1 they showed the impact of the --
2 THE COURT: No, I am --
3 MR. BAIO: Okay.
4 THE COURT: I am prepared to say that there is some
5 material harm to the company based on just a flat stay which
6 would include the interest differential and the fee as of
7 October whatever, 9th, 10th.
8 MR. BAIO: The thirty million dollar fee, yes.
9 THE COURT: Yes, the thirty million dollar fee and
10 some amount that would hurt the business on top of that, of the
11 uncertainty and the inability to invest money and to move
12 forward.
13 MR. BAIO: Okay.
14 THE COURT: And I think I have a good idea of what
15 that amount would be but it's nowhere close to 790 million.
16 MR. BAIO: Understood.
17 THE COURT: So the 600 million is the other component
18 of that.
19 MR. BAIO: Got it, Your Honor. And with respect to
20 the 600 million, I think that what they want you to do is to
21 play chicken because under the subscription agreement and if
22 you look at what was handed to you, Your Honor --
23 THE COURT: Right, I have it.
24 MR. BAIO: -- you will see that the section that was
25 not brought to the attention of any witness is Section 1.d and

1 that says, "In the event the closing does not take place on or
2 before October 1st, 2014, the subscriber may request any funds
3 sent to the subscription agent in payment for such subscriber's
4 4(a)(2) shares and accordance with the instructions provided
5 with this 4(a)(2) subscription agreement, be promptly returned
6 to the subscriber. Upon receipt of such request, the
7 subscription agent shall promptly but in any event, within six
8 business days, return such funds to the subscribers."
9 This says that every penny that has been put in, if
10 circumstances change, if the people who put the money in and
11 subscribed decide that there's another opportunity that is
12 better and October 1st has passed, they can walk. They will
13 argue that this says I get my money back and that's a risk that
14 we have to assume.
15 Now, will things happen that will require them to do
16 that or encourage them to do that? I think Your Honor saw in
17 Adelphi that sometimes the world changes and unlike everyone on
18 this side of the room, I can't predict the future. I don't
19 know what's going to happen. I don't know whether there will
20 be some event that will allow people who have put in
21 subscription amounts to take it out. And we might be
22 litigating over that.
23 I believe it says what it says. They ignored the
24 language. They've decided what it means. But it says what it
25 says, Your Honor. And we don't want to bear the risk -- we

1 don't have to bear the risk.
2 The cases talk about threatened injury. There's no
3 certain injury that we're talking about.
4 THE COURT: Well, so you're saying that it's not just
5 a risk of having to chase them down for the money. They might
6 actually not be obligated once you chase them down to pay the
7 money?
8 MR. BAIO: They might say that. They might --
9 THE COURT: But on what basis? Just on --
10 MR. BAIO: Well, see, that's what the words are.
11 These words aren't just an escrow arrangement. These words are
12 what the obligation is. Now the agreement terminates in
13 December but that would be anybody who left their money in. So
14 then if by that time you don't meet whatever has occurred --
15 excuse me, Your Honor -- if by that time there is no closing,
16 well then everybody goes home.
17 And who is going to bear the risk of that argument and
18 that conclusion? Us. And they want us --
19 THE COURT: Is there any case law on this type of
20 agreement?
21 MR. BAIO: I --
22 THE COURT: No, on this point?
23 MR. BAIO: You know, I don't know, Your Honor. I did
24 not know this was an issue until the depositions yesterday.
25 THE COURT: Well, that's true because it --

1 MR. BAIO: I did not know.
2 THE COURT: -- it wasn't raised in the --
3 MR. BAIO: Not raised in any papers. You won't find
4 it anywhere. And, of course, the other thing is -- well,
5 that's what you wanted me to address. Do you want more on
6 that?
7 THE COURT: Okay. Are you aware of any interpretation
8 of these provisions?
9 MR. KIRPALANI: Your Honor, for the record, Susheel
10 Kirpalani from Quinn Emanuel.
11 What I'm aware of is the evidence that's in the
12 record. Mr. Derrough submitted a declaration. Paragraph 14
13 says as follows: "Under the terms of the relevant subscription
14 agreement, a subscriber to the rights offering may request a
15 return of any funds sent to the subscription agent if the
16 closing does not take place on or before October 1, 2014 and
17 the debtors may be required to return such funds by December
18 31st, 2014." That's the evidence. That's the --
19 THE COURT: But the agreement --
20 MR. KIRPALANI: When Mr. Baio said --
21 THE COURT: The agreement speaks for itself on this
22 point.
23 MR. KIRPALANI: And the agreement does speak for
24 itself and the agreement says what the termination rights are.
25 This is a pure -- a new speculative harm.

1 THE COURT: Well, why would you get your money back
2 separate than trepanation?
3 MR. KIRPALANI: It could be the interest rate they're
4 earning in that bank account is lousy compared to where they
5 were going to earn it elsewhere, Your Honor. It's not a
6 termination right. Look how carefully this declaration is
7 worded, how carefully that these papers -- opposition papers
8 are worded. I think Your Honor knows exactly what the rights
9 of the debtors are in these agreements.
10 MR. BAIO: Well, Your Honor, it does --
11 THE COURT: Okay. Actually, I don't.
12 MR. BAIO: Your Honor, if they are --
13 MR. KIRPALANI: It's two clauses. You wanted to say
14 something?
15 MR. LEBLANC: Your Honor, Andrew LeBlanc, Milbank
16 Tweed on behalf of the ad hoc bondholder group.
17 Just one separate point, Your Honor. There are other
18 agreements that control here and that they themselves are
19 conditioned precedent to the consummation of the plan. So
20 there's the backstop commitment agreement for example.
21 The continuation, the non-termination of the backstop
22 commitment agreement is a condition precedent to the
23 consummation of the plan. So, just like the debtors are
24 concerned that circumstances may change and parties who have
25 subscribed may want their money back, we too are concerned

1 because as Your Honor knows, the backstop commitment agreement
2 parties include not just our group, or the requisite majority
3 of our group, but in addition to that, Apollo, as well.
4 THE COURT: But isn't that date December 31?
5 MR. LEBLANC: No, Your Honor. That's the 160 days and
6 there's --
7 THE COURT: Oh, that's the --
8 MR. LEBLANC: The October 9th versus October 10th.
9 THE COURT: Okay.
10 MR. LEBLANC: So at a minimum, Your Honor, even if
11 Your Honor were to believe that the subscription agreements are
12 still in place until December 31st, by October 10th, to the
13 extent that circumstances change in the way that Apollo wants
14 to be out of it or Mr. Qureshi could stand up here and say that
15 the ad hoc group wants to be out of this, then we could simply
16 not agree not to extend the backstop commitment agreement which
17 in turn would be an event of effectively an inability to
18 consummate the plan because that agreement has to be in full
19 force and effect.
20 I think the simple answer to all of this, Your Honor,
21 is as Mr. Baio was suggesting is there is real risk on the
22 enterprise of circumstances changing and people choosing to go
23 in a different direction and it would be different if I were
24 standing here and we controlled that decision entirely. It
25 wouldn't be credible coming from me. But we don't control that

1 decision because we have to have the agreement of Apollo, as
2 well to extend that backstop commitment agreement and if that
3 doesn't happen, then there is no plan.
4 And so the enterprise value of the company is at risk,
5 Your Honor, imminently at risk at a point either October 1st,
6 October 10th, or at some point shortly thereafter.
7 THE COURT: Although Mr. Kirpalani will say the future
8 shareholders are the ones who have the key to that decision.
9 MR. LEBLANC: Well they do, Your Honor, but something
10 may happen in these cases and Mr. Kirpalani would love nothing
11 more than his out-of-the-money constituency to be holding the
12 golden ticket to keep us from consummating with the hope that
13 something happens where his clients may then be in the money
14 but that's not his ticket to play, Your Honor. He has to post
15 a bond if he wants to prevent the consummation of this, if he
16 can even satisfy the other standards for a stay.
17 THE COURT: Okay.
18 MR. BAIO: Would you like anymore from me?
19 THE COURT: Well, no -- you should feel free to say
20 whatever you -- I just wanted to address that point first.
21 MR. BAIO: Okay. I think with respect to that point,
22 Your Honor, is there anything further you want me to address?
23 THE COURT: Well, I mean 6(c) or -- yeah, 6(c) on page
24 7 has the subscribers conditions to consummate the transaction.
25 MR. BAIO: 6(c).

