EXHIBIT 25

In Re:

MPM SILICONES, LLC, et al.

Case No. 14-22503-rdd

September 9, 2014

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 14-22503-rdd

- -x

In the Matter of:

MPM SILICONES, LLC, et al.,

Debtors.

- -x

United States Bankruptcy Court

300 Quarropas Street

White Plains, New York

September 9, 2014

2:09 PM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

Notice of Requisite First Lien Noteholders' Motion Pursuant to Bankruptcy Rule 9006(c)-1 for Entry of an Order Shortening Time with Respect to Motion Pursuant to Bankruptcy Rule 3018(a) to Change Votes Relating to Debtors' Joint Chapter 11 Plan of Reorganization.

Motion to Allow / Motion Requesting Authority for the Requisite 1.5 Lien Noteholders to Change their Votes from Rejecting to Accepting the Debtors' Proposed Plan of Reorganization.

Debtors' Ex Parte Motion for Entry of an Order Shortening Time of Notice with Respect to the Debtors' Motion to Shorten 14-Day Stay of the Confirmation Order Pursuant to Bankruptcy Rule 3020(e).

Objection to Motion / Debtors' Objection and Memorandum of Law (I) in Opposition to Motion of U.S. Bank, N.A. For an Order, Pursuant to Federal Rule of Bankruptcy Procedure 8005, Staying this Court's Confirmation Order Pending Appeal and (II) in Support of Waiving, Pursuant to Bankruptcy Rule 3020(e), the Automatic 14-Day Stay of this Court's Confirmation Order.

Adversary proceeding: 14-08238-rdd U.S. Bank National Association, as Indenture Trust v. Wilmington Savings Fund Society, FSB, as Indenture Notice of Filing of Exhibits to Debtors' Objection and Memorandum of Law (I) in Opposition to Motion of U.S. Bank, N.A. For an Order, Pursuant to Federal Rule of Bankruptcy Procedure 8005, Staying this Court's Confirmation Order Pending Appeal and (II) in support of Waiving, Pursuant to Bankruptcy Rule 3020(e), the Automatic 14-Day Stay of this Court's Confirmation Order.

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P R O C E E D I N G S

THE COURT: Please be seated.

Okay. Good afternoon. We're here on MPM Silicones, LLC.

MR. FELDMAN: Good afternoon, Your Honor. For the record, Matthew Feldman from the law firm Willkie Farr & Gallagher, here on behalf of MPM Silicones, LLC, and its affiliated debtors.

Your Honor, we have two contested matters that are going forward this afternoon. The first is a motion to change votes pursuant to Rule 3018, and the second is a motion regarding stay pending appeal and shortening designated period and expediting transmittal of record on appeal to the district court. I will cede the podium. The first motion is brought by the first lien noteholders and the 1.5 from the noteholders.

THE COURT: Okay. Before we start, there was something else that's footnoted on the calendar about a motion to enforce fee provisions and first lien indenture trustee's indenture.

MR. FELDMAN: Your Honor, correct.

THE COURT: I wasn't even aware of this. It was e-mailed to chambers late on the 3rd, and somehow I missed that e-mail. But I'm not prepared to deal with that today. And I think the parties all should have a chance to put something in front of me that actually reflects a dispute, if there is one,

on the bills.

MR. FELDMAN: Since I believe, Your Honor, the next hearing in the case is the 19th, we will either try to resolve it or put substantive parties in between now and then, if that's acceptable.

THE COURT: The 19th of?

MR. FELDMAN: September. We can do it sooner I'd say.

THE COURT: No. I was going to suggest later. I mean, that's very soon, really, as a practical matter.

MR. FELDMAN: Well, we'll work with the first liens and we'll work with your chambers.

THE COURT: Okay. All right.

MR. FELDMAN: Thank you.

THE COURT: This isn't my only case.

Okay. So let's turn to the two motions under Rule 3018.

MS. FOUDY: For to record, Theresa Foudy of Curtis, Mallet-Prevost, Colt & Mosle for certain 1.5 lien noteholders who filed the Rule 3018 motions.

Good afternoon, Your Honor.

THE COURT: Surely.

MS. FOUDY: If it's amenable to Your Honor, I consulted with the counsel for the first liens before the start of the hearing, and we thought that it might make sense to first introduce our declarations into -- first we would

introduce our declarations into evidence, the counsel for the first lien would introduce their declarations, and then if there's any other evidence, have that be introduced and then proceed to argument, if that is amenable to Your Honor.

THE COURT: Okay. That's fine.

MS. FOUDY: Okay. So --

THE COURT: The declarations are in the binder that I have of -- they're attached to the first supplement and to the 1.5s' motion, right?

MS. FOUDY: Correct, they were filed.

THE COURT: And then there's a brief declaration by Mr. Augustine to -- that talks about trading prices.

MR. SAGE: Just a quick address, there are actually two additional -- Michael Sage of Dechert on behalf of the first lien trustee. There are actually two additional declarations that were filed, one by Mr. Chou replacing Mr. Augustine's. Mr. Chou is also from Rothchild's.

THE COURT: Okay.

MR. SAGE: And that's at docket number --

THE COURT: I'm not sure I have that one. Do you have an extra copy of that?

MR. SAGE: I do.

THE COURT: Okay.

MR. SAGE: It's at 977 on the docket.

THE COURT: Okay. Can you hand that up?

MR. SAGE: Yes. And the other is by Mr. John Greene of Halcyon, who is in the courtroom today, at docket number 967. I can give you that also, Your Honor.

THE COURT: Is that in the same format as --

MR. SAGE: Yes.

THE COURT: -- all the other beneficial holders?

MR. SAGE: Yes.

THE COURT: Okay. I don't need to see that one.

MR. SAGE: Okay.

THE COURT: But I should see Mr. Chou's.

MR. SAGE: Yes. Your Honor, this appears as nonsigned, but it was signed and it looks that way in the docket.

THE COURT: Okay. That's fine. All right. It's like Mr. Augustine just traded prices.

MR. SAGE: Exactly.

THE COURT: Okay.

MS. FOUDY: Your Honor, so we're seeking to introduce into evidence the seven declarations that were attached to our pleading which was filed at the docket as number 924 on the docket. It's the declaration of Meridee A. Moore of the Watershed; the declaration of Scott Dolph of McKay Shields, LLC; the declaration of Nathan H. Van Duzer of Fidelity; the declaration of Anna Marie Lopez of Hotchkis & Wiley; the declaration of John K. Forst of Lord Abbett; the declaration of

Alex Duncan of Phoenix; and the declaration of Ryan Bloom of the Hartford.

Your Honor, five of these declarants are in the court today. That's Mr. Dolph, Mr. Forst, Mr. Duncan, Mr. Bloom, and Mr. Van Duzer.

We contacted counsel for the debtors and for Apollo, the second liens, about whether they had an intent to cross-examine and whether they objected if we were unable to secure the presence of all seven noteholders. We were told that they did not object. The two noteholders were unable to come from California, so we understood that they did not object to having these declarations admitted without those two being present.

THE COURT: Okay.

MS. FOUDY: But as I noted, the five that I noted are in the courtroom and available for cross-examination.

THE COURT: Okay. So the debtors don't have an objection to the admission of these exhibits?

MR. FELDMAN: Your Honor, we don't have an objection to the admissions of those exhibits. We will be crossing one party as a representative cross. We're not going to cross all five.

THE COURT: Okay. That's fine. So they're admitted.

(Declarations of Ms. Moore, Ms. Lopez, Mr. Dolph, Mr. Forst, Mr. Duncan, Mr. Bloom, and Mr. Van Duzer were received into evidence as of this date.)

THE COURT: I think you're kind of doing this as a tag team, but on this point, is there any objection to the admission of the first lien trustee's exhibits?

MR. SAGE: Your Honor, we don't object to any of the declarations by holders of first liens. We don't understand the relevance of Mr. Augustine, now Mr. Chou's, to describe trading prices.

THE COURT: Right.

MR. SAGE: We're not sure why it has to be brought in by a declaration since it's publicly available information. So we would object to that declaration being put on the record.

THE COURT: I'm assuming it's because it shows why people want to change their vote, because the price has gone done?

MR. SAGE: Or yes, it also answers some of the arguments that were made by the debtors to their reply.

THE COURT: All right. I'll admit it.

MS. FOUDY: So should we proceed to the cross-examination?

THE COURT: Sure, yes.

MR. FELDMAN: Your Honor, we would propose to cross Mr. Van Duzer because he put in a declaration both for the first liens and the one-and-a-halves --

THE COURT: Okay.

MR. FELDMAN: -- if the issues are identical and

shorten, again, the time.

THE COURT: Okay. That's fine.

Do you want to take a seat up here, please?

I guess this is one of the consequences of a hedging strategy.

(Witness sworn)

THE COURT: And could you spell your name for the record?

