

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Constellation Enterprises LLC, *et al.*,¹

Debtors.

)
) Chapter 11
)
) Case No. 16-11213 (CSS)
)
) (Jointly Administered)
)
) Related Documents: 560, 732
)

**THE DDTL PARTIES' SUPPLEMENTAL OBJECTION TO (I) THE JOINT MOTION
OF DEBTORS AND COMMITTEE FOR AN ORDER APPROVING SETTLEMENT BY
AND AMONG THE DEBTORS, THE COMMITTEE, THE PURCHASER AND THE AD
HOC NOTEHOLDER GROUP, AND (II) THE MOTION OF THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER (A)
APPROVING LIQUIDATING TRUST AGREEMENT, (B) APPROVING BINDING
CLAIMS MEDIATION AGREEMENTS AND (C) GRANTING RELATED RELIEF**

The Prepetition DDTL Lenders and the Prepetition DDTL Agent (collectively, the “DDTL Parties”), by and through their undersigned counsel, hereby file this supplemental objection (the “Supplemental Objection”)² to the (i) the Joint Motion of Debtors’ and Committee for an Order Approving Settlement by and Among the Debtors, the Committee, the Purchaser and the Ad Hoc Noteholder Group [D.I. 560] (the “Joint Settlement Motion”), and (ii) the Motion of the Official Committee of Unsecured Creditors for Entry of an Order (A) Approving

¹ The Debtors in these cases, along with the last four digits of the federal tax identification number for each of the debtors, where applicable are: Constellation Enterprises LLC (9571); JFC Holding Corporation (0312); The Jorgensen Forge Corporation (1717); Columbus Holdings Inc. (8155); Columbus Steel Castings Company (8153); Zero Corporation (0538); Zero Manufacturing, Inc. (8362); Metal Technology Solutions, Inc. (7203); Eclipse Manufacturing Co. (1493); and Steel Forming, Inc. (4995). The Debtors’ mailing address is located at 50 Tice Boulevard, Suite 340, Woodcliff Lakes, NJ 07677.

² Capitalized terms used herein but not otherwise defined shall have the meaning ascribed to such terms in (A) Objection of the DDTL Parties to the Joint Settlement Motion [D.I. 600] (the “DDTL Objection to Purported Settlement”); (B) DDTL Parties’ (I) Objection To the Dismissal Motion and (II) Supplemental Objection To The Joint Settlement Motion [D.I. 701] (the “DDTL Parties’ Dismissal Motion Objection”, and together with the “DDTL Objection to Purported Settlement”, the “Original Objections”); or (C) the Distribution Term Sheet (as defined below), as applicable.

Liquidating Trust Agreement, (B) Approving Binding Claims Mediation Agreements and (C) Granting Related Relief [D.I. 732] (the “Mechanics Motion”) and respectfully state as follows:

PRELIMINARY STATEMENT

The Joint Settlement Motion cannot be approved. Through the Distribution Term Sheet, the Debtors and the Committee are seeking a transparent end-around the Supreme Court’s recent decision in *Jevic* which prohibits structured dismissals that violate the Bankruptcy Code’s basic priority scheme. Specifically, the Debtors and the Committee laundered estate assets through the Purchaser and now seek authority to distribute those assets in violation of the Bankruptcy Code’s basic priority scheme. And in doing so, the Debtors and the Committee have offered no Bankruptcy Code-related objective that such a scheme satisfies. Of course, given the state of these Chapter 11 Cases, with substantially all of the assets sold and the Debtors teetering on the brink of administrative insolvency, no Bankruptcy Code-related objective can now be achieved by the priority violating Distribution Scheme.

Moreover, even if the Distribution Scheme could satisfy *Jevic*, the Distribution Scheme cannot be approved under Bankruptcy Rule 9019. If, as the Debtors and the Committee allege, the Distribution Scheme complies with *Jevic* because only non-estate assets are involved, then this Court lacks the jurisdiction necessary to preside over crucial components of the Distribution Scheme. Furthermore, the Debtors and the Committee have failed to show any claims or causes of action that are subject to settlement, a necessary predicate for approval of a settlement under Bankruptcy Rule 9019. Finally, the Debtors failed to exercise sound business judgment when approving the settlement as the Debtors were not sufficiently informed of the material terms nor did they engage in any negotiations of the terms for the benefit of the estate.

Given the state of these Chapter 11 Cases, it is time for the Debtors to either dismiss these Chapter 11 Cases and return parties to the prepetition status quo or convert to cases under chapter 7.

BACKGROUND

1. During the August 16 hearing (the “August 16 Hearing”) at which this Court approved the CSC Sale and the Non-CSC Sale pursuant to which the Debtors sold substantially all of their assets, the Debtors, the Committee and the Noteholders announced a “settlement” to the Bankruptcy Court and parties in interest. *See* August 16, 2016 Hearing Transcript.

2. Thereafter, commencing in September 2016, the Debtors and the Committee filed a series of interrelated motions designed to bring these Chapter 11 Cases to a conclusion.

3. First, on September 8, 2016, the Debtors and the Committee filed the Joint Settlement Motion, seeking approval of a term sheet (the “Distribution Term Sheet”) setting forth the terms and conditions of the agreement among the Parties as follows: (a) the Committee would withdraw any objections to the DIP Motion³ and support the Non-CSC Sale (the “Purported Settlement”); (b) the Noteholders would “contribute” assets to a GUC Trust and the GUC Trust would distribute those assets in violation of the absolute priority rule and in a manner that did not treat similarly situated creditors the same (the “Distribution Scheme”); (c) full mutual releases between the Parties; and (d) the Chapter 11 Cases would be dismissed by structured dismissal or resolved as agreed to by the Parties (the “Resolution Agreement”).

³ Motion For Entry of Interim and Final Orders (A) Authorizing the Debtors to Obtain Postpetition Secured Financing Pursuant to Section 364 of the Bankruptcy Code, (B) Authorizing the Debtors to Use Cash Collateral, (C) Granting Adequate Protection to the Adequate Protection Parties, (D) Scheduling a Final Hearing, and (E) Granting Related Relief [D.I. 13] (the “DIP Motion”).

4. Second, on November 1, 2016, the Debtors filed the Dismissal Motion.⁴ Pursuant to the Dismissal Motion, the Debtors sought authorization to memorialize the Resolution Agreement set forth in the Distribution Term Sheet – that the Chapter 11 Cases would be dismissed after certification by the Debtors that prior orders or settlements have been effectuated, including that the Debtors have consummated transactions contemplated by the APA and Joint Settlement Motion. *Dismissal Motion*, ¶23.

5. Third, on November 29, 2016, the Committee filed the Mechanics Motion seeking approval of a Liquidating Trust Agreement (the “LTA”) and Binding Claims Mediation Agreement (“BCMA”), each necessary to effectuate the Distribution Scheme.

6. The hearing on approval of the Joint Settlement Motion, the Dismissal Motion and the Mechanics Motion was originally scheduled for December 20, 2016. On that date, this Court determined to adjourn consideration of the Joint Settlement Motion, the Dismissal Motion and the Mechanics Motion pending the Supreme Court’s ruling in *Official Committee of Unsecured Creditors v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.)*, 137 S. Ct. 973 (2017) (“*Jevic*”).

7. On April 6, 2017, the Debtors informed this Court that the Debtors are not seeking to have the Dismissal Procedures Motion and/or a Motion to Convert heard at either the April 11 Hearing or the May 4 Hearing.⁵

⁴ Motion for Entry of An Order Pursuant to Sections 105(a), 305(a) and 1112(b) of the Bankruptcy Code and Bankruptcy Rule 1017 Authorizing Dismissal of the Debtors’ Cases Under Certification of Counsel [D.I. 685] (the “Dismissal Motion”).

⁵ See Notice (I) of Hearing Regarding Settlement Motion and Related Mechanics Motion and (II) Regarding Dismissal Procedures Motion [D.I. 903].

OBJECTION

I. The Distribution Scheme Seeks an Inappropriate Backdoor Means Around the Plain Holding of *Jevic*

8. There are numerous reasons upon which approval of the Joint Settlement Motion must be denied, including for the reasons set forth in the Original Objections. The Supreme Court's ruling in *Jevic* also mandates denial of the Joint Settlement Motion. The facts of *Jevic* are as follows. In 2006, Sun Capital Partners ("Sun"), a private equity firm, acquired Jevic Transportation Corporation ("Jevic") with money borrowed from CIT Group ("CIT") in a "leveraged buyout." *Jevic* at 5. Jevic subsequently filed for chapter 11 bankruptcy, owing \$53 million to senior secured creditors Sun and CIT and over \$20 million to tax and general unsecured creditors. *Id.* at 6. Subsequently, a group of former employee truck drivers obtained a \$12.4 million judgment against Jevic for claims under the WARN Act, of which \$8.3 million were priority wage claims. *Id.* at 7. In addition, the Committee obtained authority to sue Sun and CIT on fraudulent conveyance claims related to the leveraged buyout. *Id.* Negotiations ensued on a settlement, but the only estate assets were the fraudulent conveyance claims and \$1.7 million in cash, which was subject to a lien held by Sun. *Id.*

9. The parties ultimately reached a settlement that provided, among other things, that CIT would deposit \$2 million into an account earmarked to pay the committee's legal fees and administrative expenses and Sun would assign its lien on Jevic's remaining \$1.7 million of cash to a trust, which would distribute the cash in manner that violates the absolute priority rule. The Bankruptcy Court approved the settlement and the holders of the WARN Act claims appealed.

10. The Supreme Court held that "[a] distribution scheme ordered in connection with the dismissal of a chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for

final distributions of estate value in business bankruptcies.” *Jevic* at 2. In reaching its conclusion, the Supreme Court noted that “[t]he Code’s priority system constitutes a basic underpinning of business bankruptcy law.” *Jevic* at 11.

11. Here, because the Debtors and Committee seek approval of an “end-of-case” Distribution Scheme that violates the basic priority rules of the Bankruptcy Code, the Distribution Scheme is prohibited by *Jevic*.

12. Although the Debtors and the Committee seek to distinguish *Jevic* on the basis that the Distribution Scheme involves non-estate assets and the “settlement” and the “dismissal” are not linked, the facts belie these assertions. The facts are clear that this settlement involves estate assets – some of which, such as the Specified Causes of Action,⁶ the Debtors and the Committee attempt to launder through the Purchaser – and that the settlement and ultimate resolution of these cases are inexorably linked.

B. The Facts Reveal a “Settlement” Altered To Try to Avoid *Jevic*

13. On July 10, 2016, the Noteholders opened negotiations on a “settlement” with the Committee. *See* C0001141-C0001144, attached hereto as Exhibit 1. The July 10 term sheet contemplated, among other terms, that “[t]he Purchaser shall cause the APA to be amended at closing so that the [Specified Causes of Action] shall be ‘Excluded Assets’ under the APA,” (i.e., not purchased by the Purchaser). Exhibit 1, C0001143

14. On August 10, 2016, six days before the August 16 Hearing, the Committee sent to the Noteholders a term sheet “approved by the Committee.” C0001123-C0001128, attached

⁶ The Specified Causes of Action include (a) all causes of action under chapter 5 of title 11 of the United States Code against those parties which are not vendors, suppliers or service providers that will provide goods and services to the businesses acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) the Debtors’ former directors and officers, (ii) the Debtors’ current and former shareholders and their affiliates, and (iii) other parties, and (c) any claims, causes of action or defenses against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order).

hereto as Exhibit 2. The August 10 term sheet contemplated, among other terms, (A) that “[t]he Purchaser shall cause the APA to be amended at closing so that the [Specified Causes of Action] shall be ‘Excluded Assets’ under the APA,” (i.e., not purchased by the Purchaser) and (B) the “Debtors’ chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet...” Exhibit 2, C0001126; C0001128.

15. Following multiple exchanges of drafts, on August 16, just three hours before the start of the August 16 Hearing, the Committee sent to the Debtors and the Noteholders another turn of the term sheet that Committee counsel would “recommend” to the Committee. C0001097-C0001101, attached hereto as Exhibit 3. Like the drafts exchanged before then, the August 16, 2016 term sheet continued to provide, among other terms, (A) that “[t]he Purchaser shall cause the APA to be amended at closing so that the [Specified Causes of Action] shall be ‘Excluded Assets’ under the APA and shall be contributed to the GUC Trust,” (i.e., not purchased by the Purchaser) and (B) the “Debtors’ chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet.” *See* Exhibit 3, C0001099; C0001101.

16. Although the Debtors had not previously seen the term sheet and were completely unaware of the settlement negotiations, upon receipt of the term sheet and without negotiating its terms, immediately prior to the August 16 Hearing, the Debtors approved the August 16 settlement term sheet (*see* Exhibit 3) as “fair and reasonable” and “in the best interest of the Debtors, their estates, and their stakeholders.” *LaForge Declaration*, ¶¶21, 22.⁷

17. The next day, on August 17, following the announcement of the “settlement” in court, counsel to the Committee sent to the Debtors and the Noteholders a revised draft of the

term sheet “which reflects the agreement reached yesterday.” C0001015-C0001019, attached hereto as Exhibit 4. That term sheet contained identical provisions regarding the Specified Causes of Action and structured dismissal. *See* Exhibit 4, C0001017; C0001019.

18. Although the terms of the “settlement” had been fully agreed by the Parties and announced in Court, the Parties continued to modify the term sheet. On April 19, 2016, Debtors’ counsel sent a markup of the term sheet to counsel for the Committee and the Noteholders and made two relevant changes. C0000022-C0000035, attached hereto as Exhibit 5. The Debtors clarified that the Specified Causes of Action that are “Excluded Assets” under the APA would be contributed to the GUC Trust “by the Debtors” and added, for the first time that, the Chapter 11 Cases would be resolved by structured dismissal “or such other resolution agreed to by the Parties”. Exhibit 5, C0000031; C0000034 (emphasis added).

19. Subsequently, on August 29, the Debtors circulated to counsel for the Committee and the Noteholders another draft of the term sheet. C0001040-C0001057, attached hereto as Exhibit 6. In this draft, rather than have the Specified Causes of Action be “Excluded Assets” under the APA and thus remain in the Debtors’ estates, shockingly, the Debtors changed it so that the estate would no longer receive the Specified Causes of Action and instead provided that the APA would be amended so that the Specified Causes of Action would be “contributed to the GUC Trust by the Purchaser.” Exhibit 6, C0001052 (emphasis added). The language proposed by the Debtors on August 29, 2016 was accepted by the Committee and the Noteholders and appears, nearly verbatim, in the final Distribution Term Sheet.

20. It is obvious why the Debtors made these changes – concerned with how the Supreme Court might rule in *Jevic*, the Debtors, with the agreement of the Committee and the Noteholders, sought to create a fiction whereby estate assets would be laundered through the

Purchaser in a bald attempt to differentiate this case from *Jevic*. That attempt, however, fails for a number of reasons.

C. Approving the “Settlement” Would Fly in the Face of *Jevic*

21. Approving the Distribution Scheme would broadcast a “backdoor means” for avoiding *Jevic* by permitting debtors and other parties to artificially “move” assets out of the estate on a temporary basis and then distribute those assets in a priority-violating distribution.

i. *The Specified Causes of Action*

22. With respect to the Specified Causes of Action, as discussed above, when the Distribution Scheme was negotiated, it was always contemplated that the Specified Causes of Action would be “Excluded Assets” not purchased by the Purchaser and would be contributed to the GUC Trust by the Debtors. *See* Exhibit 2, C0001126; Exhibit 3, C0001099; Exhibit 4, C0001017; & Exhibit 5, C0000031. Only after significant concerns regarding *Jevic* arose, and after the settlement term sheet was approved by the Debtors, did the Debtors change course and provide for those assets to be contributed directly by the Purchaser to the GUC Trust, making the settlement worse for the estate.

ii. *The Structured Dismissal*

23. Recognizing the similarities between *Jevic* and the Distribution Scheme, at the December 20, 2016 status conference, for the first time, the Committee sought to separate approval of the Distribution Scheme and Resolution Mechanism. Specifically, counsel to the Committee stated, “nor are the settlement that’s before Your Honor today and the dismissal motion . . . linked.” December 20, 2016 Hearing Transcript, p.6:13-17.

24. As discussed *supra*, each draft of the term sheet prior to August 16, including the one approved by the Debtors prior to the August 16 Hearing and the term sheet memorializing the agreement of the Parties at the August 16 Hearing, contemplated only a structured dismissal.

See Exhibit 2, C0001128; Exhibit 3, C0001101; & Exhibit 4, C0001019. At the August 16 Hearing, in announcing the terms of the settlement, counsel acknowledged that the structured dismissal contained in the term sheet was part of the “settlement.” Counsel stated:

To the extent that there are steps the debtors need to take, so for example, in connection with the ultimate conclusion of these cases, what form that takes, et cetera, that will obviously be put before this Court at the appropriate time. **But that is an aspect of this transaction.**

August 16, 2016 Hearing Transcript, p.154:6-14 (emphasis added).

25. At the October 6, 2016 hearing, Debtors’ counsel justified adjournment of the Joint Settlement Motion so the Parties could first “amend[] the [Joint Settlement Motion] to make a specific request surrounding a **structured dismissal**.” October 6, 2016 Hearing Transcript, p.6:9-11 (emphasis added).

26. Moreover, as recently as February 2, 2017, in describing the Distribution Scheme, the Debtors stated that it “contemplates the creation of a Liquidating Trust for the sole benefit of non-priority, unsecured creditors followed by the “structured” dismissal of these cases.” See Debtors’ Bar Date Reply ¶2.⁸

27. Finally, consideration of the Distribution Scheme separate from the Resolution Mechanism defies logic. After the closing of the CSC Sale and Non-CSC Sale, substantially all of the Debtors’ assets have been liquidated. Furthermore, the Debtors are administratively insolvent.⁹ The only step remaining is to make distributions of the estates remaining assets. As stated in *Jevic*, chapter 11 foresees three possible outcomes for a chapter 11 debtor: (a) a confirmed plan, (b) conversion of the case to chapter 7 or (c) a simple dismissal with a return to the prepetition status quo. *Jevic* at 3. Of course, the Distribution Scheme could not be approved

⁸ Debtors Objection to Motion of the Official Committee of Unsecured Creditors for Entry of an Order Compelling Debtors to File and Serve New Bar Date Notice [D.I. 849] (the “Debtors’ Bar Date Reply”).