1 THE COURT: It doesn't have any date or anything like
2 that in it. I mean it just says "The representations of
3 warranties need to be accurate and in compliance by the company
4 of the Section 1145 rights offering procedures."
5 MR. BAIO: I don't see how that would help them.
6 THE COURT: Well, let's assume for the moment that
7 after getting their money back --
8 MR. BAIO: Yes.
9 THE COURT: -- they took the position for whatever
10 reason down the road, that they don't owe it. Wouldn't the
11 debtor point to 6(c) and say these conditions are the only
12 ones. They've been satisfied. There are no other conditions.
13 You do owe it.
14 MR. BAIO: No, because October 1st came and went and
15 we could get the money back and there is no clawback for the
16 money here. There's none.
17 THE COURT: Wouldn't they --
18 MR. BAIO: I mean this --
19 THE COURT: But wouldn't you say there's no condition
20 to your obligation to perform, so therefore you must perform?
21 Wouldn't that --
22 MR. BAIO: To them?
23 THE COURT: Yeah. Wouldn't that be what you would say
24 to them?
25 MR. BAIO: Well, we might say it, Your Honor. We

1 might not carry the day.
2 THE COURT: But I mean why wouldn't you?
3 MR. BAIO: Well, because there's a specific statement
4 that talks about getting the money back.
5 THE COURT: You could get your money back.
6 MR. BAIO: It says I get my money back. That's
7 pretty --
8 THE COURT: Okay.
9 MR. BAIO: And it's very, very specific. Now, I don't
10 want to argue necessarily completely --
11 THE COURT: Right.
12 MR. BAIO: -- and we do, by the way, represent the
13 debtor.
14 THE COURT: Right.
15 MR. BAIO: This is a company that actually runs
16 business --
17 THE COURT: Right.
18 MR. BAIO: -- and has employees.
19 THE COURT: Right.
20 MR. BAIO: So the fact that they have disputes on the
21 other side and maybe the money shifting from one or the other,
22 I'm talking about the debtor that is at substantial risk if
23 they don't put up a very substantial bond.
24 THE COURT: Okay. So can I ask you then to turn to
25 Mr. Anker's point which is that there's really no harm to the

1 company or minor harm in having to go either his alternative
2 one or alternative two, in essence putting in escrow, extra
3 notes?
4 MR. BAIO: Well, I heard this for the first time today
5 and I wonder where the evidence is; what are the tax
6 implications of doing that? What the terms should be included
7 in the escrow? What is the accounting treatment? How much
8 money do we have to hold off to decide and not invest while
9 that's pending.
10 There is nothing, other than a lawyer standing up and
11 weaving a scenario that may be completely impossible. It may
12 have no -- it may have drastic effect on the company. I don't
13 know what that is, but I look at the evidentiary record, and I
14 say, there's nothing. I mean, I know there are accounting
15 implications. They talk about it as a slight contingent
16 liability, but they say they're going to win at the end. I
17 understand that. But how can we just take their word for it
18 that there is a contingent liability, and then spend the money?
19 The plan is based on specific expenditures. You know
20 that, you heard that from the actual witnesses. That money
21 likely will not be available, but I'm doing that intuitively,
22 just as they are. You have nothing to assume that that
23 ameliorates any injury whatsoever; not a penny. We might have
24 the same financial effect as a result of that scheme.
25 THE COURT: Okay.

1 MR. LEBLANC: What else, Your Honor? Anything else?
2 THE COURT: It's up to you.
3 MR. LEBLANC: Well, we don't think that they've met
4 any of the standards; for the most part, this was, so far as I
5 could tell, a re-argument of the things they lost. I know they
6 don't like that, but that is not a standard to determine that
7 you have a substantial likelihood of success.
8 Also, with the amount of injury that we could suffer,
9 the burdens actually increase on them, with respect the other
10 standards. They have to show a higher likelihood of success
11 because of that. And of course, they have to -- we believe --
12 put up a very significant bond. Burden is on them to show that
13 there should be no bond requirement, and they have not come
14 close to meeting that, Your Honor.
15 THE COURT: I'm assuming the debtors are not conceding
16 the equitable mootness point?
17 MR. LEBLANC: We are not conceding anything on that,
18 Your Honor.
19 THE COURT: So Mr. Anker can buy his new car.
20 MR. LEBLANC: No, we're not conceding. He said that
21 he would bet his life or something like that on us, on what we
22 were going to do in the future.
23 THE COURT: Right.
24 MR. LEBLANC: I never know what I'm going to do in the
25 future.

1 THE COURT: But you're definitely not saying, we'll
2 waive equitable --
3 MR. LEBLANC: We are not saying that, and that wasn't
4 the bet.
5 THE COURT: Okay.
6 MR. LEBLANC: All right? Anything else, Your Honor?
7 THE COURT: Mr. Anker, you were asking -- unlike Mr.
8 Kirpalani, who was asking for a stay to December 30th, you are
9 asking for this relief through a final order, right?
10 MR. ANKER: That is right, Your Honor. Your Honor
11 obviously can consider lesser alternatives, but that's right.
12 If I might just have one moment -- but I'm happy to answer Your
13 Honor's --
14 THE COURT: No, that's fine; that was -- it was going
15 to affect whether I asked some more questions of the debtor's
16 counsel.
17 MR. ANKER: But Your Honor certainly could consider
18 lesser alternatives; we certainly think it's within Your
19 Honor's -- I just want to be clear.
20 THE COURT: I'm sorry. I just wanted to ask that
21 question, because that was going to determine whether I asked
22 more questions, but there may be other people who want to speak
23 against the motions. At least they're shifting around in their
24 chairs; I don't know if they really want to get up or not.
25 MR. LEBLANC: Again, Your Honor, Andrew LeBlanc. I

1 know that Mr. Baio was concluded.
2 Your Honor, I did want to address -- just dealing with
3 the proposal that was made today by Mr. Anker, and I guess
4 seconded by Mr. Bane. As I listened to it, Your Honor, it
5 seemed to us that what the request really is, is they want us
6 to bond against the risk that they might be equitably mooted.
7 That is what it is, in no small measure. They would like us to
8 post the collateral so they do not run the risk that they might
9 be equitably mooted. They want us to prevent that possibility
10 from happening.
11 That isn't the way that the law works; in fact, they
12 bear the burden -- they bear the burden of posting the bond.
13 We do not bear the burden of posting the bond, and that's
14 exactly what they're -- it's no different than Mr. Kirpalani
15 coming up and saying, well, they should put 200 million
16 dollars' worth of notes aside in the -- or 200 million dollars'
17 worth of equity in the event that I get successfully --
18 THE COURT: Well, it's a little different. It's a
19 little different, because you all can consummate the plan under
20 Mr. Anker's alternative; you couldn't do the same thing with
21 Mr. Kirpalani.
22 MR. LEBLANC: Well, we could put -- because of the
23 very terms of the -- I understand that part of it, Your Honor.
24 THE COURT: It wouldn't work for him. It would work
25 only for Mr. Anker.

1 MR. LEBLANC: Well, but it's no different than any
2 creditor saying, I'm at risk of being equitably mooted. You
3 should put aside some reserve for me --
4 THE COURT: Right.
5 MR. LEBLANC: -- for the future. And that's just not
6 the way that the bonding requirement goes. It goes, in fact,
7 the exact opposite way. They're supposed to bond for the risk
8 that we are harmed, that the debtor is harmed, during the
9 appeal.
10 And it's not an immaterial amount. Just to be clear.
11 Mr. Derrough had mentioned this today in the testimony. The
12 equity value here left available to the second lien lenders,
13 prior to the rights offering, is something in the neighborhood
14 of 300 million dollars, on account of their pre-petition debt.
15 And then there's the rights offering that comes in after that
16 and infuses additional equity.
17 They're asking to escrow sixty-six percent of the
18 equity value that's being provided to the second lien lenders.
19 And that's just the start of it, because of course, that would
20 grow with interest. It wasn't clear to me whether they wanted
21 cash interest to be paid into the escrow account, although I
22 assume that's what they were looking for, the 200 million
23 dollar --
24 THE COURT: No, he -- there was no cash obligation.
25 I'm sorry, there was no immediate cash hit to the company; it

1 was just an obligation.
2 MR. LEBLANC: I certainly understood that with respect
3 to the notes.
4 THE COURT: And I thought there was also a cap on it
5 for feasibility, although I'm not sure how that would work.
6 MR. LEBLANC: I don't -- nor do I know how it works,
7 Your Honor. I certainly think that if you were to inflict this
8 debtor with a 200 million dollar upfront escrow, the accrual of
9 additional notes, presumably, that -- for PIK interest that
10 would accrue, then the continuing obligation to escrow for the
11 delta or the difference or to have that assigned at some point
12 later, it's unclear to me how this debtor would ever get out
13 from underneath the shadow of bankruptcy.
14 The purpose of a consummation of a plan is to remove
15 the effects of bankruptcy and to let the new owners of the
16 company move forward with the business plans that they have for
17 the company. That's the whole purpose; that's the reason the
18 doctrine of equitable mootness even exists, because once that
19 new money is infused, and as Your Honor had alluded to, if the
20 company wants to start doing CAPEX, to start maybe even
21 engaging in other corporate transactions, if it has to do that
22 under the specter of a 200 million dollar escrow account that
23 we have bonded for their appeal, to avoid the risk of mootness,
24 it simply doesn't remove the specter or the shadow of
25 bankruptcy. That's not the purpose, Your Honor.