THE WITNESS: Nathan, N-A-T-H-A-N, middle initial H, Van Duzer, V-A-N space D-U-Z-E-R.

THE COURT: Okay. Thank you.

MR. FELDMAN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. FELDMAN:

Q. Mr. Van Duzer, can you briefly describe your educational background?

A. I received a Bachelor of Science degree from United States Military Academy at West Point. I received a law degree from the University of Virginia.

Q. And you indicated in your declaration that you're employed by Fidelity; is that correct?

A. That's right.

Q. And one of the declarations indicated your title, but can you put that on the record? What is your job title at Fidelity?

A. My title is Managing Director of Special Situations.
Q. And would it be fair to say that Fidelity is one of the largest money managers in our country, perhaps even in the world?
A. That's fair, yes.
Q. And can you describe briefly your responsibilities at Fidelity?
A. I work closely with our portfolio managers in analyzing and examining various distress situations. I handle all material not public information that comes into our high-income group. I work on restructuring of companies both pre and during, and post-bankruptcy.
Q. And in the course of your employment, do you have opportunities to sit on either official committees, unofficial committees, steering committees, ad hoc committees of creditors?
A. Yes, I do.
Q. And how long have you been Managing Director of Special Situations for Fidelity?
A. Approximately four years.
Q. And in the course of those four years, do you have any idea of how many of those either official or unofficial committees in whatever caption name you participated in?
A. Perhaps twenty in four years.
Q. And in your experience, are those committees generally

represented by professionals?
A. Yes.
Q. And does that include legal professionals and financial professionals?
A. Yes.
Q. And in the case of MPM Silicones, this case, is there, in fact, a steering committee of first lien -- noteholders?
A. Yes, there is.
Q. And is there a steering committee of 1.5 lien noteholders?
A. No, there's not.
Q. And in connection with the first lien noteholders, are you a member of that steering committee?
A. I am.
Q. And in terms of the 1.5 lien noteholders are you -- I'm sorry.
MR. FELDMAN: Strike that.
Q. In connection with the 1.5 lien noteholders, is Fidelity one of the largest holders, to the best of your knowledge?
A. To the best of my knowledge, yes.
Q. And Mr. Van Duzer, as part of your responsibilities at Fidelity, do you make the determination, perhaps with others, but is part of your responsibility to vote to accept or reject plans?
A. The voting determination is ultimately decided by the portfolio managers, but I do give advice, yes.

Q. And do you give recommendations in connection with that advice?
A. Yes.
Q. And without telling us, because I'm not asking you what the advice you receive from professionals as a member of the steering committee, did the steering committee, in fact, engage with illegal professional in connection with the MPM plan and what it meant?
A. Yes.
Q. And so just to clarify one last thing, when you signed the declarations that Fidelity was prepared, under certain circumstances, to change its vote, is that your recommendations to the portfolio managers or is that an agreement from the portfolio managers?
A. It's an agreement from the portfolio managers.
MR. FELDMAN: I have no further questions, Your Honor.
THE COURT: Okay. Any redirect from either --
MR. SAGE: No.
THE COURT: Okay. You can step down, sir.
Okay. Is there any other evidence in support of either motion?
UNIDENTIFIED SPEAKER: No, Your Honor.
THE COURT: Okay. Do the debtors have anything other than what's in the record of the confirmation hearing?
MR. FELDMAN: No, Your Honor, but we do incorporate the

record of the confirmation hearing.

THE COURT: Okay. And I guess also the revised proposed plan that was filed last week.

MR. FELDMAN: Correct, Your Honor.

THE COURT: Okay. All right.

MS. FOUDY: Again for the record, Theresa Foudy of Curtis, Mallet-Prevost, Colt & Mosle for the requisite 1.5 lien noteholders. As reflected in the declarations that have now been admitted into evidence, the votes represented by the 1.5 lien noteholders and the first lien noteholders who have moved into change their votes pursuant to Rule 3018 is sufficient to swing the classes, Class 4 and Class 5, under the proposed plan from being rejecting classes under the plan to being accepting classes under the plan, if Your Honor grants the Rule 3018 motion.

The debtors' opposition does not contest that fact.

Rule 3018 requires the movants to show cause to allow the vote change. And cause in this context is not defined in the statute. The debtors argue that cause for these purposes is limited to those situations in which the will of the voter was not initially properly expressed due to some sort of mistake or error. However, Congress wished to so narrowly circumscribe the situations in which is vote might be changed. They presumably would have done so explicitly rather than using a general word such as "cause".

I submit to Your Honor that "cause" is a broad word that

means any good reason or good basis that would serve as a justification for allowing the vote to be changed. Collier says that it should not often be a difficult standard to meet and merely requires that the change not be improperly motivated or for a tainted reason.

Here, the requisite noteholders have shown plenty of good reason to permit the vote change. In particular, because the vote change will serve to convert Classes 4 and 5 from rejecting to accepting classes under the plan, it will eliminate future litigation risk and uncertainty and costs. It will eliminate appeals of Your Honor's ruling on the make-whole premium, though they may appeal to Your Honor's ruling on the interest rate for the cramdown notes. It will avoid litigation over stays pending those appeals and it will result in a dismissal of two separate intercreditor actions which are still at a nascent stage.

THE COURT: Why would it involve the dismissal of those actions? Under the plan as filed, consistent with the modification that was made on the record, those actions survive.

MS. FOUDY: Correct, Your Honor. But presumably, if the Rule 3018 motions were granted, we would become parties who consented to the releases under Second Circuit law, so that that carve-out would no longer be necessary.

THE COURT: Do debtors agree with that? I thought there

was an express carve-out for that litigation.

MR. FELDMAN: There was, Your Honor. That was the resolution of the release that had been contested. The plan has been refiled to carve out that litigation from the (unintelligible).

THE COURT: Okay. I mean, the declarations don't say, and we would grant a release. And I don't know if that was just because people assume that to be complete litigation piece, if they had their votes changed. But I think technically it doesn't actually work that way.

MS. FOUDY: Well, we also happen to be counsel for the plaintiff in that litigation, and the plaintiff in that litigation is willing to represent that if the Rule 3018 motions are granted they will dismiss that litigation.

THE COURT: Okay. Are you speaking for the first lien trustees too?

MS. FOUDY: I will let Michael Sage speak for them.

THE COURT: Well, actually, he can't do it because it's someone else, right?

MR. SAGE: No, it's me.

THE COURT: I thought it was another firm.

MR. SAGE: That's correct, but I'm also aware of what the trustee -- counsel is here in the courtroom and can represent it.

THE COURT: It may make sense to have him say it or her

say it.

MS. FOUDY: So achieving such --

THE COURT: Well, he's coming up. You don't see him, but he's right behind you.

MR. REISNER: Good afternoon, Your Honor. Jeffrey Reisner of Irell & Manella.

THE COURT: Afternoon.

MR. REISNER: The answer is yes.

THE COURT: They would waive it?

MR. REISNER: They would waive it.

THE COURT: And dismiss the lawsuit?

MR. REISNER: Yes, Your Honor.

THE COURT: Okay. All right.

Go ahead.

MS. FOUDY: Achieving such finality and end of litigation is certainly good reason for granting the motion as is rendering the plan consensual among the classes entitled to vote. The court system and bankruptcy policy favor finalities and settlement and consensual plans. A desire to end contentious litigation and accept a settlement offer is certainly not a tainted or improper motivation and certainly is quite distinguishable from the majority of cases cited in which creditors purchased someone else's claims specifically to attempt to lock a confirmation of a vote -- confirmation of a plan.

In response, the worse the debtors can say is that the movants -- the Rule 3018 motion represents an impermissible attempt at a do-over, that the noteholder should not be allowed after all the time and cost expended in this litigation. However, much of the cost of the litigation of these disputes actually occurred in discovery which took place before the voting deadline even passed and before -- certainly before the results of the voting had become known. Thus those expenses would not have been avoided by the noteholders, even had the noteholders initially voted yes on the plan.

As to the costs incurred during the confirmation hearing, it is unusual for complex litigation to settle in the middle of a trial, and there was no bad faith by the trustees here. There were litigable issues. There still will be appeals of those issues if the Rule 3018 motions are not granted. Indeed, on the cramdown rate of interest, Your Honor recognized that there are cases that have applied a market test as the trustees were espousing. And indeed, Your Honor did require the plan to be modified to pay a different rate of interest.

THE COURT: Can I interrupt you because I think this largely comes down to the notion that these two motions are settlements. I don't think the debtor actually does take the position that 3018 only applies to instances where people make a mistake in voting technically, and even if they did, which I don't think they do, there clearly are several cases out there

where courts permitted votes to be changed with the agreement of the plan proponent. If someone else was objecting, someone who still didn't want the plan to be confirmed, but the vote was changed as part of the settlement with the plan proponent who expressly supported the change.

