filed, provided to the parties in interest, two affidavits in support of the sale, one by Richard Celiberti, the debtors' chief executive officer and president, the other Thomas Barry, managing director of Cain Brothers, who led the post-petition marketing and sales effort, and was the pre-petition financial consultants and sales consultants for the debtors.

There's no question here, Your Honor, there has been no question from day one that without a sale, Our Lady of Mercy would face closure. When we filed the case, we were looking at a liquidity -- a potential liquidity crisis as early as August, and I'm happy to say that we think in large part that the strategy that was implemented here to file this case with the stalking-horse APA on day one has allowed Mr. Celiberti and his team to immediately stabilize the operations.

The debtor, as reported recently by the patient healthcare ombudsman, has reported that the bankruptcy has not had really any impact on operations or patient healthcare, which is, obviously, of great concern to all of us.

The motion to approve the sale was filed on day one, March 8th. It was served at that time on some twenty-eight other hospitals in the tri-state area to provide those parties

with the earliest opportunity to take a look at the sale and the APA, and to encourage competitive bidding.

The committee was formed shortly thereafter, I think on or about March 16th. In working with Mr. Bunin and Mr. Freeman, we came to agreement on the bid procedures. And Your Honor had fixed a breakup fee.

I would say at the outset, Your Honor, there has also been no disagreement. The debtors and Montefiore acknowledge that this is a sale that this Court needs to look at with the heightened scrutiny standard. We welcome that. We have worked cooperatively with the committee and all parties in interest to provide them with whatever information and documents, sitting for interviews, things of that nature, that were required to fulfill the obligations of the debtor, and to make sure that all parties in interest were comfortable with the sale.

Of course, the ultimate determination of the sale price itself, we believe, was a result of the marketing effort, as I said, led by Cain, Mr. Barry's experience and his team's experience, particularly, of late, in other comparable hospital sales.

The result -- and I'll come back to this later with Mr. Barry's proffer. But the result, as we stand here today, Your Honor, is that there were no other competing bids submitted by the extended bid deadline, which was May 31. We did have the one credit bid submitted by the indenture trustee

on behalf of the New York City Industrial Development Agency. That is with respect to their bond position on the garage.

Also scheduled on the calendar today, Your Honor, is the debtors' 9019 motion, which resolves all of the issues concerning the IDA and the garage, and we'll deal with that a little bit later. You just heard from counsel for the IDA having confirmed their withdrawal of their reservation of rights in that connection.

So we stand before the Court having gone through the post-petition auction process. The Montefiore offer is the highest and best offer for these assets. We think it's a unique situation for this debtor to be in. There's not a lot of hospitals, including the ones referenced in the papers and Mr. Barry's affidavit, that are able to identify the likely purchaser to negotiate a fair and reasonable APA within the time frame that we had here, and at the same time, to proceed along, we hope, if the Court approves this transaction, with a prompt State Court approval process to reach closure.

The debtor is still losing approximately $750,000 a month. That's down from over $1 million a month. And, overall, obviously, operations are stabilized. But that is not a number that can be sustained.

I think the Court is also aware that in connection with our DIP financing, this DIP lender has lent into a sale, Your Honor, and there is an event of default if we do not

obtain a sale order by July 15th.

Notably, we have not yet drawn down on our DIP. And in the event Your Honor is to approve the sale and we obtain a sale order and proceed on the State Court closure process, current time line in terms of the actual closing, sometime perhaps early September, would indicate, if our census hold and the projections hold, we may not draw down on that DIP. And that would be an added benefit, obviously, for this estate because our DIP lender, pursuant to the order, has to get paid out first at closing.

The asset purchase agreement basically encompasses all of the debtors' real estate assets, equipment assets, claims related to those assets. It excludes, notably, the accounts receivable, which I think currently are in the area of 17 to $18 million. We think that, again, with this sale, those receivables are highly collectable. The same would not be the case if the sale were approved, and the debtors were forced to liquidate. We believe those receivable collections would be severely impacted in that event.

So with the auction having been concluded, Montefiore's offer being the only bid, and as a result of the ongoing discussions and negotiations that concluded earlier today, I'm pleased to report that the purchase price to be received under the APA has been increased by seven-and-a-half-million-dollars.

So the total base price now, Your Honor, is thirty-seven-and-a-half million.

(Counsel confer.)

MR. MINTZ: Just to correct the record, Your Honor, the purchase price is actually staying the same at 30 million. The credit that Montefiore takes for its mortgage is going to be reduced by the amount of seven-and-a-half million. The net effect is the same.

MR. OSWALD: Thank you. Okay. I appreciate that clarification.

Net impact to the estate, Judge, we picked up seven-and-a-half-million dollars in light of the resolution reached today.

The only responses and objections which were received and are addressed in the debtors' omnibus response were filed -- we had seven responses and objections filed. I think all but the objection by CIR, which is our union representing the residents and interns, have been either consensually resolved, or we have agreed to defer the issue post-sale approval so that the parties can continue their discussions.

Let me just make a note of those for the record. We have Connecticut General Life Insurance Company. That objection is being dealt with -- it's a contract assignment issue, Your Honor, and we've resolved that by adding some language in the proposed sale order.

The New York City Fire Department, Ms. Cacuci was just alluding to that one, we're going to adjourn the request to assume and assign that contract to a date in July that's convenient to the Court. The first step is to have the buyer actually approved by this Court, and then there will be a meeting in short order among Montefiore, the debtors, and the fire department to see what issues or concerns the fire department has.

One issue that Ms. Cacuci had raised is us providing her notice, at least thirty days' notice of any closing, and we agreed to do that. But we'll put that matter over until a July date and see if, in fact, we have any issues.

The committee of interns and residents, I just mentioned. That remains open, Your Honor.

The New York City Industrial Development Agency, again, that is the entity that arranged the bond financing to purchase the garage. That has been dealt with partly through the 9019 settlement between the debtors and the indenture trustee, and an agreement between the bondholders and the IDA, which was subject to the sale order being approved, and the closing occurring.

The final two limited objections, Your Honor, are sort of intertwined. That's Bank of America and JPMorgan Chase Bank, as a successor of interest to Bank of New York. These are the first and second lien holders on the ancillary real

estate buildings known as the Forand (phonetic) and the Verio properties (phonetic), Your Honor. Those properties are not being sold in this transaction; however, Montefiore has -- does require leases for those properties of up to twelve months while they either transition out or it's contemplated that the debtors and the committee and the lienors will agree to some type of marketing protocol in this court, and then, you know, all the buyers, Montefiore included, could see if they want to come in and make an offer to purchase.

What we agreed to do with those two objections, Your Honor, is reserve their rights vis-a-vis adequate protection. The debtors have been negotiating the terms of stipulations with each of the banks for continuing adequate protection. Actually, those discussions have been ongoing for quite a while. But, also, to reserve their rights in terms of any rents that are paid by Montefiore. These are contemplated to be triple net leases at a market rate of rent. And their request was that to the extent there is a surplus, that they could seek to have that surplus applied to principal. But that's for another day. And they're not here. They left, based upon my representation that I just put on the record.

So those were the responses and objections. As I said, the committee's issues have been resolved.

And with that, I would go into the proffers in support of the sale, unless somebody has questions.

THE COURT: Okay. I'll take the proffers vis-a-vis the sale. And, certainly, I'm going to want to hear argument on the remaining objection, Mr. Brofman's objection on behalf of the interns and residents. And I want to give Mr. Bunin a chance to comment, if he wishes, at this point.

MR. BUNIN: I would wish to comment, Your Honor, briefly.

THE COURT: Sure. Come on up, please.

MR. BUNIN: For the sake of clarity, Your Honor, and for avoidance of doubt, I'd just like to put the committee's understanding of the settlement on the record.

Montefiore Medical Center will first reduce its credit bid, which is the deduction it is taking for the -- what's referred to in the purchase documents as the MMC mortgage obligation from $11.5 million to $4 million. As a result, Montefiore Medical Center will pay an additional $7.5 million in cash to OLM at closing.

Next, Your Honor, there will be releases to Montefiore and Montefiore Medical Center and Montefiore Health Systems, as set forth in the asset purchase agreement, and also for the officers and directors of Montefiore Medical Center and Montefiore Health Systems. I'm not sure that's as clear in the APA, but it's something that has been agreed upon.

Next, upon the closing, Montefiore Medical Center will have no claims against the OLM debtors pre or post-petition,

secured or unsecured, except for administrative expense amounts owed by OLM to Montefiore under various service agreements between the two hospitals that, pursuant to which, Montefiore is providing various services to OLM.

And, lastly, Your Honor, there was - at the end of the committee's objection, there was a reference to something that's referred to in the contract as the cash purchase price determination, which is a procedure post-closing for addressing cash purchase price adjustments. There are adjustments proposed by the debtor. There's an ability for Montefiore to come back and dispute them, and attempt to resolve any issues, and a procedure for having unresolved disputes taken care of. And in our objection, the committee asked essentially to be a part of that process to receive the proposed adjustments to the cash purchase price and any --

THE COURT: Pause please, Mr. Bunin.

Are we talking about the typical closing adjustments that need to be worked out in connection with just about any acquisition?

MR. BUNIN: Yes, that's right. And that was Paragraph 40 in our objection, and my understanding is that both the debtors and Montefiore have no objection to the participation by the committee in that process.

THE COURT: Okay.

Mr. Mintz?

MR. MINTZ: Just wanted to clarify two things that Mr. Bunin stated. One, with respect to the reduction of the mortgage, Mr. Bunin referred to an 11.5-million-dollar amount. That was an amount that the debtor had estimated for purposes of showing how the proceeds of the purchase were going to be applied. That amount isn't a fixed amount. The mortgage is accruing interest, and continues to accrue interest. Depending on when the closing actually occurs, the amount may be more or less than 11.5.

The bottom line of our agreement is that we've agreed whatever the credit we're going to take for the mortgage, whatever the amount will be as of closing, will be less the seven-and-a-half million dollars, thereby increasing the net amount that the estate will receive.

The second statement that Mr. Bunin made that I wanted to clarify was he referred to the fact that post-closing, the estate wouldn't have any other obligations to Montefiore except for those that it may owe under service agreements that exist between Montefiore and OLM. That's partly true. I think it was implicit in what Mr. Bunin said, but there's going to be an asset purchase agreement that will have signed and closed. There are continuing post-closing obligations under that agreement that the debtor has to Montefiore and vice-versa, including with respect to the post-closing adjustments, indemnity obligations, and the like. And those -- I didn't

want Mr. Bunin's comments to imply otherwise.

THE COURT: All right. Mr. Steinberg?

MR. STEINBERG: Yeah. Just two other quick things. One, to the extent that there's been any issue about the Montefiore lien on the real estate, the lien would have to be validated, and then the appropriate adjustment to be taken.

The second thing, I think Mr. Bunin was correct that there will be a release that covers the Montefiore directors. But in view of some of the concerns raised, that I think that there are Montefiore personnel who sit as OLM directors and are released to the extent that it relates to the sale process should also be included as part of the transaction.

THE COURT: Okay.

MR. BUNIN: Your Honor, just to respond briefly, I agree with the statements made by Mr. Mintz and Mr. Steinberg with respect to the 11.5-million-dollar credit bid or deduction being an amount that can be either higher or lower, depending on accrued interest at the time of the closing. So that is a correction that is accurate.

Also, with Mr. Mintz mentioned that there would be post-closing various obligations under the asset purchase agreement of OLM, and we agree with that.

And, lastly, with respect to the releases, the officers and directors that are to be released are all of the Montefiore officers and directors who sit on the OLM board.

It's -- three-quarters of the OLM board is made up of the Montefiore appointees, and those are the individuals who would be released in connection with the sale.

THE COURT: Okay. All right. Back to you, please, Mr. Oswald.

MR. OSWALD: Thank you, Your Honor.

As I mentioned, we've submitted and filed the Celiberti affidavit, and I'm not going to repeat and take up everybody's time with that. But I think a few points that we should note on the record.

Again, this is an insider transaction among affiliates. It's governed by the heightened scrutiny standard. And particularly as it relates to issues of good faith, I think the Court needs to take notice of that and make the appropriate findings.

The parties do believe that this was a sale negotiated in good faith, and negotiated by a special committee, which is typical in out-of-bankruptcy-court context. We had our special committee comprised of the three archdiocese-sponsored independent board members chaired by Mr. James Butler, who was the pre-affiliation chairman of the OLM board.

The terms of this transaction, Your Honor, were vigorously negotiated, I think upwards of nine or ten drafts, as the motion set forth the original purchase proposed by Montefiore was $24 million, which was deemed inadequate. Based

upon comparable sales of other hospitals, the work of the independent appraiser retained by the debtors, the liquidation analysis that the debtors' professionals conducted, we believe that the price in the range of 30 to $33 million was a fair price, and the special committee had determined to accept and proceed with the APA with a base price of $30 million.

The special committee was separately advised throughout the transaction by independent counsel, independent financial advisors, and investment bankers, and OLM's management. The special committee sought independent confirmation of the purchase price through those appraisals and the Bankruptcy Court's supervised auction process in which the committee had full participation rights.

No other competing offer has been made in the open auction process for the assets, and we believe that's the best indication that the price offered by Montefiore, particularly as improved as a result of the committee's negotiations, is fair, reasonable, and is really the best indication of current market value.

The relationships have all been fully disclosed, including that of Mr. Jacobson, who is the OLM board chair, as well as the Montefiore general counsel.

Mr. Celiberti would testify that while he certainly had a laundry list of hoped-for items going into the APA, and Montefiore did not take every one of those items, that on the

whole, this APA does allow the hospital to continue operating basically in the ordinary course, provides for employment or offers of employment for all of the over 2,000 employees, including the interns and residents which are members of the CIR union. It allows for a vital acute care health provider to remain providing that healthcare in the area. I know the Court is aware of the earlier Burger Commission results where there are seven or eight hospitals slated for closure in late 2006. That's the type of climate that was -- that had existed at that time, and particularly with the change in the governorship right before we filed, did impact the funding availability.

As the Court is aware, the timing of this petition was precipitated by a grant not having come in from the State of some $13 million which would have at least allowed OLM, based upon those projections, to break even for 2007 and continue with its out-of-court restructuring efforts.

The affiliation consummated in 2006 certainly derived a tremendous amount of benefits for OLM, as indicated by the improvement in the balance sheet, and I think a reduction of its liabilities by some $20 million, Montefiore stepping in and acquiring that HUD mortgage, deferring the interest and principal payments for two years, releasing the lien on the receivables which allowed OLM to obtain account receivable secured financing, providing a resource for inter-company or inter-hospital services, which I would note were at all times

at the request of OLM and approved by a finance committee which was chaired by Mr. Butler, and the terms of which were always at or better than market, and clearly, better than what the hospital was able to obtain, outside the -- from the outside vendors.

Mr. Celiberti would further testify that the decision to enter into the APA pre-petition and rely on the post-petition marketing efforts was a function both of his concerns in maintaining employee and doctor stability. The affiliation was fairly new, again, having been consummated January of '06. It did take a while for the hospitals and the doctors in particular to get comfortable with one another. The concern about liquidity is mentioned in the papers. The then projections, Judge, were showing a possible liquidity crisis as early as May of '07. And the experience of both my firm and the Garfunkel firm and Cain Brothers in other hospital cases and the time frame that it takes to obtain not only the Bankruptcy Court approval, but the requisite State Court approvals was estimated to be about six months. So we were really cutting it close, and that's why we had earmarked the filing in this case in mid January.

The delay in filing, again, as the Court knows, was primarily due to our difficulty in obtaining the debtor-in-possession financing, which was ultimately obtained from HFG.

As I said earlier, the bankruptcy itself on operations

has really been minimal. We have seen some recent decline in our discharge numbers. And we are concerned that if we don't forge ahead with the sale approval so that parties in interest understand that we do have a buyer in Montefiore and we're ready to take this to the next step, that both doctors and other parties in interest are going to be questioning the future of OLM, and that may have a direct impact on the census. And I think, as indicated in Mr. Celiberti's affidavit, each discharge, Your Honor, results in approximately $10,000 for the estate. So a difference of fifty discharges, which I think was the main number, is a hit to the bottom line of about $500,000.

Cash remains strong, but the status quo, if there is no sale approved, will not remain. And, again, I think that's not been disputed by anybody.

The reliance, I'd say, on the post-petition marketing process was confirmed by Mr. Barry, whose affidavit I mentioned has also been submitted, as the appropriate way to proceed. And, as I said before, I think it does reflect that we have obtained the maximum value for these assets.

We have been in contact, fairly regular contact, with the State authorities, Your Honor, so they are up to speed. And, as I said before, we do intend to proceed as quickly as we can with that part of the process if the Court approves today's sale.

I think, again, I'm going to rely on the affidavit

that was submitted and not take up the Court's time. But I think Mr. Celiberti concludes that without this sale, Judge, OLM will run out of cash sooner rather than later. They'll have to curtail operations and seek closure approval from the State, transfer out patients. The closure, of course, results in a loss of some 2,000 jobs, will increase the claim pool by millions of dollars, and will take away a vital healthcare provider in that community.

So, with that, Your Honor, I put that forward as the proffer of Mr. Celiberti, and ask that his affidavit be accepted into the record.

THE COURT: All right. Are there any evidentiary objections to Mr. Celiberti's affidavit?

MR. BROFMAN: Yes, Your Honor. I'd like to examine Mr. Celiberti on some of the --

THE COURT: You'll have the chance to cross. But my fundamental question now is do you have any evidentiary issues that you want to raise?

MR. BROFMAN: No, Your Honor. I'd like to provide -- cross.

THE COURT: Okay. In the absence of objection, the affidavit will be taken as his direct testimony. And we'll now take cross-examination.

Mr. Celiberti, do you want to come on up, please? Come into the witness box, remain standing, and you'll be sworn

in by my electronic court operator.

Just a minute, please, Mr. Brofman. Go ahead. Raise your right hand, please, sir. Go ahead.

RICHARD CELIBERTI, WITNESS FOR THE DEBTOR, SWORN

THE COURT: All right. Have a seat, please, Mr. Celiberti. I'm going to ask that you keep the microphone close to you so -- and to keep your voice up, remembering that you're competing with the air conditioning system in here, and we have a pretty full courtroom.

THE WITNESS: Yes, Your Honor.

THE COURT: Thank you.

Go ahead, Mr. Brofman.

MR. BROFMAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. BROFMAN:

Q Mr. Celiberti, during the period of time that negotiations were going on for the sale of OLM to Montefiore, were you involved in each of the negotiating sessions?

A I was involved in several of the negotiation sessions. There were sessions that were conducted with attorneys only that I was not a party to.

Q And who was the lead negotiator for Montefiore?

A In the sessions that I attended, it was either Mr. Steinberg, Mr. Mintz, or, occasionally, Mr. Jacobson.

Q Okay. And during the period of time that you were involved

in the negotiations, did you put on, as part of the request for the asset purchase agreement, that Montefiore employ all of the present employees of Our Lady of Mercy?

A Yes, I did.

Q Okay. And did you have any discussions with Montefiore concerning the fact that they were unionized employees?

A We got into discussions about the various union contracts, but it was clearly known that there were three different unions with representation at Our Lady of Mercy.

Q And can you tell me what discussions you had concerning -- with Montefiore concerning the contract with the committee of interns and residents?

A I asked if they would accept the existing contract that the medical center has with the union.

Q And what was their response?

A That their feeling at that time was that they would not assume the contract automatically; however, if they were the winning bidder, if they were asked to meet with CIR by the committee of interns and residents' representatives that they would consider it at that time.

Q And did you ask that that be put into the asset purchase agreement?

A No, I did not.

Q Did they make an offer to put it into the asset purchase agreement?

A No. They made it a -- what is included in the asset purchase agreement is a statement that they would make offers of application, basically, to take on all of our interns and residents that were in good standing. And "good standing" meant that they would have a current medical license to practice in New York.

Q And at what pay scale?

A The pay scales were not addressed, to my recollection, in the asset purchase agreement. In discussions that I did have, the comments that were made were that the compensation and benefits of the current residents at Our Lady of Mercy would remain basically the same.

Q Is that consistent with what's in the asset purchase agreement?

A It's -- I don't believe that's addressed in the asset purchase agreement.