1 I don't know -- I'm unaware of any instance where a
2 court has said to a debtor, you have to put money aside to bond
3 their appeal after they've lost; after they have lost before
4 Your Honor. It has to go the other way. And so, Your Honor,
5 we would join with the debtors that the stay should be denied,
6 but to the extent that it is required, the Court should require
7 an appropriate bond, and a bond can't be in the form of the
8 debtor setting aside money to satisfy their claims. It has to
9 go the other way.
10 Thank you, Your Honor.
11 THE COURT: Okay.
12 UNIDENTIFIED SPEAKER: I think Abid wants to beat up
13 on us.
14 MR. QURESHI: Very briefly, Your Honor, for the
15 record, Abid Qureshi of Akin Gump on behalf of Apollo.
16 Two quick points, if I may. First, following up on a
17 point Mr. LeBlanc made earlier with respect to the backstop
18 commitment agreement; I just want to point out to Your Honor in
19 the backstop commitment agreement where it automatically
20 terminates, should there be a stay of the confirmation order,
21 and that is in Article 9.2, Subsection G of the backstop
22 commitment agreement, and that provision provides that unless
23 waived by the parties, if there is a stay of the confirmation
24 order, the backstop commitment agreement automatically
25 terminates.

1 And that, again, Your Honor, 9 -- 9.2(g).
2 THE COURT: But that -- Mr. Kirpalani will say
3 that's -- only puts the debtor at risk for ten million dollars.
4 MR. QURESHI: Well, Your Honor, I think that puts the
5 entire plan at risk. I think the effect of an automatic
6 termination of the backstop commitment agreement would be that
7 the entire plan is dead.
8 THE COURT: He's say that there's 590 million of
9 subscribed commitments, so you'd only have to raise 10 million.
10 MR. QURESHI: Well, which I guess comes back to the
11 point that in the subscription agreement itself, there's the
12 ability to demand that money back. And at that point, I don't
13 think there's any obligation on the parties to move for --
14 THE COURT: And I guess you're also saying for one on
15 the nail -- in this case, for one of ten million --
16 MR. QURESHI: Your Honor, one other point. And again,
17 I'm not going to repeat everything you heard from Mr. LeBlanc,
18 but it relates to Mr. Anker's comment just now that he's
19 looking for an indefinite contingent -- very significant
20 contingent liability to be on the debtor's balance sheet while
21 he pursues to a final order, through however many levels of
22 appeal he can, the issues that he wants to appeal. And that is
23 a remarkable restraint, Your Honor, on a debtor coming out of
24 Chapter 11.
25 When we think about the opportunities that the company

1 might have, whether it is strategic investments, M&A
2 transactions, capital investments, getting new funding to
3 pursue new capital investments, whatever it may be; with that
4 size of a contingent liability on the debtor's balance sheet,
5 those opportunities are simply not going to be available, and
6 Mr. Anker's not standing before the Court saying he would like
7 that type of a constraint for thirty days or for sixty days;
8 he's saying it should be indefinite. And that just can't be
9 the case, Your Honor, and certainly can't be the case without a
10 very significant bond to protect the debtors from that type of
11 risk.
12 THE COURT: Okay.
13 MR. QURESHI: Thank you.
14 MR. KIRPALANI: Judge, thank you for giving us so much
15 time. I'm going to be extremely brief and try to rifle through
16 things in under a minute or so. I just wanted to address some
17 of the points that have been raised.
18 First, Mr. Qureshi's point about the backstop, ten-
19 and-a-half million dollars that's -- potentially, no one has
20 spoken for. If that backstop agreement walks, I can represent
21 to the Court that I will find senior subordinated noteholders
22 to sign up for that at the fifteen-percent discount at the plan
23 value. In fact, I might do it myself.
24 THE COURT: You're wealthier than I am.
25 MR. KIRPALANI: Well, I'm working on it.

1 In terms of the evidence of harm that people are going
2 to walk, there is no evidence that anybody would walk at this
3 great deal. There's been no second-lien noteholder file any
4 declaration, and we all know the reason for that; it's because
5 it's a fantastic deal to buy the stock of this company at that
6 value, fifteen-percent discounted, for the privilege of being a
7 second-lien noteholder.
8 Secondly, I point out to the Court that this
9 agreement, the subscription agreement, in section -- I guess
10 it's C on page 10, I think it's 8 -- 8(c) on page 10, says
11 there is a court that can determine whether somebody walks and
12 had the right to walk, and guess who that is? It's Your Honor
13 gets to decide that. And this Court knows, even if the money
14 is not right there, there are other ways to remedy a breach of
15 the subscription agreement, including through equitable
16 subordination.
17 THE COURT: I just said I don't know how I decide that
18 issue, so that's not that's helpful. Right know it's fifty-
19 fifty.
20 MR. KIRPALANI: Well, we think it's a pretty clear
21 agreement. It's a subscription that rode through the date it
22 could be terminated, and the notion that someone who could ask
23 for their money back to do something else with it for a period
24 of time, doesn't relieve them of their obligation to subscribe
25 under the plain terms. But this Court would be the one

1 deciding that.
2 THE COURT: I mean, even on that basis, particularly
3 having lived through what happened six years ago, if you don't
4 have the money, even that's a risk, right?
5 MR. KIRPALANI: Except, different than what happened
6 six years ago, there's a lot of second-lien debt that that
7 person holds that could be equitably subordinated, so this --
8 in other words, the value that would have to --
9 THE COURT: It's not cash.
10 MR. KIRPALANI: Senior subordinated noteholders will
11 sign up for that money, if that event were to happen.
12 THE COURT: But it's --
13 MR. KIRPALANI: If that event were to happen, Your
14 Honor. Your Honor knows this is a very -- happened it was
15 oversubscribed; it's in the record of this case --
16 THE COURT: Today.
17 MR. KIRPALANI: It's in the record of this case that
18 Fortress, D.E. Shaw and Napier came into court through Mr.
19 Hansen from Stroock --
20 THE COURT: Yes. No, that's all true.
21 MR. KIRPALANI: Yeah, it's all true.
22 THE COURT: I understand that. But even if it is just
23 a collateral security provision --
24 MR. KIRPALANI: Yes.
25 THE COURT: -- I can't ignore the fact that on day 1,

1 Adelphia's plan had twelve million dollars going to people, and
2 on day 2, he was administratively insolvent. Markets change.
3 MR. KIRPALANI: Markets do change.
4 THE COURT: And financial players like this can easily
5 get overcommitted. It happens.
6 MR. KIRPALANI: Fair enough, Your Honor, except that
7 we're not talking about an indefinite period of time. We have
8 been -- we have tried to be judicious in what we are asking the
9 Court to do to give us an ability to get our matter -- but on
10 that point -- and this is the last point I wanted to raise.
11 We didn't mention the words equitable mootness here
12 today, and for a reason. The Court correctly stated, this is
13 an issue for an appellate court. And I just didn't want to sit
14 here and have Mr. LeBlanc or somebody else say, that ship has
15 sailed, and we didn't raise it. We don't concede we would be
16 equitably moot. We understand there may be difficulties in how
17 to remedy a potential reversal on our standalone little legal
18 issue about what is the meaning of "in any respect" under our
19 indenture. It may not be we can get complete relief, but it
20 may not be we get no relief. There may be additional stock
21 that can be issued that the Court might deem fair. We don't
22 concede the point; it isn't before this Court, I think, as Your
23 Honor correctly noted.
24 THE COURT: So it's not -- so how does that factor you
25 in to the irreparable harm issue?

1 MR. KIRPALANI: Well, I think it is -- it's the risk,
2 especially given that the company and the ad hoc committee and
3 Apollo have all indicated for quite a while now -- which is why
4 I keep jumping up and down -- that they intend to use equitable
5 mootness as a sword, and it is our requirement --
6 THE COURT: No, but I guess if the equitable mootness
7 issue isn't really in front of me, and we're just focusing on
8 the harm to your clients -- I think you're probably right. You
9 could get new stock and dilute the other stock.
10 MR. KIRPALANI: We have never said we needed to get a
11 hundred cents in cash or anything.
12 THE COURT: So how is that irreparable harm?
13 MR. KIRPALANI: Well, Your Honor --
14 THE COURT: The risk of that happening? I would think
15 that --
16 MR. KIRPALANI: It is a risk. It is a risk. We don't
17 have a guarantee that it will not happen; we know that they
18 have -- will assert it, and it is a risk. And in the issue
19 here is there is a fourteen-day stay provided for the rules.
20 They have asked for that to be shortened.
21 THE COURT: All right. But just --
22 MR. KIRPALANI: We have asked for --
23 THE COURT: But just focus on it. I think it is
24 properly something for a district court to consider, because
25 that's really -- it's the motion before the district court, not

1 before me.
2 MR. KIRPALANI: When they file that motion, yes.
3 Which they haven't. When they file a motion that says, we've
4 gone --
5 THE COURT: Right. And you could -- and district
6 court will, I'm sure, as Judge Scheindlin did, project forward
7 on that analysis if you make your stay motion in the district
8 court, but in the meantime, what I -- without equitable
9 mootness, if there is a stay, it appears to me that the equity
10 that your clients would be getting if they prevail would be
11 worse in value than if there is not stay, because the effect of
12 a stay will diminish the equity value of the company
13 considerably. So if -- in a way, a stay, perversely, doesn't
14 help your clients, either.
15 MR. KIRPALANI: In a way, it would be perverted that
16 it wouldn't, except that I can't control what an appellate
17 court needs in terms of time to review something, and how that
18 court views these issues. All I know is I've got three well-
19 heeled law firms going to be stressing to that court that this
20 is all equitably moot; just read quickly these cases and close
21 one eye, and you'll see we've -- and that's what I'm going to
22 be wrestling with.
23 THE COURT: Okay.
24 MR. KIRPALANI: Okay? Thank you, Your Honor.
25 THE COURT: The people I know in this building don't