⁹ “[T]he costs associated with a Bar Date will significantly impact the Wind Down Budget such that the Debtors’ ability to remain in chapter 11 is gravely at risk...” Debtors’ Bar Date Reply, ¶4.

in a confirmed plan as it violates the Bankruptcy Code's basic priority scheme and because the Debtors have no funds with which to pay administrative or priority creditors. *See* §1129(b). Additionally, a chapter 7 trustee could never implement a distribution mechanism similar to the Distribution Scheme as it violates the bankruptcy Code's priority rules. *See* §§726.¹⁰ Moreover, in light of the Distribution Scheme, no dismissal could return the parties to the prepetition *status quo ante* unless the Distribution Scheme was unwound.

28. The Debtors agree. In the Debtors' Bar Date Reply, the Debtors state:

Specifically, given the posture of these cases, the Debtors' only realistic chapter 11 exits are: (1) through the Global Settlement structure, which...obviates the need to set a Bar Date pursuant to the Bar Date Order; (2) by converting these chapter 11 cases to cases arising under chapter 7 — in which case the terms and provisions of the Bar Date Order will not survive; or (3) by dismissing these chapter 11 cases without any "bells and whistles" — thereby rendering a Bar Date purposeless.

Debtors' Bar Date Reply, ¶3.

29. The Debtors highlight three exits options. A chapter 7 conversion and a *status quo ante* dismissal are the first two. The third is an exit that maintains the Distribution Scheme — i.e., a structured dismissal — which is exactly what the Debtors and the Committee are seeking approval of.

30. Citing to *Jevic*, a Bankruptcy Court in the Eastern District of Tennessee, Southern Division, recently denied approval of a priority violating settlement that did not include a specific request for a structured dismissal. *See In re William Harry Fryar*, Case No. 16-13559 (*"In re Fryar"*), Memorandum [D.I. 81], attached as Exhibit 7. In that case, in addition to approval of a sale, a debtor sought approval of a settlement and a "payment of one unsecured creditor ahead of other parties and other unsecured creditors." Memorandum p. 7. In analyzing

¹⁰ "To be sure, pursuant to the [Distribution Scheme], distributions will be made to certain general unsecured creditors and not to other classes of creditors." *Committee Omnibus Reply*,¹⁰ ¶16.

the settlement, the bankruptcy court found that the “settlement is not part of a ‘first day’ order to ensure the Debtor’s survival to get to a plan” and that the “court is hard pressed to determine what business remains to be revived or reorganized.” Memorandum p. 10. Accordingly, the “court’s review of the facts . . . leads it to conclude that this settlement is more of a preamble to a conversion or structured dismissal The Debtor has failed to provide that disregard of the priority scheme will promote a ‘significant Code-related objective.’” Memorandum p. 11 (citing *Jevic*).

31. Although the Debtors and the Committee now claim that they are not seeking approval of a structured dismissal in connection with the Distribution Term Sheet, the facts of these cases are strikingly similar. Because neither debtor has a hope of reorganizing, both debtors seek approval of a priority violating settlement that can only be seen as a preamble to dismissal or conversion. And neither debtor provides any Bankruptcy Code-related objective to justify approval of the settlement. (*See* Section II(C) *infra*). As the court held in *In re Fryar*, in light of *Jevic*, “parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code’s priority scheme should be prepared to prove . . . that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective.” Memorandum p. 12. The Debtors and Creditors’ Committee have not and cannot offer any such proof.

II. The Distribution Scheme Does Not Comply with *Jevic*

32. The Debtors and the Committee argue that *Jevic* is distinguishable because the distribution scheme in *Jevic* concerned estate assets, while the proposed Distribution Scheme involves non-estate assets. However, a cursory review of the Distribution Scheme reveals the fallacy of this argument.

A. Even Only Considering the GUC Trust Assets, the Distribution Scheme Does Not Comply With *Jevic*

33. Even if this Court were to evaluate the Distribution Scheme solely on the basis of the contribution of non-estate assets to the GUC Trust, the Distribution Scheme cannot be approved under *Jevic*. Although the issue of estate versus non-estate assets was not specifically argued in *Jevic*, based on the facts of the *Jevic* settlement (discussed in Section I hereof, *supra*) the estate asset / non-estate asset distinction is a fallacy. First, as part of the *Jevic* settlement, CIT, the prepetition secured creditor, contributed \$2 million. This contribution was clearly not made from estate assets. Second, \$1.7 million of estate cash would be contributed to a trust. However, and importantly, this \$1.7 million of estate cash would not be available had Sun not assigned its lien, a non-estate asset, to the estate. Taken as a whole, the *Jevic* settlement was only made possible with the contribution of two non-estate assets – CIT’s cash and Sun’s lien.

B. The Distribution Scheme Involves Much More Than The Contribution of Non-Estate Assets

34. The Committee argues that the Distribution Scheme is akin to the settlement the Third Circuit approved in *In re LCI Holding, Co., Inc.* (“LCI”). 802 F.3d 547 (3d Cir. 2015). While there is an open question as to whether the holding in *LCI* is still viable in light of *Jevic*, a review of the Settlement Term Sheet in *LCI* (the “LCI Settlement TS”), attached hereto as Exhibit 8, indicates that it is readably distinguishable from the Distribution Scheme. *LCI* involved a simple settlement – a purchaser of the debtors’ assets in a Section 363 sale agreed to pay \$3.5 million to a trust for the benefit of all general unsecured creditors in consideration for the other creditors’ support of the sale. *LCI Settlement TS*, p. 1, 2. There were no causes of actions being transferred to the trust, rather the purchaser purchased and agreed not to assert the avoidance actions. *LCI Settlement TS*, p. 2. In *LCI*, the purchaser was not paying, through the debtor, the fees and expenses of the committee. Finally, the committee in *LCI* was responsible

for the claims resolution process and the Debtors were not required to provide any cooperation. *LCI Settlement TS*, p. 3.

35. The Distribution Scheme involves much more than the contribution of cash to a trust for the benefit of creditors as was undertaken in *LCI*. In addition to the contribution of the Specified Causes of Action and approval of the LTA and BMCA, each of which explicitly implicates the estate, as part of the Distribution Scheme:

- the DIP Lenders or the Purchaser are funding, to the Debtors for payment by the Debtors, up to \$2,050,000 for the allowed fees and expenses incurred by the professionals retained by the Committee (*see Distribution Term Sheet, p.2*) (emphasis added);
- the APA is being amended to increase the Wind Down Budget to account for the agreed upon amount for Committee professional fees (*see Distribution Term Sheet, p.2*);
- the creation of an escrow account maintained by the Committee for purpose of holding the Committee's professional fees (*see Distribution Term Sheet, p.2*);
- to the extent any Specified Causes of Action are not Acquired Assets under the APA, the Debtors are required to contribute such causes of action to the GUC Trust (*see Distribution Term Sheet, p.3*);
- the DIP Lenders or the Purchaser are purchasing tail insurance to cover the Debtors current and former officers and directors (*see Distribution Term Sheet, p.3*);
- the Debtors are required to cooperate with the claims reconciliation process and provide access to employees and business records (*see Distribution Term Sheet, p.5*); and
- the estate is releasing the Committee and the Noteholders from claims and causes of action (*see Distribution Term Sheet, p.5*).

36. The Distribution Scheme is completely distinguishable from *LCI* as numerous aspects of the Distribution Scheme, including the releases, plainly involve estate assets.

C. The Debtors and Committee Have Provided No Justification for the Priority Violating Distributions

37. As the Supreme Court recognized, there are instances when a court may approve interim distributions that violate ordinary priority rules. “But in such instances, one can generally find significant Code-related objectives that the priority-violating distributions serve.” *Jevic* at 15. The Supreme Court cites to first-day wage orders that allow payment of employee prepetition wages, critical vendor orders and roll-ups, all of which “enable a successful reorganization and make even the disfavored creditors better off.” *Id.* (citing *In re Kmart Corp.*, 359 F. 3d 866, 872 (CA7 2004)). But in comparing favorable priority-violating distributions to a structured dismissal, the Supreme Court noted that in a structured dismissal,

the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the status quo ante; and it does not protect reliance interests.

Id. at 15-16.

38. With respect to settlement at issue in *Jevic*, the Supreme Court could not “find in the violation of ordinary priority rules that occurred here any significant offsetting bankruptcy-related justification.” *Id.* at 16. This is equally true with respect to the Distribution Scheme. Neither the Committee nor the Debtors have argued that approval of the Distribution Scheme serves any Bankruptcy Code-related objective. Rather, the only justification for approval of the Distribution Scheme offered by the Committee and the Debtors is that without approval of the Distribution Scheme, unsecured creditors will receive nothing in these Chapter 11 Cases.¹¹ This was the exact same justification the Bankruptcy Court relied on in approving the *Jevic*

¹¹ “Without the contemplated Settlement, there will no distributions to any creditors in these cases aside from those already made to those creditors who were secured and had collateral available to satisfy their secured claims. If the Objectors prevail . . . that unsecured creditors . . . will receive no recovery in these cases.” *Committee Omnibus Reply*, ¶16; “Thus, if the Settlement is not approved, such assets will not be available for the benefit of the Debtors’ creditors . . .” *Debtors Omnibus Reply*, ¶10.

settlement: the “Bankruptcy Court feared that (1) without the worker-skipping distribution, there would be no settlement, (2) without a settlement, all the unsecured creditors would receive nothing, and consequently (3) its distributions would make some creditors (high- and low-priority creditors) better off without making other (mid-priority) creditors worse off (for they would receive nothing regardless).” *Jevic* at 17. The Supreme Court expressly rejected this justification as it “threatens to turn a ‘rare case’ exception into a more general rule.” *Jevic* at 17.

III. The Creditors’ Committee and Debtors Are Making Contradictory Jurisdiction Arguments

39. If, as urged by the Debtors and the Committee, this Court determines that the Distribution Scheme is so divorced from the estate that it can be approved under *Jevic*, then this Court does not have subject matter jurisdiction necessary to deal with the Distribution Scheme.

40. The basic statutory grant of bankruptcy court subject matter jurisdiction is contained in 28 U.S.C. § 1334. The statutory language supports a broad grant of jurisdiction to bankruptcy courts, but the jurisdiction conferred is not intended to be “limitless.” *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). Section 1334(e)(1) provides the district court in which a case under title 11 is commenced or is pending with “exclusive jurisdiction (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.” 28 U.S.C. § 1334(e)(1). Property of the estate is defined in § 541 of the Bankruptcy Code and includes “all legal and equitable interests of the debtor in property” 11 U.S.C. § 541(a)(1). Under Bankruptcy Rule 9019, the Bankruptcy Court only has subject matter jurisdiction over settlements and compromises that involve claims and causes of action related to the estate. 28 U.S.C.A. § 1334; *In re RNI Wind Down Corp.*, 348 B.R. 286, 292 (Bankr. D. Del. 2006) (Sontchi, J.).

41. The entire premise of the Committee's and Debtors arguments that the Distribution Scheme complies with *Jevic* is that the Distribution Scheme does not involve estate assets.¹² Counsel to the Committee stated it succinctly at the December 20, 2016 status conference when he stated "[t]he entire premise of the settlement . . . is it does not involve estate assets. The estate is contributing nothing." December 20, 2016 Hearing Transcript, p.5:23-24; 6:1-2. The Committee and the Debtors cannot have it both ways – that the Distribution Scheme is so divorced from the estate that *Jevic* does not apply and yet tether it enough to the estate that this Court has the jurisdiction to approve it and then be directly engaged in managing it.

42. The requests in the Mechanics Motion most readily illustrate this point. As part of the Distribution Term Sheet, the Parties intend to contribute the Specified Causes of Action to a GUC Trust that will prosecute the Specified Causes of Action. The Specified Causes of Action include chapter 5 avoidance actions.

43. Only a bankruptcy trustee or chapter 11 debtor-in-possession may prosecute avoidance actions on behalf of the estate. *Official Committee of Unsecured Creditors v. Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 240 (3d Cir. 2000) ("Only a trustee (or debtor in possession) is authorized to exercise the power to avoid certain transfers or obligations."). Additionally, a trustee or a debtor-in-possession of a bankruptcy estate cannot maintain an avoidance action unless the estate would be benefitted by the recovery of the transferred property. *Wellman v. Wellman (In re Wellman)*, 933 F.2d 215, 218 (4th Cir. 1991) (citing Collier on Bankruptcy, § 550(a)).

¹² "[T]he GUC Trust (and distributions therefrom) will be funded *entirely by the Purchaser*, at the direction of the Ad Hoc Noteholder Group, with non-estate property." *Committee Omnibus Reply*, ¶14 (emphasis in original). "[T]he GUC Trust is being funded with non-estate assets." *Debtors' Omnibus Reply*, ¶10 (emphasis in original).

44. Accordingly, in order to transfer and then prosecute the Specified Causes of Action, the Parties had to set up a GUC Trust under the auspices of the “bankruptcy estate” and must assert that they benefit the estate or they will lose the ability to pursue the Specified Causes of Action. The LTA and BMCA, which are part and parcel of approval of the Distribution Scheme, further highlight the extent to which the “estate” continues to be involved in the pursuit and collection of the Specified Causes of Action and the resolution of claims against the estate.

45. The CE Liquidating Trust (as defined in the LTA) is assuming all responsibility for all claim matters, including, the resolution of all claims. LTA, §§8.1, 8.1(a). Moreover, the Bankruptcy Court retains exclusive jurisdiction over the CE Liquidating Trust, including, (a) jurisdiction to resolve any and all controversies, suits and issues that may arise in connection the CE Liquidating Trust and (b) any dispute between any Beneficiary (as defined in the LTA) and the Liquidating Trustee. LTA, §§12.10, 6.4. Additionally, the Bankruptcy Court controls the powers of the Liquidating Trustee. For instance, the Liquidating Trustee does not have the power to divide the CE Liquidating Trust unless authorized to do so by the Bankruptcy Court and the Liquidating Trustee may only administer the prosecution, settlement, compromise, withdrawal or resolution of disputed claims in a manner approved by the Bankruptcy Court. LTA §§12.8, 2.2(f).

46. Moreover, numerous provisions of the LTA permit the CE Liquidating Trust or Liquidating Trustee to take advantage of debtor protections in the Bankruptcy Code. Specifically, (a) the Liquidating Trustee shall seek a determination of tax liability or refund under Section 505 of the Bankruptcy Code; (b) undeliverable distributions shall be held in trust by the CE Liquidating Trust until the distributions are claimed or are deemed to be unclaimed property under Section 347(b) of the Bankruptcy Code; (c) the CE Liquidating Trust may only

invest the Liquidating Trust Assets in investments described in Section 345 of the Bankruptcy Code; and (d) the CE Liquidating Trust may request an expedited determination of taxes or tax refund rights of the CE Liquidating Trust, including the Disputed Reserves, under Section 505(b) of the Bankruptcy Code. LTA §§2.2(h)(1); 9.7; 3.4; & 10.6.

47. Finally, pursuant to BMCA, the Parties are asking the Bankruptcy Court to enter an order requiring that “any holder of a general unsecured claim, in order to receive its pro rata share of distribution from funds held by the GUC Trust, must agree to participate in and be bound by certain claims-resolutions procedures.” Mechanics Motion, ¶9. Under what grant of authority does the Bankruptcy Court have the power to mandate, without creditor consent, that creditors must submit to claims mediation in order to receive a recovery from non-estate assets, whether for money owed to such creditors by the estate or for counterclaims and defenses the creditors have to Specified Causes of Action? *See Wellness International Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015). If these were estate assets, the Bankruptcy Court could set a bar date and require the filing of a proof of claim. Of course, in that instance, such creditors get the benefit of the protections of the Bankruptcy Code, including that estate assets will not be distributed in violation of the Bankruptcy Code’s basic priority scheme.

48. As these provisions show, the attempt by the Committee and the Debtors to avoid scrutiny under *Jevic* fails.

IV. The Purported Settlement Fails Under Bankruptcy Rule 9019

49. In addition to the fact that the Purported Settlement cannot be approved because it conflicts with the Bankruptcy Code, the Purported Settlements also fails under Bankruptcy Rule 9019. To be approved under Bankruptcy Rule 9019, a “settlement” requires a claim or cause of action that is subject of settlement. The Purported Settlement lacks any such claim or cause of action that is subject to settlement. In addition, the Debtors did not exercise sound business

judgment in approving the Purported Settlement. Finally, even ignoring these fatal infirmities, the Purported Settlement is not fair and reasonable and does not satisfy the *Martin* factors.

A. There Are No Claims or Causes of Action that are Subject to Settlement

50. Per the Joint Settlement Motion, the legal predicate for the Joint Settlement Motion is Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). *Joint Settlement Motion*, ¶ 7. Under Bankruptcy Rule 9019, the bankruptcy court may approve a compromise or settlement; however, as a necessary predicate, a settlement requires a claim or cause of action of one party against another. *In re U.S. Brass Corp.*, 255 B.R. 189, 193 (Bankr. E.D. Tex. 2000); *aff’d*, 301 F.3d 296 (5th Cir. 2002); *In re Fairmont General Hosp., Inc.*, 510 B.R. 783, 790 (Bankr. N.D.W. Va. 2014).

51. Here, despite the Committee’s protestations to the contrary, there are no claims or causes of action between the Parties that are subject to settlement. In the Joint Settlement Motion, the Debtors point to the resolution of the DIP Motion and Sale Motions as the only claims and causes of action that are being “settled.” *Joint Settlement Motion*, ¶2. The Committee echoed this sentiment and noted that the Committee “adamantly and consistently opposed the DIP Motion and the Sale Motions.” *Committee Omnibus Reply*, ¶8. However, a review of the events leading up to the announcement of the “settlement” on August 16 reveals that the claims or causes of action, if any, that the Committee had raised or asserted were already moot or time barred.