MR. BROFMAN: Your Honor, may I just have a moment? I've just got to go pull a document.

THE COURT: Certainly.

BY MR. BROFMAN:

Q Mr. Celiberti, did you ever ask Montefiore as to what benefits would be given to the interns and residents?

A No, not in terms of specificity.

Q Did you ever obtain anything in writing from Montefiore as to what would be offered for residents that were currently

covered under the CIR contract?

A No, I did not.

Q Mr. Celiberti, let me read to you from -- if I might, from the asset purchase agreement, which is before the Court, Paragraph 9.1, as follows:

"Such new terms and conditions of employment established by purchaser will be consistent with those applied to purchasers' residents, interns and fellows and will not be equivalent to those established by seller."

Based upon that, sir, would you like to change your testimony as to what was agreed between OLM and Montefiore?

A No, I stand by what I said.

Q So that Montefiore agreed with you that they would pay what OLM's residents were receiving at the present time?

A That's -- no, that's not what I said or meant to say.

Q Well, can you tell me what you meant to say?

A What I had been assured by representatives of Montefiore Medical Center was that the compensation and benefits that would be offered to OLM's residents would be comparable to what those individuals are receiving today.

Q And who made that representation to you from Montefiore?

A Robert Conaty, who is the executive vice president and chief operating officer.

Q And did Mr. Conaty ever send you an e-mail or any other documents that would confirm that in writing?

A I don't believe so.

Q So the only writing that exists is in the asset purchase agreement. Is that correct?

A That's correct.

MR. MAGALIFF: Excuse me, Your Honor. I'm going to raise a procedural objection. Howard Magaliff from Togut Segal for the debtors.

I understand that Mr. Celiberti's affidavit has been admitted as direct testimony. But if you go back and take a look at the affidavit, none of these issues were covered in it. And, in fact, the testimony that's being elicited now we believe doesn't comport with the Court's case management order. There was no affidavit, direct testimony on these topics, there was no indication that live testimony would be wanted on these topics, and we've really had no opportunity ahead of time to address these particular areas of inquiry in terms of testimony.

So, of course, if you want to hear it, the testimony will go forward. But I did want to preserve that objection for the record. This is way beyond the scope of what's in Mr. Celiberti's direct testimony affidavit.

THE COURT: Well, of course, it's beyond the scope, but I'm overruling your objection, Mr. Magaliff. We could have had this witness on an adverse direct. There's no suggestion that it's irrelevant to the objection made by the interns and

residents.

I, as a general rule, not just in this case but across the board, couldn't function if I made people adhere to scope of direct objections. It would materially lengthen the process. It's fair game. Obviously, you'll have the ability to address it on redirect.

The objection is overruled and you can continue.

MR. BROFMAN: Thank you, Your Honor.

BY MR. BROFMAN:

Q Mr. Celiberti, the -- in your affidavit, you indicated the -- about the financial condition of OLM. Has that changed since the filing?

A Yes, it has. The financial condition of the medical center from a cash flow perspective has actually improved. And that's as a result of the relief in pre-petition liabilities and the fact that we are not funding our malpractice insurance at this point in time.

Q And if I heard counsel make a proffer before, you haven't drawn down on the line of credit, the post-petition line. Is that correct?

A That's correct.

Q And how long do you anticipate you could function under the present levels until such time as you would have to draw down on that line?

A I believe our latest forecast indicates that as long as our

volume meets our budgeted levels, and as Mr. Oswald said earlier, in the last four weeks or so, we've been off the mark, the original forecast or the latest forecast basically says that we can continue to operate into December when we would first touch the line of credit. That will get accelerated if the current volume that we've been experiencing in the last month does not go back to budgeted levels.

We were off budget by about forty-five discharges in May, which is worth about a half a million dollars. Through yesterday morning, the June discharges were off by fifty-five. And I would expect that by the end of the month, we will probably be short about 100 in the month of June from plan.

Q Prior to the filing of the bankruptcy petition, what level of services did Montefiore provide to the debtor?

A Could you just repeat that? Was that prior to?

Q Prior to, yes.

A There were a number of services that Montefiore provided, both pre-petition and continues to provide post-petition. And I might add there are no new services that were added post-petition.

The services range from the processing of microbiology specimens, which we entered into an agreement with them in the middle of 2006. That was the first initiative. We did that for two reasons. One was to basically free up space for our emergency room because it was contiguous space, so we expanded.

And the second was that there were some cost savings.

The Montefiore, also under a service agreement, provided services in directly negotiating new managed care reimbursement rates for us with several of our major commercial payers which, last year, 2006, resulted in $5 million of additional revenues, growing to $9 million for full year 2007.

We also engaged them to provide quality oversight for our obstetrical program, which, like -- ours, like any hospital in New York City, is subject to tremendous litigation. So we asked for outside observations of how we're doing in the OB area.

We also engaged Montefiore to do our laundry processing in the early part of 2007. That's because of cost savings that we were able to materialize.

And there are probably two or three other services that we have that they're providing at present time.

Q Was there any financial management that Montefiore provided? When I say Montefiore, it could be the parent, also, MHS.

A No financial management services. What we would do as a member of the health system is as we were getting close to the completion of our budget, we would review that with the key people from the Montefiore Health System before we brought it to our finance committee, and then our full board for adoption.

We also, because we're a member of the system, provide the

system controller with copies of our monthly financial statements so that they can prepare the roll-ups for Montefiore Medical Center and OLM.

Q And from the period of time that you started this affiliation, as it's been described, up until the filing of the bankruptcy petition, were there any inquiries from any other hospitals about potentially acquiring OLM?

A None whatsoever.

Q Did you make any inquiries of any other hospitals about potentially acquiring OLM?

A We did that during a solicitation process that went -- that started in March or April of 2004 and culminated about two months later when we signed a letter of intent to affiliate with Montefiore.

Since that date, so really, May or June of 2004, no hospital that expressed interest at that point of time, or at least preliminary interest, or no other hospital in the New York area has expressed any interest or made any contact with me about a potential affiliation, or even to inquire how things were going with Montefiore.

Q During the proffer, I believe your counsel offered that eight out of the ten or eleven members of the board were affiliated in some way with Montefiore. Is that correct? The OLM board.

A That's correct.

Q Okay. Can you identify them for us, please, and what their positions are with Montefiore?

A There are currently four lay trustees: Mr. Tanner, who -- and you want their positions basically?

Q With Montefiore.

A Mr. Tanner, Mr. Langner, Mr. Bartlett and Mr. Stein are all lay trustees of Montefiore serving on their not-for-profit board, as well as the OLM board.

The other board members of OLM who are part of the management team at Montefiore are Dr. Spencer Foreman, Robert Conaty, Stanley Jacobson, as general counsel, Dr. Foreman is the president and CEO of Montefiore Medical Center, Don Ashkenase who is an executive vice president at Montefiore, and Dr. Steven Safyer, who is the medical director.

Q Okay. Would it be fair to say that no important decisions at OLM could be made without the consent of the board?

A I think it depends on how you define "important decisions." I make all of the day-to-day operating decisions. We have a budget that was approved by the board and we stay within our budget. If there are certain buy decisions, as an example, that I'm required to seek approval of Montefiore for, such as capital assets over a certain dollar amount, I do seek the permission of Robert Conaty. But I'm making the day-to-day decisions, or most of the important decisions at OLM.

Q Let me see if I just understood what you said.

There are certain decisions about purchasing that you have to go to Montefiore for?

A In the asset purchase agreement, there's a specific requirement that if there is a capital asset over $10,000, I need to get the prior approval of Mr. Conaty. The reason for that is that Montefiore will increase the purchase price by a percentage of the dollars that they approve.

Q Prior to the asset purchase agreement, was there any such approval requirement -- was there any such approval requirement?

A None whatsoever.

Q But you had to go to the board for those expenditures. Is that correct?

A On an annual basis as part of our operating budget.

Q And if you wanted to go outside of your operating budget to buy a piece of equipment or something else, did you have to go to the board?

A Not for pieces of equipment. If it was something that, as an example, if we needed to make a million-dollar purchase decision on bringing in a new type of information technology, I think in that regard, I've gone to the board, not for permission, but for information because I felt it was a significant expenditure.

We have not gone forward and done that. But we've brought it to the board saying, we needed to do it, which they agreed

to, but we just did not have the financial wherewithal to do so.

MR. BROFMAN: I have no further questions for the witness, Your Honor.

THE COURT: Very well. Any redirect?

Mr. Steinberg, come on up, please.

REDIRECT EXAMINATION

BY MR. STEINBERG:

Q Mr. Celiberti, you said that based on current positions, that you don't anticipate reaching -- being able to borrow against the DIP until December of this year. I had a couple of questions of that.

At the time, what is your current cash position now?

A At the -- in the beginning of June, we had approximately $9 million of operating cash, as well as the full DIP line available to us.

Q So at the time that you would borrow against the DIP, you will have utilized most of that cash reserve?

A That's correct.

Q So by December, you anticipate having lost close to the full $9 million, necessitating the borrowing against the DIP?

A In fact, by the end of September, we will -- we're projecting to have about -- go as low as about a million dollars in operating cash. It will go slightly back up as long as volume holds. And then come December, we would hit the DIP

line.

Q And do the projections that you have for purposes of reaching into the DIP, are they predicated on the Montefiore deal going forward and this Court approving the sale process?

A Oh, absolutely. I mean, if the Montefiore deal did not go through, and let's, you know, say that we would have to go through another auction process, I don't believe there's any way that we could hold volume. We would have physicians looking elsewhere to protect their livelihood, managers leaving positions because of fear of not being able to be employed with Montefiore or a successful bidder, and I think we would clearly be in a tailspin and we'd have a snowballing effect.

Q And what is the maturity date of the DIP at this point in time?

A There is an event of default on July 15th, if there is not a sale order obtained from the Bankruptcy Court. And I believe the primary reason for that is that, basically, Montefiore is standing behind the DIP financing.

MR. STEINBERG: I don't have any other questions, Your Honor.

THE COURT: Very well. Any recross?

MR. CHRONAKIS: Your Honor, we have additional redirect from the debtors, if we may?

THE COURT: Sure. Come on up, please. But, I'm sorry, I know Mr. Magaliff next to you, and I know you're some

of the other folks, but I need to know who you are.

MR. CHRONAKIS: Thank you, Your Honor. Phil Chronakis from Garfunkel, Wild & Travis, special counsel to the debtors.

THE COURT: Sure, Mr. Chronakis. Go ahead.

REDIRECT EXAMINATION

BY MR. CHRONAKIS:

Q Mr. Celiberti, with respect to the service contracts between Our Lady of Mercy and Montefiore, can you describe how those contracts were negotiated?

A I guess, to start off with, we would -- we at OLM would have to identify whether we had a need that we could not fulfill on our own. And if there was a need for a certain service to be provided, we would consider Montefiore as one of several options that were available to us.

As an example, when we were -- when we decided we would be better off outsourcing our microbiology services, we went and obtained a proposal from Montefiore, and then received similar types of pricing proposals, if you will, from two national laboratories to see basically if there was a cost benefit by switching from Montefiore.

Once we concluded from a management perspective that we did want to make a change, and in this case, it would be from Montefiore, we had a practice set up internally by our board that we would then go to our finance committee to review it; if the finance committee was comfortable, they would recommend

approval to the full board, and then we would -- myself and Mr. Conaty normally would be the signing authorities for that service agreement.

And that was the procedure that we've been following.

Q And were there services that Montefiore offered that Our Lady of Mercy chose to contract elsewhere to receive?

A No. There were -- there was a service that we went to the outside world for, and also went to Montefiore, that we decided that we would defer, which was to bring in an outsider to help with our corporate compliance program. And the reason that we did that is that we felt we could -- we needed to save money, to be perfectly frank. So we took -- we made the business decision and took on the business risk of not having a formal compliance program.

Q And with respect to saving money, where were the Montefiore/OLM service contracts priced with respect to market rates for those services?

A By OLM. I don't know what Montefiore did in terms of determining their price for the services that they're providing to us. But, clearly, we are very, very comfortable with the prices that we're paying for the services.

Q Did you have an understanding as to whether the rates that OLM was paying for Montefiore's services were at, above, or below market rates for those services?

A The rates we were receiving using microbiology, as an

example, and laundry as a second example, were absolutely below the market because we had a -- in the laundry situation, we had a competing proposal from our existing vendor to continue.

Where we have provided -- been providing services, or buying services, as an example, the total involvement of Montefiore financial personnel in renegotiating new managed care contracts was in the area of $75,000 that we were invoiced in 2006. And the return was $5 million in cash in '06 and 9 million recurring.

Even in a situation where we were to hire, as an example, when our material manager left, rather than trying to recruit, which would have been very difficult, we have a service agreement with Montefiore to provide a full-time material management leader on our site. The cost of that person is basically fair market value of that job, plus a modest profit percentage, which I think is well below what a consulting firm that you could bring in people like that for would charge.

Q And, Mr. Celiberti, with these service contracts, are you aware generally what the termination provisions were with respect to Our Lady of Mercy's right to terminate those agreements?

A I believe that all of them are sixty-day termination without cause.

Q Okay. Turning to the CIR agreement, can you tell the Court what involvement you had, if any, with respect to negotiating

with Montefiore regarding that agreement?

A Well, as I mentioned when Mr. Brofman was asking, we initially -- and the person that I would go to initially on business matters like this would be Bob Conaty, and talk about the assumption of all of our contracts beyond just, you know, the union's. So Bob was the first person that I would speak to. And we talked very specifically about the CIR contract, and then we talked very specifically about when he rejected the idea of assuming that contract immediately.

We talked about the people involved. And I felt extremely comfortable about the oral commitment to retain all of the interns and residents who had medical licenses, and to provide comparable pay and benefits the day that the transaction closed.

MR. CHRONAKIS: One second, Your Honor?

THE COURT: Of course.

MR. CHRONAKIS: Nothing further, Your Honor. Thank you.

THE COURT: Very well.

Anybody else want to do redirect first? Okay. I'll take any recross, limited, of course, to the scope of redirect.

MR. BROFMAN: Very short, Your Honor.

THE COURT: Sure, go ahead.

RECROSS-EXAMINATION

BY MR. BROFMAN:

Q Mr. Celiberti, you just testified that when you spoke to Mr. Conaty, he rejected immediately the concept of assuming the CIR contract. Is that correct?

A He rejected the idea of assuming almost all of OLM's contracts, including the committee of interns and residents.

Q And the other unions also? The other union contracts he rejected?

A No. The other union contracts for 1199 and Local 30, he did indicate that they would accept.

Q Did he tell you why he would not take the CIR contract?

A Mr. Conaty indicated that they had -- Montefiore had no recent experience with the committee of interns and residents, and would like to defer that decision until it was known whether Montefiore would be the successful bidder.

Q Were those his words, "no recent experience"?

A Those are my words. I know that at some point in time the committee of interns and residents did have representation at Montefiore. But I don't recall if that was in the 1980s, 1990s, or how recent.

THE COURT: Mr. Brofman, I just want to put you on notice. I'm taking this for its relevance to the debtors' understanding and state of mind. I think it's hearsay for the truth of the matter asserted.

MR. BROFMAN: Your Honor, that's why I asked him whether it was his words. That's why I asked those questions.

THE COURT: Well, whether or not it's his words, he's still not here to be subject to cross-examination. I'm taking it from the perspective of a judge with a watch over this estate.

MR. BROFMAN: I understand, Your Honor.

THE COURT: Okay, go ahead.

MR. BROFMAN: The reason I asked whether it was his words, and I apologize, Your Honor, I asked whether it was his words for that reason, because we can get utterances that would be outside of hearsay.

However, not for the truth, just whether or not he said it. That's all.

THE COURT: Go on, please.

MR. BROFMAN: I have no further questions, Your Honor.

THE COURT: Oh, okay.

I don't know if we're up to re-re-direct or whatever. Is there any?

MR. OSWALD: No, Your Honor.

THE COURT: Okay. Mr. Celiberti, you're excused with the thanks of the Court.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: Okay. Do we have any other proffers?

MR. OSWALD: Just quickly, Mr. Barry, Your Honor.

Again, as I mentioned, Tom Barry is the managing

director of Cain Brothers who led this assignment. He has more than thirty-one years of investment banking experience in the healthcare field, and has been personally involved in at least five hospital sales in the last year, and approximately fifteen in the past five years, some of which are very much in comparable size and revenue to Our Lady of Mercy.

He was the primary adviser in marketing and directing the sale efforts for the debtors. He assisted with the negotiations of the APA with Montefiore, together with the debtors' other professionals. He prepared the liquidation analysis and led the post-petition solicitation efforts.

Cain was originally engaged in October of 2006 to advise the special committee and senior management regarding the potential sale in the event the State's 2007 grant for $13 million was not provided. He was aware at the time of the debtors' strategic alliance search in 2004 for a financially strong partner, and that Montefiore was the only party interested in pursuing an affiliation with Our Lady of Mercy at that time.

He was advised that Our Lady of Mercy was losing approximately a million dollars a month, required substantial capital expenditures in the range of $60 million over the next twenty-four to thirty-six months to successfully compete in the market, and that without the 2007 New York State grant, a bankruptcy filing was in all likelihood imminent because the

hospital would run out of cash and completely draw down on its credit line by the second or third quarter of 2007.

Given the hospital's dire financial condition, it was clear that an expeditious sale would be necessary if the State funding was not provided. Management, and particularly Mr. Celiberti, expressed a deep reservation about pursuing a bankruptcy filing and first seeking out -- without first seeking out a purchaser.

There was risk to the debtors that the employees would leave the jeopardize the hospital's operating abilities. Mr. Celiberti also expressed his concerns as reflected in his affidavit that a widespread pre-petition bankruptcy sale process would impact the physician/employee morale, who would sense instability. This would lead to a serious erosion of patient volume and doctors starting to admit patients into other hospitals.

In light of the liquidation analysis performed by Cain and the other professionals, the independent appraisal information that was obtained from CBR Richard Ellis, and these other recent hospital sales which are indicated in his affidavit, the parties -- the special committee had been recommended and ultimately accepted a purchase price of $30 million, subject to the post-petition marketing on process, which we envisioned would be not less than sixty days. As it turned out, I think we ended up close to ninety days.

Mr. Barry and Cain knew that few, if any, other hospitals would have an interest in the sale because of Montefiore's proximity to OLM. It's only about two miles away. And during 2006, Cain also represented clients for not-for-profit hospitals in the metropolitan area, each exceptionally difficult cases due to the fragile market of the healthcare facilities in New York City.

The market became even more fragile at that time given the Burger Commission decision to close several hospitals.

Further, during the spring and summer of 2006, Cain represented St. Vincent's Medical Centers on a potential change of control transaction for all of St. Vincent's lines of business. They approached each of the major medical centers in New York City, and each of the -- regarding each of the St. Vincent's assets, which were put up for sale, some of which were profitable at the time. No institution was willing to purchase St. Vincent's and keep its operations in existence. And in Mr. Barry's view, the major medical institutions in New York City were exceptionally hesitant to make any strategic acquisitions, even for facilities with positive cash flow, because of their concern for the fragile financial condition of their own operations.

Mr. Barry's opinion had the debtors commence the Chapter 11 case without a stalking-horse bid, given the declining market for hospitals in New York, the value of Our

Lady of Mercy would have received at a naked auction could easily have resulted in less than what was negotiated in the original asset purchase agreement with Montefiore.

Again, Mr. Barry confirmed his opinion to the special committee that a sixty-day solicitation process after the filing would be sufficient for any potentially serious bidder to conduct due diligence, submit a preliminary bid on the sale of the assets, particularly given the 2004 solicitation for a partner. And that likely limited the scope of competitive bidders.

Mr. Barry has opined that the negotiations to the extent he was involved with Montefiore were conducted at arms length. Ultimately, Mr. Barry generally believed that a sale price in the twenty-eight to thirty-three-million-dollar range, given OLM's revenue stream and other previous sales in New York in 2000 -- between 2004 and 2006, would be fair.

And, as I said before, together with his comparable sale data, the liquidation analysis, and other information, the recommendation to accept the thirty-million-dollar offer was made.

