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D. JAFFE
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
-----x
In re:
LYONDELL CHEMICAL COMPANY, et al.,

Debtors.
-----x

DEPOSITION OF DAVID JAFFE
New York, New York
Friday, February 20, 2009

Reported by:
KATHY S. KLEPFER, RMR, RPR, CRR, CLR
JOB NO. 21126

1 D. JAFFE

2 questions, I'm going to be focusing only on the
3 ABL lenders, which I'm sure will please your
4 counsel, does that group of RBL lenders meet
5 from time to time?

6 A. Does that group of ABL lenders meet
7 from time to time?

8 Q. Yes.

9 A. We have not met as a group ever.

10 Q. Ever. Do you participate in any
11 meetings of a larger lender group?

12 A. I participated in numerous meetings up
13 until the, you know, in the negotiations leading
14 up to the filing, and I've attended a lender
15 presentation given by the company at the end of
16 January, but I have not specifically been on any
17 ABL lender calls or group calls or just ABL
18 lenders.

19 Q. Okay. And to clarify, just make sure
20 I'm certain here, the six ABL lenders have not
21 met face-to-face?

22 A. That's correct.

23 Q. Is that right? Did I understand you
24 to say that they haven't participated in the
25 conference calls among the six ABL lenders?

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2 A. That is correct. I will say RZB has
3 not participated in any call with any, to my
4 knowledge, with any of the other lenders. The
5 other lenders are also participants in the term
6 loan, okay? So, to the extent that there have
7 been ongoing term loan negotiations, I'm sure
8 there -- since the ABL lenders, five of the six
9 are also in the term loan, depending upon how
10 you want to characterize it, those people,
11 representatives of those institutions have been
12 on calls with each other. There have not been
13 any specific ABL calls.

14 Q. Okay. So it's fair to say that the
15 ABL -- five of the six ABL lenders are a subset
16 of the larger term loan lenders, correct?

17 A. They participate in both.

18 Q. Yes, all right. And so is it your
19 testimony that the ABL lenders don't meet
20 separate and apart from those that participate
21 in the larger --

22 A. I'm saying to date --

23 Q. To date.

24 A. -- that the ABL lenders have not met
25 separate and apart.

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2 month and a half ago. I've been involved with
3 Solutia as well as others. Those were probably
4 the two most recent.

5 Q. Okay. I'm going to sort of focus now
6 on some of the specific provisions of the ABL
7 Credit Facility, and the first being the
8 maturity date.

9 Now, let me just state for the record
10 here, I know we have limited time here and I
11 didn't say earlier that, to the extent you want
12 to take a break, I hope brief, I'm willing to
13 accommodate that, with two caveats: If there's
14 a question pending, I would ask that you answer
15 that, and also, just given the time that we have
16 here, that we be fairly limited.

17 So are you aware, Mr. Jaffe, that the
18 credit facility contains a December 15, '09
19 maturity date?

20 A. I am aware.

21 Q. Can you tell me the genesis of that
22 provision?

23 A. Of the December 15? Well, I think, as
24 far as I can recollect, we always had a one-year
25 maturity, or for a large part of it, it was,

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2 from fairly early on, it was one year. I cannot
3 remember who pushed for it to get it reduced. I
4 mean, actually it's a little less than a year.
5 It's about three weeks shy of a year.

6 I don't know who towards the end of
7 the process pushed to have that, you know, but
8 somewhere along the line it got shortened to
9 December 15, and certainly there wasn't
10 objection from my part and I don't know why the
11 difference came about, but, you know, so I can
12 tell you why one year, but not certainly 350
13 days or so.

14 Q. I actually want to focus earlier in
15 the process. I want to talk about where the
16 12/15 date came from. Who specifically, for
17 example, proposed December 15, '09 as the
18 maturity date?

19 A. I don't know.

20 Q. You don't know what entity?

21 A. No. I don't recall. I don't
22 remember, no.

23 Q. Do you recall whether Access proposed
24 the 12/15 maturity date?

25 A. I just said I don't remember who.

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2 Q. Okay. What was Citi's reaction when
3 the 12/15 maturity date was proposed?