52. First, in connection with the CSC Sale, the Committee filed a simple reservation of rights.¹³ In the Committee CSC Sale Reservation, the Committee states that it “provided

¹³ Reservation of Rights of Official Committee of Unsecured Creditors with Respect to the Debtors Motion for Entry of (I) an Order Authorizing the Sale of CSCs Assets to the Private Sale Purchaser or, in the Alternative, (II) (A) an Order Establishing Bidding Procedures and Granting Related Relief and (B) an Order Approving the Sale of CSCs Assets [D.I. 224] (the “Committee CSC Sale Reservation”).

counsel for the Debtors with an informal and partial list of objections that it may raise in connection with the proposed sale” and based on discussions with the Debtors the Committee “anticipates that its objections will have been resolved.” *Committee CSC Sale Reservation*, ¶3 & 4. Counsel for the Committee confirmed no outstanding objection existed (June 15, 2016 Hearing Transcript, p.14:1-3) and the Committee filed no objection to entry of the CSC Sale Order.

53. Second, with respect to the Non-CSC Sale, the Committee filed a statement¹⁴ related to the Non-CSC Sale. In the Committee Non-CSC Sale Statement, the Committee did not object to the substance of the Non-CSC Sale, the price obtained or the conduct of the auction. Rather, the Committee simply alleged that a procedural issue related to the selection of the stalking horse bidder may have tainted the sale process. *See Committee Non-CSC Sale Statement*, ¶8. Though the Committee filed the Committee Non-CSC Sale Statement, it ultimately was not prepared to press this issue at the sale hearing. At the August 16 Hearing, Committee counsel stated:

Now, we did have concerns, and we filed papers to this effect that the designation of a stalking horse might create confusion the way it was handled. But I will tell the Court that having discussed this with the debtors, having read the affidavit, the declarations that were filed, we accept the debtors’ testimony that in fact there was no confusion and that the auction was not tainted. And both for those reasons, and in part at least the fact that we have settled our differences, we are in support of the sale. We think it’s in the best interests of the estate. **We would have loved to have seen a more competitive auction, but we don't believe it was as a result of any flawed process or any mischief . . . Even though we would have loved to have an outcome that created more value, we accept that the process that was run in the end produced the highest and best value. So Committee is in support of the sale, Your Honor.**

August 16, 2016 Hearing Transcript, p.112:17-25; p.113:1-10 (emphasis added).

¹⁴ Statement of the Official Committee of Unsecured Creditors in Connection with the Committees Objection to Debtors Motion for an Order Approving the Sale of Substantially All Assets [D.I. 482] (the “Committee Non-CSC Sale Statement”).

54. The Committee determined, based on a review of the factual evidence, that it did not believe the auction was tainted or flawed and this was only “in part” because it had reached a “settlement.” Moreover, the Committee was not the only party to raise this procedural objection (*see DDTL Sale Objection*,¹⁵ ¶34-35), no actual bidder raised any concerns regarding a “tainted” sales process and this Court found that the process was, in fact, not “tainted.”¹⁶

55. With respect to the DIP Motion, as of August 10, 2016, the Challenge Period had lapsed without the filing a motion for standing, mooted any claims or causes of action of the estate against the prepetition claims and liens of the Noteholders. *See* Third Interim Order, ¶15. Accordingly, six days before the “settlement” was announced to the Court and parties in interest, the Debtors’ “acknowledgments, stipulations, waivers and releases” in favor of Noteholders became binding on the Committee leaving the Committee with no claims or causes of action to assert related to the prepetition claims and liens of the Noteholders.

56. Given the foregoing, the Debtors and the Committee cannot seek to use Bankruptcy Rule 9019 as the legal predicate for approval of the Joint Settlement Motion. Without a claim or cause of action to settle, there is no basis on which this Court can approve the Joint Settlement Motion under Bankruptcy Rule 9019 since all that the Committee and Debtor are seeking approval of is the Distribution Scheme.

B. The Debtors Did Not Exercise Sound Business Judgment

57. While a court generally gives deference to the Debtors’ business judgment in deciding whether to settle a matter, the Debtors have the burden of persuading the bankruptcy

¹⁵ Objection of DDTL Parties to the Sale Transaction(s) [D.I. 481] (the “*DDTL Sale Objection*”).

¹⁶ “First of all, the process, the sales process here was not tainted or defective in any way... The designation of a stalking-horse bidder for the credit bid without a Court order approving the stalking-horse bid status I think was an error... But at the end of the day, it was a minor hiccup that had no ultimate effect, negative effect on the auction process...” August 16, 2016 Hearing Transcript, p.128:5-20.

court that the compromise is fair and equitable and should be approved. *In re Spansion, Inc.*, No. 09-10690, 2009 Bankr. LEXIS 1283, at *13 (Bankr. D. Del. June 2, 2009) (citing *Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.)*, 336 B.R. 87, 93 (Bankr. D. Del. 2005)). In *In re Spansion, Inc.*, the Bankruptcy Court for the District of Delaware did not approve a settlement after determining that the Debtors' management had insufficient information to evaluate the settlement agreement and whether it is in the best interest of the estate. *In re Spansion, Inc.*, No. 09-10690, 2009 Bankr. LEXIS at *11, 26. Likewise, here, the Debtor had insufficient information to evaluate the settlement and determine whether it is in the best interests of the Debtors' estates.

i. The Debtors Did Not Create Sufficient Time to Inform Themselves or Negotiate For the Benefit the Estate

58. The Debtors were not involved in or aware of the negotiation of the settlement term sheets prior to the morning of the August 16 hearing. *LaForge Deposition*¹⁷, p.19:2-4; p.30:24-25, p.31:1-5; *LaForge Declaration*, ¶13. The term sheet was presented to the Debtors on August 16 to accept or not and it was clear to Mr. LaForge that at the August 16 Hearing "there would be no changes" to the term sheet. *LaForge Deposition*, p.19:5-16; p.37:2-17.

59. Mr. LaForge had very limited time at the courthouse before the start of the August 16 Hearing to discuss the term sheet with Committee counsel (*LaForge Deposition*, p. 24:12-25, 25:2-4) and does not even know if the Noteholders were willing to negotiate the term sheet. *LaForge Deposition*, p. 24:3-6. Moreover, Mr. LaForge testified that prior to receiving the term sheet at the April 16 Hearing, he had "not heard of a GUC Trust or contribution of assets or of cash." *LaForge Deposition*, p. 105:23-25, 106:2-7. Finally, Mr. LaForge also testified that he

¹⁷ Excerpts of the LaForge Deposition are attached hereto as Exhibit 9, and the entirety is attached hereto as Exhibit 10.

did not seek to adjourn the August 16 Hearing to better inform himself or the Debtors regarding the term sheet. *LaForge Deposition*, p. 25:8-11.

60. Why not request more time? Mr. LaForge testified “we wanted the APA to be approved that day” and “[t]he way to achieve what we thought as the right thing to do was to agree to an imperfect settlement term sheet.” *LaForge Deposition*, p. 51:9-10; 14-16. Moreover, Mr. LaForge testified that resolving the Committee DIP objections was critical. *LaForge Deposition*, p. 32:18-20.

61. As discussed *supra*, the Committee did not have any actual live objections to the CSC Sale or Non-CSC Sale that would have held up approval of the CSC Sale or Non-CSC Sale. And, on August 15, before the Debtors had received a draft term sheet from the Committee, the Debtors filed an amended agenda noting that the DIP Motion would not be heard at the August 16 Hearing and would be “continued to a date to be determined.”¹⁸

62. Approval of the CSC Sale, Non-CSC Sale or DIP Motion did not create exigent circumstances that would require the Debtors to forgo sufficiently informing themselves as to the terms of the term sheet or creating at least a few hours to negotiate the term sheet for the benefit of the estate. Accepting a “take it or leave it” term sheet on a moment’s notice that did not resolve any objections and which sought to distribute estate assets in violation of the absolute priority rule certainly is not a sound exercise of the Debtors’ business judgment.

ii. *Approving A Settlement As “Fair and Reasonable” That Allocates Estate Value In Violation of the Absolute Priority Rule*

63. Immediately prior to the August 16 Hearing, the Debtors approved the settlement term sheet as “fair and reasonable” and “in the best interest of the Debtors, their estates, and their stakeholders.” *LaForge Declaration*, ¶¶21, 22.

¹⁸ Amended Notice of Agenda of Matters Scheduled for Hearing [D.I. 494].

64. In reference to the Specified Causes of Action, Mr. LaForge was under the impression that the term sheet approved on August 16 included the Purchaser purchasing the Specified Causes of Action and contributing them to the GUC Trust. And in considering this fact in relation to how these assets were allocated to creditors, Mr. LaForge testified:

The company, the Debtors, would have preferred to keep many of those causes of action, and we were unable to negotiate that in the APA. At that point, they were not ours to...or certainly upon approval of the sale, they were not ours to allocate.

LaForge Deposition, p. 42:6-12.

65. And after repeated questioning on whether Mr. LaForge believed the allocation of value in the settlement to some creditors and not others was fair, Mr. LaForge replied:

The – I can’t answer that question. It’s – it – it’s not representative of what we’re talking about. It’s representative of a hypothetical that I could have controlled . . . I do not opine on the fairness of what somebody does with what they own once they buy it from me... the hypothetical that I think would be an interesting question, **but no need to answer it because it's hypothetical**, is if the Debtors owned those assets, what would be fair? And that would be a consideration. A consideration in negotiating the APA of was it fair to go forward with that as an APA while giving up – while making those causes of action part of the APA, **that decision was behind us**.

LaForge Deposition, p. 49:6-25, 50:2-4 (emphasis added).

66. Of course, as we now know, this was not a “hypothetical” and the decision was not behind the Debtors. What was negotiated between the Committee and the Noteholders and presented to the Debtors for approval on August 16 (and then approved) contemplated that the Specified Causes of Action would be “Excluded Assets” under the APA and thus still owned by the Debtors. *See* Exhibit 2, C0001126; Exhibit 3, C0001099; & Exhibit 4, C0001017. As the Debtors current sole director and responsible individual, it is shocking that when considering the settlement, Mr. LaForge was unaware that the settlement contemplated carving the Specified

Causes of Action out of the sale to the Purchasers. That he was unaware of such a crucial fact when considering the settlement renders the Debtors' business judgment null.

67. Finally, as we also now know, it was the Debtors who actually proposed that rather than be treated as Excluded Assets under the APA, the Specified Causes of Action would be purchased by the Purchaser and then contributed by the Purchaser to the GUC Trust – thus removing the Specified Causes of Action from the estate. *See* Exhibit 6, C0001052. It is beyond comprehension that the Debtors would, on their own, propose changes to the term sheet that make it worse for the estate and yet still assert that the settlement is “fair and reasonable,” “in the best interest of the Debtors' estates” and in the sound exercise of the Debtors business judgment.

C. The Settlement Does Not Satisfy the *Martin* Factors

68. Bankruptcy courts in the District generally consider four factors when considering whether a settlements of claims is fair and equitable: “(1) the probability of [the claims'] success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors.” *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996); *Joint Settlement Motion*, ¶31. The movants have the burden of proof to show the *Martin* factors are met. *In re Capmark Financial Group Inc.*, 438 B.R. 471, 509 (Bankr. D. Del. 2010).

69. As discussed *supra*, there can be no argument that the “settlement” is fair and equitable. First, without allowing sufficient time to inform themselves of the terms of the settlement or to engage in any type of negotiation, the Debtors approved a settlement that allocated estate value in violation of the absolute priority rule. Second, the Debtors constrained themselves to the Committee's “take it or leave” proposition so they could get approval of the APA and the DIP without evaluating the merits of the Committee's sale objections and the fact

that the DIP Motion had already been adjourned. And finally, after the CSC Sale and Non-CSC Sale had been approved, the Debtors proposed changes to the term sheet to make it *worse* for the estate. No such settlement could ever be found to be “fair and equitable.”

i. Probability of Success in Litigation

70. The first *Martin* factor is probability of success in litigation. As discussed *supra*, the Committee resolved all potential claims related to the CSC Sale well in advance of the announcement of the “settlement.” Moreover, the only claim the Committee raised related to the Non-CSC Sale was withdrawn by the Committee at the August 16 sale hearing. Finally, the Challenge Period lapsed prior to the announcement of the “settlement” thus leaving only ministerial DIP Motion objections, not actual estate claims and causes of action. It is hard to imagine that the remaining ministerial DIP objections lodged by the Committee would have been successful. Given the results of the auction and the fact that the new money DIP obligations were assumed by CE Star, the buyer in the Non-CSC Sale, objections related to fees and interest rates or liens on avoidance actions would have been moot.

ii. Likely Difficulties in Collection; Complexity of the Litigation

71. A ministerial DIP objection would not implicate the second or third *Martin* factors – the likely difficulties in collection or the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it, respectively. Ministerial DIP objections also do not implicate or involve collection issues and certainly would not be complex to litigate or involve significant expense, inconvenience and delay.

iii. Paramount Interest of Creditors

72. With respect to the paramount interest of creditors – the fourth *Martin* factor – it is undisputed that the Distribution Term Sheet calls for the disparate treatment of unsecured creditors. Specifically, the GUC Recovery Trust Fund Contribution is being distributed only to

“holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of pre-petition secured creditors certain.” *Distribution Term Sheet* p. 4. However, and importantly, it was the Committee – a fiduciary for all general unsecured creditors, including priority creditors and holders of deficiency claims – that proposed this disparate treatment. The initial term sheet proposed by the Noteholders contemplated that the GUC Trust beneficiaries would be “the holders of allowed general unsecured claims against the Debtors...” Exhibit 6, C0001143. The Committee proposed a change to this language on August 15 and excluded priority creditors and the DDTL Parties deficiency claim from the GUC Recovery Trust Fund Contribution. C0001085-C0001096, attached hereto as Exhibit 11, C0001095. The Noteholders were free to waive a recovery on their deficiency claim. But the DDTL Parties and the priority creditors – as unsecured creditors – were not a party to the negotiation and have not consented to the disparate treatment hoisted upon them by their fiduciary. It certainly cannot be in the paramount interest of creditors for this Court to approve a settlement negotiated by a fiduciary of unsecured creditors that calls for the disparate treatment of unsecured creditors.

V. Other Objections

73. The DDTL Parties fully incorporate and restate the objections set forth in the Original Objections.

VI. Reservation of Rights

74. This Supplemental Objection is submitted without prejudice to, and with a full reservation of, the DDTL Parties’ rights to supplement and amend this Supplemental Objection and introduce evidence at any hearing relating to this Supplemental Objection, and without in any way limiting any other rights of the DDTL Parties to further object to the Joint Settlement Motion and Mechanics Motion, on any grounds, as may be appropriate.

CONCLUSION

For the reasons set forth in the Objection, the DDTL Parties respectfully request that this Court deny the Joint Settlement Motion and the Mechanics Motion and grant such other relief as is just and proper.

Dated: May 5, 2016
Wilmington, Delaware

/s/ Andrew Remming
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– and –

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Co-Counsel to Private Equity Opportunities LP

Exhibit 1

From: Rubin, Jason
To: Lerner, Stephen D.; Kinel, Norman N.
CC: Alberino, Scott L.; Kinskey, Matthew
Sent: 18-Jul-16 4:01:25 PM
Subject: CE LLC
Attachments: CE LLC - UCC SettlementTerm Sheet_112021858(8).docx

SUBJECT TO FRE 408
FOR SETTLEMENT PURPOSES ONLY

Stephen and Norman:

Attached is a draft term sheet for a global resolution. We'd ask that you please share with your Committee (and please send us an email confirming that you have sent to your Committee) and get back to us as soon as possible. We understand that the Court is not able to accommodate an adjournment of Friday's hearing and, therefore, we would like to reach a global resolution this week.

We can discuss further on our call at 5:00.

Thanks.

Jason

Jason P. Rubin

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*AGSH&F DRAFT 7/18/16
CONFIDENTIAL
SUBJECT TO FRE 408*

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the "Term Sheet") summarizes the terms of the settlement (the "Settlement") among the Purchaser, the Creditors' Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the "Parties").

Parties: The Official Committee of Unsecured Creditors (the "Creditors' Committee") of Constellation Enterprises LLC, et al. (collectively, the "Debtors").

The ad hoc group (the "Ad Hoc Noteholder Group") and, together with the Creditors' Committee, the "Creditor Parties") of unaffiliated holders (the "Noteholders") of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the "Notes").

CE Star Holdings, LLC, a Delaware limited liability company ("Purchaser").

**Resolution of
Creditors'
Committee
Objection to DIP
Financing:**

The Creditors' Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order"), and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for the following: (i) a cap of \$1.25 million on the allowed professional fees of the Creditors' Committee (the "Fee Cap") through the DIP Termination Date (as defined in the DIP Order); (ii) an Investigation Budget (as defined in the Final DIP Order) of \$100,000; and (iii) a deadline of August 9, 2016 for the Creditors' Committee to file a motion for standing to pursue affirmative claims and causes of action seeking monetary damages against the Noteholders (a "Noteholder Action") (provided that the Creditors' Committee agrees that it shall not seek to restrict, limit or otherwise impair the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any Sale (as defined below)).

Creditors'

The Creditors' Committee (a) shall support, including filing any

**Committee Support
for Sale:**

pleadings necessary and appearing at applicable hearings, and not take any actions to interfere with, the approval of the proposed sale (the “Sale”) of substantially all of the assets of Constellation Enterprises LLC and certain of its direct and indirect subsidiaries (excluding Columbus Holdings Inc. and Columbus Steel Casting Company, the “Debtor-Sellers”) to Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (“the APA”), (b) will not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale and (c) will not object to the designation of the APA as the “Stalking Horse Agreement” or the designation of the Purchaser as the “Stalking Horse Purchaser.”