Now, in those circumstances, courts are much more wary in finding cause than when someone just didn't -- the VP who signed the ballot actually didn't have authority or the ballot was submitted mistakenly or whatever. But because you want to make sure as a court that there's been no extra consideration or improper consideration in return for the vote change, and some courts are wary of the idea that the process drags on this way and there's no end to it. But getting over those points, there are courts that have approved a change of votes where there's a settlement with the plan proponent.

The plan proponent here is actually opposing the change. So it's an odd type of settlement.

MS. FOUDY: Yes, Your Honor. But as the debtors represented in their opposition, proposing the plan in the toggle nature they proposed it was a settlement offer. If you vote yes on the plan, you accept the settlement to have payment in full in cash but no consideration for the make-whole and presumably consented to the releases and everything else in the plan. If you vote no, you get to litigate your make-whole, but you'll get cramdown notes. And they call it a carrot and a

stick.

THE COURT: And so there was a vote no.

MS. FOUDY: If the Rule 3018 motions are granted, it becomes a yes vote. I mean, I view it as they made a settlement offer in the plan. If there's cause to make the no votes yes votes, we have accepted that settlement offer. And the finality that will just result -- that will thus result is the cause because it will affect a settlement. I mean, the offer was on the table. If you grant the motions, the offer's been accepted. So it is a settlement.

And I understand that there is unhappiness that we didn't accept it sooner because there's been costs that have been incurred in the meanwhile. But those costs are water under the bridge now; there are some costs. We can't deal with those now. We're sitting here on September 9th, and the question is, on September 9th, is there cause to end -- to basically -- to but the it indelicately, stop the bleeding and put an end to this. And that's what granting the Rule 3018 motions would do. It would put an end to appeals, litigation concerning stays, pending appeals, and the intercreditor actions.

THE COURT: Well, I don't think, under these facts, I can direct the debtors to settle, can I? I mean, they're not taking actions that would require a trustee to be appointed, for example. So --

MS. FOUDY: Correct. And I'm not asking you to direct

them to settle.

THE COURT: Well, but you are telling me that this is a good deal for the company, that the change of the vote for cause would be a good thing for the company.

MS. FOUDY: Well, I think Rule 3018 says cause. It doesn't necessarily mean that it has to be a good thing for the debtors.

THE COURT: Well, there has to be a good reason for it.

MS. FOUDY: And certainly a good thing for the court system and a good thing for bankruptcy policy in having finality in consensual plans, and avoiding risk and future uncertainty is cause. It may -- the debtors may disagree, apparently disagree with whatever is a good deal for them at the present time in time or it's not a good deal for them at this point in time in light of some of Your Honor's rulings that he's made. But that's why it's ironic that they're sort of accusing us of wanting a do-over in light of Your Honor's rulings. The truth is --

THE COURT: Well, it is a do-over. I mean, there's no question it's a do-over. I mean, that's where Mr. Chou's declaration is relevant, is that there's a do-over because the trading prices went down. It's not -- I have to say I doubt that it was truly, upon closer examination of the benefits of the proposed plan that the 1.5 lien noteholders have changed their mind. These are very sophisticated people, and they

certainly could have reviewed the plan, and I'm sure they did, and they made their choice before they voted. It's not like somehow they woke up one morning and hit their forehead and said, that plan was really good objectively. They hit their forehead because the trading prices went down.

MS. FOUDY: What I'm saying though is it goes both ways. The debtors now want to revoke the settlement offer they made in the plan because they've benefited from Your Honor's rulings. So both sides want a do-over in that sense.

THE COURT: Well, I guess there's some logic to that. I understand that they didn't put in the plan a time limit, right? They didn't say this offer is only open until the commencement of the confirmation hearing. But on the other hand, it was an election. And very clearly, the consequences of a fish-or-cut-bait provision or a death-trap provision or a toggle provision are all tied to the vote. You get this if you vote one way, and you don't if you vote the other because it's intended to avoid all the risk and uncertainty of a contested confirmation hearing which is what happened. I mean, you would have had a lot more certainty, right, if 3,000 people who voted for Ralph Nader in Florida got the chance to change their vote, that might have objectively been a good thing, but that's not how elections go. They made the choice to vote for Ralph Nader.

MS. FOUDY: Well, Your Honor, I think that the issue is

that while we did go through a contested confirmation hearing, I will point out that Mr. Somerstein, on behalf of the 1.5 lien note holders, during -- on Friday of that hearing, did raise to say that --

THE COURT: Well, that's true, but it was pretty late in the day at that point. But, look, I agree. He did the right thing. It's often the case that during confirmation hearings, as facts develop, there's people with their clients present really think about the issues, they talk settlement, and that's what happened. But the parties chose not to settle.

MS. FOUDY: Your Honor, but the parties are choosing to accept the settlement now, and if there's cause to do that under Rule 3018, you can grant them the ability to accept the settlement offer now. And the cause to do that is, as I said, I understand we have some water under the bridge because we went through three of the four days of confirmation hearing before Mr. Somerstein said that, one of the days was dedicated to the subordinated notes issues. But the fact is whatever water is under that bridge, we've got a lot -- we've got an ocean in front of us still. We've got two intercreditor actions that were just filed, that the motion dismissed it.

THE COURT: Well, I agree. There may be good reasons for a settlement somewhere before this plan goes effective, but I think you're asking me to impose it, and in fact, you're imposing me -- you're asking me to impose it on terms that have

been rejected. Unless, and I have been grappling with this, you're saying that basically the fish-or-cut-bait or toggle provision in the plan is an open-ended offer, up until the very date that the plan goes effective.

MS. FOUDY: Your Honor, I don't see any reason why it isn't. If you looked at the wording of the plan, if Your Honor finds cause to grant our motion, we've accepted the offer.

THE COURT: But that would mean that cause doesn't mean anything.

MS. FOUDY: It does mean something, because we're giving you cause. We're giving you cause in the sense that there's good reason to let us accept the offer now, because it avoids all the risk, and future uncertainty, and all the future litigation that you can see trailing out in front of us.

THE COURT: I guess what I'm saying is something has to happen to keep the offer open. The offer is premised on voting in favor of the plan. Your clients voted against the plan, so I could certainly read the provision to say the offer is closed. You're looking to revive it by seeking relief for cause to change the vote, and if the only basis is that it's always open, then why even seek relief for change? It's just always open. To me, there has to be some meaning behind the cause requirement, other than I changed my mind.

MS. FOUDY: Well, there is -- I believe I have articulated a cause that goes beyond I changed my mind. In

addition, Rule 3018 was always there, and everyone was aware that it was there, and the fact is, if there's cause, Rule 3018 makes those votes yes votes. And if you read the words of the plan, once we become yes votes, we've accepted the offer --

THE COURT: But that presumes the result. That presumes that you're allowed to change the vote.

MS. FOUDY: If the Rule 3018 motion is granted, correct.

THE COURT: Right, okay.

MS. FOUDY: And --

THE COURT: I haven't located any cases like this. I have located cases where someone who wanted the plan to fail objected to a changed vote where there was a settlement with the plan proponent, but I haven't found anything like this. I have found cases where the court said the vote is important, and it's important to have that date count as a real date.

In fact, I think the best discussion of 3018 makes that point that I've seen at least, by Judge Williamson in the JC Householder Land Trust #1 case, where he goes -- he spends a long time talking about the negative impact on an orderly reorganization process if people could keep changing their votes.

There is a reason why we schedule a confirmation hearing, and there's a reason why, when there's a parallel foreign case, we often will have the hearing on the same day.

It's because there's kind of a drop-dead element to it. That's when everything comes together or it doesn't, one or the other.

MS. FOUDY: Well, Your Honor, I think that settlements frequently occur in the midst of confirmation rulings.

THE COURT: Well, but it didn't happen here. One could say objectively it should have happened, but it didn't.

MS. FOUDY: But we did seek to change our votes during the confirmation hearing, and --

THE COURT: That's not really a settlement, I think though, frankly. It's just basically --

MS. FOUDY: Correct.

THE COURT: -- saying we want to go back to what we had under the plan that we rejected.

MS. FOUDY: We wanted to accept -- we had decided to accept the settlement offer that had been made to us, and as you've said, most of the cases out there are about denying requests to change a vote to block the plan. And that's because it's sort of -- bankruptcy policy favors consensual plans, and favors confirmation plans.

THE COURT: I really don't think that's the reason that those cases go the way they go. I think there's a heavy emphasis in those cases on the regularity of the process, which is basically only modifiable on consensus. The timing counts.

Put it differently, if someone had bought a claim one day before the vote, and could be -- could direct the party to

whose claim it bought to vote against the plan, there's no problem with that, obviously, so that it's the timing issue that counts. And the timing issue is there's a date, and you have to make up your mind, because a lot of things flow from that.