4 A. Like I said, we were anticipating a
5 one year and were discussing that I think for,
6 you know, it seems like a long time, but it was
7 probably only a matter of days, and somewhere it
8 came back to us that someone was requesting, and
9 I don't remember who, a 12/15 maturity.

10 Q. So, just so I'm clear, are you saying
11 that the 1/15 date was already being discussed
12 before it was formally proposed by the party who
13 you can't remember?

14 A. Can you repeat the question? I'm not
15 sure I --

16 Q. What I'm trying to understand, it
17 sounded to me like you were saying that it was
18 always understood or being discussed a 12/15
19 maturity date before it actually was formally
20 proposed?

21 MR. MOSKOWITZ: Objection. Form and
22 vague.

23 THE WITNESS: I have no idea how long
24 or who was talking about it. All I know is
25 it came to Citi and I think a bunch of the

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2 other lenders that someone was requesting a
3 12/15 maturity. You know, it was three
4 weeks shy of what we were proposing. It
5 didn't seem like a material change and it
6 certainly didn't -- I didn't have any
7 objection to it.

8 BY MR. HARRIS:

9 Q. So this is the source of my confusion.
10 Because I'm sort of focusing on the original
11 proposal of a maturity date, and it sounds like
12 you just said when the 12/15 date was proposed
13 to you, it was three weeks shy of something else
14 that you were already talking about. So I'm
15 trying to get clarity on that.

16 What other maturity dates were you
17 talking about before you were -- before the
18 12/15 date was broached to you?

19 MR.. MOSKOWITZ: Objection. Form and
20 misstates the witness's testimony.

21 You can answer if you understand.

22 MR. HARRIS: I'm inviting the witness
23 to clarify that.

24 THE WITNESS: I'm honestly confused by
25 the question. I said we were talking about

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2 a one-year DIP and the company was going to
3 file roughly the first week in January,
4 okay? At some point right before we filed,
5 someone came back and pushed for a 12/15
6 maturity. I have had no objection to that,
7 as that was roughly two to three weeks less
8 than what we were discussing.

9 BY MR. HARRIS:

10 Q. All right. So where did the one-year
11 maturity date come from?

12 A. I think that's what the lenders had
13 always, you know, at least the bridge lenders
14 were always discussing and proposed.

15 Q. Was Citi a participant in those
16 discussions?

17 A. Yes.

18 Q. Okay. And so what was the genesis of
19 the one-year proposal?

20 A. The genesis was we thought it was a
21 market term. We also had very little long-term
22 visibility into the company. You have to
23 remember this was all negotiated and being done
24 between Christmas and New Years. We were
25 getting -- numbers, you know, were changing

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5th, 6th, 7th, and I think the ultimate date was
3 the 8th, so it wasn't a large material change.

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So, again, I don't remember who
brought it up, but it was sort of at the end and
we hadn't had ongoing discussions about the
maturity in between.

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Q. So had the lenders communicated their
inclination or preference or leaning toward a
one-year maturity date to the Debtors at any
point?

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A. I think at the outset.

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Q. Okay. What was the Debtors' response
to that?

A. The Debtors through, again, you say
the Debtors, was principally dealing with the
company's -- the Debtors' financial company,
Evercore, pushed back on that is my recollection
initially, but I think the lenders all very
quickly said, look, due to what I said before,
lack of visibility, we think this is the norm,
we pushed back on that and said it's going to be
one year.

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And I think there were bigger issues
to handle at the time. The company needed to

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2 raise \$3 billion. So there was some push-back
3 from -- my recollection is from Evercore, but
4 the lenders quickly said we weren't going to do
5 something longer than a year.

6 Q. Okay. So let's focus on the push-back
7 from Evercore. Did they articulate why they
8 were concerned or had reservations about
9 one-year maturity date?

10 A. I think -- I don't remember anything
11 specific, but generally, having been in these
12 situations, you obviously would always like a
13 longer runway. I mean, that's -- I think
14 everyone always want that.