Following the filing of the petition on March 8th, and this Court's approval of the bid procedures, Cain Brothers contacted approximately forty healthcare hospitals in the area, actively solicited interest, inviting people to enter into confidentiality agreements to get access to our data room that

had been created pre-bankruptcy in order to expedite the due diligence process.

Three hospitals actually executed confidentiality agreements, each of which doing some level of due diligence. In particular, New York Presbyterian Hospital, which Cain Brothers believed to be the most likely competitive bidder, was encouraged to bid and kept an ongoing dialogue with them, had extensive conferences and e-mail exchanges with their professionals regarding the transaction.

On or about May 18th, Cain was informed by New York Presbyterian that it considered all the aspects of the sale and concluded it was not desirable to proceed because the stalking-horse bid, together with the anticipated working capital and capital expenditure needs required by the Hospital exceeded their perceived benefits to the transaction.

As I mentioned earlier, there were no bids received by the May 31 deadline for all of the assets, and we only had the one credit bid by the indenture trustee.

With that, Your Honor, we submit as a proffer, Mr. Barry's testimony, and you have his affidavit.

THE COURT: All right. Are there any evidentiary objections to that proffer?

Hearing no response, the proffer and the underlying affidavit are in evidence as direct.

Any desire to cross-examination?

All right. The record will reflect no response. Therefore, cross-examination is going to be waived.

Anything further in the way of evidentiary showings, Mr. Oswald?

MR. OSWALD: I don't believe so, Your Honor, in connection with the sale.

THE COURT: Okay. Vis-a-vis the sale, did you mean to exclude something else? I wasn't clear on whether you wanted to compartmentalize the evidentiary showings on all of the matters in dispute today. For instance, do you have anything in the way of an evidentiary showing on the interns controversy, beyond, you know, the evidence you've already put in in that regard?

MR. OSWALD: We don't have any evidence, Your Honor. As I indicated, we will rely on the debtors' response. It was an omnibus response that dealt with all seven responses and objections. As I mentioned, the only outstanding item for today is the CIR objection, which we believe is misplaced as a matter of law. We do not believe that the sale needs to be held up. It's certainly not, in our view, an attempt to do an end-run around Section 1113 of the Code. Contrary to the objection, the debtor has had several meetings --

THE COURT: Pause, please, Mr. Oswald.

MR. OSWALD: Yes.

THE COURT: I'll take argument on the objection in a

second. I just want to get the evidentiary record buttoned up at this point.

And if I heard you right, you're going on the evidence that's already in the record, and that there's nothing beyond that which I now have.

MR. OSWALD: That's correct, Your Honor.

THE COURT: Okay. Mr. Brofman, do you have any evidence, other than the evidence you elicited on cross?

MR. BROFMAN: Yes, Your Honor. I have a witness, Michael Phelan from CIR.

THE COURT: Is there a reason why I didn't get his declaration in advance?

MR. BROFMAN: Yes, Your Honor. I was not aware that we were going -- that there was going to be a settlement between the committee and the debtor this morning. And --

THE COURT: Forgive me, Mr. Brofman. But don't my case management orders require the submission of declarations on a matter long before the day of the trial?

MR. BROFMAN: Your Honor, it would ordinarily, yes, Your Honor. And I was not aware, frankly, of your case management order. I apologize. But I did -- because I got involved in this case after the case started.

But in the same respect, I thought that we were going to have witnesses on the stand today that I could cross-examine that would be able to give me the same information. And I did

not get them because there was a settlement today.

It's a very, very short testimony, Your Honor.

THE COURT: Mr. Oswald, do you want to be heard on what I should do in this regard?

MR. OSWALD: Well, again, Your Honor, you know, we believe the objection can be dealt with on the papers. This hearing, and this motion was filed with the APA on March 8th. We have had, as I said before, I don't want to get into the argument, but we have had a discussions. Mr. Celiberti has already testified that we did seek to have Montefiore, or any buyer, to assume all of our collective bargaining agreements. Failing that, we sought to have --

THE COURT: Forgive me, Mr. Oswald. I understand that. But that's not really the thrust of my question.

I read both briefs. And it may well be the case, unless Mr. Brofman tells me some law that I don't know I think it is the case, that this is a question of law and not a question of fact.

But the issue before me now to decide is whether I should hold the non-compliance with the case management order against Mr. Brofman, or I should let him put into evidence whatever he wants to put in. And take a second to caucus with your guys, Mr. Oswald, and tell me whether you want to have me keep out whatever he would put in by way of additional factual showing by reason of his failure to comply with the case

management order.

MR. OSWALD: Mr. Brofman indicated it will be short. Why don't we hear from his witness, Your Honor?

THE COURT: Very well.

Put him on, Mr. Brofman.

MR. BROFMAN: Thank you, Your Honor.

THE COURT: Please stand. Let me get his name for the record, and then he'll be sworn by the court reporter.

MR. BROFMAN: His name is Michael Phelan, Your Honor.

THE COURT: How is that spelled, please?

MR. BROFMAN: P-h-e-l-a-n. I never get it right.

THE COURT: P-h-e-l?

MR. PHELAN: A-n.

THE COURT: Thank you, Mr. Phelan. All right. Madam Reporter, would you swear him, please?

MICHAEL PHELAN, WITNESS FOR THE OBJECTOR, SWORN

THE COURT: Have a seat, please, Mr. Phelan. Same request of you. Stay close enough to the microphone so we can all hear you.

DIRECT EXAMINATION

BY MR. BROFMAN:

Q Mr. Phelan, by whom are you employed?

A The Committee of Interns and Residents.

Q And what is your position?

A I'm the director or organizing and field services.

Q And in the context of your position, have you been involved in organizing or attempting to organize Montefiore Medical Center?

A I have.

Q And what period of time was that, sir?

A Approximately 2000 to 2003.

Q And can you tell me -- describe what happened in that case.

A Residents contacted us desiring to organize at Montefiore Medical Center. We met with --

MR. STEINBERG: Your Honor? I'm going to object at this point. Mr. Brofman said that the purpose of proffering this witness and violating the case management order was because that he was expecting to elicit the testimony from the other witnesses that were going to be proffered by the committee.

But what you're about to here now is not in any of the declarations that were proffered, or was never the subject of any testimony that was going to be elicited from any of the other witnesses. So this is really a complete surprise.

I think Mr. Brofman should say what this witness is to be proffered for, and if it has nothing to do with what was the underlying objection of the committee, he clearly has violated the case management order.

THE COURT: Need a response from you, Mr. Brofman.

MR. BROFMAN: Yes, Your Honor. I expected Mr.

Jacobson to be here present. I was advised by the committee that Mr. Jacobson would be one of the witnesses that would be produced today. Mr. Jacobson was involved in the effort to prevent Montefiore's residents from being organized in the committee of interns and residents, and I was going to elicit it from Mr. Jacobson, just for a simple purpose: To show the anti-union animus, Your Honor, which is one of the issues that we put before the Court in our objection.

MR. STEINBERG: Mr. Jacobson --

MR. BROFMAN: And if I might, Your Honor, the second reason is that there was a -- there was a statement made by counsel, both in papers, which we received, and now again, here in the courtroom, that there were negotiations. Mr. Phelan was present at the meeting, and I'm sure he would characterize it somewhat differently, Your Honor.

THE COURT: Mr. Steinberg?

MR. STEINBERG: Your Honor, none of the witnesses who are going to testify as to the subject, the declarations, did not deal with the subject. I'm not even sure what this has to do with the sale process at all, and the request for Your Honor to approve the sale.

I think what he's trying to do is litigate a claim against Montefiore in the event that Montefiore is the purchaser after a closing, and nothing before. This is just an expedition that he's trying to predict for future litigation.

It has nothing to do with the sale prices. Because the only way this has any relevance is if Montefiore is the purchaser and closes the transaction.

THE COURT: Objection sustained, insofar as you're asking him for anything other than what was said in a meeting with Our Lady of Mercy.

MR. BROFMAN: I will ask him that, Your Honor.

BY MR. BROFMAN:

Q Mr. Phelan, you were present at a meeting with the debtor?

A I was.

Q After the filing of the petition?

A I was.

Q And can you describe what went on in the meeting?

A It was a brief meeting. The debtors' counsel and the CEO of Our Lady of Mercy were present. Mr. Celiberti, they said they were having this meeting as a courtesy. They took pains to say it was not a negotiation, but that they were there to -- among many stakeholders in the affairs of Our Lady of Mercy, share information about what the intention of the parties were in terms of Montefiore acquiring OLM.

MR. STEINBERG: Objection, Your Honor. This all is hearsay.

THE COURT: Well, I'm not going to take it for the truth of the matter asserted. What are you offering it for, Mr. Brofman?

MR. BROFMAN: Your Honor, it's for what Mr. Phelan -- it's an issue of fact as to what went on in that meeting, and Mr. Phelan's recollection of what went on in the meeting is very different than was stated by debtors' counsel, both in paper and orally before this Court.

THE COURT: All right. I'm going to take it, but not for the truth of the matter of what was stated. I'm only going to take it for what was said, to the extent it might be relevant to the debtors' intention. Go ahead.

BY MR. BROFMAN:

Q Mr. Phelan, was there any further negotiations -- withdrawn. Were there any negotiations at any time with the debtor concerning the CIR contract?

A The debtor being?

Q OLM.

A No.

MR. BROFMAN: No further questions, Your Honor.

THE COURT: All right. Any redirect? All right. You're excused, Mr. Phelan, with my thanks.

(Witness excused.)

THE COURT: All right. Am I correct that the evidentiary record is now complete?

MR. OSWALD: Yes, Your Honor.

THE COURT: Mr. Brofman, do you agree?

MR. BROFMAN: Yes, Your Honor.

THE COURT: Okay. All right. Then I'm going to take oral argument on the objection, and make your presentations as you see fit, but when you argue it, I need you to address the following questions and concerns I have.

Now, one of the problems that both sides have, but I'm going to put you on notice now, is that I've dealt with this exact issue and I've ruled on it on the record, but not in a written decision, and I dealt with this in the case of Aztec Metal Maintenance, 06-12050, in which I held, as my questions are going to telegraph to you, that the matters under 363 and 1113 are separate, and that 1113 concerns, which must be honored in a motion dealing with the matters that 1113 covers, aren't the same as those addressed under 363, and I think probably the best way to do it, so you both know where I'm coming from, is for me to read from the transcript of that ruling, and then give you, Mr. Brofman, if you're of a mind to, a chance to argue why I was wrong in that decision, because it's stare decisis vis-a-vis this matter, but is not collateral estopped or res adjudicata against you.

And by way of background, in the Aztec Metal Maintenance case, we had a company that was running out of money and near going out of business and was trying to sell itself as a going concern before it went out of business, and the buyer was willing to take on as many employees as it could, and to take on as many as it could, but would not commit, in

advance, to taking on the debtor's collective bargaining agreements, a factual situation that sounds, subject to your rights to be heard, pretty similar to what we have here.

And what I said then, and I need both sides to address, is finally, I turn to the theoretical concerns under Section 1113. Theoretical may be even too much of a way of stating it. The debtors argue that 1113 isn't implicated until and unless a debtor tries to reject a collective bargaining agreement and, of course, they're right in that regard, as at least one of the unions recognizes. No authority was offered to the contrary in that respect.

I agree with the debtors' point, relying on the Eighth Circuit BAP's decision in Family Snacks, that it's okay for a debtor to sell substantially all of its assets without also assuming and assigning its collective bargaining agreements.

I went on to say that I agreed with the debtor, at least under the facts there, and you can argue whether the facts here are the same or not, where there's no indication that the 363 sale has the purpose of evading responsibilities to one's union. I am not called upon to decide and do not decide how I would deal with the situation if it ever appeared that the debtor was using the 363 sale to sidestep its obligations to its employees or their unions. A case of that character can be decided on another day.

Mr. Brofman, I need help from you on whether I got it

wrong there, and if you think I did, I need you to -- you're going to have a chance to argue -- sit down, please.

MR. BROFMAN: Oh, I thought you wanted me to stand up. I apologize.

THE COURT: No, no. You can sit because I'm going to be talking for a couple of minutes --

MR. BROFMAN: Okay.

THE COURT: -- for what I want both sides to address when they have their chances.

I need both sides to slice and dice 363, on the one hand, and 1113 on the other. And when you do that slicing and dicing, I want you to slice and dice again the way the Supreme Court has told us we've got to look at things lately, starting with textual analysis of what, if anything, 363 says that makes it subject to any 1113 obligations, and what 1113 says that says that it has to be engrafted on a 363 determination.

I looked, and I couldn't find anything, on either of the statues that says that there is such a linkage, but I'll hear what both sides have to say on that. Then, when you get to the cases, I need you to deal with Family Snacks, and in particular not the Eighth Circuit BAP's language all that much, but what the bankruptcy judge originally in Family Snacks, which was to agree with -- approve the 363 sale, without requiring an 1113 determination. And even the case that you cited, Mr. Brofman, Lady Coal, where Judge Pearson in West

Virginia had approved the sale, the 363 sale, notwithstanding his question in his mind as to whether 1113 could be satisfied.

What those things seem to be telling me, subject to both sides' rights to be heard, is that 363 isn't subject to an 1113 limitation, that I approve the 363 sale, and that 1113 issues aren't ripe, and that whatever order I enter be without prejudice to everybody's rights at such time as we deal with 1113 issues.

Now I'll hear argument. Mr. Brofman, I ask you to come to the main lectern, please.

MR. BROFMAN: Thank you, Your Honor. I will endeavor to try to answer your concerns, Your Honor.

THE COURT: Okay. And you haven't appeared before me before. I'm not an Appellate Court. You don't have to answer them all up front.

MR. BROFMAN: I'm not going to.

THE COURT: Just be sure you've covered them when you're done.

MR. BROFMAN: I promise I will try.

THE COURT: Okay.

MR. BROFMAN: Your Honor, first, what we saw today is something that is in the normal circumstances of bankruptcy cases. A debtor goes to sell and then there's a committee objection because they want more money, and then there's a resolution. But this is not a normal circumstance here, and

it's not normal for a lot of reasons, primarily amongst them is that normally, and in all the cases that Your Honor cited, including the Aztec case, we don't have a parent with two siblings that one sibling is buying the assets of the other. And essentially, in such a way that they've excluded, and Mr. Celiberti very clearly said excluded, for three years, any possibility that anybody else would be interested. And Your Honor has sat on enough bankruptcy cases to know that when you have a situation where one entity is managing the other, per se, because the boards are certainly connected, then you have a situation where it is nearly impossible to get a true competitive bid.

So that we know that Montefiore has been involved intimately in the operation of OLM, and has prevented, through this process, anyone else from getting a real interest. So that's why it's not normal. So the heightened scrutiny that Ms. Oswald alluded to many times, and we all agree exists, is even more heightened, particularly in this case.

Now, we don't normally have an APA that says we're going to assume two labor contracts, but not assume the third. Why don't we usually have that? Because usually, if there's a problem, and the Maxwell case is very instructive here, the Second Circuit, and both of us have cited to the same case, and for the same reason. The Second Circuit said, when you -- it's okay to reject a labor contract for the purpose, if the union

is not being reasonable in its relationships, to reject that contract in order to get a 363 sale. In that case, the union was arguing that it wanted to keep its -- all of its benefits, and refused to negotiation in good faith, and so the Court said I'm going to approve the sale and I'm going to reject the contract. Interestingly, in Family Snacks, we contacted the attorneys that represented the union in that case, and we got all their documentation and what we found out is that they never objected to the 363 sale. So that's very different than what we have before us here.

So Aztec is different and certainly Family Snacks is different. But Maxwell tells us -- gives us a methodology of how to do this. Now, why is this case different? We have the debtor. We have a more powerful sibling controlling the use of the sale process of the 363(b). And what do they do? They violate CIR's rights, fundamental rights to even engage in negotiations. Now, I've heard this statement that was said, well, we'll, you know -- Montefiore promised -- I heard Mr. Celiberti say that Montefiore promised that they'll engage in negotiations after the sale.

Your Honor, if you read, and I'm sure you did, Montefiore's response, they say, quite to the contrary -- they say, well, MMC does not necessarily agree with CIRCU's characterizations, those obligations, does not --

THE COURT: I think you're right on that, Mr. Brofman.

Why don't you then assume that what Mr. Celiberti thought may be relevant to this state of mind and his subjective good will, but isn't binding on either you or on Montefiore.

MR. BROFMAN: That's correct, Your Honor, and what's going on here is Montefiore, using this process, using the 363(b) process, in a situation that we now find may not have to be so emergent because we have until December before they're going to have a money problem, we could really do a plan of reorganization and, in fact, essentially, this has been a creeping merger between Montefiore and OLM from the beginning, from that point in 2004 when they first signed the letter of intent.

So what we have here is a violation of CIR's fundamental right, under 1113, to be governed by 1113 in the rejection of its union contract.

THE COURT: Why do you say that? You're going to have an 1113 motion down the road, and you'll have the ability to argue, at that time, that the debtor can't reject your contract unless and until it's complied with the hoops that 1113 requires.

MR. BROFMAN: I'll explain it, Your Honor, but this went around backwards. It's going ahead and doing the sale and saying we're taking all of our assets and, in fact, as part of our contract, in part of our contract, we are transferring all of our employees, including our unionized employees from CIR,

to the buyer, and the buyer has got to give them employment. All of the assets except we're not transferring the union contract and, by the way, the buyer must give them employment. That is an absolute requirement under the APA, provided that they were in good standing at the hospital when it sold. So that what they're doing is they say, let's get rid of the union contract, but yet take all the employees. They get the benefit. They don't have to get the burden.

What's the reason there's a problem? Simple. 1113, after the fact, is going to do nothing. What are they going to do? Your Honor, in the meantime, we'll get a 363(b) order that will say it's free and clear of liens and encumbrances and Montefiore will certainly raise that when we turn around and say to Montefiore, wait a minute. You're not acting in good faith. You are required, since you took over all the employees, you are required to bargain with us in good faith. That's how 363(b) and 1113 inter-react. They inter-react because 363(b), and particularly in the orders that I've seen in every, single one of these cases, free and clear of liens and encumbrances, with liens attached to proceeds, encumbrances -- encumbrances concluding the obligations, the union obligations. And so, what we have here is a situation where the parent organization takes the subsidiaries' assets, its employees, and does away with its union.

THE COURT: Isn't that, putting aside the motivation

or intent that you're ascribing to Our Lady of Mercy, exactly what Ron Pearson -- what Judge Pearson did in Lady Coal at Page 243 of his decision, where he approved the 363 sale and said that employee creditors are protected by the right to file claims for breach of the agreement, with such damages to be satisfied by payments from the proceeds of the sale?

MR. BROFMAN: Your Honor, I saw that decision. I saw that issue and we put it in nonetheless. We felt it was important that the Court see what was going on there. We don't necessarily agree, in that situation, that it should have been done that way. And as obviously representing unions, we think that that decision, in certain aspects, was wrongly decided, but the import of that decision, and let me just get to the point where we cited it --

THE COURT: 243.

MR. BROFMAN: No, we cited it to the Court. We cited it for different -- for a different reason, Your Honor. If I could -- I apologize, Your Honor. I have to go find it.

THE COURT: Well, at Page 6 of your brief, you said that --

MR. BROFMAN: That's where it is.

THE COURT: You cited --

MR. BROFMAN: There it is.

THE COURT: -- Lady H Coal for the proposition they couldn't comply with 1113, and we'll deal with 1113 when we

have an 1113 motion.

MR. BROFMAN: Right.

THE COURT: But right now, I've got a 363(b) before me.

MR. BROFMAN: But in that case, Your Honor, and here's where Lady Coal is different, and that's why this case is different. In Lady Coal, there was no obligation on the part of the purchaser to employ all of the union members. In this particular case there is.

We have a very interesting and different set of facts here than in most cases. That's why I said from the outset, this is not the ordinary case. I've rarely seen an asset purchase agreement that says we're going to get rid of the union, but you've got to employ all the union people. You have to. Not you may, you may want to, and please do as many as you can, Your Honor, as you had in the Aztec case, but you have to.

And this is being done between related parties, in which that occurs. That's a very strange clause. Why does that clause go in there? Why didn't it just say, you know, whoever you want to employ, go ahead and do it? You know, you're the buyer. You can go ahead and make that decision.