1 close one eye.
2 MR. KIRPALANI: Excellent.
3 MR. ANKER: Your Honor, I, too, will be brief; I
4 realize it is late in the day. One, to the extent there was
5 any ambiguity, let me try to cure that ambiguity. We are not
6 asking, as part of either of our alternatives, that any cash be
7 set aside. It would simply be a commitment.
8 Two, while I did say that the stay should run under
9 our two proposals until the completion of the appellate
10 process, I neglected, by accident, to say the following. We
11 will commit to take all steps to expedite any appeal. We are
12 more than happy to agree to very aggressive expedited briefing
13 and argument, schedules. Frankly, the motion you are not
14 hearing today, to certify to the Second Circuit, is consonant
15 with that, and we we'll also file a motion -- I think we'll get
16 that motion on file, Your Honor, by tomorrow. We will also
17 join Mr. Kirpalani in asking for expedition of both the
18 designation on the record and the statement of the issues.
19 So I just wanted, as Your Honor thought about the
20 stay, to not --
21 THE COURT: On that latter point, I would suggest that
22 you confirm with the debtor's counsel about what you would
23 contemplate the record to be. If they're reasonably satisfied
24 that that record would be complete, I can see them agreeing to
25 it. If they think that they're going to have to comb through

1 and find the missing diamond that they want, then there'll be
2 an issue on it.
3 MR. ANKER: Totally fair, Your Honor, and we will
4 absolutely do that, and we're not going to try -- I mean, the
5 record will be the confirmation hearing and every piece of
6 evidence that came in.
7 THE COURT: Okay.
8 MR. ANKER: We're not going to try to play any sort of
9 games with it. But I just wanted, for the purpose of the stay,
10 Your Honor to understand, we are absolutely committed to moving
11 quickly.
12 Just a few other points, very briefly. Tax
13 consequences. The issuance of a note is not a taxable event
14 giving rise to income. That is a question of law; I'm not a
15 tax lawyer, but anyone knows that.
16 THE COURT: I really don't know the answer to that.
17 MR. ANKER: Okay.
18 THE COURT: I think there was a fair amount of merit
19 in the suggestion that the alternatives were kind of sprung on
20 people without any chance to develop any record.
21 MR. ANKER: On the accounting treatment, Your Honor,
22 it either is a contingent liability or it's not a contingent
23 liability, under FASB 5 -- that needs to be footnoted --
24 whether or not there were notes issued.
25 On the cap for feasibility, you asked what that meant.

1 I want to be clear on that, again, so Your Honor can consider
2 it. The contingent liability on the interest rate can be not
3 capped at the current rate of interest on our notes, 8.75, and
4 on the one-and-a-halves --
5 THE COURT: Ten.
6 MR. ANKER: -- ten, but rather at the testimony that
7 is in the record as to what the market is and what the debtors
8 could, as a matter of feasibility --
9 THE COURT: I never made a finding on that. There's
10 no finding on that, and the testimony was all over the lot. At
11 one point, your expert said the market was the exit financing,
12 and then at another point, they said it was based on issuances
13 for B-rated credit or B2-rated credit, and Mr. Augustine said
14 no, it was C, and then he corrected himself. There's nothing
15 there.
16 MR. ANKER: I think, Your Honor, the record is that
17 they could, in fact, afford the flex rate, if both the exit
18 facility -- the one billion -- and the bridge went to the flex
19 rate on each of them. I can point, Your Honor, to testimony on
20 that, including Mr. Carter's testimony in particular. Happy to
21 get Your Honor a cite, if that would be helpful.
22 THE COURT: So it would be as if the backup takeout
23 loans were issued.
24 MR. ANKER: Right. I think that's right, Your Honor.
25 Finally, this. Your Honor pointed to the Fifth

1 Circuit decision -- and I will not discuss what it says in that
2 'til -- I actually do read it, Your Honor, somewhat
3 differently. And it is not a stay case, but it is a case --
4 THE COURT: Well, no, I know.
5 MR. ANKER: Pardon me, Your Honor?
6 THE COURT: It wasn't a stay case.
7 MR. ANKER: It was not a stay case. But it a case in
8 which the court reaches the merits, not finding an appeal
9 equitably moot, and in that regard, the court says, we can --
10 and I -- because I do think this is relevant for the stay --
11 "The court could grant partial relief to Wells Fargo without
12 disturbing the reorganization, by, for example, awarding
13 slightly higher cramdown interest rate or granting a small
14 money judgment." This is in the court's opinion, Your Honor,
15 on page 328.
16 THE COURT: Right.
17 MR. ANKER: Our stay request, in essence, is the same
18 thing. I say stay -- the alternatives. You can grant relief
19 here without upending the entire --
20 THE COURT: No, I wouldn't have to do anything under
21 that theory. I just wait for the -- you all would wait for the
22 appeal.
23 MR. ANKER: Well, let me answer that -- it's the last
24 point I was going to raise. My point I'm making here is just
25 like the court there thought it could fashion relief without

1 upending the bankruptcy, so too, our proposal would allow the
2 Court to do that. I do think on the point --
3 THE COURT: But if it's not equitably moot, then you
4 wouldn't need your proposal.
5 MR. ANKER: You're absolutely right. And that was the
6 last point I was going to get to. I think, Your Honor, I have
7 to concede that if there is zero risk of equitable mootness,
8 the argument for a stay is quite difficult. I think, as a
9 practical matter, everyone in this room knows, including Your
10 Honor, that while we will argue there is no equitable
11 mootness -- and I note that the Fifth Circuit in particular
12 says equitable mootness is designed to protect nonparties to
13 the appeal; it should never be used to protect the debtors,
14 Apollo, and the seconds. There is no doubt -- you heard this
15 from Mr. Baio; he's not going to concede the point. They are
16 going to argue equitable mootness, and there are cases out
17 there.
18 So yes, Your Honor, if you conclude there's no risk of
19 equitable mootness --
20 THE COURT: I don't have to conclude there's no
21 equitable -- I could conclude that the risk is low, or at least
22 no greater than the potential harm to the debtors.
23 MR. ANKER: I agree, Your -- I said it at the outset,
24 when I stood up earlier. I think it is legitimate for you to
25 take into account, and discount if you think there is no risk

1 for equitable mootness. I'm not going argue to the contrary.
2 I wanted to answer Your Honor's question, which is if
3 you assume no equitable mootness, I think you have it right. I
4 just don't think you can make that assumption. And we're
5 trying to get a formula that protects the debtors, allows the
6 plan to go effective, but reduces that risk effectively to
7 zero.
8 THE COURT: Okay.
9 MR. QURESHI: Your Honor, I apologize. Abid Qureshi
10 from Akin Gump again, for Apollo. I just need to expand on one
11 point I made earlier.
12 I said, Your Honor, that if the backstop commitment
13 agreement terminates, then the plan is dead, and let me just be
14 a little more specific and point Your Honor to section 11.1(b)
15 of the plan itself. "It is a condition precedent to the plan
16 that the backstop commitment agreement shall not be
17 terminated."
18 So if the backstop commitment agreement terminates,
19 the plan terminates. If the plan terminates, there is no basis
20 for the debtor to retain the 588 or 89 or whatever hundred
21 millions of dollars has been funded. At that point, they
22 couldn't simply keep it and say too bad and walk away. I think
23 at that point, whatever the subscription agreement may or may
24 not say, there would be no alternative but to return those
25 funds.

1 THE COURT: Okay.
2 MR. QURESHI: Thank you.
3 THE COURT: Okay. I have before me a motion by the
4 trustee for the senior subordinated unsecured notes, under
5 Bankruptcy Rule 8005, for a stay pending appeal of my
6 to-be-entered confirmation order and the related order on the
7 adversary proceeding involving that trustee, referred to in my
8 bench ruling which was filed today, in support of -- or
9 correcting, excuse me, the oral bench ruling I gave last week.
10 I also have two oral motions under Bankruptcy Rule
11 8005, by the trustees, for the first and 1.5 lien debt, for a
12 stay pending appeal, or in the alternative, a form of
13 injunctive relief that movants contend could protect their
14 appellate rights, namely the setting aside of sufficient
15 replacement notes, and that's contemplated under the plan, in
16 an amount equal to the amounts at issue on appeal, capped,
17 however, by a rate equal to the rate and costs, I'm assuming,
18 under the backup takeout financing that I reference in the
19 bench memo.
20 Bankruptcy Rule 8005 provides that, "A motion for a
21 stay of the judgment, order or decree of a bankruptcy judge,
22 for approval of a supersedeas bond or for other relief pending
23 appeal, must ordinarily be presented to the bankruptcy judge in
24 the first instance." It also provides that "Notwithstanding
25 Rule 7062, but subject to the power of the district court and

