1 conclusion.
2 THE COURT: Well --
3 MR. BAIO: If I may, I will argue from the --
4 THE COURT: All right. But we're just trying to get
5 out --
6 MR. BAIO: Okay.
7 THE COURT: -- the dates. Leaving aside the legal
8 significance of that date, your question was, in essence, the
9 document provides a different right that's around December 1st?
10 MR. LOIGMAN: Your Honor, again, it's not really a
11 legal conclusion I'm looking for here. It's what the document
12 provides is that there's an October 1st date that is referenced
13 in their papers --
14 THE COURT: Right.
15 MR. LOIGMAN: -- that is the date by which --
16 THE COURT: But what is the December 1st date?
17 MR. LOIGMAN: It's actually December 31st.
18 THE COURT: 31st?
19 MR. LOIGMAN: December 31st, 2014, is the date upon
20 which the subscription obligation terminates.
21 THE COURT: Well, is there a provision that you could
22 refer to?
23 MR. LOIGMAN: Yes, I could. I'm happy to hand up a
24 copy of the subscription agreement if Your Honor would like it.
25 THE COURT: Okay.

1 MR. LOIGMAN: And I'm happy to provide one for the
2 witness as well.
3 THE COURT: Okay.
4 MR. LOIGMAN: May I approach --
5 THE COURT: Sure.
6 BY MR. LOIGMAN:
7 Q. And I would point your attention, Mr. Derrough, to
8 paragraph 7, which is on page 7 of the subscription agreement.
9 I would also point out that there's more than one subscription
10 agreement, but the term is consistent across the different
11 agreements, and paragraph 7 is titled "Termination".
12 And Mr. Derrough, you see that in paragraph 7, in the
13 termination provision, it says that the agreement will
14 terminate upon the earlier of two events. You see that?
15 A. I do.
16 Q. Okay. And one event is the termination of the plan or
17 rejection of the plan by all classes entitled to vote. And
18 you'd agree, that has not occurred, correct?
19 A. Correct.
20 Q. Okay. And the second is December 31st, 2014?
21 A. That's what it says.
22 Q. And in this provision, Mr. Derrough, it does not say that
23 the subscribing investors would have a right, prior to December
24 31st, 2014, to terminate the subscription commitments if the
25 plan is confirmed but has not gone effective, correct?

1 A. Well --
2 MR. BAIO: Objection, Your Honor.
3 A. -- so -- oh.
4 MR. BAIO: Is he just referring to that provision? Is
5 this going to be that kind of questioning, not the agreement?
6 THE COURT: I don't know. Is this --
7 MR. LOIGMAN: I would be happy to expand it to the
8 whole agreement, Your Honor, and say that the agreement doesn't
9 provide that. And I'm just asking if -- this witness ran, to
10 my knowledge, the subscription process. I assume he would be
11 familiar with when there would be a termination of an
12 obligation under the subscription agreement.
13 THE COURT: I don't know. Are you familiar with that?
14 THE WITNESS: I was asked this question yesterday,
15 Your Honor. And I was not familiar with the specific dates.
16 I've subsequently been informed by counsel that it's the
17 debtors' view that once the backstop or the subscribers have
18 asked for their money back --
19 THE COURT: But this is not your --
20 THE WITNESS: Exactly. It's really --
21 THE COURT: I think we should just focus on the
22 agreement and lawyers talking about it.
23 Q. Mr. Derrough, the company has committed financing,
24 currently, under the DIP facility, through April 2015, correct?
25 A. That sounds about right. I don't remember the exact date,

1 but I think we asked for about a year of committed DIP
2 financing, yes.
3 Q. And in your declaration you identified one of the harms
4 asserted by the debtors in delaying the effective date as
5 additional interest payments that would be made, correct?
6 A. I set forth and calculated the differential in cost to the
7 estate of incremental interest being paid as long as we stay in
8 Chapter 11 through the status quo versus the amount of interest
9 we would pay assuming we went effective under the plan as
10 confirmed and modified, I guess, under the judge's instructions
11 on the cramdown right.
12 Q. Okay. And the differential in the interest that you
13 identified was 232,000 dollars per day, or 7 million dollars
14 per month?
15 A. Seven million dollars sounds right. The 232- sounds
16 approximately right. I don't have the schedule in front of me,
17 but it sounds about right.
18 Q. Actually, I think you may have the schedule in front of
19 you.
20 A. Oh, I do?
21 Q. It's attached to the end of your declaration.
22 A. I forgot you gave me my declaration.
23 Yes. And Your Honor, you can see on the right-hand side,
24 the third-to-the-end column at the bottom says difference in
25 status quo is 232,000 dollars on a daily basis.

1 THE COURT: Okay.
2 Q. And Mr. Derrough, most of these payments, these interest
3 payments, are being made to holders of the first lien and the
4 1.5 lien notes. Is that correct?
5 A. Most of these payments? Well, we lay out status quo and
6 the total dollar amounts. So the daily cash interest of
7 400,000 dollars. And you can see the magnitude -- the 271,000
8 dollars going to the first and senior notes. So I guess I
9 would agree that most of the cash is going to -- I lay it
10 out -- going to -- well, that's the total amount. So the
11 differential will still be the same -- the majority of the
12 differential would be going to the pre-petition creditors.
13 Q. And it's the substantial majority, correct?
14 A. Yeah.
15 Q. Mr. Derrough --
16 A. We obviously have DIP costs that we would be paying for,
17 which relative to the other costs are not huge. But coming out
18 of bankruptcy we would not have any drawings on our ABL or
19 other short-term financing facilities.
20 Q. And your firm, Mr. Derrough, Moelis, has not done any
21 analysis, correct, of how, if at all, this interest -- this
22 cost -- this additional interest, impacts the operations of the
23 debtors?
24 A. We did not perform a separate financial analysis on that,
25 no.

1 Q. And Mr. Derrough, you don't have -- or you don't know what
2 specific actions of the debtors, if any, would be delayed if
3 the plan did not go effective immediately, correct?
4 A. No, I testified yesterday, I couldn't list specific
5 actions. I think it's obvious from what we talked about during
6 the confirmation hearing that the company suffers from a high
7 debt burden. It has not been able to invest in itself over the
8 years. And so freeing up the company's cash flow to be able to
9 reinvest and attract customers -- I am aware that some either
10 vendors or customers have asked what's going on. And so some
11 reluctance to engage. But I didn't perform a separate
12 analysis.
13 Q. And when you say you're aware of these, you haven't had
14 any direct discussions yourself with the vendors and customers,
15 have you?
16 A. No; no.
17 Q. Your declaration also refers to a six-month-long appeal
18 process, correct?
19 A. Correct.
20 Q. Okay. But you don't, yourself, have any expertise on how
21 long an appeals process could take for this case, right?
22 A. No. I do not.
23 Q. Okay.
24 A. I think I -- I think I say in my declaration that I'd been
25 advised by counsel that it could take six months.

1 Q. And the appeal process could take more time or it could
2 take less time, correct?
3 A. Based on my experience in -- which is somewhat limited --
4 they can take a long time, and sometimes they can happen
5 quickly.
6 Q. Mr. Derrough, do you know the current trading price for
7 the second lien notes?
8 A. Not today, no.
9 Q. Do you know it for yesterday or earlier this week?
10 A. I think when you asked me yesterday, you told me it was
11 around 88.
12 Q. 88, right. And did that sound correct to you?
13 A. It sounds in the right range. I would have thought it'd
14 be in the mid-eighties, based upon my understanding of what has
15 been going on.
16 Q. And do you know what the trading price for the second lien
17 notes was on the petition date?
18 A. I think we talked about this yesterday as well. I thought
19 it was somewhere in the mid-seventies, around that same time
20 frame.
21 Q. And these second lien notes, are they actively traded?
22 A. Actively? Well, a significant percent are locked up into
23 the hands of the same parties you were referring to, the
24 backstop parties and people who've agreed to subscribe. So the
25 amount of public float is very little. So I'm not sure I would

1 call them actively traded.
2 Q. And for the public float that's available, there is a
3 liquid market for the second lien notes, correct?
4 A. I can't testify to that. I'm not a trader, so I don't
5 know how much is actually available to buy.
6 Q. All right. Are you aware there has been trading in the
7 notes?
8 A. I am aware that there have been some trades. I don't know
9 whether one can characterize that as sort of an active liquid
10 market or not.
11 Q. Okay. And as we've discussed, the trading price of these
12 second lien notes has gone up over the course of the
13 bankruptcy, correct?
14 A. Con --
15 MR. BAIO: Objection. I don't know what this has to
16 do with his declaration or what we're doing here, Your Honor.
17 MR. LOIGMAN: Your Honor, the trading price of the
18 notes is relevant to the testimony that Mr. Derrough provided
19 in his declaration, because as we will argue, the price of
20 these notes, which as Your Honor knows, will be exchanged for
21 equity in the company, the market would perceive them as
22 related to the value of the equity of the company. And both
23 Mr. Derrough's declaration and that of Mr. Eisenberg argue that
24 the company has been damaged during the bankruptcy process.
25 I'm trying to indicate that in fact, the trading price

1 of the very notes that would be tied to the equity do not
2 reflect such damage.
3 THE COURT: Are you done with this line of
4 questioning?
5 MR. LOIGMAN: I really only have maybe two more
6 questions.
7 THE COURT: I think you should finish.
8 MR. LOIGMAN: Can we ask the witness to answer that
9 question, though?
10 THE COURT: What question?
11 MR. LOIGMAN: The question was simply whether the
12 trading price had gone up over the course of the bankruptcy.
13 A. Well, I don't know if it went up linearly or if it -- I
14 mean, I think we could agree that the mid-eighties or so is
15 higher than 75. We talked yesterday -- I can't explain it. I
16 think Mr. Hilty can't explain it. If you look at what the
17 expected value to be received as a second lien holder on
18 account of being a holder, under our valuation, it's around 300
19 to 400 million, eighty-five, eighty-eight cents on those bonds
20 is like 800-plus-million dollars. I don't get it. There's
21 some kind of mispricing that's been going on since we got
22 started in this company -- with this company.
23 BY MR. LOIGMAN:
24 Q. And, Mr. Derrough, Moelis did a calculation of the
25 debtors' enterprise value. And that calculation was 2.2