But yet, in this particular instance, in this particular instance, they said, let's do away with the union, employ not some, but all of the people, but on whatever terms that you feel like you want to employ them.

THE COURT: This sounds upside down to me, Mr. Brofman, with respect. You have a CEO. I heard from Mr. Celiberti. He's trying to do the best that he can for his employees, to try to do as much as he can within the limits of his bargaining position, and you're saying the debtor should be penalized for that?

MR. BROFMAN: Your Honor, with his belief, false believe, as Your Honor now has come to understand, that Montefiore agreed that they would negotiate afterwards with the union. That was his understanding. That's what he testified to. That's testimony that's not backed up by anything real. There's no documents. There's no agreements. Only the APA, which says otherwise, which says in five or maybe six different places, we're not taking CIR. We don't have anything to do with CIR.

Now, what is the reason for that? What is the reason that they want to do that, other than to avoid what would be the simple requirement that the debtor could have done at any time, open negotiations, said listen, you know, we can't have your contract. We want to get rid of your contract, there's a reason for it, a good reason, or we want to modify your contract so that it terminates now, we would have said -- you know, we would have come back -- our union would have come back and made a proposal -- a counter proposal. We would have followed 1113. They would have moved to reject it. Your Honor

could have had that on the same time as today.

But they didn't do that. What they did is they put in APA together that avoided those processes, that allowed their parent or their sibling to be able to take the benefits of all of these interns and residents, and the program that they have, because believe me, ACGME was not going to put another program in there so quickly if they didn't hire all the residents, and do it without the union.

THE COURT: Pause, please. ACGME?

MR. BROFMAN: The -- Your Honor, it's in papers I filed, I don't think before -- for this motion, but that is the accrediting agency for residency programs. So not only do you have to have a sponsor, you have to have -- an accrediting agency has got to accredit the program.

What agency is going to do that if you're going to shut down the program simply because they decide, well, we'll do away with those residents? They wouldn't have accepted the program. There would have been no program at that hospital. And truly, residency programs are beneficial to hospitals because they bring in money. They give you a larger Medicare reimbursement rate and that's a big reason that they have them. Obviously, there's training reasons, and there's good reasons, as well, but the point is that now, they get the benefit of the residents, but yet, they don't have to have the union. Why? Because they're not -- they haven't had a lot of experience

with the union. They haven't had time to spend to decide -- have they even talked to the union? Not at all, Your Honor. The only meeting that occurred with Montefiore was counsel's meeting. Lawyers met and were told, in fact, before we met, that the only reason that we would meet would be because they would give us a -- they specifically said this is not a negotiation.

We asked a very simple question at the meeting. We asked Montefiore's counsel to provide us with what benefits and what salaries are expected to be offered to the residents. Something simple, that a union would ask for its members. We got no response. We've still gotten no response to date. We asked the same question of the debtor. We've gotten no response, other than you have to ask Montefiore.

So, Your Honor, what they've done is they've avoided this 1113 process, and the Ionosphere case said Congress intended that 1113 be the only method to get rid -- to be able to reject the union contract. Here, they're able to do it because now the debtor is going to stand up and say, well, we sold all the assets. We sold -- all the employees are gone. What do we need the union contract for?

So they went around it -- they went around it backwards. We didn't do it. The debtor did it backwards. The debtor went ahead and said, this is now a basis for us to turn around and say, we don't want a union contract.

Now, Your Honor, if Your Honor allows this to happen, what's going to happen is that this is going to form a pattern. What we're going to have is a pattern of debtors being able to say, well, debtors and buyers saying we want to get rid of the union contract. We got an insider company that'll buy all the assets, and we don't have to do an 1113 rejection. We can simply turn around and say 363(b), we're selling all the assets, we're not assuming the union contract.

And now we've avoided the 1113. Then we walk in and say, well, now since we've already rejected -- we've already sold all the assets, now, Judge, let's reject the union contract under 1113. And that's the problem that this Court is faced with. The problem is that what you're doing, if you allow this to happen, is you set up this problem, you set up this example, you allow debtors and buyers who are insiders to do this on a regular basis, to avoid 1113, and that's the problem. That's why Your Honor, while Aztec may have been different because it's different facts, they weren't insiders. While I will not comment on whether Your Honor was right or wrong, although I believe Your Honor was wrong under those circumstances because of what Maxwell said, what the Second Circuit said, I truly believe that under these factual circumstances, if Your Honor was to approve this sale, it violates 1113 because it does exactly opposite what Ionosphere says, which is to make sure that the only method by which you

can reject a union contract is through the 1113 process, that's what Congress enacted. It did it to protect unions from a straight rejection that was going on under 365. That's why it was done. That's what Your Honor should do, should deny the sale unless -- unless the Montefiore is willing to assume the contract or the debtor first tries to deal with the contract, deal with the 1113 issues first, before the sale is completed.

Have I answered your questions, Your Honor?

THE COURT: If that's your answer, that's your answer. I'm still looking for what Section 363 says about how 1113 is incorporated within it, or conversely, how 1113 says it's supposed to be applied to 363.

MR. BROFMAN: It doesn't say it in the statute, Your Honor, and I understand that. It does not say directly in the statute. But it does say -- it does say in the statute that a 363 sale has to be with Court approval. And the basic concept of the Code is that you can't use one section of the Code to avoid and evade another section of the Code, and that's exactly what's going on here.

That is a basic concept of the Bankruptcy Code. It has to be read together. It can't be read in separate parts. You can't use one portion to turn around and say, we're now going to have to deal with the other portion of the Code because we have a way around it. That's exactly what we are here, Your Honor, and there was nothing in 1113, but what we

have is instructions, in both Ionosphere and in Maxwell, that you go ahead and you look to reject the -- that is the only method. Ionosphere says, it is the only method that Congress subscribed -- prescribed for the rejection of union contracts.

And in these facts, under these circumstances, with the insider situation between these two parties, Your Honor is seeing a pattern that will be set that will create problems in the future and will avoid -- will allow debtors to avoid, and buyers to avoid the 1113 process.

THE COURT: All right. Thank you.

MR. BROFMAN: Thank you, Your Honor.

MR. OSWALD: Your Honor, as I mentioned before, we filed, in support of our omnibus response, a comprehensive basis why we think the objection is misplaced. I'll start with answering the Court's first question.

There is no statutory language that links the 363 sale with the 1113. We looked before we filed the motion. We did extensive research on the issue because when it was clear to us during the APA negotiations that Montefiore was not willing to take on that contract, it was one of the issues on our list to take a look at.

I think Your Honor made a comment earlier that was a comment that I first made to Mr. Brofman when he got into the case, and that is, the debtor -- there's just no dispute here, Your Honor. This debtor has to be sold. It will run out of

cash. If it runs out of cash, it has to close. All the employees will have to find jobs elsewhere.

There's been no evidence by CIR that that is not the case. The fact that Mr. Celiberti and his team have been able to do a pretty good job with stabilizing the operations and having a good cash flow doesn't change the fact that without a sale, the status quo gets blown up. No question.

As I said to Mr. Brofman, basically, I have good news and I have bad news. We sought to have Montefiore, in the stalking-horse proposal, assume all of the collective bargaining agreements. It certainly would make my job easier, Your Honor, to have a paragraph in a sale order that says the agreement's hereby assumed and assigned. We asked. I think we asked on more than one occasion. Montefiore was not willing to take that particular contract.

Here's the good news. Mr. Celiberti, looking out for all of the employees, would you offer them employment? And I think it's offers of appointment under the labor law that they were willing to do. That's what they've told us they will do. So that all of our employees, interns, residents, and the other 1,500 employees under the 1199 agreement that's being assumed, will have jobs upon a closing. The bargaining position was not one which OLM could dictate, and particularly, in this circumstance, Your Honor, and the record has been uncontroverted, there are no other buyers. I'm at a loss to

Mr. Brofman, probably ten times in his argument, referring to the insider status. There's no evidence here that the insider status had anything to do with the determination by Montefiore as to what contracts it wants to assume or not assume.

And fortunately, we do have a buyer. In terms of the case law, Your Honor, and we cited to the Family Snacks case, as well, first and foremost, find your buyer. Who will be your buyer? This is a contract, by the way, that expires by its own terms in October. Hopefully, we close the deal before that.

Montefiore has said, if it is approved as the buyer, it will forge ahead on numerous fronts with OLM to deal with the numerous other issues that have to be dealt with to close, not only dealing with the interns and residents and what it has in mind in terms of those offers, but all of the other issues. We talked about it earlier with the B of A and BONY leases. We have other professional contracts that need to be dealt with. We have the state court process that needs to be dealt with, which, as a side note, is his last point in his objection, deals with the 510 issue in applying to state court for the approval. We've been in communications with the state, as I've said before. The state counsel who I've spoken to, this is the process you take. Who is the buyer? The bankruptcy court as to appoint -- anoint the buyer for the sale order, and then we will work through the state. And it's likely that a state court proceeding is not going to be necessary, but that

determination is not one that holds up approval of the 363 transaction.

1113, and I would agree, to the extent that Mr. Brofman says we didn't have what I would call a hard negotiation, but the attempt of OLM was to communicate directly with all of the major parties in interest, and that includes CIR and its constituency. Let them know what's going on. Let them know what the time frame is. Let them know what we're trying to do. Keep them informed. All short of having the buyer agree to assume the contract.

And we asked them specifically, what can we -- what else could we do, short of getting them to assume the contract, to help? I haven't gotten an answer back on that piece. And I know they want information. They want to know what the proposal is going to be.

Also telling, Your Honor, and I think Montefiore has filed a statement to this regard, there are rights and obligations each party is going to have under the state and federal labor law. Nobody is trying to affect those rights. The APA, the sale motion do not seek any relief with regard to the contract, and nobody is looking for dispensation in terms of what has to be done if Montefiore is the successful buyer and if there is a closing. There's a duty to discuss and negotiate and meet with CIR. I presume Montefiore will do what it needs to do under the requisite statutes. But that's not

before the Court today.

So we have a record that is uncontroverted that this hospital needs to be sold or it closes. Maybe not today, maybe not tomorrow, but without a sale order and without a DIP come July 15th, this operation is going to go downhill very, very quickly.

Uncontroverted. Heightened scrutiny is applied. Special committee did the negotiating. The record has been made on that. It's not been controverted.

So we have a scenario where we either approve the sale and move forward to a closing that's going to be for the benefit of all creditors, including Mr. Brofman's constituents, and obviously they can choose not to take employment, but for all creditors to be benefitted by approval of this transaction today. There's no winners, Your Honor, if this motion is denied. No winners.

THE COURT: Mr. Mintz?

MR. MINTZ: Your Honor, to address your questions and, I think, to respond to certain of Mr. Brofman's comments, because I think his characterization certainly went far beyond what was in the evidence before Your Honor, I think the easy answer with respect to your opening question with regard to 363 and 1113, we can all read those provisions. There isn't anything in there, in 363, that makes it subject to 1113, and there's nothing in 1113 that implicates 363.

I think it's worth comparing the situation to 365. Mr. Brofman's argument, taken to the extreme, would permit every party to an executory contract, to come before the Court and say that since Montefiore is not taking their contract, the sale shouldn't go forward until the process under 365 is undertaken. It's a different standard than the 1113 standard, but that can't be the case. The buyer has the ability to take what assets it wants to take and the debtor has the ability to choose whether it wants to enter into that sale arrangement.

Mr. Brofman, I think in an effort to try to get around Your Honor's ruling, continually refers to the insider status and the implications of that. But nowhere in the evidence, and taking a quote from your Aztec Metal decision, is there any evidence that this 363 sale was intended to sidestep the union obligations. That's not what happened here. The testimony, the evidence is clear that OLM was facing a financial crisis, had to file for bankruptcy, and had to effect a 363 sale on an immediate basis, did not have the ability, and it does not have the ability right now to undertake a plan process.

Let's remember the tail of this process. Once this Court enters a sale order, there is still a substantial regulatory approval process that Montefiore has to undertake, and the state is not willing to begin that process and the other regulators are not willing to begin that process until this order is entered, and that process is estimated to take

several months, and to the extent that right now we're in June and a sale order is entered, the time that a closing is expected is in the September time frame.

This contract that's at issue expires in October. The issue of rejection could very well be mooted if the closing occurs after the expiration of this contract. The debtor doesn't have to confront the issue right now, and is not confronting the issue. This is a 363 motion, and that's what it's proceeding on.

Turning back to Mr. Brofman's comments on -- or mischaracterizations of the evidence, he described the debtors as having -- or OLM and Montefiore as having excluded interested parties for three years. That's not what happened here. There was an affiliation solicitation back in 2004, and then there was a court-supervised marketing process undertaken by the debtors, Cain Brothers, participated in by the committee over the last several months. The likely interested parties, the area hospitals all were contacted. Some understood diligence and they determined that they didn't want to bid. New York Presbyterian evaluated the proposal very carefully and they determined that Montefiore was paying -- effectively concluded that Montefiore was paying enough for these assets and they didn't want to pay any more.

Mr. Brofman also mischaracterized the nature of the service relationships that exist. He described Montefiore as

having been intimately involved in the operations. I think Mr. Celiberti's testimony was exactly to the contrary. Mr. Celiberti is the CEO of OLM. He's been the CEO since before the affiliation. He manages the day-to-day operations of this hospital, and while the board does play a board-type role, the testimony was clear that the operations were managed by Mr. Celiberti and the nature of the service agreements were very limited, narrow in scope, and were expressly designated or expressly identified by OLM because it was beneficial for OLM, from a cost standpoint, to undertake those.

Mr. Brofman also mischaracterized the asset purchase agreement. He referred to it requiring the employees, the interns and residents, to go work for Montefiore. This is an incident -- the asset purchase agreement isn't conditioned upon the indentured servitude of the OLM employees. What the asset purchase agreement provides for is that Montefiore is supposed to make offers to the employees, the interns and the residents. Obviously, the employees, the interns and residents have their unique personal decision to decide whether they want to take that offer.

I'm not sure where Mr. Brofman goes with that. Montefiore agreed to that provision at the insistence of OLM. As Mr. Celiberti testified, he requested that Montefiore agree to make offers to the interns and residents. Is the problem -- is Mr. Brofman suggesting that the issue would go away if we

didn't make offers to the interns and residents? I assume that's not the result that he wants, but that provision doesn't require the employment. There isn't a transfer of employment, as Mr. Brofman described it.

Mr. Brofman also described a meeting with Montefiore counsel. I don't think that was ever in the evidentiary record. I don't think it was appropriate to discuss and personally, I would note that I participated in that meeting. Mr. Brofman agreed that that meeting was set for settlement purposes and would not be disclosed, and I take personal offense that he is referring to that meeting in the courtroom today.

Ultimately, I think that there's nothing in the evidence that suggests that this sale was intended to sidestep the union obligations. There's nothing that suggests that 1113 is tied to 363 in the way that Mr. Brofman suggests. The debtor recognizes that to the extent, if and when it does decide to reject the contract, it will have to undertake the process that's described in 1113. That may or may not happen, depending on the timing of this closing.

THE COURT: Okay. I'll take brief reply, if there is any.

MR. BROFMAN: Your Honor, I think there's another party that wants to be heard.

THE COURT: Yes? Come on up, please. I'm sorry, I

don't know you.

MS. HEPNER: If I may, Your Honor, I'm Suzy Hepner from Levy Ratner on behalf of 1199, which is the major union at Our Lady of Mercy.

I just wanted to make a very brief comment for the record on this subject. 1199 shares the concerns expressed by Mr. Brofman about the consequences of allowing debtors to avoid obligations to recognize unions that are in place and assume their contracts, by allowing a 363 sale to not include the assumption of those contracts. And we wanted that -- we wanted Your Honor to be aware of 1199's concern about your decision in that area.

THE COURT: Okay. Thank you.

MR. BROFMAN: Your Honor, first let me just address one thing Mr. Mintz said about that meeting. Your Honor, Mr. Oswald raised it in his papers. Otherwise, I wouldn't have even discussed it with the Court. Let's start with that.

Second, Mr. Mintz also indicated -- Mr. Oswald did, that there's no evidence -- no evidence that dealt with the intent of the parties or the intent of what Montefiore was in not accepting it. Your Honor, there's such a thing called circumstantial evidence, and I'm sure Your Honor can understand that in the circumstances here, where two union agreements are assumed, one is not, but yet, offers of employment must be made to every, single employee of that union on terms to be dictated

by the purchaser. There is some concept here of intent.

When Mr. Celiberti testifies as to his state of mind and what he believed was going on, and yet, in paper we see something different, there has to be some intent. When we have parties who have been acting in concert for a year and for three years not doing -- not courting anyone else, and Your Honor, I find it kind of interesting that they should this was a wide-open thing. This is sort of like saying, like, you're living with your fiance, but yet, that person is entitled to go out and court someone else at the same time. It doesn't quite make sense.

But that's what was going on here. They were living together. They were really operating here under one umbrella, which was Montefiore Health System. They received the stock. They received the interest -- Montefiore Health System did, and both Montefiore and OLM were operating under the same umbrella, and yet, now they come to the Court and they say, well, we don't want you to take any -- we don't want you to look at the circumstances here. Just avoid the circumstances and see where it gets you.

Your Honor, I'm concerned that if this Court enters an order, not only will we have this problem that I addressed to the Court of what this means in the future, but I also believe that in the future in this case, Montefiore will raise, before another panel, the bankruptcy court approved it. We didn't

have to take it, we don't have to talk to you. And frankly, Your Honor, unless we get something at the very least here from this Court, if Your Honor is inclined not to agree with our position, then at the very least what we need is an order of this Court in the sale order that excepts out those issues and specifically determines that the Court is not saying that there is or is not an obligation on the part of Montefiore for anything else that may come under labor law.

Because what our concern is, is that that will be used as a methodology, both that and his decision, which allows this evasion of their obligations under 1113, these married -- almost married couple that are now getting married, to evade 1113 obligations, we think that that would be a critical problem. Thank you, Your Honor.

THE COURT: All right. We'll take a recess. I can't guarantee you exactly how quickly I will be back, but I want you all back by 5:30.

MR. OSWALD: Your Honor, may -- I'm sorry.

THE COURT: Yes?

MR. OSWALD: Did you want to take the 9019 before you broke, which is uncontested, or do you want to wait for that?

THE COURT: Let's wait.

MR. OSWALD: Okay.

THE COURT: We're in recess.

(Recess taken at 5:11 p.m.)

(Proceedings resume at 6:09 p.m.)

THE COURT: I apologize for keeping you all waiting.

The debtors' motion for approval of the sale of Our Lady of Mercy to Montefiore under the modified terms presented to me today is approved with a good-faith finding for Montefiore, and the union's objection is overruled. The following are my findings of fact and conclusions of law in connection with this determination:

Turning first to the facts. I reviewed with care the affidavits that were submitted as part of the motion and listened with particular care to the cross-examination of Mr. Celiberti. I found his testimony fully credible, and I accept it in full.

It cannot seriously be questioned that OLM's financial situation is serious, and that there is a need to sell OLM on a going-concern basis to maximize value for OLM's creditors, to keep over 2,000 people working, and to serve a community that would be ill served by the loss of the health services that OLM provides.

Of course it is true that, as a consequence of the affiliation agreement, Montefiore became an affiliate of OLM and obtained the ability to control it; therefore, it was entirely appropriate and perhaps essential for OLM to establish the special committee of non-Montefiore directors to handle the sale process. That went a long way toward giving me and others

comfort that the sale process would be handled diligently and is quite relevant in my view to the good faith of both OLM and Montefiore. But the presence of the special committee did not make Montefiore less of an insider; and I, therefore, do not review the transaction under a business judgment test, but rather applied the entire fairness standard.

Doing so, I find that the proposed sale, and particularly the price for the sale, is fair and is in the best interest of the estate. We leaned over backwards to ensure that there was a robust bidding process. The creditors' committee took and active role to maximize value, and the committee was successful in that regard. The fact that there were no other bids, even at the lower price originally offered by Montefiore, is strongly indicative of the fact that the debtors and the creditors' committee each did their jobs. And the reasons given by New York Presbyterian, that they did not want to pay more, which I find somewhat understandable given the major capital expenditures that would here be necessary, reinforce my conclusions in this regard.