1 the bankruptcy appellate panel reserved hereinafter, the
2 bankruptcy judge may suspend or order the continuation of other
3 proceedings in the case under the Code or make any other
4 appropriate order during the pendency of an appeal on such
5 terms and will protect the rights of all parties in interest."
6 The standard for considering such a request is -- with
7 a couple of minor exceptions -- well established. The party
8 seeking a stay has what is described a heavy burden, and that
9 is particularly in the case where it is seeking a stay of a
10 confirmation order, to demonstrate, one, whether the movant
11 will suffer irreparable injury absent a stay; two, whether a
12 party -- that is, a party other than the movant, will suffer
13 substantial injury if a stay is issued; whether the movant has
14 demonstrated a substantial possibility, although less than a
15 likelihood, of success on appeal; and four, the public
16 interests that may be affected. In re: Adelphia Communications
17 Corp., 361 B.R. 337, 346 (S.D.N.Y. 2007). See also Suprema
18 Specialties Inc., 330 B.R. 93, 95 (S.D.N.Y. 2005), and
19 generally, for the standard of a stay pending appeal, Mohammed
20 v. Reno, 309 F.3d. 95, 100 (2d Cir. 2002).
21 There is some dispute in the case law as to whether a
22 movant must establish all four factors for a stay to be
23 granted. However, the better view, as articulated in Mohammed
24 v. Reno, is that the criteria reflect -- or should reflect --
25 or the test to employ the criteria should reflect a balancing

1 approach focusing on the most important factor, which is
2 whether the movant will suffer irreparable injury, as balanced
3 against both the potential substantial injury to other parties
4 if a stay issued and whether the movant has demonstrated a
5 substantial possibility, although less than a likelihood, of
6 success on appeal. Adelphia Communications, 361 B.R. at 346,
7 and more importantly, Mohammed, 309 F.3d at 100, where the
8 court said, "The probability of success that must be
9 demonstrated is inversely proportional to the amount of
10 irreparable injury plaintiff will suffer absent the stay.
11 Simply stated, more of one excuse is less than another."
12 As I noted, irreparable harm to the movant is the
13 principal prerequisite for the issuance. If irreparable harm
14 is not shown by the moving party it is likely, before the other
15 requirements for the issuance of injunction will be considered,
16 that the motion will be denied. See Grand River Enter. Six
17 Nations, Ltd. v. Pryor, 481 F.3d 60, 66-67 (2d Cir. 2007).
18 The moving party must prove that it faces irreparable
19 harm that is "neither remote nor speculative but actual and
20 imminent". Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112,
21 114 (2d Cir. 2005) and In re BGI, Inc., 504 B.R. 754, 762
22 (S.D.N.Y. 2014).
23 A number of cases have held, both in the Second
24 Circuit and out of it, that merely invoking the doctrine of
25 equitable mootness, a risk that is present in any post-

1 confirmation appeal of a Chapter 11 plan, is not sufficient to
2 demonstrate on its own irreparable harm. See In re Board of
3 Directors of Multicanal S.A., 2005 Bankr. LEXIS 1865 at *6
4 (Bankr. S.D.N.Y. Jan. 6, 2005) and In re Baker, 2005
5 WL 2105802, at *9 (E.D.N.Y. Aug. 31, 2005).
6 However, the possibility of mootness on an equitable
7 basis rendering an appellant unsatisfied should not be
8 disregarded either, as stated by Judge Scheindlin in In re
9 BGI, Inc.
10 Several courts, including courts in this circuit, have
11 held that at least where the denial of the stay pending appeal
12 risks mooting any appeal of significant claims of error the
13 irreparable harm requirement is satisfied. That appears at
14 504 B.R. 763. See also In re DBSD North America, Inc., 2010
15 WL 1838630 at *1 (S.D.N.Y. May 10, 2010).
16 Suffice it to say that the law on this point is not
17 entirely clear, as noted by Chief Judge Morris in In re 473
18 West End Realty Corp., 507 B.R. 496 (Bankr. S.D.N.Y. 2014).
19 However, I believe that clearly the stronger the
20 likelihood of success on the merits is and the greater the risk
21 that an appeal will be equitably moot if a stay is not issued,
22 the easier it is for an appellant to obtain a stay. See also
23 In re MF Global Inc., 2012 WL 5386101 (Bankr. S.D.N.Y. Nov. 1,
24 2012) on pages 2 through 3.
25 In addition to carrying the burden on all four factors

1 they have the emphasis on the first two. A movant for a stay
2 also needs to justify why no bond needs to be issued in respect
3 of the relief it's seeking, that is why the Court should
4 deviate from the ordinary full security requirement. In re 473
5 West End Realty Corp., 507 B.R. 501, 502, citing In re Gen.
6 Motors Corp., 409 B.R. 24, 30 (Bankr. S.D.N.Y. 2009). See also
7 Moore's Federal Practice Civil Section 308.30. That is Volume
8 20, Moore's Federal Practice Civil Section 308.30 (2014).
9 Here I believe it is substantially acknowledged by all
10 three movants, and even if it weren't I believe it is the case,
11 that but for the potential for equitable mootness they will not
12 be irreparably harmed in the absence of a stay pending appeal.
13 Indeed, I conclude that in the absence of equitable mootness
14 the stay pending appeal may, in fact, harm them if they prevail
15 on their appeal, because, as I will note in a moment, the
16 debtors have shown that the debtor, and, therefore, its future
17 equity holders and creditors, derivatively, through the debtor,
18 will suffer direct and potentially much larger contingent harm
19 upon a flat stay pending appeal.
20 As far as the risk of equitable mootness is concerned,
21 the doctrine is still alive and kicking in the Second Circuit,
22 although it has been substantially cut back on by other
23 circuits, as evidenced by recent opinions in the Fifth Circuit,
24 including the Grand Prairie Hotel case that Mr. Anker was
25 quoting during oral argument.

1 Ultimately, the issue on equitable mootness is one
2 that the district court will decide in light of a full factual
3 record. I am not prepared, nor should I decide that issue
4 today, but I do believe that the risk of equitable mootness is
5 not strong here for either set of movants or -- I'm sorry --
6 the senior secured lender set of movants and the senior
7 subordinated noteholder movants.
8 That is because of a couple of factors: one, the
9 strong support given to the plan by the second lien holders,
10 each of whom have taken a position on this set of motions and
11 who are clearly parties-in-interest and active participants in
12 the underlying confirmation litigation, and the fact that if
13 the appellants are successful on appeal their recovery would
14 come largely from a recalibration of the consideration provided
15 to the second lien noteholders.
16 In addition, although this is ultimately an issue for
17 the district court to decide, it is not entirely clear to me
18 that the plan itself would fail by its terms if an appeal were
19 granted on either of the appellants' appeals.
20 So I conclude that the movants have not established
21 the most important fact here, which is irreparable injury
22 absent a stay. There is a risk of equitable mootness, but I
23 believe that that risk is not so great as to outweigh the case
24 law, which, in its unsettled state, says that I should give
25 some weight to it but not, I believe, complete weight to it,

1 particularly in light of the other factors to be considered,
2 and those are important.
3 First, as stated during oral argument, while there
4 have been a number of times -- more than a number of times when
5 I've issued rulings where the outcome could be handicapped at
6 fifty-one versus forty-nine percent in favor of my ruling, I
7 believe that each of the rulings that are on appeal have a high
8 likelihood of being sustained on appeal. I say that with
9 regard to the issue that Mr. Anker has asserted is the most
10 important issue on appeal, although in terms of monetary terms
11 it is not, which is the present value cramdown interest rate to
12 be afforded to the dissenting secured creditors under the plan.
13 I say that, in part, because of the very clear
14 guidance by controlling precedent as well as the principles
15 that the Till and Valenti cases annunciate and their, I
16 believe, complete correspondence to the purpose of Section
17 1129(b)(2)(A)(i)(II). But I believe it's also the case with, I
18 think, well-established law on make-wholes as well as the plain
19 meaning of the subordination agreement for the senior unsecured
20 subordinated noteholders.
21 I think more is required, at least at the level of the
22 Court that issued the underlying opinion, to carry the factor
23 of a substantial possibility, although less than a likelihood,
24 of success on appeal, such as under these circumstances
25 highlighting aspects of the ruling that were obviously

1 contradicted by a fact or law or points that, although argued
2 somewhere in front of the Court, the Court ignored. But simply
3 a rehashing of the arguments in a case where, as is the case
4 here, the Court is reasonably competent that it got it right,
5 isn't sufficient. See Gesualdi v. Laws Construction
6 Corp., 759 F. Supp.2d 432, 448 (S.D.N.Y. 2011), confirmed in
7 part, vacated in part on other grounds. So I guess the Court
8 was right. 485 F. App'x 450 (2d Cir. 2012).
9 That obviously, of course, is not a guarantee that
10 I'll be affirmed on appeal. Whenever I'm reversed, or any
11 judge is reversed, it's very convenient to say no one's perfect
12 without saying who you're referring to.
13 Given that fact, and given, also, the fact that the
14 equitable mootness point really should be ultimately decided by
15 the district court, it seems to me that both of those factors,
16 the irreparable harm factor and the substantial possibility,
17 although not less than a likelihood, of success on appeal
18 factor, deserve a fresh look by the district court with fresh
19 eyes. But as far as the record before me is concerned, neither
20 factor has been satisfied.
21 I am also of the view, and so find, that none of the
22 movants has established that other parties, primarily the
23 debtor, will not suffer substantial injury if a stay is issued.
24 The burden, again, is on the movants on this point.
25 As far as the senior unsecured subordinated