1 billion dollars, correct?
2 A. That was the midpoint. Our range was 2 to 2.4.
3 Q. Thank you, Mr. Derrough.
4 MR. LOIGMAN: I have no further questions of this
5 witness.
6 THE COURT: Okay.
7 MR. ANKER: Your Honor, for the record, again, Philip
8 Anker; Wilmer Cutler Pickering Hale and Dorr. Your Honor, I'd
9 presume that the record of the confirmation hearing is also
10 part of the record of the motions today for stay. Mr. Derrough
11 provided an affidavit. Assuming that they're in agreement and
12 that is agreeable to the Court, I do not have any questions of
13 Mr. Derrough.
14 There are things that came out in the confirmation
15 hearing, it seems to me this almost goes without saying, that
16 are relevant to the motion for stay.
17 THE COURT: Okay, I think that's fair. I mean, I
18 think your --
19 MR. BAIO: I agree with that.
20 THE COURT: -- your pleadings attached part of the
21 transcript too.
22 MR. BAIO: Absolutely.
23 THE COURT: Okay. That's fine.
24 MR. ANKER: Thank you, Your Honor.
25 THE COURT: Okay, do you have any redirect?

1 MR. BAIO: No, Your Honor, I don't.
2 THE COURT: Okay, you can step down or step away.
3 Okay, I think that leaves Mr. Eisenberg.
4 MR. BAIO: If they would like.
5 MR. LOIGMAN: Yes, Your Honor, we would -- yes, Your
6 Honor, we'd like to cross-examine Mr. Eisenberg as well.
7 THE COURT: All right. If you'd have a seat, please.
8 (Witness sworn)
9 THE COURT: And could you please spell your name for
10 the record?
11 THE WITNESS: Yes, it's Randall Eisenberg, last name
12 is spelled E-I-S-E-N-B-E-R-G.
13 THE COURT: Okay, go ahead.
14 MR. LOIGMAN: Thank you, Your Honor.
15 CROSS-EXAMINATION
16 BY MR. LOIGMAN:
17 Q. Good afternoon, Mr. Eisenberg.
18 A. Good afternoon.
19 Q. Mr. Eisenberg, AlixPartners -- let me start, you're a
20 managing director of AlixPartners. Correct?
21 A. Correct.
22 Q. And AlixPartners has been retained by the debtors in this
23 case?
24 A. Correct.
25 Q. Right. AlixPartners did not compare Momentive's

1 performance since the filing of the bankruptcy to the
2 performance of competitive chemical companies that are not in
3 bankruptcy. Correct?
4 A. At what point in time?
5 Q. During the bankruptcy process.
6 A. No, we have not.
7 Q. And AlixPartners did not compare the employee attrition
8 rate at Momentive during the period of the bankruptcy to rates
9 at competitive companies. Correct?
10 A. No, we did not.
11 Q. AlixPartners did not compare compensation packages for
12 employees at Momentive that were given during the bankruptcy
13 process to those at other companies. Correct?
14 A. No.
15 Q. You're not aware, are you, Mr. Eisenberg, of any evidence
16 that the bankruptcy has affected vendor pricing at Momentive.
17 Correct?
18 A. I know that there has been significant challenges within
19 the supply chain in terms of terms overall. I don't recall
20 whether those also include price increases.
21 Q. And, Mr. Eisenberg, at your deposition yesterday -- and
22 I'll represent on the record that this is at page 14 of the
23 deposition transcript.
24 MR. NETZER: May I have that?
25 MR. LOIGMAN: I'm happy to give you a copy of the

1 transcript.
2 MR. NETZER: Thank you.
3 THE WITNESS: May I have a copy, too?
4 MR. LOIGMAN: Of course.
5 Your Honor, may I approach the witness?
6 THE COURT: Yes.
7 MR. LOIGMAN: Would Your Honor --
8 THE COURT: Sure.
9 MR. LOIGMAN: -- like a copy of the transcript, as
10 well?
11 THE COURT: Yes. Thank you.
12 Thanks.
13 THE WITNESS: Thank you.
14 Q. And Mr. Eisenberg, I'll point your attention to page 14 of
15 the deposition transcript. At line 10, there's the question,
16 "Are you aware of any evidence that vendor pricing has been
17 affected by the bankruptcy?" Your answer was, "I don't
18 recall." Do you recall giving that testimony yesterday?
19 A. I do.
20 Q. Even before Momentive filed for bankruptcy, vendors were
21 concerned about Momentive's ability to pay them. Correct?
22 A. Yes.
23 Q. And even before the company filed for bankruptcy, the
24 company had cash on advance terms with certain single source
25 vendors. Correct?

1 A. Yes, shortly before the bankruptcy; that is correct.
2 Q. And do you know, Mr. Eisenberg, whether any more vendors
3 are requiring such terms today than before the bankruptcy?
4 A. I can tell you that the average day's payroll outstanding
5 for the debtors has declined from about -- it's roughly the
6 mid-forties pre-bankruptcy -- probably, approximately a year
7 before bankruptcy -- to the mid-twenties in the June and July
8 time frame. It has subsequently increased to approximately
9 forty, forty-one days today.
10 Q. Okay. And the number of vendors that are requiring
11 single -- I'm sorry -- advanced payment, cash advance payment,
12 that percentage has not increased during bankruptcy, has it,
13 Mr. Eisenberg?
14 A. I don't know.
15 Q. At the time of the bankruptcy filing in April 2014, the
16 debtors had three-and-a-half million dollars in cash on hand.
17 Correct?
18 A. I believe that's correct.
19 Q. And as of today, the liquidity is somewhere above eighty-
20 nine million dollars. Correct?
21 A. It is above eighty-nine million dollars today. Yes.
22 Q. During the period of the bankruptcy, Momentive has not
23 missed payments to vendors. Correct?
24 A. Not that I'm aware of.
25 Q. And Momentive obtained in the bankruptcy an order to

1 enable payment of critical vendors. Correct?
2 A. The debtors did receive several orders that enabled them
3 to pay certain pre-petition obligations including those vendors
4 that were deemed critical vendors.
5 Q. And the debtors have not yet spent all the money that was
6 made available to pay critical vendors. Correct?
7 A. The debtors have not.
8 Q. No. In fact, there would still be money to pay additional
9 critical vendors if there were any. Correct?
10 A. Well, to the extent the debtors haven't reached the cap
11 that was established, there would be -- there is additional
12 room to pay without violating a court order.
13 Q. And there's about ten million dollars left before the cap.
14 Is that right?
15 A. As it relates to all of the various vendor-related motions
16 that were approved as part of the first days and the second day
17 motions. I think the total is about twenty million that's
18 available under the various motions in the aggregate.
19 Q. Mr. Eisenberg, you're not aware of any projections
20 performed by AlixPartners or the debtors based on emergence
21 from bankruptcy prior to September 30th, 2014. Correct?
22 A. I am not aware of any. No.
23 Q. One of the messages that the debtors have conveyed to
24 third parties, was that the bankruptcy does not concern
25 operational issues. Right?

1 A. The primary -- a primary message to stakeholders was that
2 the bankruptcy -- the purpose of the bankruptcy filing was to
3 deleverage the balance sheets of the debtors.
4 Q. And that the bankruptcy did not concern operational
5 issues?
6 A. Correct.
7 Q. And the senior subordinated noteholders challenged
8 confirmation. That does not concern operational issues, does
9 it?
10 A. Well, I think, as I said yesterday, that's associated with
11 the bankruptcy itself. So I view that as a bankruptcy issue.
12 Q. As distinct from an operational issue?
13 A. Well, the outcome of the stay could impact -- would
14 impact, based on my declaration, the operations of the company.
15 I don't know if that answers your question but --
16 Q. Mr. Eisenberg, the ad hoc second lien noteholders do not
17 agree that the conditions precedent to consummation have been
18 satisfied. Correct?
19 MR. NETZER: Objection, Your Honor. I don't believe
20 this witness has any person knowledge of that, it would be
21 hearsay.
22 THE COURT: Well, if you know, without testifying
23 based on hearsay, you can answer that question.
24 A. Can you repeat the question, please?
25 Q. Yes. The ad hoc committee of second lien noteholders do

1 not agree that conditions precedent to consummation have been
2 satisfied. Correct?
3 THE COURT: As of today.
4 Q. As of today.
5 A. The information I have would be as provided by counsel.
6 MR. NETZER: We would, therefore, object to its
7 disclosure, Your Honor.
8 THE COURT: Okay.
9 MR. LOIGMAN: Well --
10 THE COURT: Do you have a response on that --
11 MR. LOIGMAN: I can point to his dep --
12 THE COURT: -- the hearsay objection?
13 MR. LOIGMAN: I don't think that objection makes sense
14 but what I could do maybe to --
15 THE COURT: Well, it's a hearsay objection. If you're
16 asking him just what his understanding is, it may be wrong, but
17 what his understanding is, then I'll overrule the objection to
18 that extent.
19 MR. LOIGMAN: Okay. First of all, I am asking him
20 what his understanding is.
21 THE COURT: Okay. That's fine. Not for the truth of
22 it but just for what the company's -- one of the company's
23 financial advisors believes.
24 MR. LOIGMAN: That's correct, Your Honor.
25 THE COURT: Okay. You can answer that question.