15 Q. But they didn't articulate why they
16 thought longer would be necessary or --

17 A. Other than it being, you know, it's a
18 big company, a big case, and other than that,
19 no. I don't have any specific -- it was very
20 early on that this discussion was had and there
21 was -- I don't -- I think my recollection is
22 they pushed back, but it was, you know,
23 dismissed pretty quickly because there were much
24 bigger issues at hand.

25 Q. So after the lending group dismissed

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2 pretty quickly the idea of a longer maturity
3 date, was this issue, the maturity date, ever
4 revisited in negotiations between --

5 A. Longer than a year? No.

6 Q. So when in the -- I know this is all
7 like a flurry of activity, and I appreciate
8 that.

9 MR. MOSKOWITZ: I'm sorry, are you
10 asking him if it was ever revisited in the
11 negotiations before the petition date, or
12 are you asking him if it was ever revisited
13 at any point in time?

14 MR. HARRIS: At any point.

15 BY MR. HARRIS:

16 Q.. After the lenders, to use Mr. Jaffe's
17 words, dismissed very quickly the idea and 12/15
18 was asserted by the lenders, was the maturity
19 date issue revisited at any point thereafter?

20 A. After the 12/15?

21 Q. After you said to Evercore,
22 presumably, no-go on a longer maturity date,
23 it's going to be 12/15.

24 MR. MOSKOWITZ: Objection. Misstates
25 the witness's testimony.

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2 You can answer if you understand.

3 THE WITNESS: I thought I did already
4 in the prior question. There was -- I don't
5 remember any other further discussions.
6 Whether there were or were not, I do not
7 recall any further discussion on the
8 maturity other than when we finally got to
9 the 12/15 -- I don't remember any discussion
10 on a longer maturity on asking for 15 or 18
11 months. I do not -- or anything else.

12 BY MR. HARRIS:

13 Q. Okay. So what I'm trying to establish
14 is on the timeline when did that happen? When
15 in your mind was this issue closed?

16 MR. MOSKOWITZ: Objection. Form.

17 You can answer if you know.

18 THE WITNESS: I don't. I mean, look,
19 you know, the first meeting was, you know,
20 in mid-December. We, you know, I don't even
21 think we started talking about the DIP in
22 actual form until after Christmas, maybe a
23 little before. I don't remember the exact
24 dates. We were all working basically around
25 the clock for a couple of weeks there

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2 through the holidays.

3 So, again, I'd say the bigger
4 challenge was raising -- figuring out how
5 much money the company actually needed and
6 where we were going to get it from, and that
7 was what everyone was focused on.

8 BY MR. HARRIS:

9 Q. Okay. Did at any point the Lending
10 Group express to the Debtors that a 12/15
11 maturity date was necessary to ensure that they
12 would be repaid?

13 A. I don't recall any such conversation.
14 If another lender did, like I said, I was told
15 at the end that someone was requesting a 12/15
16 maturity, and I said -- I didn't understand
17 exactly why, but, you know, it's a three-week
18 difference and I was okay with it.

19 Q. Okay. Did any of the lenders, to the
20 best of your knowledge, ever express to the
21 Debtors that a one-year maturity date was
22 necessary to ensure that they would be repaid?

23 A. I don't believe so, no.

24 Q. Okay. Do you recall if the Debtors
25 ever broached any discussion regarding a

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2 framework or mechanism to extend the maturity
3 date?

4 A. Can you repeat the question? I'm
5 sorry.

6 Q. Let me rephrase that. It was rather
7 wordy.

8 Did the Debtors ever broach to the
9 lenders a mechanism or framework by which the
10 maturity date could be extended?

11 A. I do not believe so. Again, my
12 recollection is the maturity date was brought
13 on -- you know, there was push-back on the
14 one-year maturity early on, and after that it
15 was not discussed again until the 12/15 came up,
16 or at least, you know, a longer term -- take it
17 back -- a longer term maturity was not discussed
18 in my recollection.

19 Q. Okay.

20 MR. HARRIS: Can we take two minutes,
21 please?

22 THE WITNESS: Sure.

23 (Recess; Time Noted: 11:41 A.M.)

24 (Time Noted: 11:47 A.M.)

25 BY MR. HARRIS:

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2 constantly, and so we had very little
3 confidence or visibility long-term.