1 noteholders are concerned, they, essentially, took the view in
2 their motion that as long as the debtor, on a reorganized
3 basis, is stumbling along, and they confirmed a plan, but, in
4 essence, looking like Camille in the play or the opera, that's
5 enough to show an absence of harm. I think more is required to
6 carry the burden on this point. It is clear to me that the
7 cash that the debtor would -- or the reorganized debtor would
8 otherwise have but for this appeal -- would aggregate fifty-six
9 million dollars, based on the evidence submitted by the
10 debtors, which I find not controverted as set forth in the
11 Derrough and Eisenberg declarations.
12 I also conclude that there will be substantial harm to
13 the debtors' business for the reasons set forth in the
14 Eisenberg declaration, as corroborated by the testimony of Mr.
15 Carter during the confirmation hearing, for the continued
16 inability, pending a stay pending appeal -- or in light of a
17 stay pending appeal, excuse me -- to emerge from bankruptcy.
18 Mr. Eisenberg's declaration, supported by his
19 testimony on cross-examination, is credible that given the
20 debtors' financial condition before the petition date, which,
21 by definition, will not have been resolved if there is a stay
22 pending appeal of the confirmation order, was such that the
23 debtor was seriously behind the ball in regard to trade credit,
24 maintaining existing customers and winning new business,
25 attracting and retaining employees, and engaging in the types

1 of investments that its financial position had prevented it
2 from engaging in, because it didn't have the money for CAPEX
3 and the like pre-bankruptcy.
4 It is difficult to quantify that risk, obviously.
5 I have discounted the additional cost of the case to some
6 extent because the litigation costs, at this point, will
7 largely be litigation costs that would be incurred, in any
8 event, on the appeal.
9 But the cost to the business is significant. Simply
10 one factor reflects that; as Mr. Eisenberg testified, shortly
11 before the petition date, average days payable were in the
12 forty-day range. It went down to the twenty-day range in June
13 and July. It has increased back to the pre-petition amount of
14 debtor trade credit of forty to forty-one days today, when the
15 debtor is still in bankruptcy, but the debtor has at least the
16 distinct prospect of emerging from bankruptcy without a stay
17 through a confirmed plan.
18 I quantify the uncertainty risk and the risk on the
19 debtors' business testified to by Mr. Eisenberg as being, with
20 respect to a stay pending appeal, approximately thirty million
21 dollars. That's the appeal by the December 30 date stay
22 that -- I'm sorry, that's the stay through the December 30 date
23 that was stated by Mr. Kirpalani on the record today as the
24 relief that was being sought, as opposed to the indefinite stay
25 in the motion.

1 In addition to those three amounts, it has been argued
2 by the debtors that there is a substantial risk that, during
3 the month of October, the backup -- I'm sorry, the committed
4 590 million dollar equity investment of the 600 million dollar
5 backstopped will terminate. It is not clear, as Mr. Kirpalani
6 has pointed out, whether that is, in fact, the case. It is
7 clear that as of October 10, the parties who have signed
8 subscription agreements are, under those agreements, entitled
9 to receive back from the company the cash that they have
10 delivered to the company for those subscription agreements. At
11 a minimum, therefore, after October 9, if this plan has not
12 gone effective, there is an execution risk on the subscribed
13 590 million dollars of equity investment which is critical to
14 this company.
15 In other words, simply as an execution matter, the
16 debtors would have to chase those companies who subscribed to
17 get the money back again when and if the plan were to be
18 confirmed.
19 In addition, it is not clear to me on this record, and
20 I will note that the reputation by the senior unsecured
21 subordinated note trustee of the debtors' argument regarding
22 the 600 million in essence came up yesterday and before the
23 Court for the first time today without any advance preview.
24 But in addition, it appears to me from reading the subscription
25 agreement that it is far from clear whether the unsecured

1 subordinated noteholders' interpretation is correct that,
2 notwithstanding, i.e., the return of the subscribed funds, the
3 subscribers are still liable through December 31 for their
4 subscription, or alternatively, whether the interpretation by
5 the debtors is correct that they may not be liable or would not
6 be liable once they've received the money back.
7 Again, the burden, ultimately, on this issue which is,
8 again, the issue of harm to other parties, in this case the
9 company, is on the movant. And I find that they've not fully
10 carried the burden on this 600 million dollar point. Based on
11 the record before me, when I combine the execution risk issue
12 with the issue of whether, after October 10th, there is a
13 binding obligation, I conclude that rather than a 600 million
14 dollar risk, there's a 300 million dollar risk. I say that, in
15 addition, based on the other rights, including a right, if the
16 plan is not effective and unstayed, asserted by counsel for
17 Apollo that exists separately in this case that there is
18 additional deal risk here if the stay is granted. Again, a
19 more complete record potentially would have led to a different
20 result but that's not what I have before me.
21 So I conclude that there is a substantial injury that
22 the reorganized debtors would suffer if a stay were granted
23 pending appeal through December 30, 2014, even if a district
24 court concluded that I was mistaken with regard to the
25 equitable mootness issue or the substantial possibility of

1 success on appeal issue. I believe it would be appropriate,
2 therefore, to require a 300 million dollar bond for any stay
3 pending appeal plus the 86 million of other damages that I
4 found, namely a 386 million dollar bond.
5 The trustees for the first and 1.5 lien holders have
6 sought a stay pending appeal without an outside date, although
7 they have represented that they will make every effort to have
8 their appeals expedited. I believe that the same costs would
9 apply for a simple stay, as they've asked, except that given
10 the extra duration of the stay that they are seeking, if I were
11 to impose a stay of that length, there would be, of course,
12 even more costs. But I would be inclined not to do so.
13 That leaves the alternative relief that the first and
14 1.5 lien holders have sought under Rule 8005. I have to say,
15 based on my view of equitable mootness, that even that relief
16 is not particularly warranted here, based on the record that I
17 have before me. I think it would flip the standard, in
18 essence, to force the debtors to, in essence, render the
19 appellants riskless based on the consequences of an appeal
20 which isn't appropriate.
21 Moreover, the alternative really was raised,
22 literally, as far as I'm concerned, at oral argument and has
23 not had the benefit of any thorough analysis by the debtors or
24 their allies in this case and no discovery as to any costs that
25 it would entail. It seems to me that the hard costs that I

1 have quantified of increased interest burden would be lessened,
2 but not necessarily that the other costs would, including the
3 thirty million dollar fee that would be accruing in October and
4 the potential adverse effect to the company, which I've
5 quantified at thirty million dollars, of not emerging from
6 bankruptcy.
7 On the other hand, it's possible it would be a lesser
8 amount for those matters, as well. On the other hand, there
9 may be other costs that I'm not aware of, including tax issues.
10 But on today's record, I don't believe that the burden
11 has been sustained to show that there would not be harm to the
12 estate of a meaningful nature by this alternative, if I adopted
13 either of these two alternatives proposed by the first and 1.5
14 lien trustees.
15 So I will deny the motions and ask for an order from
16 the debtors on each of the three of them.
17 I've already given you a preview of my ruling on the
18 debtors' motion under Rule 3020. I don't believe, given the
19 substantial appeals that are going forward here, that is,
20 appeals by very substantial constituents in the case, that
21 there is sufficient cause, even given the fourteen-day costs --
22 or actually, twelve-day costs of 2.8 million dollars, roughly,
23 to shorten the fourteen-day period under the case law.
24 As I said, also, I believe that a district court
25 should have a right to look at these factors with fresh eyes,

1 particularly the equitable mootness and substantial
2 possibility, though less than a likelihood of success factor.
3 I think the cases that have shortened the fourteen-day period
4 really have done so in a very different context where there was
5 substantial consensus around the plan and/or a much greater
6 cost to the debtors. I'm more inclined to take the approach
7 that Judge Gerber took in his Adelphia case, 368 B.R. 140 at
8 282 (Bankr. S.D.N.Y. 2007). So I'll ask for one of the
9 appellants to submit an order on that point.
10 You can also either put in one of the orders that I've
11 already asked to be submitted or a separate order the granting
12 of the motion to expedite the record and the transmittal of the
13 record
14 MR. KIRPALANI: Thank you, Your Honor. I have a
15 suggestion on the fourteen-day issue. It might be simplest
16 just to have provide -- it's not waived in the confirmation
17 order itself. I don't know that you need --
18 THE COURT: Okay, that's fine.
19 MR. KIRPALANI: -- it separate right --
20 THE COURT: That's fair.
21 MR. KIRPALANI: And on our order, to expedite the
22 appeal, we have prepared it with no other funny business in
23 there about --
24 THE COURT: Okay.
25 MR. KIRPALANI: -- any other motions. If I could hand