1 THE WITNESS: Thank you.
2 A. My understanding is that the company's view is that all of
3 the conditions that are outlined as conditions precedent to
4 close can or will be met -- or sorry; have been met or can be
5 met within twenty-four to forty-eight hours. I understand that
6 there is one specific condition precedent of which the ad hoc
7 committee of second lien holders does not agree has been met.
8 Q. And at your deposition yesterday, Mr. Eisenberg, I asked
9 you if you were aware that the second lien holders had asked to
10 put off confirmation. You testified that you were not aware of
11 that. Correct?
12 A. Correct. I did not recall that at the time. No.
13 Q. Okay. If future equity holders of the company asked to
14 put off confirmation, that would not be consistent with the
15 notion that continuing in bankruptcy was destructive of the
16 value of equity. Correct?
17 MR. NETZER: Objection, Your Honor. This sounds like
18 a good summation argument.
19 THE COURT: Well --
20 MR. NETZER: Or a bad one, but it's argument in any
21 event.
22 THE COURT: It's a -- I guess it's a hypothetical
23 anyway. So I don't think we should -- I'll sustain that
24 objection.
25 MR. LOIGMAN: And Your Honor, I would just point out

1 that --
2 THE COURT: It's based on a fact he said hasn't
3 happened.
4 MR. LOIGMAN: Well, it's based on the fact that he
5 said he didn't know whether it had happened.
6 THE COURT: Well, right. So you're just asking him to
7 speculate.
8 MR. LOIGMAN: Well --
9 THE COURT: Which you could do with me.
10 MR. LOIGMAN: Which we'd be happy --
11 THE COURT: But I don't need testimony on that.
12 MR. LOIGMAN: Be happy to. I just wanted to point out
13 in that regard, Your Honor, that the first question at the
14 witness's deposition yesterday was was he appearing as an
15 expert witness. He testified that he was appearing as both an
16 expert witness and as a 30(b)(6) witness.
17 THE COURT: That's fine but it's -- he doesn't know
18 the answer on this point.
19 MR. LOIGMAN: All right. Subject to any redirect, I
20 have no further questions of this witness, Your Honor.
21 THE COURT: Okay.
22 MR. ANKER: Philip Anker. No questions, Your Honor.
23 THE COURT: Okay. Any redirect?
24 MR. LOIGMAN: Unless Your Honor has some questions;
25 we'll let the witness step down or away.

1 THE COURT: Okay. That's fine. You can step away.
2 THE WITNESS: Thank you.
3 THE COURT: Thank you.
4 MR. KIRPALANI: Your Honor, Susheel Kirpalani for U.S.
5 Bank as indenture trustee. Before we close the evidentiary
6 record, I would ask -- and I'm asking truly as an officer of
7 the court and I think it's an interest to the Court -- if
8 there's any representative of the debtors, including counsel,
9 who could represent to the Court what is the total amount of
10 subscriptions of the 600 million dollars that have been
11 received. Our understanding, which is not admissible for
12 anything, is that it's 588 million dollars and there are many,
13 many professionals representing the debtors here. I think it's
14 an important fact for the Court.
15 THE COURT: Okay. Well, I mean, I -- Mr. Derrough's
16 testimony was close to that.
17 MR. KIRPALANI: Close to that. Okay.
18 THE COURT: Yeah.
19 MR. KIRPALANI: That's fine.
20 THE COURT: A substantially -- substantial majority.
21 MR. KIRPALANI: Yes, Your Honor.
22 MR. FELDMAN: I can make a representation, Your Honor.
23 THE COURT: Okay. That's fine.
24 MR. KIRPALANI: Yes. That would be great.
25 MR. FELDMAN: Your Honor, my understanding is as of

1 today it's 589.5.
2 THE COURT: Okay.
3 MR. FELDMAN: So Mr. Derrough's 588 was pretty close.
4 THE COURT: Okay.
5 MR. KIRPALANI: Yeah. And I was not trying to
6 disparage Mr. [Dar'-row]'s knowledge or recollection; I just
7 thought it needed to be in evidence..
8 MR. FELDMAN: Or Mr. [Der-row'].
9 THE COURT: Okay.
10 MR. KIRPALANI: So with that, I believe the
11 evidentiary record's closed?
12 THE COURT: Okay.
13 MR. KIRPALANI: The only thing I would add, Your
14 Honor, but I don't think it's part of the evidentiary record,
15 is Your Honor can take judicial notice of docket 971 which was
16 filed reservation of rights of the ad hoc committee of second
17 lien noteholders with respect to whether or not the fourteen-
18 day period should be shortened as a part of the proceedings.
19 THE COURT: I don't think I've seen that.
20 MR. KIRPALANI: I think it was filed late last night
21 or yesterday evening.
22 THE COURT: Okay.
23 UNIDENTIFIED SPEAKER: I can hand up a copy if you'd
24 like.
25 THE COURT: Sure.

1 MR. ANKER: Your Honor, I have a copy here if it'll be
2 easier for the Court.
3 THE COURT: Okay. Thanks.
4 Okay, I read that.
5 MR. KIRPALANI: Your Honor, if I may hand up, I've
6 just got a demonstrative that will be, I think, useful to the
7 parties and the Court as to tallying up the alleged harm versus
8 what I think is supported on the record.
9 THE COURT: Okay.
10 MR. KIRPALANI: Thank you.
11 Your Honor, I apologize for the handwriting on this
12 demonstrative. It was put together in a rushed fashion by
13 myself.
14 What we're requesting today, Your Honor, is a stay of
15 confirmation through December 30th, 2014. That's 112 days from
16 today.
17 The debtors are --
18 THE COURT: I'm sorry; can you say that again?
19 MR. KIRPALANI: Yes. What we're requesting, Your
20 Honor, through our motion, I'm revising it on the spot.
21 THE COURT: Okay. Because the order just said forever
22 until I rule otherwise.
23 MR. KIRPALANI: Okay. Things were put together before
24 we had full information.
25 THE COURT: Okay. All right.

1 MR. KIRPALANI: I just wanted to give parties notice
2 as much as possible for today's hearing. But so then, we would
3 be revising it real time.
4 To ask that Your Honor stay confirmation for December
5 30th, 2014 because the balance of harms through that date
6 favors my client. The debtors' alleged harm, through the
7 testimony of Mr. Eisenberg and Mr. Derrough, are 232,000
8 dollars a day of incremental interest. That's approximately
9 twenty-six million dollars for 112 days.
10 What we submit, respectfully, Your Honor, is that is
11 not an actual harm to the company. What it is is a shift in
12 value from the company from one set of stakeholders, the second
13 lien creditors who would otherwise own the equity, to another
14 set of stakeholders, the first and one-and-a-halves who would
15 take that cash as interest. And what I would submit, Your
16 Honor --
17 THE COURT: But it's -- it's equity. There's a big
18 difference between paying it out and equity. That doesn't make
19 any sense, Mr. Kirpalani. I'm sorry.
20 MR. KIRPALANI: I'm saying there's no injury to the
21 enterprise.
22 THE COURT: But cash is cash.
23 MR. KIRPALANI: Cash is cash but who owns that value
24 is all we're fighting over, Your Honor. It has no injury --
25 THE COURT: No, no. Cash would be paid out to a third

1 party in the form of interest instead of being retained in the
2 enterprise to do whatever the enterprise does including hiring
3 new people, doing new CAPEX, et cetera.
4 MR. KIRPALANI: Okay. Well, Your Honor, then the
5 Court could order that, pending appeal, that cash be put into
6 escrow so that there would be no harm potentially to the
7 company upon --
8 THE COURT: I have --
9 MR. KIRPALANI: -- if --
10 THE COURT: -- an emergency motion to pay attorneys'
11 fees as adequate protection. I think the others would
12 probably -- the first would and the -- okay. Enough.
13 MR. KIRPALANI: Put it this way, Your Honor, with
14 respect to cash that will be payable to stakeholders who are
15 going to be seeking an appeal anyway, the first and the one-
16 and-a-halves -- just bear with me -- the injury that's been
17 alleged -- I'm just going one by one -- that injury that's been
18 alleged is the injury that can easily be rectified by the first
19 and one-and-a-halves saying they are happy to keep that
20 interest in an account so that if we're all wrong, and there's
21 no reversal, the estate would be made whole again.
22 THE COURT: It's not being used.
23 MR. KIRPALANI: I don't think there's any other --
24 THE COURT: It's just sitting there.
25 MR. KIRPALANI: There's no evidence in the record,

1 Your Honor, that twenty-six million dollars over the next --
2 there will be a shortfall in liquidity of twenty-six million
3 dollars. They're going to have a lot of cash.
4 THE COURT: I'm not talking about a shortfall. I
5 can't imagine any corporation of this size just parking cash
6 for four months. It just doesn't make any sense. Then use it.
7 MR. KIRPALANI: The next injury, Your Honor, is a
8 thirty million dollar "fee" that will be payable to the
9 backstop parties. That's actually not an injury at all. All
10 it is is the backstop parties, who are ninety percent of the
11 stakeholders that are going to receive the equity taking an
12 early dividend of their own equity value. They don't have to
13 take that cash out if they don't want. This is the system they
14 set up.
15 They set up a bookend on for how long they're willing
16 to have their money or their backstop agreement in place. And
17 at the end of it, if it's not exercised, they want to be paid
18 thirty million dollars from the company that they own. That's
19 the dividend; it's not an injury to the company. And that's
20 our argument, Your Honor. Your Honor has to make a conclusion
21 on that but that's our argument. There's nothing in the facts
22 that suggest that it would impair the operations of the
23 company.
24 The other alleged harm that the debtors have submitted
25 quite cleverly in the papers, almost to the point of being