4 I also thought that, you know, in
5 today's market, that one year was, you know,
6 sort of the market norm, or in that, you know."

7 BY MR. HARRIS:

8 Q. Okay. So, going back, and I want to
9 talk a little bit about the bridge loan that you
10 referenced, do you recall or know what bridge
11 lenders were discussing the one-year maturity?

12 A. Which bridge lenders?

13 Q. Which bridge lenders, yes.

14 A. I think all. I --

15 Q. No dissension at all, just everyone
16 agreed one year?

17 A. I don't remember any debate or
18 discussion amongst the five bridge lenders on
19 that point, no.

20 Q. And you say "it was a market term.."
21 Can you tell me in -- first of all, what did you
22 mean by that?

23 A. I think that in today's credit
24 environment, you know, DIP tenors and maturities
25 have shortened from where they were four or five

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2 years ago, particularly after the bankruptcy law
3 changed, and we felt that that was a reasonable
4 market term.

5 Q. So have you seen any other one-year
6 maturity dates in a DIP?

7 A. I don't have any off the top of my
8 head.

9 Q. Was there any discussion among the
10 lenders, bridge lenders or otherwise, where the
11 topic of other DIP facilities containing a
12 one-year maturity date was discussed?

13 A. Again, I don't think this was a long
14 debated point amongst the bridge lenders. I
15 think it was all agreed fairly quickly. I don't
16 think we all sat down and came up with a list of
17 comps and said, well, here's ten other -- I
18 think it was just everyone sort of looked at
19 each other or came to a meeting. I don't even
20 remember who proposed it first or what, but it
21 was all sort of the consensus pretty early on
22 amongst the bridge lenders that one year was
23 appropriate.

24 Q. Were there any internal discussions at
25 Citi as to the propriety of the rationale behind

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2 a one-year maturity date?

3 A. I don't remember if we did. I just
4 remember we all -- maybe discussing this with my
5 boss and saying, you know, we're all thinking
6 about one year, do you agree this is
7 appropriate, and him agreeing, but that's about
8 it.

9 Q.. Okay. So did the lenders, bridge or
10 otherwise, ever request of any of their
11 professionals to go out and do comparable
12 analysis or see if there's any other DIP
13 facilities out there with a one-year maturity
14 date?

15 MR. MOSKOWITZ: Objection to form.

16 THE WITNESS: Not that I'm aware of.

17 BY MR. HARRIS:

18 Q. You also state that there was -- I'm
19 going to use your language -- "very little
20 long-term visibility." What did you mean by
21 that?

22 A. What I meant by that was this was a
23 case where the company had come to us where we
24 didn't think they had a liquidity problem. They
25 quickly did. We asked how much money they

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2 needed. You know, we got a number of about 2
3 billion or 2 and a half billion, and two days
4 later that number was, you know, 3-billion-plus
5 requested.

6 It seemed to take a while to get a
7 13-week cash flow forecast to get an
8 understanding of what cash was needed in Europe,
9 and so the business had changed, liquidity had
10 changed. This was running at I think 3 billion
11 of EBITDA through the third quarter and now was
12 a 2 to 2 and a half billion EBITDA company for
13 the full year.

14 So I also seem to recall that at some
15 point FTI had told the bridge lenders that the
16 company's projections were based on the last
17 downturn or cycle and not necessarily even, you
18 know, factoring everything in the current
19 environment. So there wasn't a lot of comfort
20 around what '09 would look like.

21 Q. I don't want to put too fine a point
22 on the one-year maturity date. I want to again
23 follow up on that. I understand your testimony
24 to be that, in your experience, you don't recall
25 seeing another facility with a one-year maturity

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2 date; is that correct?

3 A. No. I said I can't name one off the
4 top of my head.

5 Q. Do you recall ever seeing -- I'm not
6 asking you particular names. Do you ever recall
7 seeing a DIP facility with a one-year maturity
8 date?