I also am fully satisfied as to the good faith of Montefiore in this process and find it to be fully entitled to the 363(m) finding that Montefiore would understandably desire.

Turning to the objection raised by the Union of Interns and Residents, I must overrule that objection.

First, as a legal matter, I find that, after both

textual analysis and case law analysis, we reach the same result, which is that the debtors' failure to have engaged in the negotiation they'd have to engage in to succeed on a Section 1113 motion does not prevent them from proceeding with a Section 363 sale, under which the residents and interns' collective bargaining agreement would not be assigned.

As I noted in my questions to counsel in oral argument, Section 363 is devoid of any language making the ability to sell estate assets subject to the requirements of Section 1113. Likewise, Section 1113 is devoid of any language making compliance with it applicable to any determinations other than those relating to the assumption or rejection of collective bargaining agreements. Counsel for the union candidly acknowledged, as he necessarily had to, that there is nothing in either Section 363 or Section 1113 that makes the requirements of Section 1113 a condition to a Section 363 sale.

So then we turn to the case law. I was cited to no case where any court has ever held that Section 1113 compliance is a prerequisite to a Section 363 sale, and we have at least three cases to the opposite effect. As noted in oral argument, in Family Snacks Judge Federman in the Bankruptcy Court in Kansas City approved the Section 363 sale, even though he believed that he'd have to deny Section 1113 rejection approval, and this aspect of his ruling was accepted by the Eighth Circuit BAP.

I will assume it to be true, as Mr. Brofman argued, that the union there did not argue that 1113 compliance was a sine qua non to a sale, but the other union's failure to argue a position so lacking in textual or case law support merely weakens that particular case's full precedential value. It does not erase it, and even more clearly, it does not establish the inverse proposition.

But directly on point, as I noted, are the decisions in Lady H Coal, 193 B.R. 233, 243 (Bankr. S.D.W.V. 1996), and by me in Aztec Metal Maintenance, Case No. 06-12050, Bankruptcy, S.D.N.Y., April 26, 2007, a dictated decision dealing with the exact same issue: A sale by a company in financial distress of substantially all of its assets under circumstances where it had collective bargaining employments with its employees' unions, which its buyer was unwilling to assume.

As I noted, Judge Pearson in Lady H Coal approved the Section 363 sale, even though he denied the Section 1113 motion. He noted that employee creditors were protected by the right to file claims for breach of the agreement there, which was the National Bituminous Coal Wage Agreement of 1993, with such damages to be satisfied by payments from the proceeds of sale. See 193 B.R. at 243. The response to that was that Judge Pearson got it wrong. I disagree.

And even before I had Lady H Coal cited to me, I had

reached the same conclusion in Aztec Metal Maintenance. As against the possibility that this ruling will be read in isolation without the remainder of the transcript where I read it before, I'll read from my ruling in that case again.

> "Finally, I turn to the theoretical concerns under Section 1113. 'Theoretical' may be even too much of a way of stating it. The debtors argue that 1113 isn't implicated until and unless a debtor tries to reject a collective bargaining agreement, and of course they're right in that regard as at least one of the unions recognizes. No authority was offered to the contrary in that respect. I agree with the debtor's point, relying on the Eighth Circuit BAP's decision in Family Snacks that it's okay for a debtor to sell substantially all of its assets without also assuming and assigning its collective bargaining agreements."

I went on to say that such was true at least under the facts there, where there was no indication that the 363 sale had the purpose of evading responsibility to one's union, but that qualification would not be applicable here even if it provided a way to get beyond the textual analysis.

Here, OLM was and still is in serious financial distress, and I find that it's not being sold to engage in union-busting. In fact, Mr. Celiberti did what he could to do right by his union member employees.

I also have to reject the argument that because he succeeded in getting offers of employment for the interns and residents, but not necessarily under the same employment terms, OLM should be penalized for that. It sure sounds like no good deed goes unpunished. And it's irrelevant to what the Code says and what the case law says. If we ever had a case where a company was in no financial distress and got together with an affiliate to get out of its obligations to its unions by using the bankruptcy process, that would indeed be a matter of concern to me, but this is not such a case, and Section 1113 gives unions a lot of protection in that regard. Especially on the facts here, I see no basis for me to revisit the statutory and case law analysis I've just gone through to address any concerns of that nature.

I will, however, require that the order make clear that I am deciding only Section 363 issues and not Section 1113 issue now, and that all parties have reservations of rights with respect to matters not before me today, both with respect to Section 1113 or other unrelated issues down the road in this case, and with respect to Montefiore's future compliance with the law.

I don't need to decide whether Montefiore is the alter ego of OLM. The issue isn't ripe, it's not before me today. That issue is relevant, if at all, at such time in the future that the union wishes to impose obligations on Montefiore. If

either side requests, I'll confirm in the order and, in any event, I'm saying now that I'm not ruling on that issue, as I don't have to, and any determination I make on these wholly different issues is of course without prejudice to the rights of either side with respect to any such controversy in the future.

As Montefiore properly recognized in its brief, after the sale, quote:

"It will be subject to applicable post-closing labor law obligations, whatever those may be, including if and to the extent that Montefiore may be considered a successor employer under applicable labor law."

The issue before me is the construction of Section 363, and the extent, if any, to which I should find there to be requirements for a Section 363 determination that don't appear in Section 363 or in 1113 of the code. I've decided that issue and find that the requirements of Section 363 have been complied with in all respects.

All right. Mr. Oswald, do we have other matters before us today?

MR. OSWALD: Just one, Your Honor. It's the 9019 motion regarding the settlement of one of the debtors in the indenture trustee with respect to the garage.

In short strokes, Your Honor, the settlement resolves all of the issues, all the potential issues, for litigation

regarding title to the garage, the credited rights to the indenture trustee, evaluation concerning the garage, but the point is what we've agreed to do is to fix a sum to be paid to the indenture trustee at closing, $9,795,000 which is a compromise from the net owing and for application of the funds already being held.

THE COURT: I think one of your colleagues wants to whisper to you.

(Counsel confer.)

MR. OSWALD: Seven million. What did I say, nine million?

UNIDENTIFIED: Yeah.

MR. OSWALD: I'm sorry. It's a long day for all of us. At that reduced sum, as I said, in consideration for that sum, the debtors will be able to pass title to Montefiore at a closing.

The committee has reviewed the motion and has no objection to the settlement, nor have we received any other objections from the parties in interest, and we ask the Court to approve the settlement.

THE COURT: Okay. That'll be approved.

Now, am I right, Mr. Oswald, that you, in consultation with the committee, counsel for Montefiore and maybe some others, is going to have to massage the order to implement the rulings for today?

MR. OSWALD: Yes, Your Honor.

THE COURT: Okay. You are to do that -- you are to settle the order on no less than two business days' notice, and the time to appeal or move for leave to appeal from that order is going to be from the date of entry of the order, and not from the oral rulings that I'm making today.

There having been no request for a shortening of the automatic ten-day stay of effectiveness of this order, that ten-day stay will remain.

MR. OSWALD: That's fine, Your Honor.

THE COURT: All right. Come on up, please. I need you to come to a microphone, Ms. Cacuci. I keep saying "Catuchi." I apologize. It's Cacuci, isn't it?

MS. CACUCI: It's okay. Yes, Your Honor. Gabriela Cacuci for the City of New York, the New York City Fire Department.

We spoke about just picking a date today, that is acceptable to the Court for a hearing on the FDNY's objection towards the end of July, and if possible, I would like to know what the date is today because the client might be not available.

THE COURT: Well, you can certainly have a date in advance, but I can't give it to you at twenty-five after six in the evening, when my courtroom deputy who controls my life is no longer here.

MS. CACUCI: So should we call --

THE COURT: You can get it tomorrow morning. I would also hope that you folks could consensually resolve this, especially with the benefit of a decision I issued in the Adelphia cases. I think it was issued in the fall of last year, but was published in the early part of this year. You'll find it in the B.R.

The first question I will ask you at the outset of the argument is whether the City's requirements for approval on something that affects the public health and welfare can be blown away, and if the quality of performance to a contract counter party is of reasonable concern to the counter party, as it might be to the fire department, if it wants people to be answering ambulance calls properly, maybe you guys can work it out.

MS. CACUCI: Your Honor, we'll review the decision and they'll have a meeting. We don't even know what they want to do at this point, but we hear you.

MR. MINTZ: Your Honor, we've taken steps to arrange for a meeting, so that's certainly our intention, to --

THE COURT: Good.

MS. CACUCI: I would just like to --

THE COURT: Obviously, I'm not prejudging the issue on the merits.

MS. CACUCI: Right. And I would just like to reserve

my rights, which I know they're reserved, in case we cannot resolve the issues. I certainly feel that even though, obviously, there is law, that this is very factual in this particular case, with the FDNY, because of the whole regulatory environment and how the system operates, so we would be prepared to present evidence.

THE COURT: All right. Well --

MS. CACUCI: If necessary.

THE COURT: You don't need to reserve rights. You always have that on anything I'm not deciding. Put your noodles together, folks, and see if you can consensually resolve it. If you can't, then you can do whatever you need from me to do to hold an evidentiary hearing, but I've got to tell you, there are hard issues and there are issues that I would have thought that parties could have resolved consensually, and I think this strikes me as being in the latter category.

COUNSEL: I think it's just been a matter of time, Your Honor.

MR. OSWALD: Yeah, we would agree, Your Honor. It's really been a matter of priorities and attention.

THE COURT: Sure. I understand.

MS. CACUCI: Thank you.

THE COURT: Okay. Anything else? Anybody?

COUNSEL: Your Honor, again, we thank the Court for

its patience in accommodating the schedule and your staff in chambers.

COUNSEL: Thank you, Your Honor. Thanks.

(Proceedings concluded at 6:28 p.m.)

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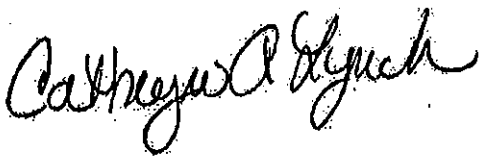
CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.



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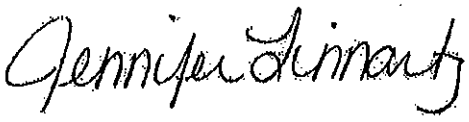

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June 22, 2007

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	06-12050
AZTEC METAL MAINTENANCE CORP.,	One Bowling Green New York, New York
Debtor.	April 26, 2007

TRANSCRIPT OF MOTION TO APPROVE DIP FINANCING AND USE OF CASH COLLATERAL MAY BE CONTESTED BEFORE THE HONORABLE ROBERT E. GERBER CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Plaintiff:	ROBERT D. RAICHT, ESQ. JULIE DYAS, ESQ. Halperin, Battaglia Raicht, LLP 555 Madison Avenue New York, NY 10022
For Tim Chase:	LESLIE BERKOFF, ESQ. Moritt Hock Hamroff & Horowitz LLP 400 Garden City Plaza, Suite 202 Garden City, New York 11530
For Corsair:	JONATHAN L. FLAXER, ESQ. Golenbock, Eiseman, Assor & Peskoe 437 Madison Avenue New York, NY 10022
For the Unions:	TODD DUFFY, ESQ. Duffy & Atkins, LLP 7 Penn Plaza, Suite 420 New York, NY 10001
For the Law Firm of Holm & O'Hara:	CAROL DELL, ESQ. MARK LICHTENSTEIN, ESQ. Crowell & Moring, LLP 153 East 53rd Street New York, NY 10022

(Appearances continue on next page.)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

APPEARANCES CONTINUED:

For the Purchaser:	PATRICK ORR, ESQ. Klestadt & Winters, LLP 292 Madison Avenue, 17th Floor New York, NY 10017
For the Marble Industry Trust Fund:	ERIN DOHERTY, ESQ. Colleran, O'Hara, and Mills, LLP 1225 Franklin Avenue, Suite 450 Garden City, NY 11530
For the DIP Lender:	JAMES RICCHIUTI, ESQ. Entrepreneur Growth Capital 545 Madison Avenue New York, NY 10022
Court Transcriber:	MARY GRECO TypeWrite Word Processing Service 356 Eltingville Boulevard Staten Island, New York 10312

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

THE COURT: Okay. Aztec. Am I right that it won't take any time to particularly set up?

MALE VOICE: That's correct.

THE COURT: All right. Come on up, folks. I want to get appearances from anybody who believes he or she is likely to want to speak today. Then I'll hear, if you wish, Mr. Raicht, any introductory remarks. I'm going to have some remarks of my own as to matters that I'm going to want people to address unless they've been mooted by anything people announce to me. First, let me get appearances.

MR. RAICHT: Yes. Good morning, Your Honor. Bob Raicht with the firm of Halperin, Battaglia, Raicht. I'm here with my colleague, Julie Dyas and we are bankruptcy counsel to the debtors.

THE COURT: Very well.

MS. BERKOFF: Good morning, Your Honor. Leslie Berkoff; Moritt, Hock, Hamroff, and Horowitz, counsel for Tim Chase in his personal capacity.

THE COURT: Okay.

MR. FLAXER: Jonathan Flaxer, again, Golenbock, Eiseman and this time counsel to Corsair Special Situations Fund.

THE COURT: Okay. Corsair has the pre-petition secured debt if I recall.

MR. FLAXER: Correct, Your Honor.

MR. DUFFY: Good morning, Your Honor. Todd Duffy, Duffy and Atkins, LLP representing Local 8828A Welfare Funds and 401K Return.

THE COURT: Okay. Pause, please. Mr. Duffy, I think I have three or perhaps four union funds. Can you tell me which one you have again?

MR. DUFFY: Well, actually we filed an objection based on the welfare and 401K retirement funds, but we do represent all three 8828A entities or unions.

THE COURT: Okay. But I got objections from more than just you.

MS. DELL: Yes, Your Honor. Carol Dell and I represent the Law Firm of Holm and O'Hara. We represent the bricklayers and allied Craftworkers, Local 1, the pointers, cleaners and caulkers fringe benefit funds and the stone setter fringe benefit funds. Here today also is my co-counsel, Mark Lichtenstein, from Crowell and Moring as well.

THE COURT: Good morning, Mr. Lichtenstein, if I heard you correctly.

MR. LICHTENSTEIN: That's correct, Your Honor.

THE COURT: Okay. Thank you.

MR. ORR: Good morning, Your Honor, Patrick Orr from Klestadt and Winters on behalf of Signature Marble and Metal Maintenance, LLC. We're the purchaser today.

THE COURT: Okay. Yes, I'm sorry.

MS. DOHERTY: Good morning. Erin Doherty from Colleran, O'Hara, and Mills. We represent the Marble Industry Trust Fund.

THE COURT: Okay.

MR. RICCHIUTI: One more. James Ricchiuti with Entrepreneur Growth Capital, the DIP senior lender.

THE COURT: Right. Okay. Mr. Raicht, do you want to make some preliminary observations first?

MR. RAICHT: Yes. Yes, Your Honor. I will be brief. Obviously, this is the hearing on the debtor's motion to sell assets free and clear of liens, claims and encumbrances in accordance with an asset purchase agreement dated April 4, 2007 between the debtors and Signature Metal and Marble Maintenance. The proposed sale was made subject to higher and better offers. Simply by way of overview I will report to the Court that regrettably we did not receive any alternative bids by the alternative bid deadline and thus, it is the debtor's intention today to proceed with the approval of the offer received by Signature.

As Your Honor understands, there are five objections that have been filed to approval of the sale motion, four by unions and one by a trade creditor that was asserted by letter I think almost after the filing of the sale papers. Yesterday the debtors filed a reply addressing the issues raised by the various objections which on some level covered a lot of the

same ground.

THE COURT: Pause, Mr. Raicht.

MR. RAICHT: Yes. Yes, Your Honor.

THE COURT: Did you consensually resolve the mechanics lien issue that Mr. Schmidt raised or -- because I didn't see a response and reply to that aspect of it.

MR. RAICHT: Yes, Your Honor. I believe Mr. Schmidt is here. The cure claim that was asserted by I think it's 40 Wall Street involves a mechanics lien that dates back to somewhere in 2003. Since the filing of the cure claim we have been investigating into it. It's very odd for a mechanics lien to be out there and no one really done anything, had really acted upon it any way for a long time. So it took some effort for us to go back and figure out what the story is with that. The asserted amount is really something in the nature by agreement I think we've reached with the party that asserted the lien. It's essentially a $30,000.00 issue.

THE COURT: Was it an unpaid subcontractor or something?

MR. RAICHT: I believe it involves rent for certain equipment that may have been used on a job. There was a dispute as to whether certain equipment had been returned or not. Essentially it's a $30,000.00. We have committed that we will have it removed prior to the closing. In terms of the contract with 40 Wall Street we would ask today that if the

Court approves the motion generally that we would make that condition to the assumption of that contract. That's how we intend to proceed with that issue.

THE COURT: All right. Let's get past that thing.

MR. RAICHT: Okay. Unless Your Honor has a different way of proceeding, and it sounds like you may, I would otherwise make a presentation on the motion, address the various objections filed. I'll also note that we have representatives of the debtor. Mr. Chase is represented by counsel. I believe there are also representatives of the proposed purchaser that we would obviously be available to respond to any questions that the Court or other parties in interest may have. But I'm sensing Your Honor has some preliminary thoughts on the matter.

THE COURT: Yes. You and the other folks can make your presentations as you see fit but by the time you're done I want you to address the following questions and concerns that I have.

Subject to your rights to be heard, I don't see a material Lionel issue here. Unless you're going to bring facts to my attention that are inconsistent with those that I gathered up while paying attention to a case that was before me, it doesn't seem to me that the debtor is going to have much staying power going into the future if this sale doesn't proceed as it's now contemplated to proceed. Therefore, I need

from the unions when it's the unions' turn to be heard not just a discussion of the wasting asset doctrine that's an element of the Second Circuit's Lionel decision, but also what they perceive as an appropriate exit strategy or continuation of the estate strategy if I were to decline approval of this transaction. Putting it in its most basic terms, do you guys have a better idea?

I need the unions to give me help on how we're going to keep workers working and how we're going to make payments on account of worker claims if this case has to tank for lack of working capital, or if I have to grant relief from the stay to the pre-petition secured debt on what is at the very least a very colorable entitlement to relief from the stay to pull the plug on its rights as a consequence of the failure to make adequate protection payments that are at least seemingly required in baby talk in an earlier order of the Court. Now, I'm cognizant of course of the need of the two senior secured lenders to resolve inter-creditor issues but while I'm fully sensitive, perhaps more than many, to the needs and concerns of the union member community, I need to know what any of you would do if you were in my place in terms of maximizing the value of this estate and keeping people working which are quite frankly important concerns on my part.

Now, so far as I can tell, this sale is not an effort to bust the union. If it were, that would be a matter of

concern to me, but I just don't see it here. If my understanding in that respect is mistaken, I need help from the union side on this.

Conversely, from you, Mr. Raicht, I want you to help me understand in part as an element of my Lionel analysis and partly because I don't like making rulings without understanding the implications of my rulings, I want a sense as to what's going to happen next in this case if I approve the sale. I assume we're then talking about an orderly liquidation. I want your views as to whether you would want to continue that in 11 or whether you have no position on whether it's an 11 or 7. I assume, but I need you to confirm that there would be nothing for equity in this case under any circumstances, but I need help from you as to how far down the food chain we're going to be able to go with the anticipated sale proceeds in terms of meeting the needs and concerns of the creditor community in this case or whether we're going to have something past satisfied in the secured debt claims, or for that matter whether we're going to have a problem even with that, the extent to which we're going to be able to pay priority claims, tax and employee benefit claims in particular, and the extent to which you're going to have something for the unsecured creditor community that doesn't have a priority.

Subject to people's rights to be heard, I don't see a North LaSalle issue here. I don't believe based on Mr.

Raicht's supplemental submission that Mr. Chase is getting anything personally out of this estate, nor that he is an investor and the acquirer, but I am nevertheless of an inclination subject to people's rights to be heard in telling me why I shouldn't, to review the entirety of this transaction on an absolute fairness basis and on a best interest of the estate basis rather than a business judgment basis so as to avoid any perception of impropriety. The transaction may very well pass muster on a best interest of the estate basis but I'm wary of giving it unscrutinized deference in light of the apparent taking over of certain contracts by Mr. Chase if the deal were to go through.