1 unintelligible, to be kind, Your Honor, as opposed to trying to
2 paint a picture that actually isn't true, that something
3 horrible is going to happen in October. I've read these papers
4 several times over the last twenty-four hours, that October 1's
5 going to happen and all of the parties that have signed up are
6 going to suddenly walk away. It took a lot of doing, and Your
7 Honor didn't see a lot of that doing, we tried to keep it short
8 for the presentation for the Court, is that October 1 deadline
9 is actually of no moment. It just means where's the cash going
10 to sit: in the subscription person's hand or in the
11 subscription agent's hand.
12 And Your Honor can review the subscription agreement,
13 section 7, page 7, which says when you subscribe you commit to
14 December 31st, 2014.
15 So 600 million dollars of the alleged harm is actually
16 an illusory harm. That harm is zero through December 30th and
17 at most eleven-and-a-half million. I put twelve on my chart
18 because I thought it was 588 when I wrote it. We heard from
19 counsel to the debtor, and I appreciate that, that it's
20 actually 589.5 that has been subscribed to.
21 And those subscriptions, we submit, are available to
22 the company until the end of this year which means that in the
23 next 3 months, or 112 days, there very well could be an
24 appellate review.
25 The last one, Your Honor, that I'll address because

1 the others, I think, are pure speculation are in the debtors'
2 papers on the final page, they talk about 20.1 million dollars
3 a month in lost EBITDA. I think they used the phrase of 120-
4 something million for six months. So over the course of my 112
5 proposed stay, it's 20.1 million dollars a month in lost EBITDA
6 plus professional fees at the same burn.
7 Our position, Your Honor, is that it is not based on
8 actual good-faith estimates of going forward amounts; that is
9 just based on what has been historical and that does not meet
10 the test for being -- of evidentiary weight as to what the
11 actual harm would be over this limited period.
12 The bottom line, Your Honor, is the real harm that the
13 parties -- the plan proponents have tried to paint for the
14 Court was that something horrible is going to happen with
15 committed money and what we submit to you, respectfully, Your
16 Honor, is that that simply is not true.
17 From a performance perspective, from an operations
18 perspective, this has from day one been the balance sheet
19 restructuring. And although they have tried through various
20 declarations and evidence to suggest that, in fact, it would be
21 cataclysmic injury to the company, upon close inspection, there
22 actually is no cataclysmic injury to the company and the only
23 harm in terms of cash out is the one we alluded to earlier.
24 THE COURT: Well, they don't have to show cataclysmic
25 injury. You have the burden of showing all four factors,

1 including the absence of harm to other parties.
2 MR. KIRPALANI: That's correct, Your Honor. And in
3 terms of -- so I make sure I do say it -- in terms of
4 irreparable harm to our clients, that we got --
5 THE COURT: No, I'm focusing on the other point.
6 MR. KIRPALANI: Okay. On the other one, you're right.
7 We have to show it's no harm to them or at least that the harm
8 to them in fairness is not as significant as the harm to us.
9 THE COURT: Right.
10 MR. KIRPALANI: And that's what we think we have show,
11 we have submitted.
12 THE COURT: Well, but your evidence is basically
13 saying that they haven't run out of money yet. It's not as bad
14 as it was pre-petition.
15 MR. KIRPALANI: It's not bad at all is what we're
16 saying.
17 THE COURT: Well --
18 MR. KIRPALANI: I'm not trying to say it's as bad as
19 it was pre-petition, although I appreciate Your Honor picking
20 that up from the evidence because this company filed with very,
21 very little liquidity.
22 THE COURT: But that --
23 MR. KIRPALANI: Injury has not occurred. This
24 bankruptcy has not depreciated the value of the company, and
25 we're asking for an opportunity for a court, and as much as

1 everyone in this courtroom appreciates how speedily you got
2 through this case, there is still time to have due process.
3 That's our position, Your Honor.
4 THE COURT: It's not a due process issue. It's a harm
5 issue. You're basically saying that as long as things aren't
6 bad as they were on the petition date, there's no harm. I
7 don't think that's the right standard.
8 MR. KIRPALANI: No, I'm not saying that as long as
9 things aren't, there is no harm. I'm saying that the harm that
10 they have alleged is entirely speculative and that upon close
11 inspection, these injuries are not injuries at all. They're
12 all -- we don't know what will happen. There is great
13 uncertainty as to what will happen. We'll say, Your Honor, the
14 second lien noteholders who are -- since the day one have been
15 represented to the Court as being the fulcrum class, the only
16 creditor class that has voted in favor of this plan, the only
17 votes that frankly had mattered to getting a plan confirmed as
18 a matter of law. Those creditors --
19 THE COURT: Well, that's because --
20 MR. KIRPALANI: -- if they wanted to --
21 THE COURT: -- the trade creditors were unimpaired.
22 MR. KIRPALANI: And will remain so. And will remain
23 so. There's still twenty million dollars to pay those
24 creditors pre-petition and they haven't even had to use it,
25 Your Honor.

1 But with respect to the injury, potential --
2 THE COURT: But that's a good thing.
3 MR. KIRPALANI: It is a good thing.
4 THE COURT: That's not a bad thing.
5 MR. KIRPALANI: Absolutely. It means this company
6 will not be injured if it doesn't have to immediately breath
7 and get oxygen. That's the picture they painted. It's just
8 not accurate, Your Honor. It's just not accurate, not on this
9 case -- not on this case.
10 With respect to --
11 THE COURT: It's a bad day if they have to pay them,
12 if they get nervous again.
13 MR. KIRPALANI: But they haven't had that. They
14 haven't had that.
15 THE COURT: Maybe because they've moving to
16 confirmation and there hasn't been a stay of the appeal.
17 MR. KIRPALANI: Well, or maybe because proceedings
18 have moved forward with great speed and will propose to do the
19 exact same thing. It doesn't have to stop in this courtroom,
20 Your Honor. That's the point we're trying to make.
21 THE COURT: Okay.
22 MR. KIRPALANI: To the point on the trading market and
23 the availability of what -- all we're trying to make of this,
24 Your Honor, is that to the extent there's a second lien
25 creditor that their interests need to be considered as well by

1 the Court. That's what the case law says; you have to look at
2 the impact potentially on creditors as well. That's the
3 creditor class that is the impaired and the vote that Your
4 Honor has taken to be supporting confirmation in cramming down
5 other creditors.
6 Those creditors have the ability to sell their bonds
7 at four times what the plan estimated their recovery can be.
8 That can be gleaned from the disclosure statement which is in
9 the record. It was between the teens and the twenties. Those
10 bonds are trading in the eighties. Thank you, Your Honor.
11 THE COURT: Of course that was before a stay.
12 MR. KIRPALANI: You know, there's no testimony as to
13 what those prices would be and Your Honor wouldn't accept it
14 anyway because it would be so speculative. That --
15 THE COURT: It's based on present facts.
16 MR. KIRPALANI: It's based on present facts, Your
17 Honor, yeah and if those creditors believe that they will win
18 on appeal, there's no reason to suggest that it would change.
19 But the point is that the crux -- the main injury here, Judge,
20 since -- through all these papers has been we're going to lose
21 our subscriptions. We're going to lose our money. It took a
22 lot of doing to unpack that, Your Honor. We want to make sure
23 the Court understands that.
24 THE COURT: And you're proposing no bond whatsoever?
25 MR. KIRPALANI: We're proposing no bond whatsoever,

1 Your Honor. If it's a very small dollar amount and if the
2 indentured trustee doesn't have the wherewithal and a
3 sufficient amount of time, we will try and get that money
4 raised in the public markets but we are an indentured trustee
5 trying to do what we think is the best interest for our
6 holders.
7 THE COURT: Well, I'm right that you all have the
8 burden on the bond, right, to get out of it?
9 MR. KIRPALANI: You are right that we have to make
10 sure that the debtors are not injured and we think that we have
11 demonstrated that through the evidence but to the extent the
12 Court can -- certainly the 793 million dollars makes no sense
13 to us. Your Honor has to make that decision but to the extent
14 that there is some injury that they can establish from a short
15 stay to allow a district court to review this -- and again, we
16 propose through December 30th, you know, we will take that to
17 our clients and try and access the public markets and see what
18 we can do.
19 THE COURT: Okay.
20 MR. KIRPALANI: Thank you, Your Honor.
21 MR. ANKER: Good afternoon, Your Honor. Again for the
22 record, Philip Anker, Wilmer, Cutler, Pickering, Hale & Dorr,
23 co-counsel to the first lien bank of BOKF N.A.
24 Your Honor, I do want to, if I can, go through the
25 factors but I want to sort of set the stage. From our

1 perspective and our motion, I think this is a rather unique
2 circumstance. It's unique in two respects.
3 First, Your Honor has issued a decision and I try to
4 maintain credibility and I don't think is hyperbole of
5 monumental importance. I think this is not an exaggeration to
6 say it is from the standpoint of secured lenders, be they banks
7 under credit facilities, be they bondholders under secured
8 indentures, perhaps the most significant decision since the
9 Philadelphia Newspapers and if I pronounce correctly, RadLAX
10 decision that ended up in the Supreme Court, on credit bidding.
11 You, I am sure, are not oblivious to all the press and
12 attention it has gotten, both on the make-whole issue and the
13 Till issue.
14 It is a decision that is thought-provoking. We
15 respectfully disagree but it is one that warrants appellate
16 review because it will indeed change the landscape, if it is
17 right, that lenders not only cannot get the interest protection
18 and the yield protection they sought without very explicit
19 language, but in addition, they can actually be crammed down to
20 a rate of interest that is below what the market perceives to
21 be par.
22 Second, it is a situation where it is entirely
23 possible in our view, for relief to be fashioned that does not
24 threaten the debtors in their reorganization at all. I think
25 we are entitled to a stay of the entire confirmation order, at