**Claims and Causes
of Action:**

Subject to the Creditors’ Committee not commencing a Noteholder Action, the Purchaser shall cause the APA to be amended at closing so that the following shall be “Excluded Assets” under the APA: (a) all causes of action under chapter 5 of title 11 of the United States Code against those unsecured creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the companies acquired by the Purchaser, and (b) commercial tort claims including, without limitation, claims against former directors and officers and claims against current and former shareholders (the “Specified Causes of Action”). The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA.

Litigation Trust:

In consideration for the Creditors’ Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the “Closing Date”) a litigation trust to be established by the Creditors’ Committee (the “GUC Trust”) with a cash payment of \$500,000 (the “Trust Funds”). The Trust Funds shall be increased dollar for dollar to the extent that the Fee Cap is not exceeded and reduced dollar for dollar to the extent the Fee Cap is exceeded. The Trust Funds amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The beneficiaries of the Litigation Trust shall be all of the Debtors’ general unsecured creditors, including Noteholders to the extent of any deficiency claim.

The Trust Funds shall be used, as determined by the Creditors’ Committee, for (a) all administrative costs of the Litigation Trust, and (b) the investigation and prosecution of the Specified Causes of Action (as defined below) for the benefit of the Litigation Trust. The proceeds recovered from the pursuit of any Specified Causes of

Action will be allocated on a ratable basis among holders of general unsecured claims (including holders of the Noteholder Deficiency Claims). No distributions shall be made to the Litigation Trust beneficiaries until after the Trust Funds have been fully reimbursed to the members of the Ad Hoc Noteholder Group who provided such funding.

For the avoidance of doubt, the Litigation Trustee shall bear sole responsibility for any and all work related to claims reconciliation and distributions from the Litigation Trust and all such amounts shall be paid from the Trust Funds. The Purchaser shall cooperate with the Litigation Trust in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process.

**Other Terms and
Conditions of the
Settlement:**

The Creditor Parties shall make good faith efforts to minimize all administrative costs incurred by them in the Debtors' chapter 11 cases from and after July 18, 2016 through the Closing Date other than administrative costs related to documenting the Settlement, oversight of the auction process, and actively supporting the Sale.

**Conditions to
Funding of the
Litigation Trust:**

- The Bankruptcy Court enters the Final DIP Order
- The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Creditor Parties shall not be in breach of this Term Sheet.
- The Creditors' Committee shall not have commenced (or sought authority to commence) a Noteholder Action.

Exhibit 2

From: Hazan, Nava
To: Rubin, Jason; Kinel, Norman N.; Alberino, Scott L.
CC: Lerner, Stephen D.
Sent: 10-Aug-16 6:49:19 PM
Subject: RE: Term Sheet - FINAL PDF
Attachments: CE - Global Settlement Term Sheet 8-10-2016.DOCX

Jason,

There is a problem with my compare software, which my IT people cannot fix quickly. I am attaching to this email a word version of our Term Sheet, so you can run the blackline on your end. Sorry for the inconvenience.

Thank you.

From: Rubin, Jason [mailto:jrubin@AKINGUMP.com]
Sent: Wednesday, August 10, 2016 6:30 PM
To: Kinel, Norman N.; Alberino, Scott L.
Cc: Lerner, Stephen D.; Hazan, Nava
Subject: RE: Term Sheet - FINAL PDF [I-AMS.FID3638389]

Can you please send us a redline vs our prior draft? Thanks.

Jason P. Rubin

Direct: [+1 212.872.7489](tel:+1212.872.7489) | Internal: [37489](tel:+1212.872.7489)

From: Kinel, Norman N. [mailto:norman.kinel@squirepb.com]
Sent: Wednesday, August 10, 2016 6:23 PM
To: Alberino, Scott L.; Rubin, Jason
Cc: Lerner, Stephen D.; Hazan, Nava
Subject: Term Sheet - FINAL PDF [I-AMS.FID3638389]

FRE 408

Dear Scott and Jason,

Attached, for settlement purposes only, is a term sheet approved this afternoon by the Committee, which would resolve all outstanding issues between the Committee, on the one hand, and the Debtors and the Noteholders, on the other.

As already communicated by Stephen, we are available to meet or discuss tomorrow. You should also feel free to contact us with any questions today.

Best,

Norman



Norman N. Kinel

Partner

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46 Offices in 21 Countries

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SPB DRAFT 8/10/16
CONFIDENTIAL- FOR SETTLEMENT DISCUSSION PURPOSES ONLY
SUBJECT TO FRE 408

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the "Term Sheet") summarizes the terms of the settlement (the "Settlement") among the Debtors, the Purchaser, the Creditors' Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the "Parties").

Parties: Constellation Enterprises LLC and its direct and indirect subsidiaries that are debtors and debtors in possession in Case No. 16-11213 (CSS) (the "Debtors").

The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the Debtors.

The ad hoc group (the "Ad Hoc Noteholder Group") of unaffiliated holders (the "Noteholders") of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the "Notes"). The Ad Hoc Noteholder Group and the Creditors' Committee are collectively referred to herein as the "Creditor Parties."

CE Star Holdings, LLC, a Delaware limited liability company ("Purchaser").

**Resolution of
Creditors'
Committee
Objections:**

The Creditors' Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order") and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,500,000 on the allowed professional fees of the Creditors' Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors' Committee investigation pursuant to the Final DIP Order.

**Creditors’
Committee Support
for Sale:**

The Creditors’ Committee (a) shall not object to the approval of the proposed sale (the “Sale”) of substantially all of the assets of the Debtors (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company) to Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (the “APA”), and (b) will not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale.

**Claims and Causes
of Action:**

The Purchaser shall cause the APA to be amended at closing so that the following shall be “Excluded Assets” under the APA: (a) all causes of action under chapter 5 of title 11 of the United States Code against those unsecured creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the companies acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) former directors and officers, (ii) current and former shareholders and (iii) other parties and (c) claims against Private Equity Opportunities, LP (including any affiliates, subsidiaries, parent companies, employees, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief (collectively, “Specified Causes of Action”).

The Purchaser shall pay to the Debtors or the GUC Trust (as defined below) the amount required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies relating to the Specified Causes of Actions in an amount of not less than \$475,000 as currently described in the Wind Down Budget (as defined in the APA).

The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA.

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity shall be contributed to the GUC Trust.

GUC Trust:

In consideration for the Creditors’ Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the “Closing Date”) a trust to be established on terms, and with a trustee (the “Trustee”) and oversight committee (the “Oversight Committee”), to be selected and approved by the Creditors’ Committee (the “GUC Trust”) and deposit the following cash amounts in a trust account specifically designated by the Creditors’

Committee: (i) \$5,000,000 (the “GUC Recovery Trust Fund Contribution”), (ii) \$1,100,000 (the “GUC Professional Fees Contribution”), and (iii) any amount remaining after the payment of each of the items listed in the Wind Down Budget in the amount of \$2,345,000 to the extent such payments are not made (the “Remaining Wind Down Trust Funding” and together with the GUC Recovery Trust Fund Contribution and the GUC Professional Fees Contribution, the “Committee Settlement Funding Obligations”). The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The exclusive beneficiaries of the GUC Trust shall be the holders of allowed general unsecured claims against the Debtors, and shall not include the deficiency claims of any holders of the Notes with respect to both pre-petition and post-petition obligations (including any financing obligations under the Final DIP Order) owed to the holders of the Notes.

The GUC Professional Fees Contribution and the Remaining Wind Down Trust Funding shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action for the benefit of the GUC Trust. The proceeds recovered from the pursuit of any Specified Causes of Action will be allocated on a ratable basis among the GUC Trust beneficiaries.

The GUC Recovery Trust Fund Contribution shall be distributed to the GUC Trust beneficiaries.

The Trustee shall bear sole responsibility for any and all work related to claims reconciliation and distributions from the GUC Trust and all such amounts shall be paid from the GUC Professional Fees Contribution. The Purchaser and the Debtors’ current senior management shall cooperate fully with the GUC Trust in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process.

**Other Terms and
Conditions of the
Settlement:**

Upon agreement by the parties to the terms hereof and related documentation, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors’ chapter 11 cases through the Closing Date.

**Conditions to
Funding of the
GUC Trust:**

- The Bankruptcy Court enters the Final DIP Order.
- The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Creditor Parties shall not be in breach of this Term Sheet.

**Mutual Release
and Exculpation:**

The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall exchange full mutual releases and exculpations.

Timing:

The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall seek approval of this Term Sheet (or a more formal agreement to be negotiated by the Parties that embodies the terms herein) in conjunction with approval of the Sale. The Parties acknowledge and agree that time is of the essence and they shall seek a Bankruptcy Court order approving this Settlement to be entered within 10 business days of the Parties' agreement to the terms hereof. The Parties further agree that this Settlement will be documented and approved in connection with the order approving the Sale.

Exit:

The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee.

Exhibit 3

From: Hazan, Nava
To: jrubin@akingump.com; Alberino, Scott L. (SAlberino@AKINGUMP.com)
(SAlberino@AKINGUMP.com); Shifer, Joseph A. (JShifer@KRAMERLEVIN.com); Rogoff,
Adam C. (ARogoff@KRAMERLEVIN.com)
CC: Lerner, Stephen D.; Kinel, Norman N.
Sent: 16-Aug-16 10:23:11 AM
Subject: CE - Global Settlement
Attachments: UCC SettlementTerm Sheet 08@16_1082575601_1 - UCC SettlementTerm Sheet
08@16_1082575601_2.pdf

All –

Please see attached a blackline version showing the changes we made the version circulated this morning by Jason.

We will recommend this to the Committee.

Thank you.



Nava Hazan

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AGSH & FSPB DRAFT 8/16/16
CONFIDENTIAL- FOR SETTLEMENT DISCUSSION PURPOSES ONLY
SUBJECT TO FRE 408

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the “Term Sheet”) summarizes the terms of the settlement (the “Settlement”) among the Debtors, the Purchaser, the Creditors’ Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the “Parties”).

Parties: Constellation Enterprises LLC and its direct and indirect subsidiaries that are debtors and debtors in possession in Case No. 16-11213 (CSS) (the “Debtors”).

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) of the Debtors.

The ad hoc group (the “Ad Hoc Noteholder Group”) of unaffiliated holders (the “Noteholders”) of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the “Notes”). The Ad Hoc Noteholder Group and the Creditors’ Committee are collectively referred to herein as the “Creditor Parties.”

CE Star Holdings, LLC, a Delaware limited liability company (“Purchaser”).

**Resolution of
Creditors’
Committee
Objections:**

The Creditors’ Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors’ debtor-in-possession financing (the “DIP Motion”) and the proposed form of final order approving such financing (the “Final DIP Order”) and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,000,000 on the allowed professional fees of the Creditors’ Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors’ Committee investigation pursuant to the Final DIP Order).

Creditors' Committee Support for Sale:

The Creditors' Committee (a) shall affirmatively support, and not object to the approval of the proposed sale (the "Sale") of substantially all of the assets of the Debtors (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company) to Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (as amended, modified or supplemented, the "APA"), (b) will affirmatively support, and not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale, and (c) shall affirmatively support, and not object to the approval of the proposed sale of the assets of Debtors Columbus Holdings Inc. and Columbus Steel Casting Company to 476 Bridge Street LLC.

Claims and Causes of Action:

The Purchaser shall cause the APA to be amended at closing so that the following shall be "Excluded Assets" under the APA and shall be contributed to the GUC Trust: (a) all causes of action under chapter 5 of title 11 of the United States Code against those unsecured creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the companies acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) former directors and officers, (ii) current and former shareholders and their affiliates and (iii) other parties, and the Debtors shall contribute any estate causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief (collectively, "Specified Causes of Action"); *provided, however*, Specified Causes of Action shall not include any claims or causes of action against the Debtors' current directors and officers.

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity ("Noteholder Specified Causes of Action") shall be contributed to the GUC Trust.

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The Purchaser shall pay to the Debtors or the GUC Trust (as defined below) the amount required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies relating to the Specified Causes of Actions in an amount of not less than \$475,000 as currently described in the Wind Down Budget (as defined in the APA).

The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA.

GUC Trust:

In consideration for the Creditors' Committee support of the Sale and

the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the "Closing Date") a trust to be established on terms, and with an oversight committee, the majority of the members of which shall be selected and approved by the Creditors' Committee (the "Oversight Committee") and with a trustee (the "Trustee") and professionals to be selected and approved by the Creditors' Committee and the Ad Hoc Noteholder Group (the "GUC Trust") and deposit the following cash amounts in a trust account specifically designated by the Creditors' Committee: (i) \$1,250,000 (the "GUC Recovery Trust Fund Contribution"), (ii) \$1,000,000 (the "GUC Professional Fees Contribution") and together with the GUC Recovery Trust Fund Contribution, the "Committee Settlement Funding Obligations"), subject to the Purchaser's option to fund additional amounts if the GUC Trust's pursuit of the Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the "GUC Holders") will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action (but not Noteholder Specified Causes of Action) will be allocated among (a) 50% for the ~~GUC Holders~~ holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of with respect to the Notes, and (b) 50% to the holders of deficiency claims with respect to the Notes.

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The net proceeds recovered from the pursuit of any Noteholder Specified Causes of Action will be allocated among (a) 50% for the GUC Holders and (b) 50% to the holders of deficiency claims with respect to the Notes.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action for the benefit of the GUC Trust.

The Trustee shall bear sole responsibility for any and all work related to the claims reconciliation process and distributions from the GUC Trust. The Purchaser and the Debtors shall cooperate fully with the Trustee in the claims reconciliation process and shall provide

	reasonable access to employees and business records in connection with such process.
Other Terms and Conditions of the Settlement:	Upon agreement by the parties to the terms hereof and related documentation, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors' chapter 11 cases through the Closing Date.
Conditions to Funding of the GUC Trust:	<ul style="list-style-type: none">• The Bankruptcy Court enters the Final DIP Order.• The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.• The Closing Date occurs.• The Creditor Parties shall not be in breach of this Term Sheet.
Mutual Release and Exculpation:	The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall exchange full mutual releases and exculpations.
Timing:	The terms of this Term Sheet shall be read into the record at the hearing on the approval of the Sale and shall be binding on all parties in interest, including a Chapter 7 trustee. The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including, if necessary, seeking a separate order of the Court.
Exit:	The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee and the Ad Hoc Noteholder Group.

Exhibit 4

From: Hazan, Nava
To: jrubin@akingump.com; Shifer, Joseph A. (JShifer@KRAMERLEVIN.com)
CC: Lerner, Stephen D.
Sent: 8/17/2016 5:56:54 PM
Subject: Constellation- Settlement Term Sheet
Attachments: UCC SettlementTerm Sheet 08_16.DOCX

All —

I spoke with Jason today.

Attached please find a draft of the Term Sheet, which reflects the agreement reached yesterday. Please note that the attached is still subject to internal and client review. Please let us know if you have any comments or questions.

We also thought that it would make sense to have a call to discuss the process to get the term sheet approved and generally exit strategy. Please let me know if you would be available for a call on Friday and what time would work for you.

Thank you.



Nava Hazan

Partner

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SPB DRAFT 8/17/16
CONFIDENTIAL- FOR SETTLEMENT DISCUSSION PURPOSES ONLY
SUBJECT TO FRE 408

In re Constellation Enterprises LLC, et al.

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The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the Debtors.

The ad hoc group (the "Ad Hoc Noteholder Group") of unaffiliated holders (the "Noteholders") of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the "Notes"). The Ad Hoc Noteholder Group and the Creditors' Committee are collectively referred to herein as the "Creditor Parties."

CE Star Holdings, LLC, a Delaware limited liability company ("Purchaser").

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Committee
Objections:**

The Creditors' Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order") and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,050,000 on the allowed professional fees of the Creditors' Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors' Committee investigation pursuant to the Final DIP Order).

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Committee Support
for Sale:**

The Creditors’ Committee (a) shall affirmatively support, and not object to the approval of the proposed sale (the “Sale”) of substantially all of the assets of the Debtors (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company) to Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (as amended, modified or supplemented, the “APA”), (b) will affirmatively support, and not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale, and (c) shall affirmatively support, and not object to the approval of the proposed sale of the assets of Debtors Columbus Holdings Inc. and Columbus Steel Casting Company to 476 Bridge Street LLC.

**Claims and Causes
of Action:**

The Purchaser shall cause the APA to be amended at closing so that the following shall be “Excluded Assets” under the APA and shall be contributed to the GUC Trust: (a) all causes of action under chapter 5 of title 11 of the United States Code against those unsecured creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the companies acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) former directors and officers, (ii) current and former shareholders and their affiliates, and (iii) other parties, and the Debtors shall contribute any estate causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief (collectively, “Specified Causes of Action”); *provided, however*, the Specified Causes of Action shall not include any claims or causes of action against the Debtors’ current directors and officers and legal counsel to the Debtors.

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity (“Noteholder Specified Causes of Action”) shall be contributed to the GUC Trust.

The Purchaser shall pay to the Debtors or the GUC Trust the amount required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies relating to the Specified Causes of Actions in an amount of not less than \$475,000 as currently described in the Wind Down Budget (as defined in the APA).

The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA.

GUC Trust:

In consideration for the Creditors’ Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree

to cause the Purchaser to fund on the closing date of the Sale (the "Closing Date") a trust to be established on terms, and with an oversight committee, the majority of the members of which shall be selected and approved by the Creditors' Committee (the "Oversight Committee") and with a trustee (the "Trustee") and professionals to be selected and approved by the Creditors' Committee and the Ad Hoc Noteholder Group (the "GUC Trust") and deposit the following cash amounts in a trust account specifically designated by the Creditors' Committee: (i) \$1,250,000 (the "GUC Recovery Trust Fund Contribution"), (ii) \$1,000,000 (the "GUC Professional Fees Contribution") and together with the GUC Recovery Trust Fund Contribution, the "Committee Settlement Funding Obligations"), subject to the Purchaser's option to fund additional amounts if the GUC Trust's pursuit of the Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the "GUC Holders") will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action (but not Noteholder Specified Causes of Action) will be allocated among (a) 50% for the holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of with respect to the Notes, and (b) 50% to the holders of deficiency claims with respect to the Notes.