My next question and concern for all to address, even though I'm not sure if it's legally relevant, and it may be not relevant, is what the game plan is for workers of this company to move forward. I don't know whether the buyer of the assets is going to take on most or all of the workers. Seemingly at least, the buyer would not take on the collective bargaining agreements, if any, with the workers or their unions. But I don't have an 1113 motion before me and I am not sure, especially after my reading of the 8th Circuit BAP's case and Family Snacks whether I probably should be considering 1113 issues here. I don't know enough about this industry. Is there a multi-employer plan under which the workers will simply be getting their benefits from the new company or are they

going to have to strike their own deals on collective bargaining issues, or what? As I said, given the financial status of this company, this does not, based on what I've seen, look to me like one of the early Continental cases where Frank Lorenzo was trying to bust a union, but help me on that. I assume that the employees have some special skills and knowledge that will be valuable to any successor employer, but that they'll strike their own deal as to whether the terms of employment are satisfactory to the employees or not. If not, I guess the employees will decline to work for the new employer. But I need help from whoever has information relevant to that.

I assume that other than inferences to be drawn there are no material disputed issues of fact on this motion. If somebody believes to the contrary, you better tell me.

With that, I'll hear first from you, Mr. Raicht.

MR. RAICHT: Thank you, Your Honor. For purposes of the record if I just could give some background regarding the motion? Obviously, Your Honor entered various orders scheduling the procedures, the dates, and the deadlines for today's hearing. In accordance with those orders the debtors served notice of the sale papers on the constituent parties in the case; the DIP lenders, the pre-petition lender, parties asserting any other liens on the debtor's assets including taxing authorities. We also gave notice to all parties that had previously expressed any interest whatsoever in the

debtor's business. Included in that I would also include parties that the debtors affirmatively went out and solicited acceptances. They received notice during our marketing process as well as by virtue of the service of the sale motion, as well as efforts by debtor's management to make sure that they knew that there was an auction sale process in place.

The sale agreement contemplates the sale of all the debtor's assets which except for excluded assets as defined in the agreement, significant among them are approximately $3.5 million in accounts receivable that will be left behind by the estate and liquidated thereafter. I think to understand the transaction it does require a little better understanding or explanation regarding the types of businesses that the debtor engages in.

The debtor has essentially -- provides several different types of services. One type of service is pursuant to maintenance contracts whereby the debtor provides cleaning and maintenance of office lobbies and buildings throughout the metropolitan area. These are contracts that are reoccurring business for the debtor. They do have 30 day cancellation provisions which is, as I understand it, standard in the industry. There are approximately 2 to 300 of such contracts that are on the table today to be assumed and assigned pursuant to the sale agreement.

In addition to those maintenance contracts with their

customers, the debtor does from time to time as sort of a one off from those contracts perform other types of repair services that would connected or related to the services provided for under the maintenance contracts.

Another type of business that the debtor engages in is facade restoration. Now, these are not reoccurring business. These are truly one off businesses where the debtor will go out into the marketplace, solicit or make bids for a certain job. It might tend to be a larger restoration project of a facade building, for example. The debtor would perform that service and at the conclusion of the contract the job is done. It's a significant aspect of understanding these businesses particularly when we are marketing them because I think it's fair to say that Signature and pretty much everyone else we spoke to saw value in the maintenance contracts primarily because they are reoccurring but they provide services on a monthly basis and then thereafter renew, and viewed differently and probably did not assert or ascribe a lot of value or any value at all to the facade restoration business in that that type of business exists to the extent that you get the next contract. In my simple brain, I need to kind of think of it as doing -- the difference between doing debtor work in my business versus other types of people who represent other parties and interests. It's a very much of a one off kind of deal. That's significant understanding that under the terms of

the agreement we are seeking to assume and assign the maintenance contracts which, as I said, are somewhere in the neighborhood of 200 in number, 2 to 300 in number.

As I think we've addressed already, there was cure claims bar date of April 20th. We received one cure claim and it was the one from 240 Wall Street, and I think I've indicated how we intend to address that issue going forward.

The sale motion also included what we described as additional disclosures describing potential post closing transactions involving the proposed purchaser's signature and certain of its affiliates on the one hand, and other non-debtor affiliates on the other. It is these transactions or potential agreements that the unions in particular have seized upon in ascribing certain descriptions of this transaction. We generally lay out what they are. There's a proposed market rate lease between Signature and a non-debtor affiliate for the premises, or a portion of the premises, out of which the debtors currently operate. There is an incentive bonus, discussions regarding an incentive bonus for Mr. Chase, the debtor's principal with Signature for a period following the closing date. There's also a description of a new potential venture between, and I want to be very clear about this, not Signature but one of the many principals, there are several principals, of Signature and Mr. Chase to pursue future facade restoration work in the future.

Based upon our description which I --

THE COURT: Pause, please, Mr. Raicht.

MR. RAICHT: Yes, Your Honor.

THE COURT: I assume even though they would presumably come to an end at job completion, there's one or more ongoing facade restoration jobs now in process?

MR. RAICHT: There are, as I understand it, and proposed to be assumed and assigned here, four that are in progress. If you want, I will address that now because it does bear on what the new company that I described will be involved with.

THE COURT: You can amplify on that to the extent you care to. To what extent, if any, does Mr. Chase have an interest in the profits of the four ongoing facade restoration jobs?

MR. RAICHT: Assuming they are assumed and assigned to the new company?

THE COURT: Right.

MR. RAICHT: I would actually say that Mr. Chase, and I will defer to his counsel and others on this, that his interest in that profit would probably be zero. Let me explain why. As I understand the new co, he will hold an interest, a 50% interest in this new co. It will be capitalized to a certain amount of money by one of the principals of Signature. Mr. Chase's ability to realize anything under the new co I

believe is subject to the repayment of the initial capitalization of the new co. So if you assume that there's capitalization, and I think it's something like in the neighborhood of $1 million that will be put forth to fund this operation, that until the other 50% owner recovers its $1 million, Mr. Chase would see nothing in terms of his equity in that company. I think we need to also put into context what these contracts involve and the reasons why it was determined that we would attempt to effect an assumption and assignment of them.

First is that there are four --

THE COURT: You're still talking about the facade restoration jobs, those four jobs?

MR. RAICHT: I am. I'm talking about the four that are referred to in our reply that are going to be assumed and assigned to Signature but may be designated to the new company to complete those contracts. In our negotiations of this agreement I will tell you that it was somewhat in the nature of an afterthought to do this, but there became a recognition and a realization, if you will, that if we simply stop the music today on those contracts, the effect that it would have upon the estate, and it became readily apparent that the first thing that would happen is that the estate would be subject to potentially significant administrative liability if the music simply stopped. But probably more important or significant to

us is that there is approximately $1.5 of the accounts receivable that are going to be left behind to the estate or for the benefit of the estate, and how having the music stop would affect the ability of the estate to collect upon those receivables. So I think it's important for us and for the Court to understand the effect of just simply not doing anything with those contracts would have not upon Mr. Chase or on the new company but the real effect it would have on the estates.

In terms of the new co, based upon the exhibit we submitted to the reply, these are contracts that are, for lack of a better word, probably 80% completed. I think we detail that there's something in the neighborhood of 300 and change that would be paid under these contracts to the party that was handling them. There are also labor and other costs associated that would have to be paid to complete the contracts, and that when it's all said and done what we are really talking about is something in the neighborhood of $68,000.00 that would be realized by the new co, and that's if everything goes according to plan. That depends -- that's contingent upon the fact that the estimated cost for labor and materials are as were budgeted from the outset. If the labor and materials, for reasons that I assume happen and we understand happen often in these contracts, the gross margin could be significantly less than $68,000.00, or it could be zero, or it could be a loss. But

that is the sum and substance of the reason why and I think the effect of the assumption and assignment of those contracts to Signature, and ultimately if they are approved to be designated over to the new co.

THE COURT: Okay. Continue, please.

MR. RAICHT: If I could just remember where I was. The union's assertions when looking at these transactions suggests, as Your Honor has indicated, suggests that they represent an insider transaction that somehow that because of these transactions there was a less than aggressive effort to market these assets and that somehow these factors somehow compromised the ability to market the assets and obtain the highest offer. I want to be very clear, and I think the Court has already recognized it, that I think that they somewhat misapprehend the agreement that under the terms of the sale agreement all of the assets are to be transferred to Signature. End of story. Mr. Chase is not going to have any equity interest or officership or other title in Signature. Signature and there are probably others here who can speak better to it, but Signature is an established entity. It has its own principals, and there's no intention from what I understand now or in the future that he would hold any such interest in that entity. The only relationship, if you will, that he will have --

THE COURT: Pause, please.

MR. RAICHT: Yes, Your Honor.

THE COURT: Am I right in my understanding that Signature is, for lack of a better word, a player in this business that's existed for awhile as contrasted to being a start up company solely for the purpose of making this acquisition?

MR. RAICHT: It is a company that is a player in this industry. It clearly is not an entity that was started up in order to acquire these assets.

THE COURT: Continue, please.

MR. RAICHT: The only relationship that there will be involving Mr. Chase directly or indirectly are twofold. One is that he is the -- controls the non-debtor entity pursuant to which there will be a market rate lease between Signature and this non-debtor entity to lease a portion of the debtor's premises which they currently operate.

The second relationship, if you will, is that there is in discussion the concept that Mr. Chase would receive some sort of incentive bonus from Signature in the event the maintenance contracts that are to be assumed and assigned are retained by Signature for a period of time following the closing date. I think it's something in the neighborhood of a year and I believe the amount that he would receive is something in the neighborhood, and others can speak to it more specifically, is like $50,000.00.

THE COURT: This would be of contracts that are otherwise terminable and essentially will 30 days notice were to be kept fertilized, kept alive, whatever the proper word would be?

MR. RAICHT: Correct. That's absolutely correct. What I also further understand is that in the event 100% is not retained that the $50,000.00 number reduces to a lower number and is certain fairly close early threshold if a certain percentage, and it might be 20% are lost, there's no bonus at all. But I think that we can appreciate that given the nature of these contracts it's not an unreasonable request for a purchaser who's looking to acquire assets that have these type of deal terms. But that is the sum and substance of all of the connections that Mr. Chase will have with the purchaser.

The other additional disclosure which I think got somewhat confused in some of the objections is the potential new venture to be engaged in by one of the several principals of Signature and Mr. Chase, and that's the new co that I described. As I indicated, it will not be capitalized -- it will be capitalized by other sources. Its capitalization will not be using any of the purchased assets or assets to be transferred by the debtors to Signature, as I've also indicated, his ability to really have a valuable equity stake in that he's subject to the repayment of the capital contribution. But more importantly, what it's really reliant

on is his ability to go out and get that next contract, to get that next better gig. It's based on his ability, his reputation, the connections, if you will, that he has made in the industry over the 22 years. There's nothing about the debtor's assets that really bear on this new business.

I've already addressed, so I won't go over, there is the issue of the four contracts, but I think it's fair to say that our view is the reasons why those contracts would be being assumed and assigned and designated to the new co provide significant value to the estate. Also, I think it's clear that they are of significant value and the new co would bear the risk that they either realize $68,000.00 or they don't. So I think on balance it was a reasonable and appropriate provision of the sale agreement. Again, as I said, its genesis really stemmed more from the estate's desire to not incur greater liabilities in connection with the sale transaction.

I think the issue, when you look at the objections at the end of the day, I can tell already from Your Honor's initial comments and I assume this is where you're going with it, the issue comes down to, in my view, is whether these potential transactions and agreements are a rational, reasonable type of agreements that a purchaser would want in this kind of transaction, or are these transactions designed in some way to decrease the purchase price and basically transfer to Mr. Chase something that the estate would otherwise be

entitled to. Obviously, our view on that is of course it's the former, not the latter. Again, these leasing arrangements -- the leasing arrangement involves two non-debtor entities. Again, it's at market rate value. The potential incentive bonus I think in the scheme of things is a rational decision for the purchaser to make. I think its terms are rational given the fact that these are, you know, reoccurring contracts with a provision that they can be cancelled on 30 days notice. There are reasonable benchmarks for him getting the bonus. Frankly, the bonus in the scheme of things is not what I would call excessive.

The proposed new venture in the facade restoration business does not involve the purchaser but one of its principals. It involves no asset of the debtor's, debtor entities, and the company or the equity interest he would supposedly hold in this business would have no value, as I indicated, until Mr. Chase were able to go forward and obtain the next contract.

I would turn now to some of the concerns Your Honor raised. I would obviously concur that I don't believe that there is a Lionel issue here on any number of levels. I don't even know if this is substantially all the assets, clearly. There's $3.5 million of accounts receivable that is remaining in the estate. On the other hand, I recognize --

THE COURT: Assume that the way any bankruptcy Judge

would look at it, it's substantially all of the assets. Every -- I can't say every. The overwhelming bulk of the 363 sales that have taken place on my watch have excluded accounts receivable and cash and have instead involved hard assets, contractual rights, intellectual property and the like. Assume that the carve out of accounts receivable and cash does not get you a get out of jail free card on that for that reason alone.

MR. RAICHT: I understand and I obviously would take no issue with that. Obviously, it is the core of the business I mean just in terms of monetary, on a monetary basis. But I would concur with Your Honor that's only one way of looking at it and I think that most people would agree that in the scheme of things it is substantially all the assets. But I think it's equally clear from the record and this proceeding that the debtors have undertaken significant marketing effort which is detailed in the reply and I will obviously respond, but wouldn't go into it in great detail, but a significant marketing effort, and that initial marketing effort focused exclusively on the strong desire of the debtors to reorganize. It was a function of many factors, but ultimately it came down to there was no party willing given that structure to put up money in an amount that will allow us to confirm a plan. In fact, in the discussions we did have regarding a potential strategic investment, all of them would have required compromises, steep compromises with all the constituent parties

to make that happen. Frankly, no one was more disappointed than the debtor, frankly. Particularly a company that's been in operation and was started from the ground up 22 years ago to make the top decision that a reorganization was really not in the cards. That became much more clearer in the early part of 2007 where the company experienced what I would call a liquidity crisis and it became clear that it was not going to be able to continue pursuing the plan process and it made the tough decisions to maximize the asset values using another method.

As Your Honor is aware and is a matter of the record before this Court, we were unable to make payments of the February, March, and April adequate protection payments due the pre-petition secured creditor. We at that time were strongly looking to find a stalking horse bidder but were in a position where for awhile there we were fending off efforts by the secured creditor to foreclose while trying to come to terms of an agreement that would put a process in place to maximize asset values. I think that's what we have achieved here. I think all of us wish that there had been competitive bidding, and I think no one would benefit more from competitive bidding to go forward on some of the unions' assertions. Mr. Chase, as we addressed in our reply, this is a case where he has guarantees out to the secured lenders. There is tax obligations in which he has exposure, a trust fund liability.

I think if you look at the package that's on the table, if you will, the potential transactions and you weigh that against a $500,000.00 or $1 million, or $2 million increase in the purchase price which would on a dollar for dollar basis decrease his personal liability, I think it's fair to say that in this case it's very clear that the principals and the debtor's interest were fully aligned in terms of trying to maximize asset values here.

I don't think there's another alternative for the debtor at this juncture. I think the debtor is -- or I think others can -- we are essentially running on fumes. We have little or no availability under our DIP facility. In fact, on some level we are trying to make sure that we can keep things together for closing. Part of the reason why we -- given the fact that we had marketed this so extensively that we requested a somewhat shorter auction process, but it was really a function of where we were on a liquidity basis.

THE COURT: Pause, please, Mr. Raicht.

MR. RAICHT: Yes, Your Honor.

THE COURT: Is the debtor in an over-advanced mode on its DIP?

MR. RAICHT: It is not in an over-advance, but I believe in a discussion we had yesterday with the DIP lender we are at our limits. We have --

THE COURT: So minimal or zero availability?

MR. RAICHT: We are not in over-advance but we are at -- we're fully drawn I guess is the appropriate phrase.

THE COURT: Continue, please.

MR. RAICHT: Your Honor has asked what we expect will happen following the transaction. Obviously, I think I've made -- hopefully I made it clear that if the transaction is not approved that the company will likely cease operation and proceed in some sort of liquidation mode. I think the only difference between -- well, the difference between the sale and what will happen after this is I think is simply $2.5 million that we intend in any event to liquidate the $3.5 million in accounts receivable following the closing. I think it's fair to say that if the sale is not approved that we'll just be liquidating $3.5 million but in a different way. We'll be liquidating with the fact that if these four contracts are not assumed and assigned that we will have a much tougher time, you know, maximizing value on those receivables.

In terms of where I think this is going to go in terms of going down the food chain, unfortunately, as I indicated, there is significant asserted secured debt here. There's the DIP lender and the purchasing lender, and then there's I believe the taxing authorities assert $8 million in secured debt. So unfortunately, I think that it will probably end somewhere with some distribution to the taxing authorities.

Your Honor, and of course would agree that I don't

believe there's a North LaSalle issue here. I think what -- I think it's clear the debtor has been, and should be, very forthright in terms of all of the potential transactions that have occurred. When doing this, where do you draw the line? I think we've chosen to draw the line being probably providing more disclosure but for the very reason that we don't want to run afoul of anyone thinking that something out there has not been fully disclosed.

I think that pretty much concludes my remarks except for probably just end by saying that I know that there are some unhappy union workers here, or the unions representing these workers. I don't think anyone started this process with the idea that this is where we wanted to go. At a lot of times both prior to the petition date and since the company has taken action sometimes to its detriment. I think the idea that there is unpaid withholding here that is personal was an attempt by the debtor to try and make it work even if it did result in some personal -- some significant personal exposure to its principal.

I think that unfortunately not every case results in payments to creditors, but I'd like to think that what we have here is a transaction that does provide the unions with something it hasn't had for awhile which is a company that is backed, is healthy financially and that the union workers into the future have a trading partner that it will continue to

flourish into the future. But I recognize and appreciate -- I think the debtor recognizes and appreciates that this is not the result we were looking for, but I think that given the marketing efforts we've undertaken, regrettably I think the market has spoken that this is the value at this point in time. I think this is the only deal out there. For all the reasons, we would ask the Court to approve the sale motion.

THE COURT: Before you sit down, Mr. Raicht, without making a judgment on materiality, on the materiality of the answer, what, if anything, do you know about the availability of work with the existing workers after the sale of the lot closes?

MR. RAICHT: Probably something the purchaser would be in a better position to speak about, but my understanding would be that the workers will be rehired.

THE COURT: Will be rehired?

MR. RAICHT: I'm careful when you use the word rehired because what happens as I understand it you get a job, it's a job and --

THE COURT: You form a crew to perform the job?

MR. RAICHT: I assume that they call from the union the people they need. The contemplation would be that the next day these same union workers should be working with Signature. Probably also something I imagine the purchaser's would want to refer to, but there is no attempt here to get out from the

obligations of the union. In fact, Signature has many of the existing collective bargaining agreements with a number of these same unions already. So clearly there's no attempt whatsoever to do that.

THE COURT: Are these multi-employer pension plans?

MR. RAICHT: I'm told yes.

THE COURT: Okay. Continue. Oh, you're done now, Mr. Raicht?

MR. RAICHT: I'm concluded for the moment, Your Honor.

THE COURT: Ms. Berkoff?

MS. BERKOFF: Your Honor, I want to be brief but I thought it was important as Mr. Chase's personal counsel to just let the record reflect that Mr. Raicht certainly accurately reflected the terms of the transaction as relates to Tim Chase personally, the benefits that he may or may not derive. I think it would be fair to say that nobody besides Mr. Chase would have been more pleased to see more money come into this estate given the magnitude of the obligations that he's personally responsible for. There was no incentive for him to do anything other than hope for a higher and better offer, and he is probably the most disappointed of all, not belittling or diminishing any of these other creditors' concerns.