1 least through the date Mr. Kirpalani mentioned and potentially
2 later, if appellate review is needed or if the appellate
3 process needs that much time.
4 But I think there is much less invasive alternatives
5 here. We flagged in our notice, two and I want to mention both
6 of them and make sure they are clear to Your Honor. The first,
7 frankly would require no stay at all. It would require simply
8 other relief and I do want to note in that regard --
9 THE COURT: I'm sorry, wait. So you're not seeking a
10 stay? I am confused.
11 MR. ANKER: We are seeking a stay. This is in the
12 alternative, Your Honor.
13 THE COURT: Okay.
14 MR. ANKER: In Rule 8005, Your Honor --
15 THE COURT: Right. No, it gives me a fair amount of
16 ability to tinker.
17 MR. ANKER: That's right. What Rule 8005 says, Your
18 Honor, by its terms, is that and I quote, "The Court" -- and
19 obviously this is an ellipsis -- may "suspend the bankruptcy
20 judge" -- and there's a quote -- "may suspend or order the
21 continuation of other proceedings in the case under the Code or
22 make any other appropriate order during the pendency of an
23 appeal on such terms as would protect the rights of all
24 parties-in-interest.
25 So here are the two alternatives that we've tried to

1 come up with, Your Honor. The first is this. The debtors
2 would, as is provided under the plan, issue notes to the first
3 liens and to the one-and-a-halves in the amount of the
4 principal that is due them; about a billion-one on the first
5 and I believe it's 250 million on the one-and-a-halves.
6 They would put into escrow additional notes equal to
7 the amount of the make-whole that would be due the first, if
8 the first were to prevail and the one-and-a-halves. Those
9 notes would not leave escrow until and unless an appellate
10 process was finally resolved. If at the end of that process
11 the plan proponents prevail, those notes would be canceled --
12 the additional notes that are escrow -- and terminated. If the
13 Court were instead in a final now non-appealable order on
14 appeal to hold that we are entitled to the make-whole in whole
15 or in part, that amount of the notes would be released.
16 Your Honor raised the point with Mr. Kirpalani, what
17 about cash? That's not cash. We're not restricting their use
18 of cash. That is simply an additional note put in escrow.
19 THE COURT: Although they -- for budgeting purposes,
20 they can't really spend it.
21 MR. ANKER: I'm sorry, Your Honor?
22 THE COURT: For budgeting purposes, they can't really
23 spend the differential.
24 MR. ANKER: That is unquestionably correct, Your
25 Honor. It is a contingent liability, a contingent liability to

1 preserve the appeal process but you're right, Your Honor. It
2 is a contingent liability from an accounting standpoint, from a
3 P&L standpoint if you will, or a balance sheet standpoint.
4 From a cash flow standpoint, no cash is going out the door.
5 In addition, with respect -- that would deal with the
6 make-whole issue. With respect to the interest issue, a toggle
7 feature could be put on the notes simply providing that in the
8 event that the notes would be issued at the rate Your Honor has
9 determined is appropriate, they would be paid at that rate
10 during the appellate process. If at the conclusion of a final
11 resolution of the appeal, there were a determination that the
12 appropriate rate of interest on the notes is greater than the
13 rate Your Honor has set, then the interest on the notes would
14 toggle up to that rate and there would be a true-up, if you
15 will, for interest in the interim.
16 We're not asking that that money be escrowed in the
17 interim. It would simply be an obligation. So again, yes,
18 Your Honor, it's a contingent liability. I'm not going to deny
19 that. But it's going to have no cash flow effect.
20 And let me pause there for something which I think is
21 worth emphasis here; two points, Your Honor. First, that is
22 consistent, if you will, with the plan and I'm not talking
23 about here the death trap or the alternative. If you simply
24 look at the vote no alternative in Section 5.4 for the first
25 lien trustee, in 5.5 for the one-and-a-half lien trustee, it

1 says, "In such interest rate as the Court determines is
2 appropriate." And by the way, it says the bankruptcy court
3 which is defined in the plan to be either Your Honor or any
4 other court with jurisdiction which would clearly include an
5 appellate court.
6 And with respect to the make-whole issue, it
7 specifically says in Section 5.4 and 5.5 that, "The replacement
8 notes will be in an allowed amount of such holders first lien
9 claim which may include, in addition to the first lien notes
10 claim allowed pursuant to Section 5.4 hereof, any applicable
11 make-whole premium, pre-payment penalty or applicable premium
12 to the extent allowed by the bankruptcy court." So the plan
13 contemplated this.
14 Secondly, I did want to make sure earlier before I
15 gave up the right to cross Mr. Derrough, I think I am
16 pronouncing it correctly, Your Honor, if I heard --
17 THE COURT: It's like Clarence.
18 MR. ANKER: Yes. I butcher all names. I'm proud that
19 I didn't butcher this one.
20 I did want to make sure that the record is clear and
21 that we had the record from the confirmation hearing. Mr.
22 Derrough testified through a declaration and affidavit in
23 confirmation. It's his August 15 declaration where he attached
24 his expert report as Exhibit A. On page 10, he specifically
25 says, "This plan is feasible. The debtors can reorganize even

1 if the make-whole amount is ultimately included in the
2 principal amount of the notes."
3 And as Your Honor may recall, Mr. Carter, who I
4 believe is the chief financial officer of the company,
5 testified that the plan was feasible and he also gave an
6 affidavit to this effect, even if the interest rate on the --
7 even if the exit facility and the bridge notes had to be issued
8 and they ratcheted it up to the market rate; the maximum market
9 rate set forth in those instruments. So --
10 THE COURT: But that's not harm. That's irreparable
11 harm you're saying. The debtors would not be irreparably
12 harmed by this as opposed to harmed.
13 MR. ANKER: Your Honor, I acknowledge that they would
14 have a balance sheet contingent liability. I would suggest to
15 you that can't be enough to deny a stay because what you're
16 really saying then, Your Honor, is the possibility that we
17 might prevail on appeal and we might be able to get effective
18 relief is in and of itself harm. That can't be right. The
19 only --
20 THE COURT: No. Well, I'm focusing on two things;
21 one, I'm focusing on the harm factor and I'm also focusing on
22 the bond issue.
23 MR. ANKER: I will be happy to address both.
24 THE COURT: And it does seem to me that there is harm
25 in having a contingent liability of this size on your balance

1 sheet because both you and your competitors and your vendors
2 and customers will know you can't really spend it.
3 MR. ANKER: Your Honor?
4 THE COURT: You can't spend the money.
5 MR. ANKER: Well, no, I don't think that's right, Your
6 Honor.
7 THE COURT: Would you really invest 150 million in R&D
8 or a new plant if you knew that there was a prospect of having
9 to pay it out in interest, depending on the outcome of an
10 appeal?
11 MR. ANKER: Your Honor --
12 THE COURT: And if the appeal doesn't go in your
13 client's favor, then that opportunity will have been lost and
14 they wouldn't have spent the money and how are they going to be
15 recompensed for that? Wouldn't that be a bond?
16 MR. ANKER: Your Honor, I'm happy to -- Your Honor can
17 condition the grant of a stay on a bond and we can talk to our
18 clients but I would suggest to you that there are lots of cases
19 out there that don't require a stay where you can tailor relief
20 that is consistent with the terms of the plan and which allows
21 the plan otherwise to go effective.
22 One thing which is quite different here -- I've said
23 at the outset there are two things that are different, Your
24 Honor, I suggest there is three. In the vast majority of
25 cases, what the party seeking a stay is asking is don't allow

1 the debtors to make distributions to other parties. No one is
2 saying that in this proposal. The debtors can make their
3 distribution to the second liens. They can go effective with
4 the plan otherwise and make the distribution.
5 They're simply setting up a reserve, so that if we
6 prevail on appeal, there can be meaningful recovery by us.
7 And, Your Honor, am I going to say to you that there's 0.0 harm
8 in having a theoretical contingent liability? I am not. I
9 would submit to you, Your Honor, that liability exists and that
10 harm exists anyway.
11 If Your Honor doesn't grant a stay and I want to be
12 clear on this, we are not conceding by any stretch of the
13 imagination that our appeal would be equitably moot. Frankly,
14 given the language of 5.4 and 5.5, given that the debtors and
15 the plan proponents proposed a plan here that specifically
16 contemplated this relief, I don't think it will be equitably
17 moot.
18 So that harm potentially exists either way and I think
19 what the case law suggests, Your Honor, is if the answer is
20 there cannot be one shred of harm to a debtor or you don't get
21 a stay without a bond, that is not what I think the law is.
22 THE COURT: But that's kind of a straw-man argument.
23 That's not what we're talking about here.
24 MR. ANKER: I think, Your Honor, we are talking about
25 modest harm at all. A contingent liability that exists, one

1 way or the other, but in one way there are notes that are
2 reserved to cover it if it happens. The other way, the
3 appellate court would simply order at that point in time, that
4 the notes be issued.
5 Let me go to the second alternative. The second
6 alternative that we put in our papers is that there would be a
7 stay but not a stay of the entirety of the effective date of
8 the plan but a stay of those provisions that address the
9 treatment of the first liens and the one-and-a-halves. So the
10 current indentures would remain in place.
11 Those indentures obviously do not have the same
12 principal amount of the debt, 1.1 billion for us, 250 million
13 for the one-and-a-halves, that the new notes would have. The
14 interest rate is different. That difference in interest could
15 either be escrowed or alternatively, it could function just as
16 I described with the first alternative, as simply an obligation
17 so that it would toggle, if you will, with a true-up in the
18 event that we prevailed on appeal.
19 What would happen is ultimately there would be a
20 resolution on appeal. If the debtors win at that point, all
21 that happens is the new notes get issued. The new notes don't
22 include the make-whole and they've been paying us in the
23 interim at the interest rate under the new notes. That
24 interest rate would continue.
25 Conversely, if we prevailed on both -- on the make-