MS. FOUDY: Correct, right, but Rule 3018 was amended in 1991 to eliminate any time requirements, and Congress --

THE COURT: I understand.

MS. FOUDY: -- Congress said you can have changes after that date.

THE COURT: I understand, but so far, it's only been interpreted as is permitting changes where, A, there's been no shenanigans, which no one's alleging is the case here; and B, it's largely consensual, and most importantly, with the support of the plan proponents. And even then, if there's a material change, people may well have a right, under 3019, who are affected by that.

MS. FOUDY: Well, I think under -- if 3018 was meant to require the consent to the plan proponents, that could easily have been written into the statute, and I think that there's never been a case -- at least we couldn't find a case, that had anywhere close to these facts, or these reasons for cause. They were all very factually distinctual (sic). So I want to give the first-lien counsel a chance to speak, but I would like to reserve the right to come up and reply.

THE COURT: Okay.

MR. SAGE: Good afternoon, Your Honor, Michael Sage of Dechert, on behalf the first lien trustee -- excuse me, on behalf of the 3018 parties.

I'm not going to cover the ground that's been covered. I understand the questions and the line of questions of Your Honor. I just want to emphasize a few things. Ms. Foudy actually said something that I'd like to start with, and that is this an unusual case.

There isn't anything in Rule 3018 that talks about timing, and there isn't -- respectfully, there is not a settlement -- I recognize that many or if not most -- a great majority of the cases are effectively implementing a settlement with a plan proponent. I understand that, but that requirement is not in the rule.

This case is very different in lots of ways. One, the parties who want to change their votes now, now have perfect information. They didn't have that all along. They also didn't --

THE COURT: That's the worst reason -- that's why I might well deny the motion.

MR. SAGE: I understand.

THE COURT: Life is not about perfect information. Life is about choices, which is why you have elections.

MR. SAGE: But let me develop this.

THE COURT: We all may regret how we voted, even the next day. This is not -- it's one thing Congress knows when they draft a statute, and that's how elections go.

MR. SAGE: I understand, but to your point about elections and Ralph Nader, that example, in that example there isn't a Rule 3018. There isn't a notion that you can change your vote in that context. Here there is, and here, respectfully, it's not tied to a date of the election. It's tied to the statute, which doesn't say it.

I also think it bears emphasis, Your Honor, that Mr. Feldman got up on Thursday morning at the confirmation hearing, and said we may not have a cramdown. We may have a consensual -- we may have a resolution if the make-whole ruling goes our day, and our requisite lenders agree, we will instead revise the plan to put in the cash -- a cash feature. That was said on Thursday.

THE COURT: But I --

MR. SAGE: Excuse me.

THE COURT: -- there was something like that said, like some -- I think a suggestion came from Apollo through the debtors, but I don't think the requisite lenders ever agreed.

MR. SAGE: No, I -- they did not. You're hundred percent, but my point is between the footnote in the plan, and that thought process, and the fact that they have the possibility to take out the debt in thirty days, or take any

debt that would be the new first lien -- the replacement first-lien notes within thirty days.

THE COURT: But is that -- that's interesting. Is that in the first-lien notes?

MR. SAGE: Yes.

THE COURT: That they have the right to take them out in thirty days --

MR. SAGE: Yes.

THE COURT: -- in cash?

MR. FELDMAN: The first liens -- the first-lien notes don't prohibit refinancing.

THE COURT: Okay.

MR. FELDMAN: It's Section 3.05 of the notes say with thirty-days' notice they can take this out. Making the point that throughout this situation --

THE COURT: But that has to be on a -- there has to be some mechanism, I guess, for -- I don't know, someone has to decide to do that.

MR. FELDMAN: Sure, the board of the new company is going to have to decide to do it, and they're going to get taken out at the exact amount that they would like to get today, so we're not sure why that's all that important.

THE COURT: Okay.

MR. SAGE: My point is that if they didn't like the rate of interest that Your Honor was selecting, they always

had, throughout this entire case, the optionality that they -- that we didn't have, if the Court doesn't -- Your Honor does not rule our way of 3018. The point is it's not been reciprocal.

They may say, and they will say that's our right as plan proponents. But as Your Honor just observed, they were speaking for Apollo and the second liens when they referenced it.

THE COURT: They weren't speaking for the requisite --

MR. SAGE: Correct.

THE COURT: -- lenders, because they didn't agree to that.

MR. SAGE: Correct, but the option to exercise, the ability to exercise that was always on the other side, because they had, at any moment in time, could have not liked where the ruling was going, until -- and made that determination, or made a determination based on the make-whole going their way, or they thought it would go their way, and made that determination. So my point is simply that they've had the optionality to -- the second-lien lenders Apollo had optionality through the debtors throughout.

Now, we look at this and say the statute doesn't -- the rule doesn't say anything about timing. The rule doesn't have a settlement concept even, and as a result, we think it's appropriate that, given the entire playing field of this case,

and the fact that this case was begun as a litigation against the first liens and the 1.5s, and even before the voting deadline, as Ms. Foudy said, discovery started. It was a Hobson's choice. Do you give up your entitlement which -- and no -- now with 20/20 hindsight, we all say, well, I guess it's obvious, you're never going with the make-whole. But courts have differed on that. And courts respectfully have differed on the Till (unintelligible). So if there is --

THE COURT: But you guys would still have all your rights on that. All the reasons that both motions have said that it might be a good settlement to settle this issue somehow by letting you change your vote, those are still out there. You won't have that leverage.

MR. SAGE: Well, we agree that settlement should occur, but I don't -- respectfully, I don't accept the premise that it has to be viewed as a forced settlement upon the debtors. That's not what 3018 says, and I think this case is unique, for all the reasons I've discussed.

And I think also, as Ms. Foudy said, and I agree with her, the fact of this would bring -- I mean, the Court's allowed to look at this holistically, not just in the eyes of one side or the other of course, and I think the fact that holistically this will result in a consensual resolution of everything, including the creditor lawsuits.

THE COURT: But it's not consensual.

MR. SAGE: A final resolution.

THE COURT: Mr. Van Duzer's obviously a very sophisticated, very intelligent --

MR. SAGE: Yes, he is.

THE COURT: -- very experienced person.

MR. SAGE: Yes.

THE COURT: So I'm sure his opposite number at Apollo and in the second-lien ad hoc group and at the debtors, they're all advised by very sophisticated people. If they can't reach a settlement agreement, why should I tell them they must? And what would that agreement be?

MR. SAGE: It would be the -- first of all, accepting the premise that it's a forced settlement and that's what 3018 requires. I don't accept it, but assuming that premise, it would be exactly what the plan always envisioned. The plan always envisioned that if we vote yes, this is the treatment.

THE COURT: But you didn't vote yes. I keep coming back to that. It envisioned a yes vote. It didn't envision a yes vote -- I'm sorry, it didn't envision a no vote, all the risk being undertaken as a result of that no vote, and then the changed vote. I don't think the plan envisioned that. How could it, when it didn't say that?

MR. SAGE: As Ms. Foudy said, I agree, 3018 always existed --

THE COURT: Was incorporated in that provision?

MR. SAGE: The law is the law. I mean, the rules of the road apply, and just as they could've always made a modification and gone that way, we reserved the right for us to move Your Honor.

THE COURT: So there really -- so cause doesn't really even apply here.

MR. SAGE: No, cause -- there's a number of causes. It's like --

MS. FOUDY: Well, there really wouldn't be cause, because you basically just say we're accepting the option now, done. There's no cause, we just did it.

MR. SAGE: I don't think Ms. Foudy or I are saying that cause -- that we can do it as a right without any -- having to establish cause. That's not what I'm saying. That's not what I intended to say. What I intended to say is that due to the entire circumstances of the case, due to the fact that it would bring resolution, not finality.

THE COURT: I'm sorry, I'm focusing on a much more narrow issue.

MR. SAGE: Okay.

THE COURT: Because I believe that I cannot be so paternalistic as to impose my view of what a proper settlement would be on all the parties. So all of those other things I put by the side. Frankly, I also believe just for my own self, that a proper settlement here would not be what you all want,

because that would just ignore all that's happened in the meantime. But leave that aside.

I'm just focusing on the more narrow point, which is we're just accepting an offer, and to me, that would take out from my determination, the whole determination of cause, because that's basically just saying we can accept this at any time, and we don't have to weigh any of the facts and circumstances, any of the context in which the offer was made, the fact that it required a vote, not a no vote, a vote in favor.

And the typical reading of these types of fish-or-cut-bait provisions. I mean, there's a reason it's called fish-or-cut-bait or death-trap. You either do it, or you die, or you win. You guys concluded that you wouldn't die, you would win, and maybe you will on appeal. It's possible. Maybe the bond prices will go up again. Should I let people change the vote every time bond prices go down? If the bond prices go up, are the seconds going to say I want to change my vote? It's just -- there's no end to it.