The net proceeds recovered from the pursuit of any Noteholder Specified Causes of Action will be allocated among (a) 50% for the GUC Holders and (b) 50% to the holders of deficiency claims with respect to the Notes.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action for the benefit of the GUC Trust.

The Trustee shall bear sole responsibility for any and all work related to the claims reconciliation process and distributions from the GUC Trust. The Purchaser and the Debtors shall cooperate fully with the Trustee in the claims reconciliation process and shall provide reasonable access to employees and business records in connection

with such process.

**Other Terms and
Conditions of the
Settlement:**

Upon agreement by the parties to the terms hereof and related documentation, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors' chapter 11 cases through the Closing Date.

**Conditions to
Funding of the
GUC Trust:**

- The Bankruptcy Court enters the Final DIP Order.
- The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Creditor Parties shall not be in breach of this Term Sheet.

**Mutual Release
and Exculpation:**

The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall exchange full mutual releases and exculpations.

Timing:

The terms of this Term Sheet shall be read into the record at the hearing on the approval of the Sale and shall be binding on all parties in interest, including a Chapter 7 trustee. The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including, if necessary, seeking a separate order of the Court.

Exit:

The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee and the Ad Hoc Noteholder Group.

Exhibit 5

From: Shifer, Joseph A.
To: Rubin, Jason; Hazan, Nava; Rogoff, Adam C.
CC: defranceschi@rfl.com; Shapiro@rfl.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinell, Norman N.
Sent: 19-Aug-16 11:53:32 AM
Subject: RE: Constellation Call
Attachments: KL2-#2971355-v5-Constellation_-_UCC_Settlement_Term_Sheet.DOCX; Constellation - UCC Settlement Term Sheet.5 to Constellation - UCC Settlement Term Sheet.1-2.pdf

Subject to FRE 408

All,

Following up on our call, attached is a markup of the settlement term sheet. Please note that the term sheet remains subject to further internal review and client sign off and is being shared in the interest of time.

-Joe

Joseph A. Shifer
Associate

KRAMER LEVIN
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From: Rubin, Jason [mailto:jrubin@AKINGUMP.com]
Sent: Thursday, August 18, 2016 5:43 PM
To: Hazan, Nava; Rogoff, Adam C.; Shifer, Joseph A.
Cc: defranceschi@rfl.com; Shapiro@rfl.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinell, Norman N.
Subject: Re: Constellation Call

Can someone please send a calendar invite? Thanks.

Sent from my BlackBerry 10 smartphone.

From: Hazan, Nava
Sent: Thursday, August 18, 2016 5:23 PM
To: Rogoff, Adam C.; Shifer, Joseph A.
Cc: Rubin, Jason; defranceschi@rfl.com; Shapiro@rfl.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinell, Norman N.
Subject: RE: Constellation Call

9:30 am works for us.

Please call 1-800-925-7671 and dial 8729822.

Thank you.

From: Rogoff, Adam C. [<mailto:ARogoff@KRAMERLEVIN.com>]
Sent: Thursday, August 18, 2016 5:21 PM
To: Shifer, Joseph A.
Cc: Rubin, Jason; Hazan, Nava; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinell, Norman N.
Subject: Re: Constellation Call

9:30 is fine.

Adam C. Rogoff
Partner

KRAMER LEVIN
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[view bio](#)
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On Aug 18, 2016, at 5:17 PM, Shifer, Joseph A. <JShifer@KRAMERLEVIN.com> wrote:

Subject to Adam's availability, I can do earlier.

From: Rubin, Jason [<mailto:jrubin@AKINGUMP.com>]
Sent: Thursday, August 18, 2016 5:06 PM
To: Rogoff, Adam C.; Hazan, Nava
Cc: Shifer, Joseph A.; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinell, Norman N.
Subject: RE: Constellation Call

Could we do earlier please? 9:30 am, maybe?

Jason P. Rubin
Direct: [+1 212.872.7489](tel:+12128727489) | Internal: [37489](tel:37489)

From: Rogoff, Adam C. [<mailto:ARogoff@KRAMERLEVIN.com>]
Sent: Thursday, August 18, 2016 5:02 PM
To: Hazan, Nava
Cc: Rubin, Jason; Shifer, Joseph A.; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinell, Norman N.
Subject: Re: Constellation Call

Fine for me.

Adam C. Rogoff
Partner

KRAMER LEVIN
NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas

New York, New York 10036
O: 212-715-9285 | F: 212-715-8265 | M: 908-451-3207
arogoff@kramerlevin.com
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www.kramerlevin.com

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On Aug 18, 2016, at 4:54 PM, Hazan, Nava <nava.hazan@squirepb.com> wrote:

All –

Please let me know if you would be available for our call tomorrow **Friday August 19, 2016 at 10:00 am ET**.

The proposed agenda for the call is the following:

- ? process for approval of the term sheet
- ? exit strategy
- ? bar date

Thank you.

<image001.jpg> **Nava Hazan**

Partner
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza, 23rd Floor
New York, New York 10112
T +1 212 872 9822
O +1 212 872 9800
F +1 212 872 9815
M +1 646 269 3192
Nava.Hazan@squirepb.com | squirepattonboggs.com

46 Offices in 21 Countries

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*KL COMMENTS AS OF 8/19/16 TO SPB DRAFT 8/17/16
CONFIDENTIAL- FOR SETTLEMENT DISCUSSION PURPOSES ONLY
SUBJECT TO FRE 408*

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the “Term Sheet”) summarizes the terms of the settlement (the “Settlement”) among the Debtors, the Purchaser, the Creditors’ Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the “Parties”).

Parties:

Constellation Enterprises LLC and its direct and indirect subsidiaries that are debtors and debtors in possession in the bankruptcy cases (the “Bankruptcy Cases”) jointly administered as Case No. 16-11213 (CSS) (the “Debtors”).

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) of the Debtors.

The ad hoc group (the “Ad Hoc Noteholder Group”) of unaffiliated holders (the “Noteholders”) of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the “Notes”). The Ad Hoc Noteholder Group and the Creditors’ Committee are collectively referred to herein as the “Creditor Parties.”

CE Star Holdings, LLC, a Delaware limited liability company (“Purchaser”).

**Resolution of
Creditors’
Committee
Objections:**

The Creditors’ Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors’ debtor-in-possession financing (the “DIP Motion”) and the proposed form of final order approving such financing (the “Final DIP Order”) and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,050,000 on the allowed professional fees of the Creditors’ Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors’ Committee investigation pursuant to the Final DIP Order). The Creditors’ Committee agrees that any professional fees incurred following the DIP Termination Date will not be payable from the Wind Down Budget (as defined in the APA).

KL2 2971355.5

**Creditors’
Committee Support
for Sale:**

The Creditors’ Committee (a) shall affirmatively support, and not object to the approval of the proposed sale (the “Sale”) of substantially all of the assets of the Debtors (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company) to the Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (as amended, modified or supplemented, the “APA”), (b) will affirmatively support, and not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale, (c) shall affirmatively support, and not object to the approval of the proposed sale of the assets of Debtors Columbus Holdings Inc. and Columbus Steel Casting Company to 476 Bridge Street LLC, (d) shall affirmatively support, and not object to, or solicit others to object to the approval of the Settlement, and (e) shall affirmatively support, and not object to, or solicit others to object to the approval of the Resolution Mechanic (as defined below).

**Claims and Causes
of Action:**

The Purchaser shall cause the APA to be amended at closing so that the following shall be “Excluded Assets” under the APA and shall be contributed to the GUC Trust by the Debtors (all of the following, the “Specified Causes of Action”):¹ (a) all causes of action under chapter 5 of title 11 of the United States Code against those creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the businesses acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) the Debtors’ former directors and officers, (ii) the Debtors’ current and former shareholders and their affiliates, and (iii) other parties, and (c) any estate causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief; *provided, however*, the Specified Causes of Action shall not include any claims or causes of action against the Debtors’ current directors and officers and legal counsel to the Debtors (which, for the avoidance of doubt, shall constitute “Acquired Assets” under the APA).

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity (“Noteholder Specified Causes of Action”) shall be contributed to the GUC Trust.

The Purchaser shall pay to the Debtors the amount of not less than \$475,000 required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies as currently

¹ NTD: Mechanism for transferring causes of action to be determined.

described in the Wind Down Budget (the “Tail Policies”). The Tail Policies shall cover the Debtors’ current and former directors and officers and shall cover, to the extent applicable, the Specified Causes of Actions.

The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA and that it shall not transfer such causes of action to any entity.

GUC Trust:

In consideration for the Creditors’ Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the “Closing Date”) a trust to be established on terms mutually acceptable to the Parties, and with an oversight committee, the majority of the members of which shall be selected and approved by the Creditors Committee (the “Oversight Committee”) and with a trustee (the “Trustee”) and professionals to be selected and approved by the Creditors’ Committee and the Ad Hoc Noteholder Group (the “GUC Trust”) and deposit the following cash amounts in a trust account specifically designated by the Creditors’ Committee: (i) \$1,250,000 (the “GUC Recovery Trust Fund Contribution”), (ii) \$1,000,000 (the “GUC Professional Fees Contribution” and together with the GUC Recovery Trust Fund Contribution, the “Committee Settlement Funding Obligations”), subject to the Purchaser’s option to fund additional amounts if the GUC Trust’s pursuit of the Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser. The Creditors’ Committee and the Ad Hoc Noteholder Group shall consult with the Debtors in connection with the selection of the Oversight Committee, the Trustee, and the professionals to be retained by the GUC Trust.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the “GUC Holders”) will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action (but not Noteholder Specified Causes of Action) will be allocated among (a) 50% for the holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of with respect to the Notes, and (b) 50% to the holders of deficiency claims with respect to the Notes.

The net proceeds recovered from the pursuit of any Noteholder

Specified Causes of Action will be allocated among (a) 50% for the GUC Holders and (b) 50% to the holders of deficiency claims with respect to the Notes.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action for the benefit of the GUC Trust.

The Trustee shall bear sole responsibility for any and all work related to the claims reconciliation process and distributions from the GUC Trust. The Purchaser and the Debtors shall cooperate fully with the Trustee in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process at the cost of the GUC Trust. Notwithstanding the foregoing, nothing shall obligate the Debtors to undertake any activity that will interfere the wind down of the Debtors, including the continued employment of any person or retention of any professional.

Other Terms and Conditions of the Settlement:

Upon agreement by the parties to the terms hereof and related documentation, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors' chapter 11 cases through the Closing Date.

Conditions to Funding of the GUC Trust:

- The Bankruptcy Court enters the Final DIP Order.
- The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Bankruptcy Court approves the Settlement.
- The Creditor Parties shall not be in breach of this Term Sheet.

Mutual Release and Exculpation:

The Parties shall exchange full mutual releases and exculpations (including the Parties' Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors' past, current, and future respective directors, officers, employees, partners, insurers, co-insurers, reinsurers, agents, attorneys, accountants, auditors, advisors, investment advisors, or legal representatives, solely in their capacity as such, and to the extent such entities are not the subject of a Specified Cause of Action).

Timing:

The terms of this Term Sheet shall be read into the record at the hearing on the approval of the Sale and shall be binding on all parties in interest, including a Chapter 7 trustee. The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including, if

necessary, seeking a separate order of the Court.

Exit:

The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee and the Ad Hoc Noteholder Group, or such other resolution of the Bankruptcy Cases as may be agreed to by the Parties (collectively, the "Resolution Mechanic").

KL COMMENTS AS OF 8/19/16 TO SPB DRAFT 8/17/16
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In re Constellation Enterprises LLC, et al.

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The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the Debtors.

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**Resolution of
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Objections:**

The Creditors' Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order") and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,050,000 on the allowed professional fees of the Creditors' Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors' Committee investigation pursuant to the Final DIP Order. The Creditors' Committee agrees that any professional fees incurred following the DIP Termination Date will not be payable from the Wind Down Budget (as defined in the APA).

KL2 2971355-12971355.5

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The Purchaser shall pay to the Debtors ~~or the GUC Trust~~ the amount

¹ NTD: Mechanism for transferring causes of action to be determined.

of not less than \$475,000 required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies relating to the Specified Causes of Actions in an amount of not less than \$475,000 as currently described in the Wind Down Budget (as defined in the APA) the "Tail Policies"). The Tail Policies shall cover the Debtors' current and former directors and officers and shall cover, to the extent applicable, the Specified Causes of Actions.

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holders of deficiency claims with respect to the Notes.

The net proceeds recovered from the pursuit of any Noteholder Specified Causes of Action will be allocated among (a) 50% for the GUC Holders and (b) 50% to the holders of deficiency claims with respect to the Notes.

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Timing:

The terms of this Term Sheet shall be read into the record at the hearing on the approval of the Sale and shall be binding on all parties

in interest, including a Chapter 7 trustee. The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including, if necessary, seeking a separate order of the Court.

Exit:

The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee and the Ad Hoc Noteholder Group, or such other resolution of the Bankruptcy Cases as may be agreed to by the Parties (collectively, the "Resolution Mechanic").

Comparison Details	
Title	pdfDocs compareDocs Comparison Results
Date & Time	8/19/2016 11:49:15 AM
Comparison Time	0.25 seconds
compareDocs version	v4.2.100.13

Sources	
Original Document	[#2971355] [v1] Constellation - UCC Settlement Term Sheet
Modified Document	[#2971355] [v5] Constellation - UCC Settlement Term Sheet

Comparison Statistics	
Insertions	20
Deletions	8
Changes	5
Moves	2
TOTAL CHANGES	35

Word Rendering Set Markup Options	
Name	Standard with Change Bars
<u>Insertions</u>	
Deletions	
<u>Moves</u> / Moves	
Inserted cells	
Deleted cells	
Merged cells	
Formatting	Color only.
Changed lines	Mark left border.
Comments color	By Author.
Balloons	False

compareDocs Settings Used	Category	Option Selected
Open Comparison Report after Saving	General	Always
Report Type	Word	Formatting
Character Level	Word	False
Include Headers / Footers	Word	True
Include Footnotes / Endnotes	Word	True
Include List Numbers	Word	True
Include Tables	Word	True
Include Field Codes	Word	True
Include Moves	Word	True
Show Track Changes Toolbar	Word	True
Show Reviewing Pane	Word	True
Update Automatic Links at Open	Word	False
Summary Report	Word	End
Include Change Detail Report	Word	Separate
Document View	Word	Print
Remove Personal Information	Word	False
Flatten Field Codes	Word	True

Exhibit 6

From: Hazan, Nava
To: Lerner, Stephen D.
Sent: 29-Aug-16 1:55:36 PM
Subject: FW: Constellation Call
Attachments: KL2-#2971355-v7-Constellation_-_UCC_Settlement_Term_Sheet.DOCX; Constellation - UCC Settlement Term Sheet.7 to Constellation - UCC Settlement Term Sheet.6.pdf

Redacted

From: Shifer, Joseph A. [mailto:JShifer@KRAMERLEVIN.com]
Sent: Monday, August 29, 2016 1:45 PM
To: Hazan, Nava; Rubin, Jason; Rogoff, Adam C.
Cc: defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: RE: Constellation Call

Nava,

Subject to the usual caveats, please see the attached revised term sheet and a redline to the last version you circulated. We are working on the 9019 motion and expect a draft to be circulated later in the week.

I am available for a call tomorrow morning.

-Joe

Joseph A. Shifer
Associate

**KRAMER LEVIN
NAFTALIS & FRANKEL LLP**
1177 Avenue of the Americas
New York, New York 10036
O: 212-715-9517 | F: 212-715-8105 | M: 917-714-5697
jshifer@kramerlevin.com
[view bio](#)
www.kramerlevin.com

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From: Hazan, Nava [mailto:nava.hazan@squirepb.com]
Sent: Monday, August 29, 2016 12:20 PM
To: Shifer, Joseph A.; Rubin, Jason; Rogoff, Adam C.
Cc: defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: RE: Constellation Call

Joe and Jason,

We would like to set up a call with you to finalize the term sheet. What is your availability tomorrow morning? We thought it would be most efficient to just turn pages and get the term sheet finalized. Also, if you could please send to us the draft 9019 motion today, we will provide our comments prior to our call and get the 9019 motion finalized as well.

Thank you.



Nava Hazan

Partner
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza, 23rd Floor
New York, New York 10112
T +1 212 872 9822
O +1 212 872 9800
F +1 212 872 9815
M +1 646 269 3192
Nava.Hazan@squirepb.com | squirepattonboggs.com

From: Hazan, Nava

Sent: Wednesday, August 24, 2016 8:19 PM

To: 'Shifer, Joseph A.'; Rubin, Jason; Rogoff, Adam C.

Cc: defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.

Subject: RE: Constellation Call

Joe,

Please see attached clean and blackline versions of the term sheet, showing the changes made to the version you sent below.

Thank you.



Nava Hazan

Partner
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza, 23rd Floor
New York, New York 10112
T +1 212 872 9822
O +1 212 872 9800
F +1 212 872 9815
M +1 646 269 3192
Nava.Hazan@squirepb.com | squirepattonboggs.com

From: Shifer, Joseph A. [<mailto:JShifer@KRAMERLEVIN.com>]

Sent: Friday, August 19, 2016 11:54 AM

To: Rubin, Jason; Hazan, Nava; Rogoff, Adam C.

Cc: defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.

Subject: RE: Constellation Call

Subject to FRE 408

All,

Following up on our call, attached is a markup of the settlement term sheet. Please note that the term sheet remains subject to further internal review and client sign off and is being shared in the interest of time.

-Joe

Joseph A. Shifer
Associate

**KRAMER LEVIN
NAFTALIS & FRANKEL LLP**
1177 Avenue of the Americas
New York, New York 10036
O: 212-715-9517 | F: 212-715-8105 | M: 917-714-5697
jshifer@kramerlevin.com
[view bio](#)
www.kramerlevin.com

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Cc: defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: Re: Constellation Call

Can someone please send a calendar invite? Thanks.