1 it up?
2 THE COURT: So e-mail that to chambers.
3 MR. KIRPALANI: Thank you, Your Honor.
4 THE COURT: Okay, just copy the others --
5 MR. KIRPALANI: Yeah.
6 THE COURT: -- the other parties on it.
7 MR. ANKER: We have seen it, Your Honor.
8 THE COURT: Well, I think it was attached but -- or at
9 least a paragraph was attached, but you can copy in the other
10 parties.
11 Now, speaking of orders, I'm sure this is what
12 everyone wants to do at 6:30, but --
13 MR. ANKER: Your Honor, do you mind if I raise one
14 housekeeping issue, first?
15 THE COURT: Sure.
16 MR. ANKER: I apologize. As I mentioned -- Philip
17 Anker for the first lien -- we will be filing our filing rights
18 to answer the motion for direct certification. We will confer
19 with the debtors as to expediting the appeal as thus and the
20 statement of issues. I think we can get all of that on file
21 tomorrow. Is it -- given the stay period's unique and unusual
22 requirements on parties to expedite, I would hope we can have a
23 hearing, consistent with Your Honor's schedule, and I recognize
24 it's tight, on the motion to certify if it's not agreed upon
25 prior to the 19th. And I wanted to --

1 THE COURT: I don't know; you'll have to check with
2 Ms. Li. This whole month is really tough.
3 MR. ANKER: Okay, we will check with Ms. Li.
4 THE COURT: But you check with her. I may just have
5 to decide on the papers.
6 MR. ANKER: Thank you, Your Honor.
7 THE COURT: And you all write good papers, so that's
8 fine. Or maybe you'll agree on it. I don't know. That's
9 possible, too.
10 MR. ANKER: We will certainly confer with the debtors
11 on that, Your Honor. Thank you.
12 THE COURT: Okay. I mean, I do note, though, and I've
13 so held, as you've probably already checked, that the Second
14 Circuit likes the intermediate review, generally, and
15 particularly when they're -- well, I'll leave it at that. So I
16 think that's -- you would have to deal with these facts,
17 fitting it into that case law.
18 MR. ANKER: Understood, Your Honor.
19 THE COURT: Okay.
20 MR. ANKER: I will only note that the statute requires
21 both that you certify and the Second Circuit to agree.
22 THE COURT: Right.
23 MR. ANKER: So it could simply decline if it wanted
24 the intermediate court.
25 THE COURT: I guess that's fair, although I think they

1 prefer us not sending a lot of stuff to them.
2 Okay, on that -- do you all have the blackline that
3 Mr. Sage sent?
4 MR. ANKER: Your Honor, at least copies because we
5 brought everything. Yes, Your Honor.
6 THE COURT: Okay, can we deal first with the
7 subordinateds points?
8 MR. KIRPALANI: Sure.
9 THE COURT: I think this is -- can we start from the
10 last one first, paragraph 44?
11 MR. KIRPALANI: Sure.
12 THE COURT: I'm inclined to -- I mean, wait for the
13 debtors to catch up with us.
14 UNIDENTIFIED SPEAKER: Which one are we starting with?
15 THE COURT: The letter that the subdebt holders sent.
16 And they had problems with two paragraphs in the order.
17 MR. KIRPALANI: Right.
18 THE COURT: And frankly, I have a problem with the
19 second one, paragraph 44. I don't think I can legislate this,
20 and I would take it out. I usually take this type of thing
21 out. I don't know -- what is the -- I don't know if there's
22 any authority for it.
23 MR. DUNNE: Your Honor, it was requested by our ABL
24 lenders.
25 THE COURT: Okay, I just don't -- I don't think I can

1 do this. I don't think I have the power to do it.
2 MR. DUNNE: I understand. I understand that's --
3 THE COURT: I mean, that's --
4 Okay, so that'll come --
5 MR. DUNNE: We'll deal with our ABLs on that one.
6 THE COURT: Okay, well, I just don't -- I normally
7 strike this out in a confirmation order because I don't think I
8 do have the power to say -- it's not like 363(m) or the
9 equivalent for 364. So I'll -- obviously, striking out doesn't
10 mean that the debtors have waived anything, as far as mootness
11 is concerned, but this is really legislating mootness in the
12 order. So that would come out.
13 And then on the language in paragraph 57, I'm not sure
14 what the -- what is the rationale by saying that the trustee's
15 fees would be limited to those incurred before the effective
16 date? Is it because --
17 MR. FELDMAN: The indentures --
18 THE COURT: -- the indentures go away?
19 MR. FELDMAN: The indentures go away, and frankly, we
20 don't think we need to pay for the appeal unless they're
21 successful, in which case they'll collect the appeal through
22 their agreements, through the trustee.
23 THE COURT: Okay. I mean --
24 MR. KIRPALANI: That's --
25 THE COURT: -- I think that's right.

1 MR. KIRPALANI: I don't think so, Your Honor. I think
2 a claim's a claim. It's a right to payment; it's contingent --
3 it's unliquidated.
4 THE COURT: But --
5 MR. KIRPALANI: If they want to estimate what the cost
6 they feel it would be --
7 THE COURT: But if you don't have an indenture
8 anymore --
9 MR. KIRPALANI: That's a temporal problem.
10 THE COURT: Well, you would -- no, it is temporal, but
11 you get it back -- if you win, you get it back.
12 MR. KIRPALANI: Right, but that shouldn't be -- that's
13 not the way Section 502 should work. On the petition date, I
14 had a claim. On the petition date, I had a claim for future
15 fees and expenses. If you ever want to say you want to --
16 THE COURT: Well, can we just -- look, I don't think
17 this issue should be decided this way. I think, basically, it
18 should say that the allowed claim would be allowed, and then
19 we'll decide what's the allowed claim. I mean, you may be
20 right, Mr. Feldman, but I think this --
21 MR. FELDMAN: I think 1123 says I can terminate my
22 indenture.
23 THE COURT: You can. You can. And I think that is
24 enough that you can terminate it.
25 MR. FELDMAN: Okay.

1 THE COURT: But the allowed claim would be the allowed
2 claim, and Mr. Kirpalani can say notwithstanding the
3 termination of the indentures, it's an allowed claim.
4 MR. FELDMAN: Your Honor, I'm fine with this
5 resolution, provided that we're not prejudicing ourselves, and
6 I think --
7 THE COURT: No, you're not.
8 MR. FELDMAN: -- it probably should say that it's
9 terminating all those relevant documents to the extent allowed
10 under applicable law.
11 THE COURT: Yes.
12 MR. FELDMAN: And then we'll debate whether --
13 THE COURT: Fine.
14 MR. FELDMAN: Fine.
15 THE COURT: That -- I'm using shorthand. Would
16 subsume an allowed claim is consistent with that.
17 MR. FELDMAN: I just wanted to accomplish an order
18 that actually effectuated it to the extent allowed under the
19 law, and then we'll debate over what that is.
20 THE COURT: That's fine.
21 MR. KIRPALANI: That's certainly fine with us, Your
22 Honor.
23 THE COURT: You're probably going to have to e-mail
24 that to Mr. Kirpalani --
25 MR. FELDMAN: Yeah.

1 THE COURT: -- to show him, but I think those are your
2 two points, right?
3 MR. KIRPALANI: The one -- super tiny one, in (ii) at
4 paragraph 57, cancellation of the senior subordinated indenture
5 is not intended to impair our appellate rights, if any. We ask
6 that -- that's not typical judge words. I thought maybe Your
7 Honor should say the cancellation of the senior subordinated
8 indenture shall not impair our appellate rights, as opposed to
9 what you intended to do. It's not a statement of intent. I
10 think we're asking Your Honor to say that the fact that the
11 indenture is cancelled doesn't mean that we don't really have
12 appellate rights.
13 THE COURT: Well, why don't we say without prejudice
14 to your appellate right.
15 MR. KIRPALANI: That would be --
16 THE COURT: Just say without prejudice to the
17 appellate rights.
18 MR. FELDMAN: It was not intended.
19 THE COURT: All right. All right, I think the next
20 one will take a little longer, unless you guys have narrowed
21 down some of the issues. You haven't yet? Okay.
22 MR. FELDMAN: We have not.
23 THE COURT: I think we should just go through it page
24 by page, if that's all right, rather than -- I mean, obviously,
25 the first change is fine with me. I don't have a problem with

1 referencing the lift stay motion.
2 MR. FELDMAN: Which page are you looking at, Your
3 Honor?
4 THE COURT: On page 5. Do you all have this?
5 UNIDENTIFIED SPEAKER: I haven't got a blackline.
6 THE COURT: Can you -- yeah, if you could give a copy
7 to them.
8 MR. FELDMAN: I have a letter and I have --
9 UNIDENTIFIED SPEAKER: Where is it?
10 MR. FELDMAN: Page 5.
11 THE COURT: Page 5 of the blackline. You just want to
12 add in the documents, would it include the lift stay motion,
13 which I think was part of the confirmation hearing.
14 MR. FELDMAN: Yeah, okay.
15 THE COURT: So that's fine. It should be in there.
16 Also, obviously, any references to the bench ruling in here
17 should be to the corrected and modified one that was filed
18 today. So that should be defined on page 1 as that.
19 MR. FELDMAN: I'm sorry, Judge. On page 1?
20 THE COURT: Well, page 1 refers to the bench
21 decisions.
22 MR. FELDMAN: Oh, I see.
23 THE COURT: And it's -- you can now reference the
24 corrected and modif --
25 MR. FELDMAN: Yeah, we can reference all the

1 extensions you put --
2 THE COURT: Yeah, right, what was filed today.
3 MR. FELDMAN: Page 15, Your Honor.
4 THE COURT: The next one? Okay. Well, I guess we'll
5 take out 4, footnote 4, yeah.
6 Okay, page 15. Yeah, I think it's fine, here, to -- I
7 don't think you need separate findings here. I think you could
8 just -- maybe up front you should say that the bench decision
9 constitutes the Court's findings of fact and conclusions of law
10 as amplified by those set forth herein.
11 MR. FELDMAN: So we'll reference it up front, the
12 definition.
13 THE COURT: Yeah, and say that upfront, that that
14 constitutes the findings of fact and conclusions of law.
15 And then on the findings of fair and equitable and
16 other findings that you have in here, but let's just go
17 through. But for this first one, I think the change is fine.
18 I appreciate why you did this, which is why I made
19 substantial corrections to the bench ruling. But I think it's
20 now clear enough so that you don't need to put in these types
21 of findings.
22 MR. FELDMAN: Okay.
23 THE COURT: I think the same for (d)(d).
24 MR. REISNER: Your Honor skipped over (b).
25 THE COURT: Did I?