MR. SAGE: The rule of law you're suggesting, Your Honor, respectfully, would mean there's never a change of vote after the first time.

THE COURT: Well, I think the parties could get together and agree on it. I understand that, clearly. Again, if there's no shenanigans, and obviously there wouldn't be any

shenanigans here. But that's not what we're dealing with here.

MR. SAGE: I don't think Congress intended that you only could change your vote up until the point of the first deadline.

THE COURT: I agree with that. If people agree, you could change your vote after the deadline, if most people agree, if the plan proponent agrees with you, because then it really is a settlement. If it meets the other criteria of the settlement, and it's not a material modification of the plan, so be it. That's great.

MR. SAGE: To the extent that Your Honor views this that the only way to implement 3018 is with the debtor's assent, or with the consent of the debtor, then you're right. This motion -- but that's just not how I read 3018, and I recognize that cases have been decided -- have been in that context. There are also not a lot of cases that discuss this rule.

THE COURT: That's true.

MR. SAGE: And I don't think it's dispositive --

THE COURT: But the better cases all talk about the notion that -- and this is post '91, post amendment, that having a regular, reliable process is really important for the vote, and to me, a toggle or fish-or-cut-bait provision only makes sense as part of that regular process, which is you make your decision. We're giving you this chance to make a decision

to vote yes. If you don't, there should be consequences from it.

Now, maybe ultimately the parties can get together and settle that, even after the no vote, but to just say I'm going to back to the pre-voting deadline world and ignore what's happened in between, I think is misreading the offer.

Maybe there would be some circumstances where a plan proponent was acting so pigheadedly that the court would say you really should not oppose this, but the case where the professionals in the aggregate are running a million-nine a week, month -- not day.

MR. SAGE: I think it's a wee.

THE COURT: A week -- I think they could make up their own minds, they and their clients. Maybe they're wrong, just like maybe you shouldn't want to change your vote. Maybe ultimately on appeal you'll be right. There's a lot of maybes in this world, but votes are important as a way to sort of fix the playing field, I think.

MR. SAGE: Understood. I too will reserve the right to comment if there's anything that comes up.

THE COURT: Okay.

MR. SAGE: Thank you.

MR. FELDMAN: Your Honor, again for the record, Matthew Feldman, Willkie Farr & Gallagher. I'm just going to make a couple of points, Your Honor. First of all, I do think

that this offer has not been open beyond the voting deadline. There was a disclosure statement order entered in the case, on June 23rd, which established July 28th as the voting deadline.

The plan says that you'll vote to accept, you'll vote to reject, and we could not write 3018 out of the plan. That wouldn't be appropriate. That's essentially what they're asking, is that 3018 be written basically into the plan, to say we can change our votes at any time.

If that's not what they're saying, and they're saying they still have to establish cause, then I think it's pretty clear they haven't met that burden, and it is their burden, under the various cases.

THE COURT: I guess the voting -- I'm sorry, the disclosure statement, as I recall, warned people that if they voted no, they wouldn't get the cash payment.

MR. FELDMAN: That's correct, Your Honor. There's a whole description of that in the disclosure statement. And I think --

THE COURT: Maybe you guys can address that. There are -- they usually don't come up in this context, they come up in the avoidance context. But there are a number of cases that say that a disclosure statement order is res judicata for what's in the disclosure statement. I don't know, we -- leave that aside.

MR. FELDMAN: The other point I'd make, Your Honor,

and I think Your Honor mentioned it, but I think it's worth mentioning again, which is Mr. Van Duzer, as well as the other declarants are sophisticated investors. They understood exactly what they were doing, and the reason they'd like to change their vote is based on the affidavit from Mr. Chou, from Rothschild. I get that. Had this bonds gone to 120, maybe we'd like to change our votes, but --

THE COURT: Well, maybe it's a --

MR. FELDMAN: -- that's not going to happen.

THE COURT: -- maybe it's a buying opportunity. I don't know.

MR. FELDMAN: Maybe it is. That's not my business. The last piece, this idea that this would end litigation is actually not correct, and we point that out in our papers. We now have sort of seen what's behind the curtain. The idea from the company's perspective, and the board of the company that we would go back to okay, we'll toggle back to payment in cash is just not correct. We would bring a 3019 motion, and we'd be mired in litigation over what plan is being confirmed, and whether this plan is going effective, or some other plan.

So this idea that this would end litigation is just not accurate, Judge. It's as simple as what you said in the beginning. They want a do over. I understand why they want a do over, but we created a carrot and a stick for a purpose. It would've been nice had they picked up the carrot. They chose

not to.

We're all prepared to live with the risks of what has happened, including risks to the second lien and to the company, because as Your Honor points out, there are risks of appeal. There are risks of that litigation, and that's a judgment that the company and the company's board has made, that it would prefer to continue to go down that route, now that it understands where everything stands at this point in time.

And I guess the last point, Your Honor, that I wanted to make is just a small clarification. While Mr. Somerstein did come before the podium to muse about whether or not he would bring a 3018, he didn't have the votes, and it was actually at the conclusion of the four days of the confirmation hearing, when we had closed the record. That doesn't mean that he didn't stand up and raise the point, and I'm not suggesting he didn't, but it wasn't as if he raised the point before we had spent all the time and effort litigating make-whole until.

As Your Honor may recall, those were really the second, third, and fourth days of the confirmation hearing. The first day was spent on the subordinated notes, and it was really at the conclusion of all of that where I think it was pretty clear where Your Honor was leaning, that Mr. Somerstein made that point.

THE COURT: Right, although the debtors and their

allies could've settled then, if they wanted to.

MR. FELDMAN: Could have, Your Honor.

THE COURT: In some way. It wouldn't necessarily have been the equivalent of accepting a change of the vote, but there could've been a settlement then.

MR. FELDMAN: Correct, Your Honor, and without going into that deeper, as Your Honor knows, there was time spent in that regard.

THE COURT: Okay.

MS. FOUDY: Your Honor, I didn't mean to suggest that we could change our vote to accept the offer at any time, with no cause. The argument is that we have shown cause, and I think each case -- I think you have to look at the very specific facts and unique circumstances of this case. And on these specific facts, and these unique circumstances, that cause has been shown.

You had mentioned whatever the professionals' fees are that are being spent a week in this case. That's why the bankruptcy process and the court process, viewed holistically, favors settlement and finality and consensual resolution.

THE COURT: But I guess -- I think Mr. Feldman made a good point, which is that whenever you impose a settlement on someone that doesn't really agree, they have options too, and whether or not it would be granted or not, they are saying that they would then move to amend the plan. Or alternatively, I

guess they would move to change their votes on the plan, or they would, just with the elapse of time, have their plan support agreement and backstop agreement expire, and that happens when people aren't really truly on board with the settlement.

MS. FOUDY: Well, I think the risk of future uncertainty with the backstop agreement or the restructuring support agreement expiring would be a reason why they would be unlikely to move to amend the plan, if the Rule 3018 motion is granted.

I can't predict what they would do if the Rule 3018 motion was granted, but they certainly wouldn't have an unfettered right to amend the plan. And it's not clear that they would do so. It's sort of a hypothetical we'll cross that bridge when we come to it.

THE COURT: Right, but I guess the point is that there's no assurance that, in fact, with the changed vote, there would be peace in the valley.

MS. FOUDY: There's always the possibility that even if these issues were resolved because a Rule 3018 motion was granted, that someone would start an ancillary ligation over something else. That is correct, Your Honor. But the movants here would not be the ones doing that. The movants here are the ones who believe they've established cause to bring about finality and to stop the bleeding as it stands now. Unless

Your Honor has any further questions, I'll rest on the papers.

THE COURT: Okay, thanks. All right, I have two motions before me by representatives of certain firsts and 1.5 lien holders, who seek to change their votes on the debtors' Chapter 11 plan.

Based on the declarations attached, or admitted into evidence, it appears clear that if the motions were granted, both Class 4 and Class 5 under the plan would, instead of having rejected the plan, accept the plan.

The premise of the votes is that by having the plan -- I'm sorry, by having the votes changed -- I'm going to step back.

The premise of the motion is that by having the votes changed the movants would have the benefit of the so-called toggle or carrot-and-stick or fish-and-cut-bait or death-trap provision in the plan, in Section 5.5, with respect to the 1.5 lien notes, and 5.4 with respect to the first lien notes, which provides that if Class 4 or 5, as the case may be, votes to accept or is presumed to have accepted the proposed plan, such class will receive payment in full in cash on account of their secured claims, without any premium or make-whole amount.

The plan sections that I've referred to then go on to state that if the respective class votes to reject the proposed plan, Class 5 will receive replacement notes issued by Momentive Performance Materials Inc.