9 MR. MOSKOWITZ: Objection. Asked and
10 answered.

11 THE WITNESS: Again, I'm sure I have,
12 but I can't remember one.

13 BY MR. HARRIS:

14 Q. When you say you're sure you have,
15 what's the -- why do you think you're sure you
16 have?

17 MR. MOSKOWITZ: Objection. Form.

18 MR. FRIEDMAN: Plus argumentative.

19 MR. MOSKOWITZ: That, too.

20 MR. FRIEDMAN: Which is out of
21 character for you, Robert.

22 THE WITNESS: Because, you know, it's
23 a tough question to answer because I can't
24 name one, but there are a large number of
25 DIPs out there and I'm fairly certain I, you

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2 I have not.

3 BY MR. HARRIS:

4 Q. Do you recall during the course of
5 discussions among the lenders, the ABL or
6 otherwise, the topic of case milestones being
7 discussed?

8 A. Very early on there was discussion
9 when we were negotiating the term sheet that
10 there would be certain milestones. As I have
11 mentioned, sort of after the facility closed, I
12 have not been involved in the term loan
13 discussions in any meaningful way and so I have
14 not been a party to this. I did know that
15 milestones were going to be negotiated and be
16 part of the term loan document and that we would
17 simply import them into the ABL.

18 Q. Okay. And I'm only interested in what
19 you know on behalf of Citi.

20 Do you know what the genesis of this
21 provision was?

22 A. The genesis, again, as my recollection
23 as part of the term loan negotiations, to the
24 extent that milestones was something that was in
25 the term sheet, was that we wanted to make sure

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2 that the -- you know, I guess the purpose of
3 milestones is to make sure the case is or the
4 company is making progress in
5 restructuring/reorganizing.

6 Q. Do you know who proposed this
7 provision?

8 A. No idea.

9 Q. So it fair to say that this provision
10 was negotiated as part of the term loan
11 provisions -- Term Loan Agreement that was
12 ultimately imported into the ABL?

13 A. That is correct, as well are lots of
14 other provisions.

15 Q. Yes. Understood. You know, we can
16 point that out where if necessary when we talk
17 about particular provisions here.

18 Do you know, Mr. Jaffe, how these
19 dates were established?

20 A. I do not.

21 Q. Were you -- I apologize if I've asked
22 this already -- were you a party to any
23 discussions where these dates or similar dates
24 were proposed and discussed?

25 MR. MOSKOWITZ: Objection. Asked and

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2 Q. Okay. At some point, I presume you
3 became aware, Citi became aware, that the ABL
4 Facility will contain certain milestones?

5 A. I knew that from the term sheet, as I
6 said, it was discussed that the term sheet had
7 milestones or that -- and they would be
8 negotiated as part of the Term Loan Agreement
9 and we would import them into the ABL.

10 Q. Was there any discussion when you
11 became aware of that among Citi, among the folks
12 at Citi, as to the propriety of these
13 milestones?

14 A. Not as far as the ABL goes.

15 MR. MOSKOWITZ: I will interpose an
16 objection to form.

17 You can answer.

18 THE WITNESS: My colleague, who is
19 responsible for, you know, who is involved
20 as part of the steering committee in the
21 term loan negotiations, whether he had any
22 discussion with it, he might have with other
23 individuals within Citi, but as far as I'm
24 concerned, as a representative and the
25 admin. agent on the ABL Facility, I did not

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have any discussion on these milestones.

BY MR. HARRIS:

Q. And that includes discussions with --
is it Mr. Becker who was representing --

A. That's correct. I do not recall
having any discussions with him on these
milestones.

Q. Okay. Are you aware of any push-back
from the Debtors with regard to these
milestones?

A. Not -- other than, generally, you
know, people always want more time, right? I
did not know specifically what the dates were or
exactly what the milestones were, but obviously,
you know, there are ongoing negotiations.

Q. I'm asking you whether you personally
became aware or acquired through your own
interactions any objections raised by the
Debtors with respect to these milestones?

MR. MOSKOWITZ: Objection. Form.
Foundation.

THE WITNESS: I'm not aware.

BY MR. HARRIS:

Q. Okay.

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(Pause in the proceedings. Time
Noted: 12:06 P.M.)

(Time Noted: 12:09 P.M.)