The disclosures that were made were made pursuant to

our belief, debtor's counsel and my belief that bankruptcy is an open book. It's an open process and people should know what is going on. Regardless of whether people think we should have not disclosed as much or whether this was the right amount we went with, this is what we felt appropriate that people should be aware of because we were not hiding anything here. This is what is going to happen. If this business were to have been sold to Signature, nothing would have precluded Mr. Chase from day one thereafter from going out and simply getting a job. Quite frankly, that's almost really what he's done. To the extent that there will be any future jobs arrived at as a result of his efforts with new co, his personal benefit other than his salary is honestly a hope and a prayer very long time down the road subsequent to repayment of one individual's capitalization. That's a very long time to look for something that may or may not happen. He needs to continue to work. I don't think anything in the process constraints him from doing that given the nature of what was going on here, if he wanted to disclose it. I think Mr. Raicht, as I said, has fairly described it so I won't reiterate it unless there are questions. But I did want the record to be clear.

THE COURT: Thank you.

MS. BERKOFF: Thank you.

THE COURT: Yes. Come on up, please.

MR. ORR: Good morning, Your Honor. Patrick Orr on

behalf of the purchaser, Signature Metal and Marble Maintenance, LLC. Your Honor, also here with me today is Frank P. Squeri who is the vice president and chief financial officer of Pritchard Industries, Incorporated which is effectively the controlling affiliate of Signature. He'll be here to fill in any gaps and answer any questions that the Court may have with respect to the purchaser itself and any other terms --

THE COURT: Well, pause, please, Mr. Orr, because I want to get a full record but I also want to stay efficient if I can. Did you or your client hear anything that was represented to me in the way of answers to my questions that either of you regards as inaccurate or incomplete?

MR. ORR: No. In fact, Your Honor, we would endorse any of the representations that Mr. Raicht had made today with respect to our client and the terms of the agreement, as well as the reply that was filed yesterday. It's accurate and it is all inclusive in terms of disclosure. One of the issues that's been raised here is whether or not this entity was formed as a special purpose entity to effectuate this transaction. That's clearly not the case. Signature is part of a larger conglomerate of Pritchard Industries that has been in the business since at least 1986 in the United States, and longer than that overseas.

While the Signature Group performs services that are very similar to what the debtor previously did, the larger

conglomerate does the same services on an even greater scale with respect to stadiums and arenas. This company is a very real player in this market and it viewed this sale opportunity as a perfect compliment for its existing business.

Again, to stay on track and stay efficient, with respect to the employees, the employees in this industry are critical. The union employees are critical. Signature is currently party to its own collective bargaining agreement. While Signature is specifically not assuming the debtor's collective bargaining agreements, the employees that are hired by Signature subsequently will be subject to and have the benefits of Signature's collective bargaining agreements.

THE COURT: So the principle practical difference without deciding whether it's relevant would be the pre-petition defaults and the existing agreements wouldn't be cured but going forward the employees will be subject to Signature's agreement?

MR. ORR: That's correct, Your Honor.

THE COURT: Continue, please, Mr. Orr.

MR. ORR: In addition to that, during the course of negotiations one of the things that Signature actually requested and was granted is included as a condition of closing here is the hiring, the agreement to hire four employees of the debtor, not Mr. Chase, but four separate service employees that will come over as well. These are new jobs. As a result of

the fact of them being new jobs for Signature, they're going to need new workers and it's a critical part of going forward here. So Signature is certainly sensitive to the issues raised by the unions and it's not unsympathetic to what's going on here.

With respect to the nature of Signature's business, again, it's very similar to what the debtor has done. It used this opportunity as a compliment to its long term business plan. Throughout the entire course of negotiations which initially started back in October of 2006, this has been an arm's length transaction. Our firm was involved as bankruptcy counsel. Signature and Pritchard was represented by their own corporate counsel. We've had myriad meetings and the terms of the APA have been negotiated at length. There is nothing that has gone on that would give rise to any of the allegations in the objections that Signature is anything other than a good faith purchaser. The sale price in Signature's belief and opinion is a fair value of what the assets are that are being purchased. On the terms as submitted to the Court in the APA, it believes that this is a good deal and that this is an opportunity for all parties to move ahead here.

I don't think I have anything else to add unless the Court would have questions either for myself or Mr. Squeri, but we would respectfully request that the Court enter the order as proposed.

THE COURT: Okay. Thanks, Mr. Orr. Before I give the unions and other objectors a chance to respond, or others who want to be heard who are generally supportive of what's before me, Mr. Flaxer?

MR. FLAXER: Yes, Your Honor. We did not file an objection. I would observe as came out on the record this debtor is evidently close to or already fully drawn on its DIP. The Court is aware of the issue surrounding the motion made to lift the stay by Corsair, that there are several months now of defaulted adequate protection payments. Without going into any detail, I think it's fair to say that the debtor does not have an endless amount of rope on its failure to make adequate protection payments.

The Court should be aware of the following. Corsair considered an objection. Corsair did file some discovery requests that led to discussions which resulted in a letter agreement between the debtor and Corsair. I think as part of the process, the Court should be aware of the fundamentals. In essence, it's been agreed that the proceeds from -- the cash proceeds from the sale after satisfaction of Entrepreneur, which is the DIP lender, will be delivered to Corsair. It was also agreed with the debtor to work on the terms of an order which we would send in to Your Honor on notice providing for the delivery of the proceeds and the collection of the accounts post sale to Corsair until Corsair is paid in full. We've also

agreed to cooperate in discussing some procedures and methods for liquidating the accounts that has not been --

THE COURT: Pause, please, Mr. Flaxer. Was that based on your understanding that subject to the higher DIP facility priority Corsair is next in the pecking order so to speak in terms of entitlement to assets of this estate?

MR. FLAXER: That's correct, Your Honor, and I believe that's reflected in the final DIP order that we've entered. The pecking order is Entrepreneur, and then Corsair, and then the IRS.

THE COURT: Let me make this clear and ask the question again even though I think you probably answered it a moment ago. So this was not in any way, shape, or form an effort to change or flip around bankruptcy priorities?

MR. FLAXER: No, Your Honor. I think this is all -- these are all matters that are correct and not disputed by any party but my client wanted some comfort on these issues and the debtor has given them to us.

THE COURT: I see Mr. Lichtenstein has risen behind you. I'm going to give you a chance to be heard, Mr. Lichtenstein, but not now.

MR. FLAXER: Other than that, Your Honor, the agreement required the delivery of some financial disclosures which the debtor has done on a timely basis. So with the statements, Your Honor, and in light of this agreement, Corsair

is in support of the motion.

THE COURT: All right. Thank you. Anybody else before I give unions and other objectors a chance to be heard? Mr. Ricchiuti?

MR. RICCHIUTI: Just for the record, Your Honor, James Ricchiuti with Entrepreneur Growth Capital. Obviously as a senior DIP lender we have no objection and we are very comfortable with all the disclosures that were made and all of the motions articulated here today.

THE COURT: All right. We'll now take ten minutes and then I'll hear from unions or other objectors. I will ask, not require, but ask that the unions take a moment or two in the next ten minutes to see if one person might be the lead speaker on their behalf and then others will simply supplement what the lead speaker has said so as not to say the same points more than once. It's a minute or two before 11. I'll see you folks at 11:10. We're in recess until then.

[Off the record.]

THE COURT: Mr. Lichtenstein?

MR. LICHTENSTEIN: Good morning, Your Honor. I'll be speaking. Mr. Duffy may be speaking as well.

THE COURT: Okay.

MR. LICHTENSTEIN: But I'll be speaking initially. We represent the Pointers and Cleaners Union and Funds, Your Honor. Your Honor, the first thing I'd like to respond to is

your initial colloquy at the beginning of the hearing with respect to the Lionel argument.

After hearing the record develop this morning, we're not going to focus on the Lionel argument given the exigency of the sale. But that is not to say that we're still as the collective voice of the union workers not convinced at all about the successor -- that the successor liability argument or the de facto merger doctrine wouldn't militate in favor of imposing perhaps successor liability on the purchaser here given the facts that have been introduced so far and given the potential for future discovery into this.

I mean let's note at the outset what's happening here with respect to the proposed sale. You've already had an admission that the principal of the debtor will be continuing albeit continuing on the maintenance contract aspect receiving a personal benefit if that continues to do well, these 30 day recurring contracts. In addition, although it'll be somewhat removed from the Signature corporate body, the other core business of the debtor, the marble restoration, will be exploited by a principal of Signature and Mr. Chase together.

In addition, there will be four employees, existing employees hired by the purchaser. We've now learned that on day one after the closing all of the existing workers on all of these four jobs will be hired and continue in the same space. So there is quite a bit of Your Honor's --

THE COURT: I think that you would prefer that your employees have jobs after this transaction.

MR. LICHTENSTEIN: Your Honor, absolutely would prefer that. While we will note one of the issues here, Your Honor, is that while one of the unions has a collective bargaining agreement with Signature, the union that I'm representing does not.

THE COURT: That is the pointers?

MR. LICHTENSTEIN: That is the pointers. So if the pointers workers were called in to do any work on the job after the acquisition, they would be forced to work without a collective bargaining agreement which they couldn't do.

Now, I think, Your Honor, it's important to focus respectfully on --

THE COURT: Pause, please. I assume that your organizers or your folks could deal with Signature management and try to put an agreement into place.

MR. LICHTENSTEIN: Without question, Your Honor. One byproduct of having this done in an expeditious way on relatively short notice even under 363 is that we had no idea this was happening and only received the motion papers relatively recently. There wasn't -- while there was broad disclosure I guess to the marketplace, there wasn't any disclosure to argue. It would have been nice if this had been in the works for awhile to permit the workers to start -- the

union to start talking to Signature about a transition that would certainly make people more comfortable. But I think, Your Honor, it goes back to a more basic issue. There are two analyses here. There's one analysis from a matter of bankruptcy law which talks whether the sale could be accomplished free and clear of liens set, claims and encumbrances, and you have to look at successor liability and things we've been looking at this morning. But as recited on Page 5 of our objection of the pointers and cleaners, there's a different element. You cannot sell, Your Honor, assets free and clear of the labor law. I mean the bankruptcy law and the labor law are two different things. There's a federal labor law and we're concerned that an order to be entered in this case and the APA has such broad language excusing Signature from having any obligations going forward to the workers -- I mean it goes affirmatively to say that at their own discretion, they have no duty, they have no obligation. It seems to me that they're trying -- it could be misread, a subsequent order, to free Signature as successor from its duty to bargain in good faith and it's --

THE COURT: Pause, please, Mr. Lichtenstein, because I dealt with analogous issues, or somewhat analogous issues in the environmental area in Magnesium Corporation of America. Is there anything in the orders that are going to be handed up to me that give Signature a get out of jail free card on its

compliance with federal labor law going forward?

MR. LICHTENSTEIN: No, there's nothing that explicitly -- no, there's nothing that explicitly says that. I think that the language of the APA which is incorporated in the order is broad and specifically talks about a freedom from any obligations to the workers, to the funds, et cetera.

THE COURT: All right.

MR. LICHTENSTEIN: So I think it could be --

THE COURT: So the real issue is the extent, if any, to which Signature must be required to undertake monetary obligations relating to the time before it acquires the assets it's going to acquire?

MR. LICHTENSTEIN: That's the issue implicated in the 363 sale motion, but I would submit that the language in the APA at a minimum could -- that it would be appropriate to clarify the freedom of any obligations to the funds and the unions should be, if Your Honor is even inclined to grant the sale motion, should be severely limited and made clear that any prior contracts or courses of dealing should be imposed on Signature, at least at a minimum a duty of good faith should be imposed on Signature under principles of labor law.

THE COURT: Did you have a chance to look at the Family Snacks case, Mr. Lichtenstein, that Mr. Raicht had cited in the supplemental brief that was served on us all yesterday?

MR. LICHTENSTEIN: No, Your Honor, I have not.

THE COURT: Because your contentions are -- the point that I shouldn't be giving Signature a get out of jail free card on its future obligations to comply with federal labor law, or for that matter any other law, seems subject to your opponents' right to be heard pretty self-evident to me. But what you're talking about is something different. You're saying that assets can't be sold free and clear, notwithstanding the general language in case law under 363, unless the buyer buys or undertakes liabilities that aren't being sold, and that seems to run pretty contrary to Family Snacks and the Eighth Circuit BAP's analysis in that case.

MR. LICHTENSTEIN: Your Honor, Your Honor, that's not what -- I'm sorry, that's not what I'm trying to say. What my argument is trying to make is that initially what I've said is that I wouldn't necessarily buy into the fact that the facts presented here would not warrant -- obviously, 363 permits a sale free and clear from pre-petition obligations. That's the -- I'm saying the situation here seems for the unions to present, subject to further discovery, et cetera, a relatively wholesome instance of a continuation of an entity, almost a de factor merger such that it would take it out of the general rule in New York regarding successor liability which fit into some of the exceptions to the rule that you shouldn't impose a successor liability in the context of an asset sale. That was all I was trying to say, Your Honor. I wasn't taking issue

with that case law, that type of case law.

Your Honor, just to make a couple of specific points, we can't, from the union's side of the table, we can't quite understand why the accounts receivable attributable to the four jobs should not come directly back to the estate, the four jobs that are being assumed and assigned. I believe that the --

THE COURT: In contrast, you mean to the mechanism Mr. Flaxer was talking about under which his client would get first dibs on those?

MR. LICHTENSTEIN: I think not in contrast to Flaxer comments. I think Mr. Flaxer -- that's the $3 million, the $3.5 million in accounts receivable that Mr. Raicht was talking about. I think that there's also this sub-issue about the accounts receivable attributable to the four contracts that are being assumed and assigned to Signature, the marble restoration jobs that from my reading of the sale papers, those monies are going to the new entity.

THE COURT: The entirety of them or attributable to work performed after the sale goes through?

MR. LICHTENSTEIN: Attributable to work performed after the sale goes through.

THE COURT: Well, help me. If Signature does new work on the contracts, why is it unfair that Signature -- I mean this may be simply part and parcel of an overall transaction that I have to look at in light of its totality.

But if I were to give it greater scrutiny, why would it be unfair to draw a line and say that if it's word for word that's already been done, the existing debtors get it, and if it's work that's done hereafter, the company that does the work gets the receivables? It strikes me as being subject to people's rights to be heard, almost common sense.

MR. LICHTENSTEIN: Your Honor, I'll withdraw that objection.

THE COURT: Okay.

MR. LICHTENSTEIN: The other objection, Your Honor, is that this -- again, we're not talking about hugely material amounts of money, but the $50,000.00 that is going to the debtor's principal has an incentive with respect to assets of the estate that are being assigned, the maintenance contracts. I'm not quite sure why that $50,000.00 which if these contracts are retained for a certain amount of time why all or at least some of that should not come back to the estate because these maintenance contracts are estate assets that are being assumed and assigned. I'm not sure why there should be -- if there is an incentive bonus going forward, I'm not quite sure why that wouldn't come back to the estate. I guess the same argument could be made about the potential percentage earned on the $300,000.00. I misspoke. I believe that Mr. Chase has a potential incentive bonus with respect to future -- or that to the extent that the $300,000.00 goes to offset the capital

contribution made by Signature's principal to the new co that's going to do the marble contract. That's certainly a benefit to Mr. Chase and that kind of ducktails with our absolute priority argument, North LaSalle argument which we're sort of -- which I just wanted to make. That was why I raised the issue about the $300,000.00. It's actually going to the new co that's going to be running the jobs, the four remaining jobs going forward. To the extent any money benefits the former equity holder, that would be money that hopefully could come to the estate.

Finally, in addition, we'd like to raise with respect to the agreement reached between the debtor and Corsair, Mr. Flaxer's client, regarding the distribution of monies, accounts receivable directly to first the DIP lender and then to the senior secured lender, Your Honor may recall that last year in connection with the debtor in possession financing final order hearing our fund and union raised the issue of Article 3A trust fund claims. I think my recollection of that hearing was that the parties agreed to hold that issue in abeyance and made a reservation of rights on the record. So I think that the union and the funds would like to preserve the rights to make sure that whatever waterfall exists with respect to the distribution of the funds from the estate do not abrogate the rights of Article 3A creditors.

THE COURT: Your point being in substance that assuming that I approve the sale and that cash comes into the

estate, either the $2.5 million or accounts receivable, that your folks get some procedural due process before I give Mr. Flaxer or anybody else first dibs on that money, you would want a procedural opportunity to show me why your trust fund entitlements trump his rights?

MR. LICHTENSTEIN: Yes, Your Honor. Thank you.

THE COURT: Okay.

MR. LICHTENSTEIN: We would --

THE COURT: I understand that contention.

MR. LICHTENSTEIN: There is also, just for the record, to preserve the record, our funds have filed a mechanics lien on a certain job at 1180 Raymond Boulevard in New Jersey and just given the posture of the case now not certain -- as of right now we filed the mechanics and we haven't really done anything to enforce it. But given the procedural posture of the case, now we're not sure what might happen with respect to that.

Finally, Your Honor, in your colloquy with Mr. Raicht about what happens next, it wasn't very clear to me at least what happens next because in the motion papers themselves there was an 1146(c) statement that these transactions would be exempt from stamp and other similar taxes pursuant to 1146(c) because a liquidating plan was in process. Yet, when I listened to the hearing before it seemed to me that once this sale goes forward I'm not certain that the case won't just

convert to a Chapter 7 which would have a deleterious effect on both collecting accounts receivables perhaps and also perhaps adding on another layer of administrative expense which would further imperil the recoveries of the junior creditors down the line. So it wasn't -- that was one of the arguments that because this was done by way of 363 sale we didn't have the kind of disclosure you would have in a plan or disclosure statement about well okay, the $25 million is coming in, here are the liabilities, couldn't get a good handle on what the anticipated dividend would be to the various constituencies -- constituents rather, in the bankruptcy case. So we would just note for the record that we're still not sure what the next step is here in the event that Your Honor is inclined to approve the 363 sale motion what the next step is, whether this will be done by way of a liquidating plan, or whether this will be a converted, or abandoned or even dismissed.

THE COURT: Could I ask you to stand in place for a second, Mr. Lichtenstein? Mr. Raicht, if the corporation counsel or any other taxing authorities objected to your 1146 proposal, I didn't see any such objection.

MR. RAICHT: No, Your Honor, there were no objections by any taxing authorities.

THE COURT: Okay. Back to you, Mr. Lichtenstein.

MR. LICHTENSTEIN: Your Honor, Mr. Duffy would like to say a word.

THE COURT: Sure. Mr. Duffy?

MR. DUFFY: Thank you, Your Honor. I'll be brief. We have one additional concern. Mr. Raicht and Ms. Berkoff's representations were sure wholeheartedly genuine. Our concern --

THE COURT: You say that you don't quarrel with the fact that they were genuine? Or --

MR. DUFFY: That's correct.

THE COURT: -- you're satisfied they were genuine?

MR. DUFFY: Correct. We're representing we believe that they are genuine.

THE COURT: Okay.

MR. DUFFY: However, we don't think that -- we think the sale as proposed which showed the possibility that Mr. Chase would be possibly having an employment contract with the purchaser and having an employment contract with this new company down the road may have had the unintended consequence of chilling bidding. So people may have looked at this and said well, he may not approve or he may not choose our bid if in fact he does have these things unless we can give him a similar sweetheart deal. So we were concerned that that would have that -- that may have had that unintended consequence.

THE COURT: Did any other bidders in the wings express that concern to you or are you just trying to put yourself in the mindset of a hypothetical bidder who might be

presented by this situation?

MR. DUFFY: The latter, Your Honor. We put ourselves in the mindset of a hypothetical bidder, Your Honor.

THE COURT: Okay.

MR. DUFFY: Okay. That's all. I just wanted to supplement Mr. Lichtenstein's points.

THE COURT: Very well.

MR. DUFFY: We endorse those points as well.

THE COURT: Thank you. Any other unions want to supplement what I heard so far? I see some negative nods behind me. Go ahead.

MS. DELL: Your Honor, if I may, just to --

THE COURT: Just an audiotape is being made of this.

MS. DELL: Sure.

THE COURT: Your name, please?

MS. DELL: Carol Dell for the Bricklayers and Local 1, Pointers, Cleaners, and Caulkers --

THE COURT: Okay.

MS. DELL: -- and Stone Setters. We just wanted to clarify again that there was some confusion with respect to I believe the $300,000.00 which was at issue which our understanding of the papers was that that money was supposedly going to be receivables from the jobs that are currently ongoing which would include receivables for work that had already previously been done. Is that not accurate? Okay.