The plan was resoundingly rejected by the votes of Classes 4 and 5, comprising of first and 1.5-lien noteholders, including in large respect by the same institutions that which to change their votes at this time.

As a result of that rejection, the debtors, as proponents of the plan, proceeded to seek confirmation on the cramdown basis under 1129(b)(1) and (2) of the Bankruptcy Code over those two classes.

The Court issued a bench ruling at the conclusion of the four-day confirmation hearing, which indicated that it would not allow as part of the first and 1.5 lien holders' allowed claim a make-whole claim, or other premium for being paid early, or earlier than the original maturity date of their notes.

And also, concluded that the plan could be confirmed albeit with a change to the interest rate, under the -- or with the proposed replacement notes provided for therein. The plan has since been amended to conform to the Court's ruling with respect to the interest rate.

It's only in that context, and as also I believe implicitly clarified by Mr. Chou's declaration, which states that thereafter the trading prices of the first lien notes substantially decreased, that the movants have sought to change their votes.

Bankruptcy Rule 3018(a) provides in pertinent part

that for cause shown the court, after notice of hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection that is an acceptance or rejection of the plan.

Before the 1991 amendments of the bankruptcy rules, Bankruptcy Rule 3018(a) also required that any motion to change or withdraw a vote be made before the deadline for voting had passed, but this was repealed in the form of the current version of the rule, which retains still, however, the for cause shown requirement. See advisory committee notes in the 1991 amendments.

There's no explanation as to why the change was made. However, notwithstanding the deleted clause, several cases decided before the 1991 amendments -- ignored the timing limitation upon a sufficient showing of cause, which suggests that the committee concluded that under the right circumstances, as was consistent with practice already, a post-ballot deadline vote could be changed.

See In re Eastern Systems Inc., 118 B.R. 223 (Bankr. S.D.N.Y. 1990); Texas Extrusion Corp v. Lockheed Corp., In re Texas Extrusion Corp, 833 F2d 1142 (Fifth Circuit, 1988), cert denied 488 U.S. 926; In re Jartran Inc., 44 B.R. 331, (Bankr. N.D. Ill, 1984); and In re American Solar King Corp., 90 B.R. 808 (W.D. Tex. 1988).

Cause is not defined in Section 3018. It is instead

left up to the court to determine in the exercise of its discretion. See In re J.C. Householder Land Trust #1 -- that's the number sign 1, 502 B.R. 602, 605-606 (Bankr. N.D. Fla. 2013).

It is clear from the cases that the test for cause very much depends on the context. As stated by the editors of Collier on Bankruptcy, "The test for determining whether cause has been shown for purposes of Bankruptcy Rule 3018(a) should often not be a difficult one to meet. As long as the reason for the vote change is not tainted, the change should usually be permitted. The court must ensure only that the change is not improperly motivated." 9 Collier on Bankruptcy, paragraph 3018.01(4), (16th ed. 2014).

Thus, certain types of cause are obvious and covered by the should not often be difficult to meet language in Collier's, as illustrations it gives, three hypothetical examples, all of which are attributable to human error: 1) a breakdown in communications at the voting entity for the creditor; 2) a misreading of the terms of the plan; and 3) execution of the ballot by someone who did not have authority, caught within a reasonable time by someone who did.

That statement is clearly consistent with the case law, although those facts don't normally make their way into the reported decisions. The reported decisions more often deal with a more difficult type of cause to deal with, and address

whether the vote change is somehow tainted. They involve instances where the creditor believes the change in the vote will benefit it, based on new facts.

Those decisions have been -- those types of decisions have been cited by both sides in connection with these motions before me. And they've reached a, I believe, proper and general consensus.

First, the courts have held, I believe uniformly, that changing a vote based on the creditor's subsequent assessment that the vote will actually have meaning. If changed, will not be permitted, unless the change is further supported by the support or agreement of the plan proponent.

Oftentimes, this comes up in the context of a party who was opposed to the plan acquiring the claim of a creditor who voted in favor of the plan, and then seeking to change that creditor's vote to enhance the objector's leverage in opposing confirmation, such as by being able to force a cramdown. See, for example, the Eastern Systems case that I've previously cited, and In re Windmill Durango Office, LLC, 481 B.R. 51 (B.A.P. 9th Cir. 2012).

On the other hand, where the plan proponent does not oppose the claim -- I'm sorry -- does not oppose the vote being changed, the courts generally support the change over the objection of a still-dissenting creditor, in furtherance of the courts' and the Code's policy in favor of consensual

negotiation of Chapter 11 plan. See for example In re Dow Corning, Corp., 237 B.R. 374 (Bankr. E.D. Mich. 1999).

Even in that context, some courts have looked askance at such a change, worried about the effect on the bankruptcy process of after-the-fact alteration of the fact of the vote. See In re MCorp Financial Inc., 137 B.R. 327 (Bankr. S.D. Tex. 1992), which however I will note may have been influenced by the fact that the pre-1991 version of the rule was being considered.

As stated in the Windmill Durango case, which did not permit the vote change, or sustain the bankruptcy court decision not to permit the vote change, to further the objectant's position, Rule 3018(a) requires something more than a mere change of heart.

The movants argue that they are, or their vote change would be in the line or in line with cases that permit a vote change in furtherance of a consensual plan, such as the cases I've cited for that proposition, as well as In re Cajun Electric Power Co-op., 230 B.R. 715 (Bankr. M.D. La. 1999); and In re CGC Shattuck -- S-H-A-T-T-U-C-K, LLC., 2000 Bankruptcy LEXIS, 1806 at page 9, (Bankr. D. New Hampshire, November 28th, 2000), which state the apple-pie proposition in bankruptcy cases -- that's stated in the Cajun Electric case, that the goal after all is consensual plans. "Such being the goal, what greater evidence of cause exists than where major parties in

Chapter 11 proceeding negotiate a settlement." Quoting in the American Solar King, 90 B.R. 808, 825 (Bankr. W.D. Tex. 1988).

If that in fact were the case, based on the facts before me, which do not indicate any consideration extra being offered for the changed vote, although I would in all likelihood hold at least a mini hearing on those issues, I would approve the changed vote. That is, I would not follow MCorp Financial.

However, it is clear to me that that is not the case, i.e. that the changed vote in the present context would not be in furtherance of a consensual plan. As I noted, the plan provided a choice for the first and 1.5 lien noteholders. Either they could vote in favor of the plan, and receive the treatment that they are looking to have now, although they instead voted against the plan; or alternatively, if they voted against the plan, they would have their treatment that they're trying to avoid now, although they did in fact vote against the plan.

Such fish-or-cut-bait, death-trap, or toggle provisions have long been customary in Chapter 11 plans. See In re Drexel Burnham Lambert Group, 138 B.R. 714, 717 (Bankr. S.D.N.Y. 1992); and In re Adelphia Communications Corp., 368 B.R. 140, 275 -- someone writes longer opinions than I do -- (Bankr. S.D.N.Y. 2007). They're also rather thorough.

There's a clear rational behind such provisions, as

stated by the court, In re Zenith Electrics Corporation. If the classic steps, the planned proponent is saved the expense and uncertainty of a cramdown fight, which is in keeping with the Bankruptcy Code's overall policy of fostering consensual plans of reorganization, 441 B.R. 92, 105 (Bankr. D. Delaware 1998). That is, such provisions offer a choice to avoid the expense and more importantly the uncertainty of a contested cramdown hearing.

The first and 1.5 lien holders clearly are sophisticated institutions represented by knowledgeable and sophisticated professionals. They made the choice to vote against the plan, and I believe it would not be proper, and that they have not shown cause now to change that vote in order to undo its consequences.

I do not believe the offer is still open. If it were, the debtors would have accepted it. Instead, I'm advised that if I were to grant the motions rather than look to consummate the plan with the cash-out provision in it the debtors would seek to amend the plan under Bankruptcy Rule 3019, Section 1127 of the Code and that, I assume, in addition, the second lien holders who voted in favor of the plan and who are backstopping the rights offering and have various rights based on timing and the reasonable nature of the order confirming the plan would seek to support that attempt to amend the plan and potentially withdraw their support of the plan and the backstop of the

rights offering.

The debtors and the second lien holders might or might not win, ultimately, on those attempts. And I suppose it's conceivable that they would eventually change their minds and negotiate a resolution.

On the other hand, it is crystal clear that the vote change is not, in effect, a consensual settlement. It is seeking to undo a choice that had originally been made. I believe that there is not sufficient cause for that result.

As I noted during oral argument, the best discussion of Section 3018 appears in In Re: J.C. Householder Land Trust Number 1, which Judge Williamson goes to great length to discuss the importance of an orderly voting process, noting that permitting tactical or strategic changes in a vote would "sharply shift the balance toward the creditor that has obtained a blocking position" or, I would say in this case, has forced a cramdown fight. And moreover, that such a process would "negatively impact the otherwise orderly reorganization process".