1 whole issue, the new notes would be issued at that point in
2 time on appeal to include the additional amount and if we
3 prevailed on the interest, the interest rate would increase up
4 to the amount that the debtors have testified they can afford
5 as a market -- in the market as priced this at. And if not,
6 the interest rate would remain at the same level.
7 Again, it's a way of Your Honor creating a mechanism
8 that allows and ensures that effective relief can be granted,
9 while at the same time allowing the plan otherwise to go
10 effective.
11 Your Honor, let's talk about the four factors briefly.
12 I think, Your Honor, the case law generally says there has to
13 be a showing on all four but I think the better cases say you
14 balance them and the greater the showing on one, the lesser of
15 the need on the showing on the other. And Your Honor,
16 obviously, can read the cases and decide whether that's a fair
17 construction but I think it is a fair construction of the case
18 law.
19 Let's talk about the harm to my clients. First, there
20 is certainly a risk, as I said to you and I'm not going to make
21 misrepresentations to the Court. We do think our appeal will
22 not be equitably moot in any event but I am confident, I would
23 be every dollar in my net worth, and I would take on that
24 liability, Your Honor, that the plan proponents will argue to
25 the opposite. And we all know that there have been cases --

1 THE COURT: Will you put it in escrow?
2 MR. ANKER: I'd be happy to, Your Honor. If that --
3 THE COURT: I'm not so sure about that.
4 MR. ANKER: I normally don't like to put my own
5 finance at risk to my client but here, I feel pretty
6 passionately about this.
7 THE COURT: Okay.
8 MR. ANKER: And the answer, Your Honor, is I would.
9 THE COURT: Okay.
10 MR. ANKER: I understand it was a rhetorical question
11 but I wanted to answer it.
12 Your Honor, there is a risk here of equitable
13 mootness. That is a risk that affects our clients in this
14 credit. It's a risk that affects them from a precedent
15 standpoint because this really is a monumental decision across
16 the board in their portfolios. Your Honor --
17 THE COURT: It's just one court. They could argue it
18 differently in every court including in the Southern District
19 of New York if they want to.
20 MR. ANKER: Your Honor, unquestionably and other
21 judges may not follow it but there is no question that this is
22 going to give rise to lots of attempts to cram-up, senior
23 secured lenders and it will affect people in valuations all
24 across the lending community. It has gotten amazing attention.
25 THE COURT: But that's not really irreparable harm

1 like the Courts are talking about. They're really talking
2 about imminent irreparable harm as a result of this
3 particular --
4 MR. ANKER: Okay. Let's focus on this --
5 THE COURT: The operation of this order.
6 MR. ANKER: Let's focus on operation of this order and
7 operation economically. Let's focus on the first liens. The
8 principal amount of their claim is 1.1 billion. The make-whole
9 is, I understand, around 200 million. That is not quite twenty
10 percent of the total amount but it is certainly very close to
11 twenty percent.
12 I understand that the record is sealed and so I want
13 to be careful on what I say about the interest rate spread on
14 the Till issue, but I simply will -- Your Honor, I may be
15 mistaken. I under -- let me say it my way and if it's too
16 cryptic, I'll try to be less cryptic. If one envisions that
17 the difference between -- let's assume we prevail on appeal and
18 the Court sets a market rate of interest and that rate of
19 interest is in the mid-sixes, let's say -- and I think
20 there's -- I leave to Your Honor what evidence there is in the
21 record -- to the rate now which is as I understand it on the
22 first lien it's 4.1 percent, that's a spread of 2.4 points per
23 annum on a 1.1 billion balance -- I don't have my calculator
24 with me but I think that that works out to --
25 THE COURT: Actually, the rate on the billion

1 dollar --
2 MR. ANKER: I'm sorry, Your Honor?
3 THE COURT: The rate on the billion dollar backup
4 takeout is five.
5 MR. ANKER: Five but it could ratchet-up. But let's
6 use five, Your Honor. One percentage point delta, even if it's
7 that small and I don't think it would be the real market
8 evidence here -- the market evidence on a ratchet-up is higher
9 than that but let's say that's right. It would be --
10 THE COURT: Well, then the takeout people weren't
11 market, I suppose.
12 MR. ANKER: I --
13 THE COURT: But anyway, go ahead.
14 MR. ANKER: Let's use that number, Your Honor. Let's
15 just use that number.
16 THE COURT: Okay.
17 MR. ANKER: That's ten million dollars a year over a
18 loan that goes out to the year 2021; that is seventy million
19 dollars. What you're talking about -- and, Your Honor, I am --
20 THE COURT: Well, except for the equitable mootness
21 point, it wouldn't go out that long because hopefully and
22 assuredly, there would be a ruling on the appeal before then.
23 MR. ANKER: Okay. Let's go out three years, Your
24 Honor; thirty million dollars -- let's go out a year -- let's
25 go out one year.

1 THE COURT: Okay.
2 MR. ANKER: Ten million dollars.
3 THE COURT: Right.
4 MR. ANKER: Ten million dollars plus 200 million
5 dollars is 210 million dollars on a 1.1 billion dollar
6 principal. That is north of twenty percent, if I just did the
7 math correctly in my head. It is material under any standard
8 that one could imagine.
9 I know and I see Your Honor's facial expressions every
10 time people refer to the trading prices but to look at what the
11 market has said, the market as I understand it on my client's
12 paper was 105, 106 when this confirmation hearing began and
13 traded down to ninety-three. That's thirteen percentage points
14 on 1.1 billion. That's a 140 -- I'm doing this in my head,
15 Your Honor -- 140, 150 million dollars.
16 It is material economic harm and lots of cases say
17 even if the loss of the ability to get legal review is not in
18 and of itself irreparable harm, where the underlying rights are
19 significant, and to be vindicated and they could be lost, that
20 can constitute irreparable harm.
21 THE COURT: Well, again though, leaving aside the
22 mootness point, if there's a reversal on appeal on the make-
23 whole, the company would owe it.
24 MR. ANKER: That's right, Your Honor. Let me try to
25 make the arguments slightly more refined or maybe make it -- I

1 agree with you that if there's no risk of equitable mootness,
2 then there is effectively a much harder showing on our part
3 that there is harm.
4 What I think some of the cases have said and, Your
5 Honor, this falls into the category of I think only lawyers and
6 judges -- and I don't mean to disparage judges, I am saying
7 lawyers make these sort of arguments -- there are cases out
8 there that say the loss of the right to appeal is not in and of
9 itself necessarily irreparable harm as a matter of law. But if
10 that means if you can't appeal, that the underlying rights that
11 you will not be able to vindicate -- here, the right to a make-
12 whole and the right to a higher interest rate -- are
13 significant, then that can be the irreparable harm.
14 And all I am saying is the courts that say that, the
15 same point Your Honor is making would apply in every one of
16 those cases which is if there were not a risk of equitable
17 mootness, the argument wouldn't hold.
18 On harm to the --
19 THE COURT: Well, except -- could I stop you there?
20 MR. ANKER: Sure.
21 THE COURT: I think you categorized those cases well
22 but I've always viewed that issue as more an issue for the
23 district court because if the risk of equitable mootness is not
24 crystal clear to the bankruptcy judge, then it becomes really a
25 weighing process where you weigh your sense of the merits as

1 against a somewhat lesser risk of equitable mootness and
2 certainly, I think that -- well, I think that's how Judge
3 Scheindlin did it because she said it twice when she quoted
4 herself but she reiterated it that, "Mootness is a factor where
5 the denial of the stay pending appeal risks mooting any appeal
6 of significant claims of error," and she italicized any and
7 significant.
8 So to me, the person you'll be making the argument
9 about mootness to is the district judge and they're going to
10 look at this -- he or she is going to look at this fresh and
11 decide whether there's a prospect of significant error or not
12 and so maybe the fourteen days is enough and you can make your
13 point to the district judge or maybe, you know, twenty days or
14 to the end of October or whenever I get convinced that big
15 money is really raising its head.
16 MR. ANKER: Your Honor, I do not -- I mean I put a
17 double-negative -- I think you are exactly right to say that
18 where there is no risk of equitable mootness, that the argument
19 for a stay becomes lesser. If the debtors were prepared, and
20 they're not, to stand up here and say they won't argue
21 equitable mootness or were Your Honor to conclude and write an
22 opinion that you don't see why this should become equitably
23 moot, I think that's a relevant factor and I'm not going to
24 argue to the contrary.
25 I think the case law is quite clear that we need to

1 seek a stay. I think it's quite clear that we need to seek a
2 stay from Your Honor in the first instance and I think I'd
3 be -- while I don't think equitable interest should apply here,
4 is there a risk of it applying? Of course there is. There's
5 lot of set cases where courts have found --
6 THE COURT: But there's also a risk that the debtor
7 will suffer at least --
8 MR. ANKER: Your Honor, let's --
9 THE COURT: -- twenty to fifty million dollars of
10 harm, at least through December 30th.
11 MR. ANKER: And that pales compared to 200-plus
12 million dollars.
13 THE COURT: Well except that again, it's not that
14 dollar amount. It's the risk that you wouldn't be able to get
15 it back based on equitable mootness, so --
16 MR. ANKER: Your Honor, I don't think it would be
17 wrong of you -- and I'm not suggesting this is the math you're
18 doing in your head -- if you said there's a 210 million dollar
19 potential loss but you think it's ninety percent likely we
20 won't be equitably moot, I'll therefore take ten percent of 210
21 million and say it's only a twenty-one million dollar injury to
22 us. People do contingent liability evaluations that way all
23 the time. I just think Your Honor has to -- it's difficult,
24 because Your Honor has to be predicting how other courts will
25 view the equitable decision.