BY MR. HARRIS:

Q. Back on the record, Mr. Jaffe. Thank
you very much. Before we move on to another
topic, I sort of want to close the loop --

A. Sure.

Q. -- on a couple of loose ends in my
mind.

First, we talked about the bridge
lenders in the context of the one-year maturity,
do you recall that?

A. Yes.

Q. Can you tell me -- and again, I
apologize if I've asked this already, and
there's a lot of lenders here so I just want to
nail this down -- who were the bridge lenders
who were involved in this discussion of the
one-year maturity?

A. UBS, RBS, Merrill Lynch, Goldman Sachs
and Citi.

Q. Was Access involved in these
discussions in the capacity as a bridge lender?

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MR. MOSKOWITZ: Objection to form.

MR. FRIEDMAN: Objection to form.

THE WITNESS: I didn't think Access was a bridge lender.

BY MR. HARRIS:

Q. All right. And with respect to the milestones, is it fair to say, Mr. Jaffe, that you never discussed, you being Citi, never discussed with the Debtors the steps it would take to confirm a plan?

MR. MOSKOWITZ: Objection to form.

THE WITNESS: When you say you, Citi, me, no, and as ABL agent, no. I cannot testify as to what anyone else in Citi did in their capacity in negotiating the term loan.

BY MR. HARRIS:

Q. But in your capacity as I guess the representative for the ABL Facility, you never had any discussions with the Debtors with regard to the steps to take to confirm a plan?

A. No, I have not.

Q. Mr. Jaffe, you're aware that the ABL Facility contains a number of financial

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2 covenants, are you not?

3 A. Yes.

4 Q. Now, were you involved in the
5 negotiation of those covenants?

6 A. I was involved in the negotiation of
7 what I would say is one financial covenant under
8 the ABL, which is an ABL-specific covenant, that
9 there's a minimum collateral availability at all
10 times.

11 Q. Okay. So what's that covenant about?

12 A. The company must maintain at least 100
13 million of availability, meaning that whatever
14 the borrowing base is, which is percentages
15 applied against eligible receivables in
16 inventory, it comes out -- it's a formulaic
17 calculation, the company can only borrow a
18 hundred million less than whatever that amount
19 is. So if the borrowing base is a billion-five,
20 the company can borrow a billion-four.

21 Q. And you call that the minimum
22 collateral availability?

23 A. Yes.

24 Q. Separate and apart from the minimal
25 collateral availability covenant, were you, in

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your capacity as the representative for the ABL Facility, involved in the negotiation of any other financial covenants?

A. No, I was not.

Q. So, for example, with respect to the -- well, first of all, are you aware that the ABL Facility contains a minimum EBITDA test?

A. Yes.

Q. Okay. And were you involved in the negotiation of that covenant?

A. No, I was not.

Q. Do you know where that covenant emanates?

MR. MOSKOWITZ: Objection to form.

THE WITNESS: My assumption, I know that in the term sheet when we negotiated the term sheet there were financial covenants to be negotiated and agreed upon, and that was negotiated by the term loan. I guess by the steering committee is my assumption. I know it's being imported into the ABL document.

BY MR. HARRIS:

Q. So you anticipated my next question.

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2 So it's fair to say that, in the
3 context of the ABL Facility, the minimum EBITDA
4 test was not specifically negotiated with the
5 Debtors?

6 A. From the ABL perspective, that's
7 correct. We are just importing from the Term
8 Loan Agreement.

9 Q. Do you know the status of negotiations
10 on that covenant?

11 MR. MOSKOWITZ: Objection. Vague.

12 THE WITNESS: I do not. I do know,
13 because I get e-mails and I saw some even
14 this morning, that documents have been
15 circulated. So it seems like we're getting
16 close to being final, but I do not know
17 specifically on that item.

18 BY MR. HARRIS:

19 Q. Do you know whether there's been any
20 sensitivity analysis done as to whether the
21 Debtors will be able to comply with that
22 covenant?

23 MR. MOSKOWITZ: Objection to form.
24 Vague.

25 THE WITNESS: I don't know if they

1 D. JAFFE

2 have or they haven't. It wouldn't surprise
3 me, but I'm not aware..