Sent from my BlackBerry 10 smartphone.

From: Hazan, Nava
Sent: Thursday, August 18, 2016 5:23 PM
To: Rogoff, Adam C.; Shifer, Joseph A.
Cc: Rubin, Jason; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: RE: Constellation Call

9:30 am works for us.

Please call 1-800-925-7671 and dial 8729822.

Thank you.

From: Rogoff, Adam C. [<mailto:ARogoff@KRAMERLEVIN.com>]
Sent: Thursday, August 18, 2016 5:21 PM
To: Shifer, Joseph A.
Cc: Rubin, Jason; Hazan, Nava; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: Re: Constellation Call

9:30 is fine.

Adam C. Rogoff
Partner

**KRAMER LEVIN
NAFTALIS & FRANKEL LLP**
1177 Avenue of the Americas
New York, New York 10036
O: 212-715-9285 | F: 212-715-8265 | M: 908-451-3207
arogoff@kramerlevin.com

[view bio](#)
www.kramerlevin.com

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On Aug 18, 2016, at 5:17 PM, Shifer, Joseph A. <JShifer@KRAMERLEVIN.com> wrote:

Subject to Adam's availability, I can do earlier.

From: Rubin, Jason [<mailto:jrubin@AKINGUMP.com>]
Sent: Thursday, August 18, 2016 5:06 PM
To: Rogoff, Adam C.; Hazan, Nava
Cc: Shifer, Joseph A.; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: RE: Constellation Call

Could we do earlier please? 9:30 am, maybe?

Jason P. Rubin
Direct: [+1 212.872.7489](tel:+12128727489) | Internal: [37489](#)

From: Rogoff, Adam C. [<mailto:ARogoff@KRAMERLEVIN.com>]
Sent: Thursday, August 18, 2016 5:02 PM
To: Hazan, Nava
Cc: Rubin, Jason; Shifer, Joseph A.; defranceschi@rlf.com; Shapiro@rlf.com; Alberino, Scott L.; mbcleary@ycst.com; Lerner, Stephen D.; Samis, Chris (External); Kinel, Norman N.
Subject: Re: Constellation Call

Fine for me.

Adam C. Rogoff
Partner

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On Aug 18, 2016, at 4:54 PM, Hazan, Nava <nava.hazan@squirepb.com> wrote:

All --

Please let me know if you would be available for our call tomorrow Friday August 19, 2016 at 10:00 am ET.

The proposed agenda for the call is the following:

- ? process for approval of the term sheet
- ? exit strategy
- ? bar date

Thank you.

<image001.jpg> **Nava Hazan**
Partner
Squire Patton Boggs (US) LLP
30 Rockefeller Plaza, 23rd Floor
New York, New York 10112
T +1 212 872 9822
O +1 212 872 9800
F +1 212 872 9815
M +1 646 269 3192
Nava.Hazan@squirepb.com | squirepattonboggs.com

46 Offices in 21 Countries

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#US

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RL/KLF Comments 8/29/16

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the "Term Sheet") summarizes the terms of the settlement (the "Settlement") among the Debtors, the Purchaser, the Creditors' Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the "Parties") and shall be effective as of August 16, 2016.

Parties: Constellation Enterprises LLC and its direct and indirect subsidiaries that are debtors and debtors in possession in the bankruptcy cases (the "Bankruptcy Cases") jointly administered as Case No. 16-11213 (CSS) (the "Debtors") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the Debtors.

The ad hoc group (the "Ad Hoc Noteholder Group") of unaffiliated holders (the "Noteholders") of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the "Notes"). The Ad Hoc Noteholder Group and the Creditors' Committee are collectively referred to herein as the "Creditor Parties."

CE Star Holdings, LLC, a Delaware limited liability company and any designees or assignees of CE Star as applicable under the APA ("Purchaser").

**Resolution of
Creditors'
Committee
Objections:**

To the extent it has not already done so, the Creditors' Committee shall (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order") and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for sufficient funding by the DIP Lenders (as defined in the Final DIP Order) to the Debtors for payment by the Debtors of allowed fees and expenses incurred by the professionals retained by the Creditors' Committee ("Committee Professional Fees") up to the amount of \$2,050,000 (the "Overall Committee Fee Cap"), and the

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existing cap on the Creditors' Committee's Investigation Budget (as defined in the Final DIP Order) shall be removed in its entirety from the Final DIP Order and only the Overall Committee Fee Cap shall apply to the Committee Professional Fees. The Parties agree that they will not raise or assert, or cause any other party to raise or assert any objection to an award by the Bankruptcy Court of amounts sought by the Parties' professionals for fees and expenses.

The Creditors' Committee agrees (i) not to seek payment of any Committee Professional Fees in excess of the Overall Committee Fee Cap and (ii) that any Committee Professional Fees incurred following the DIP Termination Date (as defined in the Final DIP Order) will not be payable from the Wind Down Budget (as defined in that certain asset purchase agreement, dated July 14, 2016, as amended, modified or supplemented, the "APA") with respect to the sale (the "Sale") of substantially all of the assets of the Debtors to the Purchaser (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company).

Parties' Support for Settlement:

Each of the Parties shall affirmatively support, and not object to, or solicit others to object to the approval of the Settlement or to the approval of the Resolution Mechanic (as defined below).

Claims and Causes of Action:

The Purchaser shall cause the APA to be amended so that, upon the later of the date that the Bankruptcy Court enters the Approval Order (as defined below) and the formation of the GUC Trust (as defined below) the following causes of action shall be contributed to the GUC Trust by the Purchaser (all of the following, collectively, the "Specified Causes of Action"): (a) all causes of action under chapter 5 of title 11 of the United States Code against those parties which are not vendors, suppliers or service providers that will provide goods and services to the businesses acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) the Debtors' former directors and officers, (ii) the Debtors' current and former shareholders and their affiliates, and (iii) other parties, and (c) any causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief; *provided, however*, the Specified Causes of Action shall not include any claims or causes of action against the Debtors' current directors, officers and legal counsel and investment banker [^{**} and discuss status of diligence regarding CM ^{**}] (which claims or causes of action, for the avoidance of doubt, shall constitute "Acquired Assets" under the APA).

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity ("Noteholder Specified Causes of Action") shall be contributed to the GUC Trust.

The Purchaser shall pay to the Debtors the amount of not less than \$475,000 required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies as currently described in the Wind Down Budget (the "Tail Policies"). The Tail Policies shall cover the Debtors' current and former directors and officers and shall cover, to the extent applicable, the Specified Causes of Actions.

The Purchaser agrees that it will not prosecute any causes of action (including chapter 5 actions) that it acquires under the APA and that it shall not transfer such causes of action to any entity.

GUC Trust:

In consideration for the Creditors' Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the "Closing Date") a trust (the "GUC Trust") to be established by the Creditors' Committee in consultation with the Ad Hoc Noteholder Group and the Debtors, with an oversight committee, the majority of the members of which shall be selected and approved by the Creditors Committee (the "Oversight Committee") and with a trustee (the "Trustee") and professionals to be selected and approved by the Creditors' Committee and the Ad Hoc Noteholder Group, in consultation with the Debtors (the "GUC Trust"), and deposit the following cash amounts in a trust account specifically designated by the parties to be used for the GUC Trust: (i) \$1,250,000 (the "GUC Recovery Trust Fund Contribution"), (ii) \$1,000,000 (the "GUC Professional Fees Contribution") and together with the GUC Recovery Trust Fund Contribution, the "Committee Settlement Funding Obligations"), subject to the Purchaser's option to fund additional amounts if the GUC Trust's pursuit of the Specified Causes of Action and/or the Noteholder Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the "GUC Holders") will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action (but not Noteholder Specified Causes of Action) will be allocated among (a) 50% for the holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of with respect to the Notes, and (b) 50% to the holders of deficiency claims with respect to the Notes.

The net proceeds recovered from the pursuit of any Noteholder Specified Causes of Action will be allocated among (a) 50% for the GUC Holders and (b) 50% to the holders of deficiency claims with respect to the Notes.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action and the Noteholder Specified Causes of Action for the benefit of the GUC Trust.

The Trustee shall bear sole responsibility for any and all work related to the claims reconciliation process and distributions from the GUC Trust. The Purchaser and the Debtors shall cooperate reasonably with the Trustee in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process at the cost of the GUC Trust; provided, however, that nothing in this Term Sheet or the Settlement shall require the Debtors to maintain a responsible person (which may, but need not, include an officer and/or director) for longer than the Debtors deem reasonably necessary for the Debtors to complete their wind-down.

Other Terms and Conditions of the Settlement:

Effective as of August 16, 2016, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Bankruptcy Cases through the Closing Date.

Conditions to Funding of the GUC Trust:

- The Bankruptcy Court enters the Final DIP Order.
- The Sale is not subject to a present stay.
- The Closing Date occurs.
- The Bankruptcy Court enters an order that approves the Settlement (the "Approval Order").
- The Creditor Parties shall not be in breach of this Term Sheet and/or the Settlement.

Mutual Release and Exculpation:

Effective as of the date that the Bankruptcy Court enters the Approval Order, the Parties shall exchange full mutual releases and exculpations (including the Parties' past and current respective directors, officers, employees, partners, insurers, co-insurers, reinsurers, agents, attorneys, accountants, auditors, advisors, investment advisors, or legal representatives, solely in their capacity as such; provided,

however, that none of the parties against whom a Specified Cause of Action or a Noteholder Specified Cause of Action could be asserted will be released or exculpated).

Timing:

The material terms of this Term Sheet were read into the record at the hearing on the approval of the Sale. The Parties shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof. The Settlement, once approved, shall be binding on all the Parties (and their successors and assigns) and all parties in interest, including any chapter 7 trustee. Prior to the approval of the Settlement, the Parties shall agree to be bound by the Term Sheet.

Exit:

The Bankruptcy Cases shall be (a) dismissed by structured dismissal on terms that are consistent with this Term Sheet and/or the Settlement and are otherwise acceptable to the Debtors, the Creditors' Committee and the Ad Hoc Noteholder Group, or (b) resolved by such other process as may be agreed to by the Parties and approved by the Bankruptcy Court (collectively, the "Resolution Mechanic").

[SIGNATURE PAGES FOLLOW]

Wilmington, Delaware

Dated: [], 2016

/s/DRAFT

Daniel J. DeFranceschi (DE Bar No. 2732)

Zachary I. Shapiro (DE Bar No. 5103)

Rachel L. Biblo (DE Bar No. 6012)

Joseph C. Barsalona II (DE Bar No. 6102)

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- and -

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Joseph A. Shifer (admitted *pro hac vice*)

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1177 Avenue of the Americas

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Telephone: (212) 715-9100

Counsel for the Debtors

/s/DRAFT

[Ad Hoc Group/Purchaser Counsel Information]

Counsel for the Ad Hoc Group and the Purchaser

/s/DRAFT

[Committee Counsel Information]

Counsel for the Committee

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010-8250-5198/2/AMERICAS

~~SPB-RL/KLF Comments 8/24/16 KL COMMENTS AS OF 8/19/16 TO SPB DRAFT~~
~~8/17/16 8/29/16~~
~~CONFIDENTIAL FOR SETTLEMENT DISCUSSION PURPOSES ONLY~~
~~SUBJECT TO FRE 408~~

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the “Term Sheet”) summarizes the terms of the settlement (the “Settlement”) among the Debtors, the Purchaser, the Creditors’ Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the “Parties”) and shall be effective as of August 16, 2016.

Parties: Constellation Enterprises LLC and its direct and indirect subsidiaries that are debtors and debtors in possession in the bankruptcy cases (the “Bankruptcy Cases”) jointly administered as Case No. 16-11213 (CSS) (the “Debtors”) in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

The Official Committee of Unsecured Creditors (the “Creditors’ Committee”) of the Debtors.

The ad hoc group (the “Ad Hoc Noteholder Group”) of unaffiliated holders (the “Noteholders”) of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the “Notes”). The Ad Hoc Noteholder Group and the Creditors’ Committee are collectively referred to herein as the “Creditor Parties.”

CE Star Holdings, LLC, a Delaware limited liability company and any designees or assignees of CE Star as applicable under the APA (“Purchaser”).

**Resolution of
Creditors’
Committee
Objections:**

~~The~~ To the extent it has not already done so, the Creditors’ Committee will shall (a) withdraw any pending objections to the motion seeking approval of the Debtors’ debtor-in-possession financing (the “DIP Motion”) and the proposed form of final order approving such financing (the “Final DIP Order”) and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for sufficient funding by the DIP Lenders (as defined in the Final DIP Order) to the Debtors for payment by the Debtors of allowed fees and expenses incurred by the professionals retained by the Creditors’ Committee (“Committee Professional Fees”) up to the

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amount of \$2,050,000 (the “Overall Committee Fee Cap”), and the existing cap on the Creditors’ Committee’s Investigation Budget (as defined in the Final DIP Order) shall be removed in its entirety from the Final DIP Order and only the Overall Committee Fee Cap shall apply to the Committee Professional Fees. The Parties agree that they will not raise or assert, or cause any other party to raise or assert any objection to an award by the Bankruptcy Court of amounts sought by the Parties’ professionals for fees and expenses.

The Creditors’ Committee agrees ~~that any professional fees (i) not to seek payment of any Committee Professional Fees in excess of the Overall Committee Fee Cap and (ii) that any Committee Professional Fees incurred following the DIP Termination Date (as defined in the Final DIP Order) will not be payable from the Wind Down Budget (as defined in that certain asset purchase agreement, dated July 14, 2016, as amended, modified or supplemented, the “APA”) with respect to the proposed sale (the “Sale”) of substantially all of the assets of the Debtors to the Purchaser (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company).~~

Parties’ Support for Settlement:

Each of the Parties shall affirmatively support, and not object to, or solicit others to object to the approval of the Settlement or to the approval of the Resolution Mechanic (as defined below).

Claims and Causes of Action:

The Purchaser shall cause the APA to be amended ~~at closing so that the following shall be “Excluded Assets” under the APA and so that, upon the later of the date that the Bankruptcy Court enters the Approval Order (as defined below) and the formation of the GUC Trust (as defined below) the following causes of action shall be contributed to the GUC Trust by the Debtors-Purchaser (all of the following, collectively, the “Specified Causes of Action”):⁺ (a) all causes of action under chapter 5 of title 11 of the United States Code against those parties which are not vendors, suppliers or service providers that will provide goods and services to the businesses acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) the Debtors’ former directors and officers, (ii) the Debtors’ current and former shareholders and their affiliates, and (iii) other parties, and (c) any causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief; *provided, however*, the Specified Causes of Action shall not include any claims or causes of~~

⁺NTD: Mechanism for transferring causes of action to be determined.

action against the Debtors' current directors, officers and legal counsel ~~(which and investment banker [** and discuss status of diligence regarding CM **])~~ (which claims or causes of action, for the avoidance of doubt, shall constitute "Acquired Assets" under the APA).

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity ("Noteholder Specified Causes of Action") shall be contributed to the GUC Trust.

The Purchaser shall pay to the Debtors the amount of not less than \$475,000 required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies as currently described in the Wind Down Budget (the "Tail Policies"). The Tail Policies shall cover the Debtors' current and former directors and officers and shall cover, to the extent applicable, the Specified Causes of Actions.

The Purchaser agrees that it will not prosecute any causes of action (including chapter 5 actions) that it acquires under the APA and that it shall not transfer such causes of action to any entity.

GUC Trust:

In consideration for the Creditors' Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the "Closing Date") a trust (the "GUC Trust") to be established by the Creditors' Committee in consultation with the Ad Hoc Noteholder Group and the Debtors, with an oversight committee, the majority of the members of which shall be selected and approved by the Creditors Committee (the "Oversight Committee") and with a trustee (the "Trustee") and professionals to be selected and approved by the Creditors' Committee and the Ad Hoc Noteholder Group—in consultation with the Debtors (the "GUC Trust")—and deposit the following cash amounts in a trust account specifically designated by the Creditors' Committee parties to be used for the GUC Trust: (i) \$1,250,000 (the "GUC Recovery Trust Fund Contribution"), (ii) \$1,000,000 (the "GUC Professional Fees Contribution" and together with the GUC Recovery Trust Fund Contribution, the "Committee Settlement Funding Obligations"), subject to the Purchaser's option to fund additional amounts if the GUC Trust's pursuit of the Specified Causes of Action and/or the Noteholder Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the "GUC Holders") will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action (but not Noteholder Specified Causes of Action) will be allocated among (a) 50% for the holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of with respect to the Notes, and (b) 50% to the holders of deficiency claims with respect to the Notes.

The net proceeds recovered from the pursuit of any Noteholder Specified Causes of Action will be allocated among (a) 50% for the GUC Holders and (b) 50% to the holders of deficiency claims with respect to the Notes.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action and the Noteholder Specified Causes of Action for the benefit of the GUC Trust.

The Trustee shall bear sole responsibility for any and all work related to the claims reconciliation process and distributions from the GUC Trust. The Purchaser and the Debtors shall cooperate reasonably with the Trustee in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process at the cost of the GUC Trust; provided, however, that nothing in this Term Sheet or the Settlement shall require the Debtors to maintain a responsible person (which may, but need not, include an officer and/or director) for longer than the Debtors deem reasonably necessary for the Debtors to complete their wind-down.

Other Terms and Conditions of the Settlement:

~~Upon agreement by the Parties to the terms hereof and related documentation~~ Effective as of August 16, 2016, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors' chapter 11 cases ~~Bankruptcy Cases~~ through the Closing Date.

Conditions to Funding of the GUC Trust:

- The Bankruptcy Court enters the Final DIP Order.
- The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Bankruptcy Court enters an order that approves the Settlement: (the "Approval Order").

**Mutual Release
and Exculpation:**

- The Creditor Parties shall not be in breach of this Term Sheet and/or the Settlement.