1 THE COURT: Well, right, so maybe the point is to at
2 least give the district court the benefit of my thinking as far
3 as how the debtor would be harmed and the district court could
4 decide, since it will anyway, the equitable mootness point.
5 MR. ANKER: I think it would be useful for the
6 district court to get the benefit of all of your thinking, Your
7 Honor --
8 THE COURT: Well, sure, of course.
9 MR. ANKER: -- not just part of it. And I think in
10 fairness, Your Honor --
11 THE COURT: Put it -- I'm sorry, just to interrupt --
12 put it differently, and maybe this is giving a preview to my
13 views on the Rule 3020 motion, it seems to me that at a
14 minimum, I should give the district court enough time to hear a
15 stay motion.
16 MR. ANKER: We concur.
17 THE COURT: Okay.
18 MR. ANKER: Your Honor, let me spend a couple of
19 minutes and I know this is a delicate point, about
20 substantial -- I think I've already covered the harm issue vis-
21 a-vis the debtor, which is the second factor. I think I began
22 with it, so I am going to not prolong this.
23 Let me move to the third factor which is substantial
24 possibility of success on appeal. It's always a hard thing to
25 argue to a judge because you're basically saying, Your Honor,

1 there's a chance -- a significant chance that a different court
2 will have a different view. So I will be brief.
3 But this case, it seems to me, calls out for that. On
4 the Till issue, as Your Honor has acknowledged, there is
5 contrary authority. The only U.S. Court of Appeals to consider
6 the issue of the application of Till in a Chapter 11 context
7 since Till was issued is the Sixth Circuit.
8 THE COURT: That's not true.
9 MR. ANKER: Your Honor, I'm not aware --
10 THE COURT: The Fifth Circuit just did it in Prairie.
11 MR. ANKER: I will take a look at it.
12 THE COURT: Okay.
13 MR. ANKER: I will take a look at it but there's
14 certainly the --
15 THE COURT: And said that the majority of courts apply
16 the Till formula, Prairie Home View, excuse me.
17 MR. ANKER: Your Honor, we will take a look. I will
18 certainly say, Your Honor --
19 THE COURT: And as I said before, the Sixth Circuit
20 was applying its pre-Till law which was the formula -- I mean,
21 the forced loan approach, unlike what I need to follow which is
22 Valenti.
23 MR. ANKER: Your Honor --
24 THE COURT: But look, it is a sensitive point. I will
25 say this though, I have issued rulings where it was fifty-

1 one/forty-nine and that clearly comes into my analysis of
2 whether I grant a stay or not. I don't think this is fifty-
3 one/forty-nine. I really do understand, I think, the arguments
4 and the case law and that it's up to a district court to decide
5 otherwise which is another reason I think that when looking at
6 the formulation on equitable mootness, as opposed to other
7 harm, it really should be up to the district court to decide a
8 stay because the district court may be completely of a
9 different view.
10 MR. ANKER: Your Honor, let me just go on for a couple
11 of more minutes. I realize it's late in the day but I also
12 need, at a minimum, to create -- to have a record.
13 There is a Sixth Circuit case to the contrary. There
14 is Judge Stong's decision to the Eastern District of New York
15 to the contrary.
16 THE COURT: She ended up applying Till.
17 MR. ANKER: I'm sorry, Your Honor?
18 THE COURT: She ended up applying the formulate rate.
19 MR. ANKER: There is Judge Gerber's approach in this
20 district in DBSD.
21 THE COURT: Which was on the indubitable equivalent
22 standard.
23 MR. ANKER: No question, Your Honor, but it seems to
24 me it's the same. His essence said it's the same analysis.
25 All I will say is on this issue, however Your Honor

1 wants to slice it, which is the majority rule -- I've seen
2 courts say the majority is absolutely to look at the market
3 where there is an efficient market. And I think the reality of
4 this case, including the way people voted reflected the fact
5 that no one, based on their experience, saw this coming. No
6 one had this experience of other courts doing this at an 11
7 with an official bar date.
8 THE COURT: Well, they obviously haven't read the
9 Supreme Court opinion in Till and Valenti.
10 MR. ANKER: I understand Your Honor's view.
11 Your Honor, on the make-whole issue, I am not going to
12 recanvas all the law but as Your Honor knows, make-wholes have
13 been upheld in many cases. The language may differ. There is
14 no question that many of us, me included -- I understand how
15 Your Honor distinguished it but I read Your Honor's decision to
16 be contrary to Judge Gerber's statements in Chemtura,
17 admittedly in a 9019. I will say to Your Honor, when I read
18 cases like Calpine and Premier Biloxi, yes, they were no-call
19 cases, not make-whole cases but they were cases that had
20 automatic acceleration provisions and there was a bankruptcy
21 and the only way I see the Court getting to those decisions is
22 to say automatic acceleration does not vitiate the right to
23 yield premium protection.
24 And indeed, if one looks at Judge Daniels' opinion, he
25 as I read it -- I understand Your Honor may not -- I read him

1 that he saying had the payment in that case been made during
2 the make-whole period, he would have held that the make-whole
3 was due and I think there's quite clear language, in my view,
4 to that effect. Your Honor obviously disagrees.
5 But there's that issue, Your Honor and there's also
6 the separate issue of if there is not a claim for a breach of
7 the make-whole or for payment of the make-whole, what about the
8 claim for damages for breach of the no-call, the deacceleration
9 covenant and the rule of perfect tender? Your Honor said those
10 are valid state law claims but they're disallowed under the
11 Bankruptcy Code by 502(b)(2).
12 Respectfully, there is certainly an argument to be
13 made that this is not a matured interest, that it's a breach of
14 damage claim and that indeed, the measure of it is not the
15 make-whole -- I'm sorry, is not unmatured interest. It is the
16 make-whole.
17 And as Your Honor is aware, lots of courts have held
18 and I'm not going to use my words, I'm going to use the words
19 of Judge Carey, they have held that, "The substantial majority
20 of courts have viewed make-whole and other pre-payment
21 protection payments not as unmatured interest and not
22 disallowable under 502(b)(2)." He said that in School
23 Specialty, judge --
24 THE COURT: Sure, when they're spelled out, then
25 they're an option.

1 MR. ANKER: It's a different context, I agree but on
2 the 502(b) -- I'm just talking about the 502(b)(2) issue.
3 Your Honor let me end here and where I sort of
4 started, and I understand Your Honor's point about let the
5 district court make the decision here. I can tell by Your
6 Honor's body language, you may not view this decision as being
7 as material as many in the community feel it is. It has
8 substantial effects, not only for lenders but for borrowers.
9 Borrowers -- you know, the history of make-wholes as I am sure
10 Your Honor knows, is they came about because previously, they
11 were just absolute no-calls and if the answer is that we can't
12 have make-wholes, either we're going to have very clear
13 indentures going forward or we're going to have higher priced
14 debt.
15 THE COURT: Could always have done that -- they could
16 always have done that.
17 MR. ANKER: Or we're going to have -- I think people
18 did not perceive this risk.
19 THE COURT: Okay.
20 MR. ANKER: Or people are going to have much more
21 expensive credit.
22 On the Till issue, Your Honor, this issue is
23 significant. There's a doctrine, and I'm not going to argue it
24 fits on all four, that the U.S. Supreme Court has applied in a
25 constitutional context, that something is capable of repetition

1 yet evading review. And it's a concept where the Court says
2 we're going to take that case. We're going to hear it. That
3 is this context.
4 This is an issue that warrants getting definitive law
5 at the circuit level and frankly, maybe at the U.S. Supreme
6 Court level. And what this case presents as an opportunity is
7 there are ways to fashion relief -- I've illustrated two --
8 that allow the plan to go forward, that don't require a stay
9 preventing distributions to the seconds.
10 And will there be a contingent balance sheet
11 liability? Yes. But that will exist anyway. When you balance
12 those factors, Your Honor, I would urge that this case cries
13 out for fashioning careful, limited relief that allows the
14 appeal to go forward, ensures that we get a final decision of a
15 higher court and at the same time, allows the debtors to go
16 forward with their reorganization.
17 Your Honor, unless you have questions, I'll rest
18 there.
19 THE COURT: No, that's fine. Thank you.
20 MR. ANKER: Thank you.
21 THE COURT: Although I do think you all are making
22 more out of this than there but that's fine.
23 Mr. BANE: Good afternoon, Your Honor. Mark Bane,
24 Ropes & Grey on behalf of Wilmington Trust, counsel to the
25 indentured trustee for the one-and-a-halves.

1 THE COURT: Did you all file something, too or is this
2 an oral motion?
3 Mr. BANE: We join in the oral motion for the stay and
4 I won't repeat the entirety --
5 THE COURT: I haven't read it. Have you read it?
6 Mr. BANE: Pardon me?
7 THE COURT: Have you read it?
8 Mr. BANE: I'm not sure I understand.
9 THE COURT: I was learning about aspects of the
10 written motion as Mr. Anker was explaining them. I just want
11 to make sure that I understand what you're joining in because
12 what I understand is what he's explained to me --
13 Mr. BANE: We are joining with Mr. Anker's pleadings
14 and with regard --
15 THE COURT: Well, no, I haven't read his pleadings.
16 Mr. BANE: Okay. Then, Your Honor, I --
17 THE COURT: So now we're like two steps removed
18 because the pleadings apparently came in when, yesterday
19 afternoon or --
20 MR. BAIO: Yes, Your Honor.
21 THE COURT: All right.
22 MR. BAIO: I think it was yesterday early afternoon.
23 THE COURT: So I just want to make sure what I
24 understand that you're joining --
25 Mr. BANE: Right.