4 BY MR. HARRIS:

5 Q. You're not aware. Has Citi done any
6 analysis in that regard?

7 A. Again, Citi may have. Citi as ABL or
8 in my capacity, I have not.

9 Q. So in the context of the ABL, you have
10 not?

11 A. Yeah. I don't even know what the
12 covenant is.

13 Q. Okay.

14 A. Dollar amount.

15 Q. Okay.

16 A. So I couldn't tell you.

17 Q. Fair enough.

18 If I could call your attention to page
19 152 of Jaffe 1.

20 A. Yes.

21 Q. You see in subsection B there's a
22 Minimum Liquidity provision?

23 A. Right.

24 Q. If you could take a moment to review
25 that.

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D. JAFFE

(Document review.)

Q. So is this the same drill here, import it from the term loan into this document?

A. That's correct.

Q. So it's fair to say that, in the context of the ABL Facility, you did not specifically negotiate this at all with the Debtors?

A. That is correct.

Q. And you don't know whether, in the context of the ABL Facility, whether there's been any sensitivity analysis done as to whether the Debtors are able to comply with this provision?

MR.. MOSKOWITZ: Objection. Form.

THE WITNESS: That is correct.

BY MR. HARRIS:

Q. So, Mr. Jaffe, you may have already stated this, so is it your testimony that separate and apart from the minimum collateral availability -- make sure I got that right?

A. Uh-huh.

Q. -- that any other financial covenant contained in the ABL Facility was merely

1 D. JAFFE

2 imported from the term loan?

3 A. Yes, along with a number of other
4 provisions.

5 Q. Yes.

6 A. That's correct.

7 Q. And Citi had no specific negotiations
8 with the Debtor with regard to any of those
9 financial covenants?

10 MR.. MOSKOWITZ: Objection.

11 MR. FRIEDMAN: Objection form.

12 MR. MOSKOWITZ: Objection. Form.

13 THE WITNESS: Citi as ABL agent did
14 not.

15 BY MR. HARRIS:

16 Q. As ABL, yes.

17 Are you aware that the ABL Facility
18 also contains a Change in Control provision?

19 A. Yes.

20 Q. Would that provision similarly fall in
21 the category of those provisions that were
22 imported from the term loan into the ABL
23 Facility?

24 A. You know, I'm sure they're matched up
25 and I don't know if that one specifically was

1 D. JAFFE

2 imported. Generally, we -- it probably was, but
3 I'm not a hundred percent sure. It's a pretty
4 standard provision.

5 Q. Do you recall participating in any
6 negotiations with regard to that provision?

7 A. I did not participate in any
8 negotiations with regards to that provision.

9 Q. Do you recall participating in any
10 discussion among the ABL lenders with regard to
11 that provision?

12 A. I did not have any discussion with the
13 ABL lenders on that provision.

14 Q. Were you privy to or party to any
15 discussions with the larger lender group with
16 respect to that provision?

17 A. No.

18 Q. Are you aware that the ABL Facility
19 also contains a provision for a review of
20 management to be conducted within a certain
21 period of time?

22 A. There was -- again, I believe the
23 details of that again were imported from the
24 term loan and the term sheet, and when we were
25 negotiating the term sheet and the DIP facility,

1 D. JAFFE

2 there was discussion about management and
3 everyone had their concerns about management and
4 how exactly that was going to occur, and review
5 of management was to be determined and
6 negotiated as part of the term loan document and
7 those -- I have not been a party to those
8 discussions.

9 Q. Were you a party to the original
10 discussion when the idea was first broached?

11 A. Again, yes, to the extent that there
12 were -- it was discussed during the term sheet
13 negotiations, yes, I was.

14 Q. Who broached that provision, that
15 concept, as best you can recall?

16 A. I don't know. Again, these were long
17 days, long nights, and I think it was a very
18 overwhelming consensus that people had concerns
19 about management.

20 Q. What were the nature of those
21 concerns?

22 A. I think everyone was a little
23 surprised about the situation that we were put
24 in, and you had a parent who did not fund under
25 a 750 million commitment and you had members of

1 D. JAFFE

2 were -- I don't think they -- they just said
3 we don't think we have to fund and you don't
4 want the company to request a funding from
5 us, you won't like the answer.