Continuing on with that quote, "No creditor could ever be confident in investing either their time or money in any debtor-proposed plan so long as a blocking creditor might arise. Other creditors, moreover, might decide to change their ballots for strategic reasons to gain leverage in what would be never-ending negotiations. All this leads to one unmistakable

conclusion. Changing a vote to block confirmation cannot constitute cause under Rule 3018." That appears at 502 B.R. 608, the earlier quote appearing at 607.

Now, as noted, Judge Williamson was dealing with someone who wanted to block confirmation, but I think someone who wants to obtain a tactical advantage that would not resolve confirmation on a consensual basis with the plan proponent raises the same concerns for the process, whether or not the vote is before or after -- I'm sorry, whether or not 3018 is silent, as it is now, on the ability to raise the issue after the vote.

The noteholders also argue or come close to arguing, at least, that even if the debtors and their allies are opposed to the forced settlement, which I believe would not be a complete settlement for the reasons I've stated, based on the requested vote change, I should force it on them for various good reasons cited by the movants, such as the end of litigation, the end of appeals and, as stated on the record, the end of litigation not only in the bankruptcy case with regard to the confirmation hearing, but also in the creditor litigation that's pending before me.

I think, however, that that is a choice that the debtors and their allies should have the right to make on their own. I don't believe it is cause for me to, in such a parochial way, to force on plan proponents "consensual" end

result that the Court, but not the proponents themselves, believes is advisable even if I believed that, in fact, a settlement going back to and ignoring the results of the confirmation hearing would be fair, which, as I stated during oral argument, I do not believe.

So while there is, obviously, a high premium placed on consensus, and I have repeatedly urged the parties, starting well before the disclosure statement hearing, to reach consensus, they have chosen not to do so. I do not believe these motions are, in fact, a choice to achieve consensus.

Accordingly, based on the exercise of my discretion and in review of the applicable case law, I conclude that there has not been a sufficient showing a cause to permit the vote to be changed.

So I would ask the debtors to submit two orders granting -- denying the relief.

MR. FELDMAN: We will do so. Thank you, Your Honor.

THE COURT: Okay. Thanks.

MR. FELDMAN: Your Honor, the next item on the agenda is the motion of U.S. Bank for stay pending appeal shortened designation period, expedite transmittal. The debtors filed an ex parte motion to shorten the fourteen-day period with respect to the stay under 3020.

Your Honor, just so that everybody has the same factual background before we start, in fact, the debtors are

still not ready to close, although we hope to be ready and may become ready on relatively short notice.

That said, we think it makes sense to go forward today. We're not going to ask the Court to enter an order shortening the stay, but would suggest, instead, a mechanic that if we gave notice of two business days, that the stay could terminate, provided we're able to establish that at today's hearing as to what the damage would be if we continued the stay. And obviously, the Court will make whatever determinations on the other side if you think the stay should just continue indefinitely or be subject to a bonding, as we're going to request today.

But I don't stand here today, Your Honor, telling you that we're ready to satisfy all eighteen conditions in the plan of reorganization.

THE COURT: Okay. Well, that raises an interesting issue. I don't know if parties have a response to that.

Who's arguing the -- you're arguing this motion, Mr. Kirpalani?

MR. KIRPALANI: Yes.

THE COURT: Okay. What is your response to that? I mean, there are really two issues here. One, I think we can get over fairly easily, which is there is still no signed confirmation order. And I did, in fact, bring with me the correspondence I received from your firm, as well as the

blackline from Mr. Sage's firm and wanted to go over those points at the end of this hearing. But I'm assuming that within a day or so, there will be a confirmation order.

And I don't know if you saw it. I did file a mod -- a corrected and modified bench ruling, so that would be attached to it or referred to in it. So I think --

MR. KIRPALANI: Yes, Your Honor. We were looking for the part that said we're not subordinated anymore, but it wasn't in there.

THE COURT: I promised everyone that holdings wouldn't change. So the -- I think we can get over that issue. I mean, because that's going to happen in the next day or so. But it's somewhat open-ended to me when the debtors will, in fact, be ready to go effective. And if it's -- as Mr. Feldman said, if it's a couple days from -- a week, it's one thing. If it's conceivably twenty days from now, a lot of this hearing's, like, unnecessary.

MR. KIRPALANI: Thank you, Your Honor. For the record, Susheel Kirpalani from Quinn Emanuel on behalf of U.S. Bank, as indenture trustee.

I appreciate Your Honor pointing out that the proposed form of order that was filed did engender some objections, including from my firm and that of Mr. Sage. I wasn't sure, since it wasn't reflected on the agenda, how to raise that, but I appreciate the Court raising it.

THE COURT: Okay.

MR. KIRPALANI: Sunday night, we got two declarations from the debtors' witnesses on harm from not being able to go effective within two business days of whenever the Court enters an order and they determined they're ready. Yesterday, depositions were taken.

We're prepared to go forward with the evidentiary bases, or not --

THE COURT: Okay.

MR. KIRPALANI: -- for there being an injury to the debtors from the stay. I agree with the Court that if they're not going to actually satisfy their conditions to consummation for some period of time, as I said, Your Honor, on August 26th, we want to get our appeal going to give the other court as much time as humanly possible to read things.

THE COURT: Right.

MR. KIRPALANI: And we remain eager to do that.

We do appreciate the Court filing its decision in our adversary proceeding in the form of a transcript on the docket. And with that, I don't know if Your Honor wants to take the issues with the form of confirmation order first, or --

THE COURT: No, I think --

MR. KIRPALANI: -- we go straight to this.

THE COURT: -- I think that should wait to the end.

MR. KIRPALANI: Perfectly fine.

I think the debtors have some evidence they'd like to put on --

MR. FELDMAN: I want to --

MR. KIRPALANI: -- on the issue before you.

MR. FELDMAN: -- clarify something, Your Honor. I am not representing that we're ready to go effective in twenty-four hours from now.

THE COURT: No, I understand.

MR. KIRPALANI: No, no, I didn't mean that.

MR. FELDMAN: I understand. I can't --

THE COURT: It's kind of a question mark of when that would happen.

MR. FELDMAN: I don't have an answer to that, Your Honor.

THE COURT: And --

MR. FELDMAN: I just want to be clear. I don't want to suggest that we're going to do it in a week. I hope we are --

THE COURT: Right.

MR. FELDMAN: -- but I am not making that representation.

THE COURT: Well, I mean, I guess, obviously, one factor that needs to be shown to get a stay is that there's imminent irreparable harm. If you all are not going to close for thirty days, then it's not that imminent.

MR. KIRPALANI: Thank you, Your Honor. But --

THE COURT: But that helps you guys. It doesn't help Mr. Kirpalani. But on the other hand, it's kind of a question mark in my mind.

All right.

MR. ANKER: Good afternoon, Your Honor. Philip Anker, Wilmer Cutler Pickering Hale & Dorr. We entered an appearance yesterday as co-counsel for the first liens. We also were a signatory to a pleading that was filed yesterday informing the Court and the parties that we had not yet moved for a stay, in part, because there was no confirmation order, but also because we were hopeful Your Honor would grant the 3018(a) motion, which would have mooted the appeal. Your Honor, obviously, has not.

I simply wanted to alert the Court that we will, consistent with that notice, be asking today to be heard both on any motion to shorten the normal fourteen-day period, we would also orally be moving for a stay. I'm happy to do it either at the completion of oral argument, both by the subdebt, Mr. Kirpalani, and by Mr. Feldman and other allies to the debtors, or I'm happy to go after Mr. Kirpalani, which I think may be more appropriate.

THE COURT: Well, it would be the same record.

MR. ANKER: It would be the same record, and so I think it -- I mean, I think the issues, Your Honor, are

somewhat different in our position and --

THE COURT: Well, on --

MR. ANKER: -- theirs, but --

THE COURT: Okay.

MR. ANKER: -- I think that is the more sensible approach.

And finally, just to alert the Court, and we put this in there, we would also orally move -- we, too, want move things forward quickly.

THE COURT: Right.

MR. ANKER: We would file a motion -- we would orally move, pursuant to 28 U.S.C. 158, today for a direct certification of an appeal to the Second Circuit so that we would bypass the district court on an appeal from confirmation, which, as Your Honor may be aware, is what happened in the AMR case in the appeal there.

I just wanted to alert the Court.

THE COURT: That's something I would probably want to have a written motion on. It's really not something, I think, the debtors have had a chance to respond to.

MR. ANKER: Your Honor, we can file that motion by tomorrow. I would -- maybe it's appropriate to take this up at the end of today's hearing. I obviously would like to see if there's a process consistent with Your Honor's schedule where that can be brought on on a quite expedited basis. But we have

a -- we can file that motion by tomorrow morning.