1 MR. FELDMAN: Page 18.
2 MR. REISNER: Did you mean to do that, or did you want
3 to --
4 THE COURT: There's nothing on -- oh, I didn't see --
5 oh, yes.
6 MR. FELDMAN: Two little changes, Your Honor.
7 THE COURT: No, I think -- I think -- on this one, I
8 think they had it right. The point was that it was amended so
9 it would be with me. I mean, subject to appeal.
10 MR. REISNER: Let me make two comments, Your Honor, is
11 that Your Honor, in the transcript, referenced Judge Gerber's
12 decision. In one decision, he retained -- he actually kicks
13 (ph.) it. In the other decision, he says I have exclusive
14 jurisdiction as a gatekeeper for a short period of time, and
15 then he acknowledges that there's a Stern issue when it comes
16 to and determined. That's what the issue is with --
17 THE COURT: Well, but I think -- but the issue here is
18 that -- and this has already been accomplished by the orders
19 that I entered today saying that the remand motion's been
20 resolved. So I think it's herein determined. We're talking
21 about the intercreditor litigation.
22 MR. REISNER: Yes, but it's --
23 THE COURT: So I think the deal was that I would
24 herein determine it. I appreciate why you struck it because he
25 did, in GM, do what he did, but I was really focusing on

1 keeping jurisdiction over the case.
2 MR. REISNER: Well, let's talk about two things, if
3 you don't mind, Your Honor.
4 THE COURT: Okay.
5 MR. REISNER: So on the word "exclusive", there's 1334
6 which should have been exclusive, and again, the gatekeeping
7 function and whether you're really exclusive, it's not
8 exclusive from district court; if you found that -- you found
9 that, but exclusive in the sense that Judge Gerber meant it and
10 where I think Your Honor meant it is different.
11 THE COURT: Well, actually, let me -- what really is
12 going on here as part of the resolution of this issue was that
13 I would decide the intercreditor action, and I guess if
14 anything else came up, any other claims, it would have to be
15 funneled through me. I supposed if I didn't have jurisdiction
16 over it, I couldn't decide it and someone else would have to
17 decide it. But there was going to be an injunction that would
18 funnel everything through me.
19 MR. REISNER: Well, and in the first --
20 THE COURT: So maybe it's not an exclusive
21 jurisdiction point, but the point is that I would hear it.
22 MR. REISNER: And Your Honor, of course, your ruling
23 is your ruling and we're here, in part, just to understand the
24 ruling.
25 THE COURT: Right, and this --

1 MR. REISNER: And this is a tough issue because I did
2 read Judge Gerber's decisions. I do get them. I also read
3 what's in the transcript. And what Your Honor was faced
4 with -- and you were very specific; I was actually struck, Your
5 Honor, at how specific you were -- there was an objection that
6 we filed. The objection was to your entry of a final
7 confirmation order on the grounds that the final confirmation
8 order dealt with third-party releases, and we said you don't
9 have the power to grant third-party releases in a final
10 confirmation order. You said in that context, you specifically
11 said, because of that objection, I'm telling you that I do have
12 Stern power to do it because it's in the nature of
13 confirmation.
14 THE COURT: Right.
15 MR. REISNER: We never went into the underlying
16 intercreditor agreements. As to a ruling, at least in my --
17 THE COURT: Well, no. Look, it's already done. You
18 guys dismissed the remand motion.
19 MR. REISNER: We didn't --
20 THE COURT: I couldn't determine it.
21 MR. REISNER: We didn't dismiss, Your Honor.
22 THE COURT: I signed an order that was agreed by the
23 parties.
24 MR. REISNER: Your Honor, let's be fair because it's
25 important. What we agreed to was that you rule against us.

1 The issue is one of --
2 THE COURT: No, that's not the case at all. It was
3 submitted to me as in light of my ruling, you all were
4 submitting an agreed order, at which point the remand motion
5 was dismissed.
6 MR. REISNER: Your Honor, I have to tell you that I
7 saw the order. We may respectfully disagree. I don't think
8 that's what --
9 THE COURT: Well, did you send me the e-mail?
10 MR. REISNER: No.
11 THE COURT: Well --
12 MR. REISNER: I got --
13 THE COURT: -- whoever did should send you the e-mail
14 because the clear import of that e-mail was the parties had
15 agreed that I would decide the intercreditor action.
16 MR. REISNER: We agreed on a form of order, Your
17 Honor, that said that you had denied the motion to remand.
18 THE COURT: I did not. It wasn't in front of me.
19 What was resolved was this issue.
20 MR. REISNER: Okay, we need to --
21 UNIDENTIFIED SPEAKER: Excuse me, Your Honor, for one
22 second.
23 THE COURT: I mean, look, as far as other causes of
24 action are concerned, you're right. I wouldn't have exclusive
25 jur -- I might not even have jurisdiction. It's possible.

1 MR. REISNER: Right.
2 THE COURT: But there should be, for those other
3 causes of actions, I'm the gatekeeper.
4 MR. REISNER: Your Honor, look, it's important we
5 (indiscernible). And we're -- I'm sorry we're getting into
6 this at 7 o'clock --
7 THE COURT: Yeah.
8 THE CLERK: Could you give your appearance for the
9 record?
10 MR. REISNER: Sure, Jeffrey Reisner of Irell & Manella
11 for the first liens.
12 So Your Honor, I think that on the issue of are we
13 going to have this ICA heard by you, I think the answer is yes.
14 Are we agreeing that you have prior authority? The
15 answer is no.
16 Are we agreeing that -- I mean, I think that's clearly
17 the final issue. I think what we drop -- what we said if he
18 rules against (indiscernible) from first liens' perspective,
19 other than maybe the 1.5s maybe don't care, I think we've
20 accepted the notion that we're going to be in front of you on
21 that issue.
22 THE COURT: Okay.
23 MR. REISNER: I don't think we've accepted the notion
24 that (indiscernible) been resolved (indiscernible). We've been
25 through this process and feel strongly about that. That's an

1 issue that's herein determined. Here find determined -- no.
2 THE COURT: Well, it's my order; I'm going to put it
3 in. You can appeal it if you want to. You can take out the
4 "exclusive", but that's the deal.
5 MR. REISNER: What is the deal, Your Honor?
6 THE COURT: That I have jurisdiction over and shall
7 herein determine these other things.
8 MR. REISNER: Okay, so -- all right.
9 THE COURT: I mean, you can dispute it, I suppose, but
10 that's certainly what I believe.
11 MR. REISNER: Okay, so Your Honor, the actual order
12 that was entered, unless you changed it, is it was ordered that
13 the motion --
14 THE COURT: No, I haven't entered it yet; that's why
15 we're going through this.
16 MR. REISNER: I'm talking about in the remand.
17 THE COURT: Oh, okay.
18 MR. REISNER: The remand motion says it was ordered
19 that the motion for remand was denied for the reasons stated by
20 the Court in the stricken, modified bench ruling.
21 THE COURT: Yeah, and the e-mail said, in light of
22 that, we've agreed on this order.
23 MR. REISNER: Which -- "the order" meaning that the
24 motion for remand is denied for the reasons --
25 THE COURT: Because the parties agreed on it.

1 MR. REISNER: Okay, Your Honor, I think you can -- I'm
2 not going to argue with you; you're the judge. But I am going
3 to say is that (indiscernible) Stern that the order securing
4 (indiscernible) --
5 THE COURT: No, this isn't the consent order; this is
6 the confirmation order.
7 MR. REISNER: And as far as the exclusive jurisdiction
8 provision, we talked about exclusive; that's been resolved. We
9 should take that out. Herein determined, we think -- we think
10 that if "determined" means final resolution for purposes of
11 Stern, that's just the appellate division rights. It's nothing
12 more at this point.
13 THE COURT: That's fine.
14 MR. REISNER: Right? But we're trying to explain our
15 view.
16 THE COURT: Okay.
17 MR. REISNER: Which is what you asked.
18 THE COURT: All right, so you should take out the
19 "exclusive" and just say jurisdiction over it shall herein
20 determine.
21 MR. REISNER: And you want --
22 THE COURT: Just a second. Mr. Dunne, you have
23 something?
24 MR. DUNNE: Yeah, I just wanted clarify that by the
25 deletion -- let me put my name on the record. For the record,