Timing:

~~The Effective as of the date that the Bankruptcy Court enters the Approval Order, the Parties shall exchange full mutual releases and exculpations (including the Parties' past and current respective directors, officers, employees, partners, insurers, co-insurers, reinsurers, agents, attorneys, accountants, auditors, advisors, investment advisors, or legal representatives, solely in their capacity as such; provided, however, that none of the parties against whom a Specified Cause of Action or a Noteholder Specified Cause of Action could be asserted will be released or exculpated).~~

Exit:

~~The material terms of this Term Sheet were read into the record at the hearing on the approval of the Sale and all terms of this Term Sheet are and shall be binding on all the Parties and all parties in interest, including a Chapter 7 trustee. The Parties shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including The Settlement, if necessary once approved, seeking a separate order of the Court. shall be binding on all the Parties (and their successors and assigns) and all parties in interest, including any chapter 7 trustee. Prior to the approval of the Settlement, the Parties shall agree to be bound by the Term Sheet.~~

~~The Debtors' chapter 11 cases The Bankruptcy Cases shall be (a) dismissed by structured dismissal on terms that are consistent with this Term Sheet and/or the Settlement and are otherwise acceptable to the Debtors, the Creditors' Committee and the Ad Hoc Noteholder Group, or (b) resolved by such other process as may be agreed to by the Parties and approved by the Bankruptcy Court (collectively, the "Resolution Mechanic").~~

[SIGNATURE PAGES FOLLOW]

Wilmington, Delaware

Dated: [] 2016

/s/DRAFT

Daniel J. DeFranceschi (DE Bar No. 2732)

Zachary I. Shapiro (DE Bar No. 5103)

Rachel L. Biblo (DE Bar No. 6012)

Joseph C. Barsalona II (DE Bar No. 6102)

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- and -

Adam C. Rogoff (admitted *pro hac vice*)

Joseph A. Shifer (admitted *pro hac vice*)

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FRANKEL LLP

1177 Avenue of the Americas

New York, New York 10036

Telephone: (212) 715-9100

Counsel for the Debtors

/s/DRAFT

[Ad Hoc Group/Purchaser Counsel Information]

Counsel for the Ad Hoc Group and the Purchaser

/s/DRAFT

[Committee Counsel Information]

Counsel for the Committee

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Comparison Details	
Title	pdfDocs compareDocs Comparison Results
Date & Time	8/29/2016 1:27:49 PM
Comparison Time	1.92 seconds
compareDocs version	v4.2.100.13

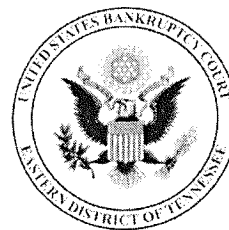
Sources	
Original Document	[#2971355] [v6] Constellation - UCC Settlement Term Sheet
Modified Document	[#2971355] [v7] Constellation - UCC Settlement Term Sheet

Comparison Statistics	
Insertions	49
Deletions	10
Changes	16
Moves	0
TOTAL CHANGES	75


Word Rendering Set Markup Options	
Name	Standard with Change Bars
<u>Insertions</u>	
<u>Deletions</u>	
<u>Moves / Moves</u>	
Inserted cells	
Deleted cells	
Merged cells	
Formatting	Color only.
Changed lines	Mark left border.
Comments color	By Author.
Balloons	False

compareDocs Settings Used	Category	Option Selected
Open Comparison Report after Saving	General	Always
Report Type	Word	Formatting
Character Level	Word	False
Include Headers / Footers	Word	True
Include Footnotes / Endnotes	Word	True
Include List Numbers	Word	True
Include Tables	Word	True
Include Field Codes	Word	True
Include Moves	Word	True
Show Track Changes Toolbar	Word	True
Show Reviewing Pane	Word	True
Update Automatic Links at Open	Word	False
Summary Report	Word	End
Include Change Detail Report	Word	Separate
Document View	Word	Print
Remove Personal Information	Word	False
Flatten Field Codes	Word	True

Exhibit 7



SIGNED this 25th day of April, 2017


Shelley D. Rucker
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

William Harry Fryar,
Debtor

No. 1:16-bk-13559-SDR
Chapter 11

MEMORANDUM¹

The Debtor filed a Notice of Proposed Use, Sale or Lease of Property Outside of the Normal Course of Business combined with a Motion to Sell Property Free and Clear and Motion for Settlement and Compromise on February 24, 2017. The property to be sold was the Debtor's stock interests in two corporations whose value the Debtor listed as \$900,000 on Schedule A/B, Question 19. The buyer of these interests is the other shareholder of the companies. The purchase price for these interests is \$350,000 plus the conveyance by one of the companies of a

¹ The court delivered this opinion orally on April 13, 2017. Due to its applicability to settlements proposed in a Chapter 11 case after the Supreme Court's decision in *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017), the court is filing a written opinion. Modifications and edits for citation, style and grammar have been made to enhance readability. To the extent that this memorandum differs from the opinion read in court, this memorandum shall control.

piece of property which it owns. The interests are to be sold free and clear of the tax lien filed by the Internal Revenue Service and any other claim or interest. However, the settlement does not propose for the IRS lien to attach to the proceeds of the sale. Rather the lien will attach to two other properties which the Debtor owns individually on Highway 58, Chattanooga, Tennessee, and the property being conveyed to the Debtor in the settlement. Those Highway 58 properties are currently encumbered by a \$531,000 mortgage in favor of Pinnacle Bank, the successor in interest to Cornerstone Bank. The settlement piece of the motion requires Pinnacle's lien to be satisfied by the payment to Pinnacle of the \$350,000 in sales proceeds. This would be less controversial if Pinnacle's collateral were worth \$350,000, but the Debtor contends that the property is worth only \$200,000. The U.S. Trustee and creditors Sammie and Robert Gammenthaler, BBCO, LLC, and SmartBank appeared in opposition to the motion. The Gammenthalers, BBCO and SmartBank have filed unsecured claims totaling \$436,000 (after deducting the secured portion of SmartBank's claim). The basis of their objections is that Pinnacle is being preferred and the priorities set for distribution under the bankruptcy code are being reordered to Pinnacle's benefit. As such, the court should not find the settlement to be fair and equitable.

The parties made oral arguments regarding the appropriateness of the settlement at the hearing but put on no evidence. Following the hearing, the parties filed Stipulations of Fact on which the court will rely for making its findings. (Doc. No. 73.) Those stipulations were supplemented with testimony from the Debtor at the hearing on April 13th before the court issued its opinion.

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (N). These are the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 as made applicable to contested matters by Fed. R. Bankr. P. 9014.

A. Findings of Facts

The Debtor owns a 50% interest in two businesses: WLF Properties, Inc. and LF Properties, Inc. Stephen Long owns the other 50% of both businesses.

WLF owns a storage operation in Oak Ridge, Tennessee, and four rental houses in Murfreesboro, Tennessee. The storage operation has a value of approximately \$2.4 million, and the rental houses have a value of approximately \$325,000. WLF has debts of approximately \$1.8 million. Based on these stipulations, the court calculates the Debtor's 50% interest to be worth approximately \$467,500.

LF owns property located at Belgrade Road, Oak Ridge, Tennessee, and 219 Yearwood Avenue, Murfreesboro, Tennessee. Those properties are worth approximately \$265,000. LF has debts of \$220,000. Based on these stipulations, the court calculates that the Debtor's equity in LF is worth approximately \$22,500.

The value of the Debtor's interest in the two businesses, after debt, is approximately \$490,000.

In addition to these business interests, the Debtor individually owns properties at 6308 and 6310 Highway 58, Harrison, Tennessee. In his schedules, the Debtor valued these properties at \$100,000 each. The Debtor owes Hamilton County and the City of Chattanooga property taxes on the Highway 58 properties totaling approximately \$48,000 based on proofs of claim nos. 5-9 & 14-17. Pinnacle Bank has a mortgage of approximately \$531,000 on these two

properties based on the documents filed with claim 3. Its deeds of trust were recorded on October 20 and 31, 2008.

The IRS has a claim of approximately \$90,000 based on proof of claim no. 4. Approximately \$74,000 of this claim was asserted as secured. Notice of the federal tax lien was filed on July 5, 2016. An additional approximately \$15,000 of the claim is asserted as priority. The priority of the liens on 6308 and 6310 Highway 58 appears to be: first, the property taxes owed to the City and County, then the mortgage to Pinnacle Bank, and finally the IRS lien to the extent that its claim is not satisfied by other property of the Debtor.

WLF owes Pinnacle Bank \$1.1 million, secured by the storage operation and the rental houses owned by WLF. This debt was guaranteed by the Debtor and Mr. Long. Pinnacle Bank has assigned the debt to Mr. Long's company, S.J. Long, Inc. which is now the holder of that debt.

Excluding the claims of Pinnacle Bank and S.J. Long, Inc., there is approximately \$700,000 of unsecured debt reflected in the claims filed in this case. No objection to any of these claims had been filed at the time of the hearing on the settlement.

As noted above, the settlement involves a series of transactions that breaks down as follows:

1. Mr. Long will pay \$350,000 into the estate. In exchange, the estate will convey all stock interests of the Debtor in WLF Properties and LF Properties to Mr. Long. This is all subject to Mr. Long's obtaining financing from Pinnacle Bank for \$350,000.
2. LF Properties will convey one of its properties, 219 Yearwood Ave., to the estate free and clear of liens. Debtor estimates the value of that property to be \$150,000. The stipulations state that the property was purchased for \$166,000 in 2004 and that the tax appraisal made by

Rutherford County, Tennessee is \$124,800. The Debtor testified that the property is regularly rented and believes that the property will provide value of that amount, although the Debtor also stated that there are repairs he would like to make to the property.

3. Mr. Long, WLF Properties, and LF Properties will release the Debtor from all claims they may have against him. At the hearing, Mr. Long's counsel clarified that there were debts that WLF Properties and LF Properties have asserted against the Debtor individually. Counsel for the Debtor agreed that these were amounts owed by the Debtor.²

The settlement also provides that the Debtor will release Mr. Long, WLF Properties, and LF Properties from all claims he may have against them. No claims or causes of action were listed in Schedule B filed by the Debtor. (Schedule A/B, Questions 33-34.)

4. S.J. Long, Inc. will release the Debtor's guaranty on the obligation from the debt it purchased from Pinnacle Bank.

5. The estate will pay the sale proceeds of \$350,000 to Pinnacle Bank on the \$531,000 obligation. Pinnacle Bank will release the mortgage on 6308 and 6310 Highway 58, but will retain a claim for \$181,000 for the deficiency which it will subordinate to the other unsecured creditors.

Pinnacle Bank acknowledges that if the \$350,000 were paid to the estate, that the IRS lien on the stock and the IRS priority lien would be paid before its unsecured claim. It also acknowledges that if it were to foreclose on the two Highway 58 properties that the tax liens of

² The stipulations do not indicate what types of claims are being settled. None of these parties have filed proofs of claim, so the court is relying on the stipulations made in court that these claims exist and are being released. Only Mr. Long was listed as a creditor in the Debtor's schedules. To the extent that Mr. Long and the Debtor are both guarantors of the debt of WLF to S.J. Long, Inc., there might be contribution claims but the parties' stipulations lead the court to believe that the WLF obligation is fully secured.

the City and County would have to be paid, and that it is likely to only receive \$140,000 from the sale of its collateral.³

Creditors BBCO, LLC (Claim no. 23 for \$57,191), Robert Gammenthaler (Claim no. 22 for \$34,360) and Smartbank (Claim no. 24 for \$381,843 of which \$37,100 is claimed as secured) have objected to the settlement.

The Debtor testified that he will reduce the claims through objections to filed claims and liquidation from other sources to \$100,000. The unsecured claim for his school loans will stay in deferment because he intends to return to school to complete his doctorate degree.

B. Legal Analysis

The court can authorize the sale of assets when there is a sound business purpose for such action. *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 390 (6th Cir. 1986). The stipulations do not specifically state the business purpose of the sale. However, in oral argument, the Debtor argued that this settlement resolves the issues between the two shareholders and provides a means for WLF to continue and avoid a foreclosure which would subject both shareholders to significant individual tax liability.

The Debtor testified at a hearing on a motion to dismiss, brought by Pinnacle Bank early in the case, that his relationship with Mr. Long had deteriorated and that he was not getting information from Mr. Long nor any income from the properties. At the initial hearing on this motion, the court asked the parties if this settlement was to facilitate a business divorce between two business associates. The parties acknowledged that this was the case. Given that situation, the Debtor faced either buying out his partner or selling to him to resolve these disputes. The

³ The court calculates that rather than leaving it with a \$391,000 deficiency claim, the current settlement proposal leaves it with only a \$181,000 deficiency claim on which it will not receive any other funds until the other creditors have been paid.

court finds that the resolution of the claims arising from the two companies, the avoidance of the tax liability, and realization of value for the creditors from the stock interest provide a sufficient business purpose for the sale. However, because the business terms of the sale also involve a settlement and a payment of one unsecured creditor ahead of other prior parties and other unsecured creditors, the court must also review the standards for approval of a settlement.

The involvement of the court in the approval of a settlement is based on Fed. R. Bankr. P. 9019(a) which provides that a court may approve a compromise or settlement on motion by the trustee after notice and a hearing. Notice is required to be given to creditors, the U.S. Trustee, the debtor, and indenture trustee as provided in Rule 2002 and to any other entity as the court may direct. Fed. R. Bankr. P. 9019.

In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and equitable. *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968); *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir.), *cert. denied*, 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986). In considering a proposed compromise, the bankruptcy court is charged with an affirmative obligation to apprise itself of the underlying facts and to make an independent judgment as to whether the compromise is fair and equitable. *In re American Reserve Corp.*, 841 F.2d 159, 162-63 (7th Cir.1987). The court is not permitted to act as a mere rubber stamp or to rely on the trustee's word that the compromise is "reasonable." *Id.* at 162.

The need for this safeguard is obvious. Any settlement between the debtor and one of his individual creditors necessarily affects the rights of other creditors by reducing the assets of the estate available to satisfy other creditors' claims.

Reynolds v. C.I.R., 861 F.2d 469, 473 (6th Cir. 1988); *see also In re Anderson*, 377 B.R. 865, 871 (B.A.P. 6th 2007) (abrogated on other grounds) (discussing unpublished opinions by Sixth Circuit and the 6th Cir. B.A.P. adhering to the "fair and equitable standard" for settlement approval).

To determine whether a compromise is fair and equitable, the court considers factors such as the probability of success on the merits, the complexity and expense of litigation, and the

reasonable views of creditors. *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988). The debtor has the burden of persuading the court that the compromise is in the estate's best interest. *McGraw v. Yelverton (In re Bell & Beckwith)*, 87 B.R. 476, 478 (N.D. Ohio 1988).

The stipulations are short on exactly what is being compromised. At the hearing, the Debtor was able to clarify that it is a compromise of what he owes Pinnacle and what he owes WLF and LF and a compromise of the value of the stock interest being sold. The stipulations still do not clearly answer the question of why all of the cash should be paid to Pinnacle other than that Pinnacle is requiring it to be done that way. They do not offer facts from which the court could determine how this helps the Debtor move forward with a plan or how that plan will ultimately leave the Code's distribution priorities intact.

The issue of reordering the distribution priorities in a settlement has been the subject of controversy. The Fifth Circuit held that it would not approve a settlement that disregarded the priority system required by the Code in sections 726 and 1129. *U.S. v. Aweco, Inc.* 725 F.2d 293, 298 (5th Cir. 1984) (“[A] bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors.”).

The Second Circuit found that standard to be “too rigid a test.” *Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 464 (2nd Cir. 2007). It opted for a more flexible test where the facts of the case indicated that approval of a settlement reordering distribution from some assets was necessary to allow the estate to pursue its most significant assets and where the nature and extent of the estate and the priorities were not fully resolved. *Id.*

Nevertheless, it recognized that a more flexible rule created a greater risk that the parties to a settlement might engage in improper collusion. “Thus whether a particular settlement’s distribution scheme complies with the Code’s priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is ‘fair and equitable’ under Rule 9019.” *Id.* “The court must be certain that parties to a settlement have not employed a settlement as a means to avoid the priority strictures of the Bankruptcy Code.” *Id.*

The United States Supreme Court recently accepted certiorari on this issue, but opined on a more specific question involving the approval of a structured dismissal which did not follow the Code’s priority distribution. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 985 (2017). The Supreme Court held that bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors. *Id.* at 983.

In dicta, the Supreme Court acknowledged that there are instances where interim distributions that violate the ordinary priority rules have been approved.

We recognize that *Iridium* is not the only case in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve. Courts, for example, have approved “first-day” wage orders that allow payment of employees’ prepetition wages, “critical vendor” orders that allow payment of essential suppliers’ prepetition invoices, and “roll-ups” that allow lenders who continue financing the debtor to be paid first on their prepetition claims. *See Cybergenics*, 330 F. 3d, at 574, n. 8; D. Baird, *Elements of Bankruptcy* 232-234 (6th ed. 2014); Roe, 99 Va. L. Rev., at 1250-1264. In doing so, these courts have usually found that the distributions at issue would “enable a successful reorganization and make even the disfavored creditors better off.” *In re Kmart Corp.*, 359 F. 3d 866, 872 (CA7 2004) (discussing the justifications for critical-vendor orders); see also *Toibb v. Radloff*, 501 U.S. 157, 163-164, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991) (recognizing “permitting business debtors to reorganize and restructure their debts in order to revive the debtors’ businesses” and “maximizing the value of the bankruptcy estate” as purposes of the Code).

Id.

The court now turns to the settlement before it. It finds that the settlement does in fact provide for a distribution that does not follow the ordinary priority rules. Based on the filed claims which are deemed allowed until objected to under 11 U.S.C. § 502(a), the proceeds from the sale of the stock should go first to the lien of the IRS. 26 U.S.C. §§ 6321, 6323(a). Then the proceeds would be paid into the estate for distribution to priority creditors and then to unsecured creditors on a pro rata basis. The amount of claims might be reduced and liens might be avoided or further negotiated, but, as the claims currently stand, Pinnacle Bank is moving to the head of the line.