But I just wanted to alert the Court so when I stood up, Your Honor wasn't surprised.

THE COURT: Okay.

MR. ANKER: Thank you, Your Honor.

THE COURT: I mean the Second Circuit has generally said they like to have the intermediate review, but that's why I think it should be a written motion, so people can deal with that.

MR. ANKER: We'd be happy to submit it in writing, Your Honor.

THE COURT: Okay.

All right. So it's --

MR. KIRPALANI: I think --

THE COURT: -- it's his motion.

MR. FELDMAN: It's his motion. Right.

MR. KIRPALANI: I appreciate counsel for the debtors -- again, for the record, Susheel Kirpalani from Quinn Emanuel -- trying to move things along, at least at this moment.

But it is our motion. We did file a motion to stay Your Honor's order, which has been pending, on confirmation so that we'd have to have an adequate opportunity to seek appeal of that and, in particular, the determinations on the subordinated notes status.

In addition, which was unopposed, Your Honor, unopposed, as part of our motion, we asked to shorten the designation period -- the counterdesignation period and the -- to expedite transmittal of the --

THE COURT: Right.

MR. KIRPALANI: -- docket.

THE COURT: And I think Mr. Kirpalani is right. I didn't see any objection to that.

MR. BAIO: And we did not file an objection.

THE COURT: Okay. It may be different for Mr. Anker's client. I mean, the record's very simple for the subordination issue. So by not objecting to the subdebt's motion doesn't mean that you've waived your rights on the firsts.

MR. BAIO: Thank you.

MR. KIRPALANI: Thank you, Your Honor.

And with respect to the legal standards at issue, we're going to rest on our papers. I don't think we need to belabor the point and waste --

THE COURT: Okay.

MR. KIRPALANI: -- Your Honor's time. The Court obviously knows the standards for getting a stay pending appeal. We really think this comes down to a fight about the balance of harms between us, the senior subordinated noteholders, and the debtors and the other plan proponents on their side. And the determination's going to be up to the

Court as to what is fair under the unique circumstances of this case in terms of what those alleged harms and what they actually are.

So for that, I think we'd like to call -- the debtors do have two witnesses here on the alleged injury to the debtors, Mr. William Derrough, as well as Mr. Randall Eisenberg. My partner, Bob Loigman, is going to be cross-examining or putting on their testimony through adverse examination. But we have no objection to their declarations being admitted.

THE COURT: So it'd really be cross-examination.

MR. KIRPALANI: It'd really be cross-examination, Your Honor.

THE COURT: Okay.

MR. KIRPALANI: And in either order that the debtors would like them to go --

THE COURT: Okay. Are they --

MR. KIRPALANI: -- is fine with us.

THE COURT: -- going to be the only witnesses?

MR. KIRPALANI: Yes, Your Honor.

THE COURT: Okay. So who would you like to put on first?

MR. LOIGMAN: Your Honor, when I stood up, I was going to ask that Mr. Derrough be --

THE COURT: Okay.

MR. LOIGMAN: -- Derrough be put on first.

THE COURT: Okay.

MR. KIRPALANI: He's now French, Your Honor.

THE COURT: All right.

You can have a seat.

(Witness sworn)

THE COURT: And could you spell your name for the record?

THE WITNESS: William Derrough, D-E-R-R-O-U-G-H.

THE COURT: Okay. You can go ahead.

And by the way, the declaration's now in evidence that he submitted that's attached to the debtors' objection.

(Declaration of William Derrough was hereby received into evidence, as of this date.)

MR. LOIGMAN: Good afternoon, Your Honor. Robert Loigman of Quinn Emanuel for the record, on behalf of U.S. Bank as the trustee for the senior subordinated notes.

CROSS-EXAMINATION

BY MR. LOIGMAN:

Q. Good afternoon, Mr. Derrough.

A. Good afternoon.

Q. In your declaration to the Court, you referenced October 9th as a meaningful date, the date that is 180 days after filing the petition, correct?

A. I don't recall. If you can give me a copy of my report --

or my declaration, I can confirm that.

Q. Okay. I would be happy to give you a copy of the declaration.

MR. LOIGMAN: I don't know if the Court would want me to hand --

THE COURT: I have a copy.

MR. LOIGMAN: Okay.

May I approach the witness?

THE COURT: Sure.

Q. Mr. Derrough, I just point your attention to paragraph 13 of your declaration, which is on page 5. I believe at the very bottom of that paragraph, you referenced a termination date of October 9th, 2014, which, in the parenthetical, specifies 180 days after the petition date.

A. Correct. That's what it says.

Q. And as we discussed at your deposition yesterday, Mr. Derrough, is it correct that 180 days after the filing of the petition date, not including the date of the filing itself, is actually October 10th, not October 9th?

A. So you showed me a document that had a calendar that had P plus a number. And I confirmed that the numbers seemed to add up to 180. But I couldn't confirm whether that calendar was accurate. So if you'll tell me the calendar was accurate, then I would probably agree with you that it was probably October 10th.

Q. Well, I can represent to you that the calendar is accurate that we presented to you at the deposition yesterday. And I'm happy, again, to give you a copy of the calendar --

THE COURT: We'll accept it.

MR. LOIGMAN: You'll accept it. Okay.

Q. So then if we use the October 10th date as 180 days after the petition date, October 10th is the date that the parties' obligations under the backstop commitment agreement terminate, is that correct?

A. That's my understanding.

Q. Okay. And that agreement provides a backstop for new shares of the reorganized debtors that are not subscribed by existing second priority noteholders, right?

A. I think I'd probably describe it as it's backstopping the 600 million dollars that we've identified that we need. So any amount that's not subscribed to by non-backstop parties, would be -- they'd be obligated to pick up the difference of that 600 to whatever --

Q. Well, let's start with that 600, then. The debtors already have subscriptions through the backstop parties for ninety percent of the new equity that would be issued pursuant to the rights offering, right?

A. I don't recall the exact number that's come in. But it's not quite 600 yet, and it's certainly in the high -- you know, mid to high 500 million, is my recollection.

Q. And --
A. It's got a "5" on it. I just don't remember the exact number.
Q. All right. And I'm asking a slightly different question here. Now, I'm referring to the parties that are obligated under the subscription agreements to invest in the rights offering. Are there not ninety percent of the new equity already subscribed to pursuant to those subscription agreements?
A. Oh, sorry.
MR. BAIO: I object to the use of the word "obligated".
A. So --
MR. BAIO: We're dealing --
A. Can you ask your question --
THE COURT: Well, what do you mean by -- when you say "obligated"? That they've signed up?
MR. LOIGMAN: Yes, Your Honor. I believe that they have signed up --
THE COURT: Okay.
MR. LOIGMAN: -- and they are, in fact, obligated to purchase --
THE COURT: Well, but, so you're asking Mr. Derrough, as far as institutions that have signed subscription agreements, is there approximately ninety percent of the 600

million subscribed?

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

THE COURT: Okay.

A. I believe that's -- it's eighty-five, ninety percent, something like that.

Q. Okay. And in fact, Mr. Derrough, together with that, the debtors have already received additional subscriptions from other holders of the second lien notes, correct?

A. I believe that's correct.

Q. Okay. And haven't they, in fact, received subscriptions for approximately ninety-eight percent of the new equity being issued pursuant to the rights offering?

A. I don't know.

Q. Okay. And ninety-eight percent --

THE COURT: I'm sorry, I didn't hear --

THE WITNESS: I'm sorry, Your Honor. I don't know. I don't know --

THE COURT: Okay.

THE WITNESS: -- what the number is as of today.

THE COURT: Okay.

Q. And ninety-eight percent, Mr. Derrough, that's 588 million. Do you know if that is the accurate amount that has been subscribed to?

A. I don't know. I thought it was, you know, mid- to high fives, but I just don't know.

Q. The October 10th date that we've been discussing as the termination date of the backstop agreement, that's not the date, is it, for termination of the parties' commitments under the subscription agreements for the rights offering, is it?
A. I'm trying to remember. Can you ask your question again? Sorry.
Q. Yes. The October 10th date, that date is not the termination date for the parties' commitments under the subscription agreements, correct?
A. Commitments under the -- so, I don't believe that those two dates line up exactly. My understanding -- and we covered this yesterday, is -- I think there was a whole discussion about whether it's the end of the year or a different day that I'm not recalling right now, when people could ask for their money back if we don't go effective by a certain date, if it's not -- I don't think it was October 10th.
Q. Okay. Well, the date that you're referring to in the agreement when they could ask for their money back, that's October 1st, 2014, correct?
A. I think that's right.
Q. Okay. And while the parties may request that the escrow agent return subscription amounts if the closing does not occur by October 1st, their commitment to subscribe to the rights offering does not terminate until December 31st, 2014, correct?
MR. BAIO: Objection, Your Honor. It's a legal