That --

THE COURT: Well, this isn't a parliamentary debate. We're not in the English parliament where people put questions to their opponents. I'm going to regard that as issue that you would like Mr. Raicht to address in his reply.

MS. DELL: Yes, please.

THE COURT: I'll give you a chance to surreply if you don't like his answer. Okay?

MS. DELL: Yes, Your Honor.

THE COURT: Thank you. Okay. Anything else? All right. Mr. Raicht, take a moment and then I'll hear a reply if you wish.

MR. ORR: Your Honor, if I may --

THE COURT: Mr. Orr? Sure. Come on up, please, Mr. Orr.

MR. ORR: Your Honor, Patrick Orr on behalf of the purchaser. Just to correct the record with a few points raised by the union, as an initial matter my client has no inclination or desire to violate any federal labor laws, obviously. I think that goes without saying. To take a step back, and to the extent I gave the Court this impression during my presentation, there's no commitment on the part of Signature to hire all of the debtor's employees on day one as was stated by Mr. Lichtenstein. There's going to be a transitional period here. We need to get into some of these jobs before our guy

can -- my client can make a determination as to whether or not all staff, all employees formerly on these jobs, or some of them need to come on board. The agreement specifically says that we have no obligation to hire all the debtor's employees or any of the debtor's employees. But in terms of business practice, number one, how would the jobs get done without retaining most of the employees, and secondly, what kind of industry stance would that be and where would we -- quite frankly, where would we get employees if we didn't rehire the employees that were previously associated with the debtor? However, that's not going to occur on day one. It's going to take a period of time and it's going to happen as quickly as possible.

Number two, to the extent that any of these employees are not currently subject to collective bargaining agreements with any of the unions, my client has every intention of drawing up and entering into an independently negotiated collectively bargained agreement with the employees that are working for him. There's no intention here to skirt that obligation or skirt any obligations under federal law.

Then just finally, there was one other statement that Mr. Chase is entering into an agreement with the purchaser. There is no deal with the purchaser. I think Mr. Chase's counsel can speak to that. But I just want to make clear that my client is not entering into an employment agreement with Mr.

Chase.

THE COURT: I understood there was no employment agreement but there is some piece of paper between Mr. Chase and Signature dealing with his ability to get paid if Signature can hold onto this essentially at will continuing maintenance agreement for certain periods of time.

MR. ORR: That's correct, Your Honor.

THE COURT: Okay. I understand the distinction you're making.

MR. ORR: I think one other -- my last point would just be that there is -- well, it is clear in the assert purchase agreement that we are waving all liability with respect to the collectively bargained agreements that the debtor was subject to, or was party to. We are not waiving our obligations to future collectively bargained agreements. We're not seeking to waive our obligations under federal law, nor quite frankly I don't think that we could. So I just wanted to make that clear. There certainly isn't an attempt here to skirt any obligations that my client would have under laws existing under the federal labor law.

THE COURT: Thank you, Mr. Orr. Mr. Raicht, do you have anything to add, or Ms. Berkoff?

MR. RAICHT: Yes, Your Honor. To address the issue raised regarding the $300,000.00, let me be very clear that if the receivable is accrued up until the time of closing it

remains with the estate. If it accrues after the closing, and that's what the $300,000.00 contemplates --

THE COURT: $300,000.00 is estimated to be the component of the receivable that will accrue after the closing --

MR. RAICHT: Correct.

THE COURT: -- if the closing is approved by me.

MR. RAICHT: That is correct, Your Honor.

THE COURT: Okay.

MR. RAICHT: In terms of the -- there was a reference made by I believe it was Mr. Duffy regarding the possibility that there was chilling of the bidding because of the structure of the transaction. Let me be very clear that the asset purchase agreement which was the document against which people were to bid contained none of these other proposed transactions. It was clearly delineated as being conditional disclosures, and in fact, there was a footnote adding that -- made it clear to people I believe that they had the option to seek or not seek such conditional transactions with the idea that some people may or may not need -- may have an existing platform. I think we went to some lengths to make sure that everyone knew that these were not part and parcel of the deal.

THE COURT: So, okay. I think I understand that but I want to take the risk of repeating what you just said. That information was provided to me and to other people in this

courtroom by way of disclosure but it was not a required element of what you had to match in order to bid on the purchase of the assets?

MR. RAICHT: That is correct.

THE COURT: Okay.

MR. RAICHT: A final point I would make is regarding, I think by Mr. Lichtenstein, regarding the $50,000.00 incentive payment. Without getting into the negotiation of the transaction, but fair to say that maintaining contracts would be important to this purchaser as probably any purchaser. One of the other types of things or the way you could resolve that would be through requiring some sort of holdback on the purchase price for those contracts that may fall away post closing. I will say that we were very firm in our negotiations that we didn't want to have any divots against the purchase price. One could assume that this arrangement was a way of bridging the gaps of the estate maximized consideration to be received rather than having the prospect that the fall away of contracts would be borne by the estates.

THE COURT: Okay. All right. Mr. Flaxer, are you rising to speak or just to anticipate the recess I'm about to take before I give you a ruling?

MR. FLAXER: It was the former.

THE COURT: Go ahead. You certainly may speak.

MR. FLAXER: Thank you, Your Honor. With respect to

the agreement that Corsair reached with the debtor which I understand is an agreement between us and the debtor, the Court hasn't approved it, it hasn't been presented to the Court and it's not binding on the unions. However, it may be no issue here but I think this is important enough that it be raised. If the unions are suggesting that because they may have trust fund claims that the proceeds of the sale starting with the cash proceeds, the $2.5 million, somehow will not be distributed but be held in the estate or held in escrow or some such thing, it should be kept in mind that both the Entrepreneur debt and the Corsair debt would continue to accrue interest. They're both, let's be honest, high rate debt. In addition, if there's going to be litigation, et cetera, there would be fees that would be incurred.

It seems to me as a practical -- I also, excuse me, I also don't think that to the extent the unions have trust fund claims that could be liens, and I believe the last go around we looked into this and concluded that they did not have liens but I don't think they're precluded from raising the issue subject to whatever the final order says regarding DIP financing. But to the extent they do have liens, I think they would only apply to accounts receivable. I can't imagine how those liens would apply to proceeds of the sale of the business itself. So for legal reasons and practical reasons, it seems to me it makes eminently good sense for checks to be cut at closing to

Entrepreneur and to Corsair and then we can see about the recoveries on the accounts and who gets that money. I mean it would make sense to tee up the issue if it has to be teed up before Your Honor and, you know, very quickly.

But we were talking about three and a half million [unintelligible] accounts which we're told should have a value of at least $2.5 million. It sounds like any amount of trust fund liens would be far less than the $2.5 million that should be available from the accounts. So it seems to me that at the very least the money from the closing should be distributed immediately to cut off the accrual of interest for the benefit of other creditors.

THE COURT: I'm not sure if this is a 363 issue or an issue for what happens immediately thereafter but let me ask you does your client have the ability, (A), and willingness, (B), to discourage, if I later determine that the unions are right in terms of priority and your client is wrong?

MR. FLAXER: Yes, Your Honor.

THE COURT: All right. Mr. Raicht, you're rising as well but before you speak I want to give Mr. Flaxer an opportunity to say anything further if he wishes.

MR. FLAXER: No. That's it, Your Honor. Thanks.

THE COURT: Go ahead.

MR. RAICHT: I just remarked that here it's nine months and I'm finally rising in support of something Mr.

Flaxer was saying. But I have the same sort of issue that he does. Obviously, I appreciate Your Honor wants to accord some due process and obviously that's appropriate.

THE COURT: I like to give people due process in this room, yes.

MR. RAICHT: Absolutely, and I appreciate. I have to say that off the bat I have the same issue that Mr. Flaxer does that --

THE COURT: You don't want to be the victim of a negative arbitrage where you're paying a huge interest accrual until you can pay Mr. Flaxer's client off.

MR. RAICHT: Agreed. But I also make the distinction that he's making that the Article 3A claims were issues that attached to accounts receivable which are not being transferred here, that what we're dealing here with the sale proceeds that does not derive from accounts receivable. So I appreciate the due process concept but I don't understand really where the unions would assert a claim against the sale proceeds. I'm not even hearing -- I don't know if I misheard them, but I don't know if they're suggesting here and now that they believe that they have such a right in the sale proceeds. The accounts receivable, I appreciate that issue, but on the sale of proceeds I don't even see a prima facie argument as to how they would allege 3A rights against the sale proceeds against those assets, or the proceeds of those assets.

THE COURT: Okay. Yes, Mr. Duffy? I'm sorry.

MR. DUFFY: My comment is actually in response to something Mr. Orr stated earlier which is that the asset purchase agreement said that there's no obligation to hire employees, but actually, if a de facto merger be found then although an 1113 issue is not before the Court today, Your Honor, they may have an obligation to hire people in that collective bargaining agreement if a de facto merger is valid. That can only be discovered with -- or that could only be determined as a question of law through discovery and other opportunities that the unions would like to avail themselves of.

THE COURT: Anybody, anything further? All right. We'll take a recess. I can't guarantee you that I'll be ready by noon but I would ask that everybody be back in the courtroom at noon. We'll proceed then. We're in recess.

[Off the record.]

THE COURT: I apologize for keeping you all waiting.

In these jointly administered cases under Chapter 11 of the code I have the debtor's motion for approval of the sale of all of their assets other than their receivables and cash. In substance, the entirety of their business, at least in terms of the debtor's ability to generate new business going forward all under Section 363 of the code. The motion has engendered a number of objections principally by the union welfare funds

maintained for the benefits of the debtor's employees.

The Section 363 sale is approved and with an order that will say that it's approved free and clear of liens, claims, and encumbrances, and with a good faith finding. The following are my findings of fact, conclusions of law, and to the extent applicable, the bases for the exercise of my discretion in this regard.

The objectors make a number of arguments which I'll consider in turn. The first is that the sale is impermissible under the Second Circuit's decision in Lionel and could only be achieved under a plan of reorganization. At least the pointers withdrew the Lionel objection, but I'm not sure if all of the unions did. In any event, to the extent the Lionel objection is still out there, I can't agree with it. Lionel stands for the proposition that a Section 363 sale must take place for a good reason. It also stands for the proposition that a debtor or a Court can't find the required good reason just because an important creditor or creditor group demands it. But it also recognizes the permissibility of proceeding with the sale where there's a good reason for not waiting until a confirmation of a plan. The debtors have made a very persuasive showing of the need for a proceeding now here.

Wasting assets represent the prototypical situation where sales are appropriate before a confirmation of a plan. Here, the debtors asserted, and their assertion was not

disputed understandably so, that this estate is running on fumes. This estate has been hanging on but its economic performance has been marginal and it wasn't able to make its adequate protection payments occasioning a motion for relief from the stay. The debtors just barely beat back the motion for relief from the stay when they were able to offer an exit strategy that would enable them to realize value on a going concern basis before their liquidity ran out. I note that the debtors now have no further borrowing ability on their DIP financing facility. They plainly had the need to realize on their going concern value now without having the luxury of waiting the more luxurious or leisurely period under which they might try to confirm a reorganization plan.

The next issue is whether I should review this transaction under a strict scrutiny standard or under the less demanding requirements of the business judgment rule. The debtors have noted that the buyer's signature is an independent third party with no affiliation with the debtors or their principal, and no evidence has been introduced or argued to the contrary. The existence of any agreement in writing, in principle, or otherwise was categorically denied. This obviously gives me considerable comfort. However, it does appear that Mr. Chase will be one of the owners of a new company that will have dealings with Signature and may well succeed to the debtors in the completion of the work on several

debtor contracts.

Also, Mr. Chase will receive incentive payments if Signature is successful in keeping the counterparties to the continuing maintenance contracts which are very nearly at will signed up going forward. That doesn't mean that transactions of this character are impermissible, but they are close enough to the transaction under review, that is the Section 363 sale under review. I think it would be better if I were to examine the transaction under a strict scrutiny standard and not give it business judgment rule deference.

So we next get to whether this transaction is in the best interest of the estate and not just a reasonable exercise of the debtor's best business judgment. Though I here may be going into a matter that's subject to Court discretion but not necessarily required as a matter of law I think, as noted, that I should apply a best interest of the estate analysis. Doing so I find that the proposed transaction still passes muster and is in the best interest of the estate. For the avoidance of doubt, however, I'm noting that I'm approving the transaction and finding it in the best interest of the estate on a standard that looks to best interest of the estate and to the absolute fairness test, and I'm not approving it merely by granting a business judgment rule deference.

I think that the debtors have made a satisfactory showing that they took reasonable steps to maximize value and

secure competing bids and I so find. While we're all disappointed that hire bids weren't obtained, I don't think it's for lack of reasonable effort. The debtors tried and failed to secure more value. There were no other bidders. But we have every indication that the debtor secured the maximum value available. I agree that Mr. Chase had the motivation to maximize the recovery and that his interests and those of the estate were aligned. The others advising on the asset disposition helped ensure that the best deal could be obtained.

There is no LaSalle issue here. I'm using a short hand to describe the violation of the absolute priority rule. Neither Mr. Chase nor any other equity holder of the estate is getting anything on account of his interest or on account of the interests of equity. Based on information provided to me and that on this record appears to be undisputed, there will be nothing in this estate to make a distribution beyond priority claims. Both equity, and so far as the record reflects, even general unsecured claims will likely be wiped out. But neither Mr. Chase nor so far as the record reflects anyone else will receive any consideration on account of estate assets.

Turning next to the matter of good faith and whether there should be a good faith finding in the order, I have no basis for denying a good faith finding here, and to the contrary the facts support granting one. There is no indication or evidence that Signature is entering into this

transaction to obtain a get out of jail free card on its future compliance with law, and in particular, labor law. Signature represented in this Court what many might have expected it to say. It is quite purposefully not undertaking to assume debtor obligations that accrued prior to its acquisition but it will meet any and all legal obligations going forward. It will likely take on many employees of the debtor's, but it isn't promising to take any particular number of them on, much less all of them on, and can't give predictions as to how quickly that will happen. These are all positions that an acquirer is entitled to take.

As to free and clear of liens, claims, and encumbrances, that is of course customary under Section 363 transaction of this nature.

It was exactly what happened in the Family Snacks case decided by the Eighth Circuit BAP, see 257 B.R. 884, and was there permissible, even though the debtor in Family Snacks was subject to collective bargaining agreements with its employees.

I am going to issue an order with free and clear provisions consistent with principles of judicial restraint. I am going to issue an order with the usual provisions bankruptcy Judges customarily include in orders of this character, but I'm not going to reach to decide other issues that are not before me.

Finally, I turn to the theoretical concerns under Section 1113. Theoretical may be even too much of a way of stating it. The debtors argue that 1113 isn't implicated until and unless a debtor tries to reject a collective bargaining agreement, and of course they're right in that regard as at least one of the unions recognizes. No authority was offered to the contrary in that respect. I agree with the debtor's point relying on the Eighth Circuit BAP's decision in Family Snacks that it's okay for a debtor to sell substantially all of its assets without also assuming and assigning its collective bargaining agreements. I should say that I agree with them at least under the facts here where there's no indication that the 363 sale has the purpose of evading responsibilities to one's union. I am not called upon to decide and do not decide how I would deal with the situation if it ever appeared that the debtor was using the 363 sale to sidestep its obligations to its employees or their unions. A case of that character can be decided on another day.

Now, what that means of course is that the buyer's signature won't have the benefit of any collective bargaining agreements that had been previously negotiated and that if Signature wants to avail itself of the skills and knowledge as to the debtor's projects that the debtor's existing employee tradesmen have, the new buyer will have to reach satisfactory arrangements with them or that they will work under the buyer's

similar collective bargaining agreements which are already in place in some but not all of the cases. I can't and certainly wouldn't force the employees to work for the new buyer. The employees and new buyer, and to the extent appropriate, the unions can work that out for themselves. But to the extent relevant, and frankly I'm not sure that it is, I find that there is no evidence of union busting here or of a transaction that was structured to evade duties to the unions.

The long and short of it is that the debtors don't have the ability to continue in business as they did in the past, and this transaction is the best way to preserve what going concern value there is to keep as many employees as possible working and to maximize value for creditors to the extent their legal priorities will then dictate how they receive the value that the debtors can bring in.

In that connection, I turn to the distributions to Mr. Flaxer's client, Corsair, and the unions' understandable desire to avoid prejudice concerning any priorities they might have with respect to their Article 3A trust fund claims. Here I need to balance the legitimate need and desire of the unions for due process and having any entitlements on their part considered with the need to avoid prejudice to parties in interest by reason of the quite high rate of interest on the estate's secured debt which will continue to accrue until lenders are paid. In the exercise of my discretion I am going

to authorize payment to secured debt upon the execution of undertakings to discourage any amount so received if and to the extent I or any higher Court finds that payments were made to lenders inconsistent with priorities under law, and upon a reasonable showing that the recipient lender is good for the money and has the ability and not just the willingness to pay it back. An arrangement of that character is in substance what we did in the Adelphia cases where billions of dollars of estate funds were distributed on similar showings and undertakings where there were very similar concerns. The unions and secured lenders, at least Corsair -- I'm not sure if this also applies to the DIP, f it does, I'm sure we could work out similar arrangements -- are to confer to work out an expedited mechanism for briefing any entitlements that are claimed to exist.

Finally, the specifics of any areas where the debtor's approval, or it might be over-broad, were not articulated to me. It may be that the rulings that I just announced obviate the overbreadth concerns or it may be that overbreadth concerns continue. The debtor is to settle an order in accordance with this ruling on two business days notice by hand, fax, or e-mail unless there are compelling reasons why two days represents too long a time in which case I'll hear argument as to that matter. Any overbreadth issues can be raised in connection with the proposed counter order, or

any proposed counter order with a letter of explanation explaining the differences between the counter order and the order. Any counter order should be black lined to highlight its differences from the original order offered to me.

All right, folks, not by way of reargument, are there any open issues?

MR. FLAXER: Yeah, Your Honor, just limited to the issue of the distribution of proceeds. I think during the break we worked something out which would deal with the issue in a way that's somewhat different from the way Your Honor has proposed to work it out, and it is consensual, so if I may explain what it is?

THE COURT: You bet.

MR. FLAXER: The debtor would settle an order that provides for the distribution of the funds from the cash at closing. I'm not talking about the accounts at all, just cash at closing to Entrepreneur and to Corsair. The unions will let us know by I think it was 2 p.m. tomorrow whether or not they have any issue with that. If they don't, then the order would be signed as submitted subject to any other objections, any other issues obviously. If they do have an issue with hit, then I guess we would revert to what Your Honor has suggested. The discussion was that it seems highly remote that there is a chance that the unions' Article 3A asserted liens would attach to proceeds being paid by the purchaser, but understandably,

they would like some time to just go back to their office and confirm that. So that seems to be -- that's fine with us. I believe it's fine with Entrepreneur and with the debtor.

THE COURT: On behalf of the unions, did Mr. Flaxer satisfactorily describe the deal?

MR. LICHTENSTEIN: Yes, Your Honor. Actually however, given the way things take more time than they usually do, maybe I can have until -- we can have until 3 if that's okay with you.

THE COURT: I'll accept that arrangement.

MR. RAICHT: Your Honor, that's acceptable to the debtor. Just so Your Honor understands the timing issue, we are looking to close Monday or Tuesday of next week. So if we settle the order today for presentment on I guess it would Monday, that would probably be consistent with our time frame. So I think that works for us as well.

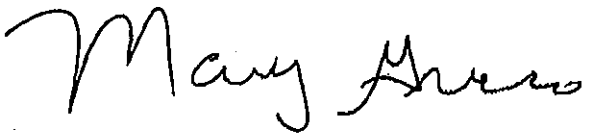
THE COURT: Okay. To what extent are there open issues then, folks? All right. Hearing no response, I think we're done. Good luck, folks, and have a good day.

MS. DELL: Thank you.

MR. RAICHT: Thank you, Your Honor.

* * * * * *

I certify that the foregoing is a court transcript from an electronic sound recording of the proceedings in the above-entitled matter.



Mary Greco

Dated: May 6, 2007