1 THE COURT: -- is the motion. I am assuming you're
2 joining what he's told me in oral argument.
3 Mr. BANE: Correct, Your Honor.
4 THE COURT: Okay.
5 Mr. BANE: And all I would like to do, I'm certainly
6 not going to repeat Mr. Anker's very well presented arguments,
7 which obviously we join in, I just want to emphasize a couple
8 of the points that perhaps Your Honor raised and reiterate on a
9 limited basis to public policy issues. And I'm not going to
10 focus on the make-whole I mentioned to the public policy. I'm
11 only going to focus on the Till that I mentioned.
12 And I acknowledge Your Honor's perspective. I just
13 want to make sure that the Court appreciates its significance.
14 It's an impact on lenders. It's an impact on borrowers and
15 it's an impact on the bankruptcy community.
16 It's an impact on lenders because as of today, Your
17 Honor may be correct there are other courts but every court
18 respects Your Honor's decision and we don't know what other
19 courts are going to follow your interpretation of Till and its
20 applicability to Chapter 11.
21 What this means is that if a troubled company is
22 looking to a lender who would otherwise be prepared to lend on
23 a secured basis knowing that it was going to be bargaining for
24 a rate that would be put in stone, they now know that that's
25 not the case and therefore its willingness to lend at this rate

1 is now in question.
2 THE COURT: Right. Just like the subprime auto
3 lenders.
4 Mr. BANE: Your Honor, I think --
5 THE COURT: I haven't seen them stop lending but
6 that's fine. I -- okay.
7 Mr. BANE: Your Honor, I am not going to get into the
8 arguments regarding the subprime distinction today.
9 THE COURT: No, but it's the same point. They've
10 continue to lend money to the Tills of this world ever since
11 the Till decision. They didn't stop lending.
12 Mr. BANE: Your Honor, the subprime lenders are
13 lending way above the levels of risk that they're engaged in.
14 Subprime lenders are lending --
15 THE COURT: But --
16 Mr. BANE: -- at enormous profits.
17 THE COURT: -- but you --
18 Mr. BANE: And their worst case scenario is --
19 THE COURT: Well, so then under Till they should stop,
20 right? But they're not according to what you just told me.
21 Mr. BANE: No, what I just told you Your Honor is the
22 worst --
23 THE COURT: You're basically saying that people who
24 will be lending to corporations will actually stop because of
25 my ruling --

1 Mr. BANE: I think that they will, Your Honor.
2 THE COURT: -- which I find hard to believe.
3 Mr. BANE: Okay. I think that they will, Your Honor.
4 I also think that borrowers are going to be more restricted in
5 their liquidity availability and I think what will happen, Your
6 Honor, and what the community is concerned about now is that
7 there has been a very successful trend away from Chapter 11
8 filings and out-of-court workouts. And that trend has been
9 facilitated by the secured lenders being prepared to lend in a
10 troubled situation and extend credit in a troubled situation.
11 Based on Your Honor's application of Till to Chapter
12 11, that will no longer be the case because every Chapter 11
13 potential lender to a distressed company will be concerned
14 that --
15 THE COURT: This is -- I'm sorry, this is just -- you
16 know, one of the district judges down in Delaware would always
17 say when something like this started, and his favorite movie
18 was the movie "Diner" which is just about guys sitting around
19 talking. That's what this is really. This is just you talking
20 to me. There's no evidence of this.
21 Mr. BANE: Your Honor, it's not me alone talking.
22 It's the talk of the marketplace right now.
23 THE COURT: Well, it's just people talking. There's
24 no evidence of this.
25 Mr. BANE: Well, Your Honor, when we talk about public

1 policy --
2 THE COURT: People who have an interest in an opposite
3 result; it's even worse than people sitting around talking.
4 Mr. BANE: Your Honor, when public policy is discussed
5 as a factor in determining the application of a stay, public
6 policy is the projected impact of a decision. There's always
7 projection and that's what we're discussing today. We're
8 discussing the potential impact on the public marketplace and
9 you're right, it's just talk today but that's what public
10 policy considerations need to be when we're considering the
11 application of the stay.
12 THE COURT: Okay.
13 Mr. BANE: I also want to go back outside of the
14 public policy arena to one limited point and that is when Mr.
15 Anker presented alternatives that would result exclusively in
16 the hypothetical payment of monies in the event that the appeal
17 would be successful, and Your Honor suggested that that would
18 be a prejudice to the debtor and Mr. Anker suggested well, that
19 means that every appeal creates this contingent liability and
20 that's a prejudice to the debtor. I think that's exactly the
21 case here, Your Honor.
22 THE COURT: No, because there's a stay. They're
23 actually being forced to budget, as opposed to using their
24 choice about budgeting on the merits.
25 Mr. BANE: Your Honor, that might be true.

1 THE COURT: They're two different things.
2 Mr. BANE: That might be true if we were asking them
3 to take cash and put it aside. We're ask --
4 THE COURT: But that's exactly what he was asking to
5 do.
6 Mr. BANE: No, he wasn't, Your Honor.
7 THE COURT: He said put it in escrow.
8 Mr. BANE: So, Your Honor, let me clarify what he was
9 asking. What he was asking for was to put notes into escrow
10 with no cash involved, just the notes. If we prevail, those
11 notes will be honored. If we do not prevail, they won't.
12 There's absolutely no impact on the cash balance
13 sheets. No impact other than the contingency of success on an
14 appeal. And to allow that to be a consideration as a prejudice
15 to the debtor implies directly that the contingent's liability
16 created of a successful appeal is a prejudice to the debtor and
17 I don't think that -- if Your Honor understood us as we're now
18 explaining, will see that that cannot be a factor. And,
19 therefore, the presentation that we're making, the suggestion
20 that we're putting on the table illuminates in its entirety the
21 debtors' downside in pursuing this appeal. We're not asking
22 for any cash segregation. We're merely asking to ensure that
23 there is no equitable mootness arguments and as Mr. Anker said,
24 if there would be a concession on equitable mootness, we
25 wouldn't even have to make that contingency provision but we're

1 creating a contingency provision that all it would do was to
2 sustain the obligation in the event that we would prevail on
3 appeal. And frankly, Your Honor, I think that it's very
4 difficult to perceive that --
5 THE COURT: But that goes both ways because you're
6 looking for absolute assurance that it's in escrow, not the
7 cash but the notes. So really it does come down to equitable
8 mootness again.
9 Mr. BANE: Correct.
10 THE COURT: Okay.
11 Mr. BANE: Correct, Your Honor. Thank you.
12 THE COURT: Okay.
13 MR. BAIO: Your Honor, may it please the Court, Joseph
14 Baio from Willkie Farr & Gallagher on behalf of the debtors.
15 I'm going to take a different tack from the one that
16 was taken by my opponents and by my opponents, I mean the one
17 who actually put in papers and made a motion.
18 THE COURT: Well, no, I'm hearing all three because
19 the record's substantially the same.
20 MR. BAIO: I understand. I understand that, Your
21 Honor, but this was -- there were no papers put in on --
22 THE COURT: Right.
23 MR. BAIO: -- on these other points that are flying
24 around.
25 THE COURT: Okay.

1 MR. BAIO: But understanding that you will accept
2 that, I am going to talk about things like the burden of proof,
3 the evidence, because I believe this was an evidentiary
4 hearing.
5 THE COURT: Well, on that point --
6 MR. BAIO: Yes.
7 THE COURT: -- they have the burden of proof, okay?
8 MR. BAIO: Yes.
9 THE COURT: And they have the burden of proof on a
10 bond also.
11 MR. BAIO: Yes.
12 THE COURT: So I don't think you need to spend time on
13 that.
14 MR. BAIO: I won't but I do think that they didn't
15 spend any time on it. You would think from that
16 presentation --
17 THE COURT: Well, because they know the law.
18 MR. BAIO: Okay. That could very well be.
19 THE COURT: But --
20 MR. BAIO: That was my conclusion, as well.
21 THE COURT: Are we right? You know the law Mr.
22 Kirpalani.
23 MR. KIRPALANI: I do, Your Honor.
24 THE COURT: So --
25 MR. BAIO: so they stayed far away from the law.

1 THE COURT: The thing that I --
2 MR. BAIO: Tell me the key point you'd want me to
3 address.
4 THE COURT: -- and I appreciate this because it's
5 getting late and I want to go through the confirmation order,
6 too, the key point I want to hear about --
7 MR. BAIO: Yes.
8 THE COURT: -- I'm not stopping you from everything
9 else is what is your response to Mr. Kirpalani's argument that
10 of the 790-some million dollars of harm, 600 of it should come
11 out because there's -- or 590 of it should come out?
12 MR. BAIO: Just that part of it because I don't have
13 to do the twenty-six million on the incremental interest.
14 THE COURT: I don't think -- well, I don't think you
15 have to do that except I would like you to respond to the first
16 and 1.5's point on their not full stay but tinkering point but
17 first on the 600 million dollars.
18 MR. BAIO: Okay, the 600 million dollars --
19 THE COURT: Is it real or not real?
20 MR. BAIO: Right now, and this has to do with the
21 subscription agreement, we are in a situation where -- and let
22 me say, the evidence also included Mr. Carter's declarations --
23 THE COURT: Right.
24 MR. BAIO: -- Mr. Thaler's declarations and Your
25 Honor's comment and finding that they were credible and that