6 BY MR. HARRIS:

7 Q. What was Citi's reaction to that?

8 A.. I think Citi along, you know, with the
9 other lenders were not happy with that. That
10 was 750 million of lost liquidity.

11 Q. So, with respect to the management of
12 the company, were there any individuals or
13 positions in particular that you were concerned
14 about?

15 A. When you say "you," me personally
16 or --

17 Q. You in your capacity as the
18 representative of Citi for the ABL Facility.

19 A. Look, again, as I stated a little
20 earlier, I think we had some concern about, you
21 know, people who were put in place by Access.

22 Q. All right. I'm in the business of
23 naming names. Are we talking about Mr. Bigman,
24 the CFO?

25 A. Yes.

1 D. JAFFE

2 Q. Do you care to tell me the nature of
3 your concerns with Mr. Bigman as CFO?

4 A. Again, I think the concerns were that
5 he was brought in to be CFO and appointed by
6 Access.

7 Q. What were the nature of those
8 concerns?

9 A. Again, that he might have, you know,
10 conflicting interests.

11 Q. Was this something discussed among
12 other -- among the Lender Group, first on the
13 ABL side and then on the larger group?

14 A. I think there was no specifics other
15 than felt like we were put in a very awkward
16 position, partly due to actions by the
17 pre-petition equity owner, and there were people
18 who were pretty unhappy about that.

19 Q. And did you express those -- your
20 consternation about these things to the Debtor?

21 MR. MOSKOWITZ: Objection to form.

22 THE WITNESS: I think that when you
23 say the Debtor, again, I'm certainly aware
24 that Evercore was aware of it.

25 BY MR. HARRIS:

1 D. JAFFE

2 Q. Yes. And for the record, Evercore is
3 acting as a representative of the Debtor,
4 correct?

5 A. Right.

6 Q. Yes, sir.

7 A. I didn't go up to Mr. Bigman and say
8 we want --

9 Q. I suspect you had conflicting
10 interests.

11 A. But certainly, again, it was in the
12 term sheet so everyone was fully aware of the
13 concerns.

14 Q. Is that still a concern, that being
15 Mr. Bigman and having potential conflict of
16 interest?

17 A. I think it --

18 MR. MOSKOWITZ: Objection.

19 THE WITNESS: Again, I have -- yeah, I
20 think it's a concern and I'm, you know,
21 we're going to live with the process of
22 whatever has been negotiated in terms of
23 management review.

24 (Recess; Time Noted: 12:25 P.M.)

25 (Time Noted: 12:30 P.M.)

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D. JAFFE

Are you there?

A. Sure.

Q. The section entitled Sponsor Letter Agreement. If you'll take a moment to review that section, please.

(Document review.)

Q. Have you had a chance to review it?

A. I've read it.

Q. Are you familiar with this provision, Mr. Jaffe?

A. No, I'm not.

Q. Have you ever seen it before?

A. No, I think this is the first time I'm reading it.

Q. Were you a party to any discussions or negotiations where this provision, in form or substance, was discussed?

A. No.

Q. So this is the first time you've ever seen sort of this concept laid out?

A. I'm aware --

MR. MOSKOWITZ: Objection. Objection to form. Asked and answered.

THE WITNESS: I'm aware that there

1 D. JAFFE

2 were discussions regarding the sponsors, the
3 sponsors defined here, about, generally,
4 about voting rights.

5 BY MR. HARRIS:

6 Q. What did you learn from those
7 discussions?

8 A. Nothing, other than exactly what I
9 just said. I knew that there were ongoing
10 discussions about whether they would have voting
11 rights or not.

12 Q. Who broached this topic?

13 A. I don't know.

14 When you said "broached," broached to
15 the company and to the Debtors?

16 Q. To you.

17 A. I knew this was a discussion just in a
18 passing conversation I had with Mr. Becker.

19 Q. Would Mr. Becker know more about this
20 particular provision?

21 A. Sure.

22 Q. Does this fall in the category of one
23 of those provisions that were negotiated in the
24 context of the term and then imported here?

25 A. That's correct.