This might be acceptable if all of the creditors were consenting; however, three creditors and the U.S. Trustee have objected, so the court must consider whether there are Code-related objectives being served that are so significant that deviation is justified.

This settlement is not part of a “first day” order to ensure the Debtor’s survival to get to a plan. This case has been here for eight months and was filed on the heels of prior chapter 11 which was dismissed for failure to propose a plan. At the initial hearing on the motion, the court asked counsel whether there were other properties which would provide an income stream to fund a plan and pay unsecured creditors, but the Debtor and the U.S. Trustee both contended there was very little income in the case and that funding would have to come from the liquidation of assets. The court is hard pressed to determine what business remains to be revived or reorganized. This is an individual chapter 11 in which the Debtor sought settlement approval on the basis that he believes he can provide the same 53% dividend to all unsecured creditors. Under the law in the Sixth Circuit, an individual may not retain anything in a chapter 11 unless each class of creditors consent or are paid 100%. *Ice House Am., LLC v. Cardin*, 751 F.3d 734,

739 (6th Cir. 2014). The Debtor has not provided any proof that the objecting creditors would support a plan if they were paid 53%.

The court's review of the facts in this case leads it to conclude that this settlement is more of a preamble to a conversion or structured dismissal than it is to the situation in *Iridium*, where there was a reorganization anticipated. The Debtor has failed to prove that disregard of the priority scheme will promote "a significant Code-related objective." *Jevic*, 137 S. Ct. at 985. As with the situation in *Jevic*, this case more closely resembles the proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards. *Id.* at 986.

The court does not refuse to authorize the compromise lightly. The court realizes that the parties found themselves caught at a time when the settlement standards may have changed based on the *Jevic* case. The court understands the Debtor's desire to find a way to retain the two properties on Highway 58, one of which is where the Debtor originally testified he lives and leases a business location to a family member for the operation of his business. The court also understands that the Debtor wants to ensure that there will be no new tax liability arising from a foreclosure of WLF's holdings. Failing to approve this settlement may result in the unsecured creditors getting nothing, but that is their decision to make if they want to see if they can find a better deal for the Debtor's stock interests. The fact that this settlement disregards the priority scheme contained in the bankruptcy code entitles them to ask the court for close scrutiny of the proposed compromise and the prospects for reorganization.

In light of the Supreme Court's recent ruling in *Jevic*, parties who seek approval of settlements that provide for a distribution in a manner contrary to the Code's priority scheme should be prepared to prove that the settlement is not only "fair and equitable" based on the

factors to be considered by the Sixth Circuit, *Bauer*, 859 F.2d at 441, but also that any deviation from the priority scheme for a portion of the assets is justified because it serves a significant Code-related objective. The proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and maximize the value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even the disfavored creditors better off.

The proposed settlement in this case fails to meet this standard. To approve a settlement which is a *sub rosa* plan or a precursor for a conversion or dismissal in which the Code's priority scheme is ignored would be an abuse of the bankruptcy court's discretion.

For these reasons, the Debtor's motion to compromise is denied. Without the compromise the buyer is unwilling to go forward with the sale, therefore the motion to sell is denied as moot.

A separate order has been entered at docket number 79.

Exhibit 8

In re LCI Holding Company, Inc., et al.

Settlement Term Sheet

This settlement term sheet (the "Term Sheet") summarizes the terms of the settlement (the "Settlement") among the Purchaser, the Creditors' Committee, the Lenders and Highland (each, respectively, as defined below, and, collectively, the "Parties").

- Parties:** The Official Committee of Unsecured Creditors of LCI Holding Company, Inc. et al. (the "Creditors' Committee").
- Highland Capital Management L.P. and its affiliated entities in their capacity as holders of the 9 ¼% Senior Subordinated Notes Due 2013 (collectively, "Highland" and, together with the Creditors' Committee, the "Creditor Parties").
- Hospital Acquisition LLC, a Delaware limited liability company ("Purchaser").
- The Debtors' prepetition senior secured lenders and post-petition lenders (collectively, the "Lenders").
- Creditor Parties' Support for Sale:** The Creditor Parties shall support, including filing any pleadings necessary and appearing at applicable hearings, and not taking any actions against, the proposed sale (the "Sale") of substantially all of the assets of LCI Holding Company, Inc. and its affiliated debtors and debtors in possession (collectively, the "Debtors") to Purchaser, and will not object to, or solicit others to object to approval of the Sale.
- Purchaser and Lenders Support for the Settlement** Purchaser and the Lenders shall use commercially reasonable efforts to support entry of a form of the Sale Order incorporating the terms of this Term Sheet. Failure of the Bankruptcy Court to enter a form of the Sale Order incorporating the terms of this Term Sheet at the time of the entry of the Sale Order shall return the parties to their respective positions *status quo ante* as of March 18, 2013.
- GUC Funds:** In consideration for the Creditor Parties' support of the Sale, the Purchaser shall establish a \$1.5 million fund (the "GUC Funds") for the benefit of all non priority general unsecured creditors, excluding the holders of the 9 ¼% Senior Subordinated Notes Due 2013 (the "GUC Beneficiaries"). At the election of the Creditors' Committee, the GUC Funds shall be (i) contributed on the Closing Date, or as soon as reasonably practicable thereafter, to a trust to be established by the Creditors' Committee for the benefit of the GUC Beneficiaries (the "GUC Trust Option") or (ii) paid directly to the GUC

Beneficiaries pursuant to a schedule to be provided to Purchaser by the Creditors' Committee after reconciliation of unsecured claims (the "Direct Payment Option", collectively referred to with the GUC Trust Option, as the "Distribution Options").

The GUC Funds shall be used for (i) all administrative costs incurred in connection with implementation of the Distribution Options, (ii) claims reconciliation analysis and litigation conducted by the Creditors' Committee prior to and subsequent to the Closing Date, and (iii) distributions to the GUC Beneficiaries.

The Purchaser agrees that allowed professional fees and expenses incurred by the Creditors' Committee in connection with implementation of any of the Distribution Options prior to Closing shall not exceed \$150,000 (the "Cap"). To the extent that any costs exceed the Cap, such costs may be paid by the Debtors' estates; *provided, however*, that any amounts paid in excess of the Cap shall reduce the amount of the GUC Funds funded by the Purchaser on a dollar for dollar basis.

For the avoidance of doubt and notwithstanding anything to the contrary in any other place in this Term Sheet, Purchaser shall not be responsible for payment of any amounts under this Settlement in excess of \$3.5 million, including the \$2.0 million payment to the Notes (as defined below) and the \$1.5 million payment of the GUC Funds, plus the payment of the Cap and the payment of the actual, reasonable and documented fees and expenses of U.S. Bank National Association ("US Bank") as set forth below.

Indenture Trustee Fees:

On the Closing Date, the Purchaser shall pay U.S. Bank, as trustee under the Indenture, dated as of August 11, 2005, pursuant to which the Company issued 9 ¼% Senior Subordinated Notes Due 2013 (the "Notes"), all of its actual, reasonable and documented fees and expenses outstanding as of the Closing Date, plus the amount of \$2.0 million, which amount shall be for the benefit of the holders of the Notes.

Avoidance Actions:

All claims and causes of action of the Debtors (collectively, the "Avoidance Actions") arising under chapter 5 of title 11 of the United States Code (the "Bankruptcy Code") shall be Acquired Assets under the Purchase Agreement. The Purchaser agrees not to prosecute or convey the Avoidance Actions.

Claim Reconciliation:

Purchaser shall provide reasonable cooperation to provide access to the books and records so that the Creditors' Committee can conduct a claim reconciliation process in respect of holders of any asserted

claim that may be a beneficiary of the GUC Funds.

The Lenders shall subordinate their deficiency claim and agree that such deficiency claim shall not be entitled to any recovery from the GUC Trust. The Lenders agree further that they shall waive any provision in any agreement with the holders of the 9 ¼% Senior Subordinated Notes Due 2013 or the Indenture Trustee of such notes that any monies received on account of such notes has to be paid to the Lenders until the Lenders are paid in full. For the avoidance of doubt, the Lenders shall not require or demand that any distribution made to the holders of the 9 ¼% Senior Subordinated Notes Due 2013 from the GUC Trust be paid to the Lenders.

**Other Terms and
Conditions of the
Settlement:**

The Creditor Parties shall make good faith efforts to minimize all administrative costs incurred by them in the Debtors' chapter 11 cases from and after March 18, 2013 through the Closing Date, including administrative costs related to documenting the Settlement, actively supporting the Sale and carrying out their statutory duties set forth in Bankruptcy Code.

**Conditions to
Closing the
Settlement:**

- The Bankruptcy Court approves the Sale and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Creditor Parties shall not be in breach of this Term Sheet.
- No order or other court ruling enjoining or otherwise prohibiting the transactions contemplated under the Settlement shall be in effect.

Exhibit 9

In re: Constellation Enterprises LLC, et al.

DANA LaFORGE
April 27, 2017

<p style="text-align: right;">Page 17</p> <p>1 LaFORGE</p> <p>2 A. Thank you.</p> <p>3 Q. Sure. But other than A, B and --</p> <p>4 A. Other than A, B and the first</p> <p>5 sentence of F, yes.</p> <p>6 Q. Okay. What, if anything, did you</p> <p>7 do to prepare for this deposition?</p> <p>8 A. Read public filings and had a</p> <p>9 couple of conversations with counsel.</p> <p>10 Q. Did you talk to anybody else at</p> <p>11 the Debtors?</p> <p>12 A. No.</p> <p>13 Q. Okay. Did you review any</p> <p>14 documents that were not publicly filed?</p> <p>15 A. No.</p> <p>16 MR. KAPLAN: Okay. Let's just</p> <p>17 jump right into the -- you mentioned</p> <p>18 earlier the settlement agreement, so</p> <p>19 let's jump right into the settlement</p> <p>20 term sheet, if we could.</p> <p>21 (DDTL EXHIBIT 2, Settlement Term</p> <p>22 Sheet, marked for identification.)</p> <p>23 MR. KAPLAN: I'm handing you what</p> <p>24 we've marked as DDTL Parties Exhibit 2.</p> <p>25 Q. Do you recognize that document?</p>	<p style="text-align: right;">Page 19</p> <p>1 LaFORGE</p> <p>2 Q. Okay. Were you involved in the</p> <p>3 negotiation of this term sheet?</p> <p>4 A. No.</p> <p>5 Q. Was anybody on the Debtors' behalf</p> <p>6 involved in the negotiation of the term sheet?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. This was presented to us in, if</p> <p>9 not this form, substantially this form at the</p> <p>10 August hearing. We shared with the parties</p> <p>11 thoughts on it, but -- but none of our -- I</p> <p>12 would not say it was a negotiation. It was</p> <p>13 presented to us as a term sheet prepared and</p> <p>14 discussed by -- between the Notcholders and</p> <p>15 the Creditors' Committee, and it was ours to</p> <p>16 accept or not.</p> <p>17 Q. And who presented it to you?</p> <p>18 A. Well, I got it from our counsel,</p> <p>19 but it was Creditors' -- you know, the -- I</p> <p>20 don't recall any discussion besides with</p> <p>21 Creditors' Committee counsel on it, outside of</p> <p>22 my own counsel.</p> <p>23 Q. And so not to put words in your</p> <p>24 mouth, but effectively the settlement was</p> <p>25 delivered to you as a take-it-or-leave-it?</p>
<p style="text-align: right;">Page 18</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Gary, can you just</p> <p>3 clarify for the witness what -- where</p> <p>4 this was filed in the Debtors'</p> <p>5 bankruptcy case?</p> <p>6 MR. KAPLAN: The docket number</p> <p>7 is -- I believe this was attached to the</p> <p>8 motion seeking approval of the</p> <p>9 settlement, so it's docket 560.</p> <p>10 MR. RAMOS: So attached to the</p> <p>11 joint settlement motion?</p> <p>12 MR. KAPLAN: The joint settlement</p> <p>13 motion, correct.</p> <p>14 THE WITNESS: Can you repeat the</p> <p>15 question?</p> <p>16 BY MR. KAPLAN:</p> <p>17 Q. Yeah. Have you seen this document</p> <p>18 before?</p> <p>19 A. Yes, I have.</p> <p>20 Q. And what is this document?</p> <p>21 A. The settlement term sheet.</p> <p>22 Q. And that's the settlement for</p> <p>23 which the Debtors and the Creditors' Committee</p> <p>24 are seeking approval, correct?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 20</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Objection.</p> <p>3 A. Those words were not used, so I</p> <p>4 don't want to put words in other's mouths, but</p> <p>5 it was presented -- there was -- we were --</p> <p>6 you know, we had a -- we had a time deadline,</p> <p>7 and there was -- and the -- and the initial</p> <p>8 thoughts that I had on it were not going to be</p> <p>9 considered prior to the time deadline that we</p> <p>10 had, which was the court -- you know, the</p> <p>11 timing of the court session.</p> <p>12 Q. And how do you know that the</p> <p>13 thoughts that you had were not going to be</p> <p>14 considered?</p> <p>15 A. I stepped out of the room. I had</p> <p>16 counsel and Committee counsel there, I</p> <p>17 expressed some thoughts about it, and in that</p> <p>18 discussion -- and I don't remember the words</p> <p>19 or -- or -- or exactly who spoke them, I --</p> <p>20 there -- we were unable to make changes, you</p> <p>21 know, we were unable to make changes.</p> <p>22 Q. But just so I understand, when you</p> <p>23 say you were "unable to make changes," was</p> <p>24 that because you made proposals that they</p> <p>25 rejected or they told you it's too late, we're</p>

In re: Constellation Enterprises LLC, et al.

DANA LaFORGE
April 27, 2017

<p style="text-align: right;">Page 21</p> <p>1 LaFORGE</p> <p>2 not making any changes?</p> <p>3 MR. RAMOS: Objection.</p> <p>4 A. There were -- it was a reading and</p> <p>5 a -- on my part, a discussion with -- with</p> <p>6 counsel and of course, I'm sure, the other</p> <p>7 director, but I don't recall that. And it --</p> <p>8 it -- I'm -- I'm trying to...</p> <p>9 MR. RAMOS: Let me just caution</p> <p>10 you not to disclose any attorney-client</p> <p>11 or privileged information. So if you</p> <p>12 can't answer the question without the</p> <p>13 benefit of it, don't disclose such</p> <p>14 information.</p> <p>15 MR. KAPLAN: But just to be clear,</p> <p>16 if counsel's relaying what the Committee</p> <p>17 says or a third party says, that's not</p> <p>18 attorney-client privilege. So if it's</p> <p>19 advice --</p> <p>20 MR. RAMOS: We'll let the witness</p> <p>21 try to answer the question.</p> <p>22 MR. KAPLAN: Understood.</p> <p>23 MR. RAMOS: I'm reminding him</p> <p>24 about the privilege issue.</p> <p>25 MR. KAPLAN: That's fine.</p>	<p style="text-align: right;">Page 23</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Are you represent --</p> <p>3 okay. Your question is about the term</p> <p>4 sheet.</p> <p>5 MR. KAPLAN: My question is about</p> <p>6 the term sheet.</p> <p>7 MR. RAMOS: All right. So you're</p> <p>8 not representing to the witness that the</p> <p>9 hearing occurred in September --</p> <p>10 MR. KAPLAN: No.</p> <p>11 MR. RAMOS: -- we're talking about</p> <p>12 August --</p> <p>13 MR. KAPLAN: We're talking about</p> <p>14 the August hearing --</p> <p>15 MR. RAMOS: So just so the witness</p> <p>16 is clear, your question is focused fully</p> <p>17 on the term sheet?</p> <p>18 MR. KAPLAN: My question is</p> <p>19 focused on the term sheet.</p> <p>20 MR. RAMOS: Thank you.</p> <p>21 A. It was -- it was Committee counsel</p> <p>22 who was not prepared to make changes that I</p> <p>23 thought would be helpful to making this -- to</p> <p>24 change -- to making this a document that might</p> <p>25 be termed as a better document from a number</p>
<p style="text-align: right;">Page 22</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: And perhaps it makes</p> <p>3 sense at this point, since we</p> <p>4 interfered, for you to restate the</p> <p>5 question so the witness knows</p> <p>6 specifically what you're asking and the</p> <p>7 time period in which you're asking it.</p> <p>8 MR. KAPLAN: Sure.</p> <p>9 Q. We were talking about when the</p> <p>10 term sheet was presented to you at the</p> <p>11 hearing, or immediately prior to the hearing.</p> <p>12 And my question was, when you say</p> <p>13 you were "unable to make changes" to the term</p> <p>14 sheet, was that because you made proposals and</p> <p>15 they were rejected or because they told you</p> <p>16 it's too late and they're not making any</p> <p>17 changes?</p> <p>18 MR. RAMOS: And let me lodge an</p> <p>19 objection to that question. Gary, just</p> <p>20 for point of fact, you're referring to</p> <p>21 the term sheet which was filed on</p> <p>22 September 8, but your question is about</p> <p>23 the hearing. And --</p> <p>24 MR. KAPLAN: My question is about</p> <p>25 the term sheet.</p>	<p style="text-align: right;">Page 24</p> <p>1 LaFORGE</p> <p>2 of points of view.</p> <p>3 Q. And do you know whether the</p> <p>4 Noteholders were willing to engage any</p> <p>5 discussions about changes to the document?</p> <p>6 A. I don't know that.</p> <p>7 Q. And --</p> <p>8 A. We're talking about this term</p> <p>9 sheet at this time?</p> <p>10 Q. Correct.</p> <p>11 A. I don't know that.</p> <p>12 Q. Okay. And you mentioned earlier</p> <p>13 in one of your answers that there was a time</p> <p>14 deadline that you were dealing with.</p> <p>15 What was that time deadline?</p> <p>16 A. Well, there was -- we were in</p> <p>17 Delaware in the -- the last of the discussion</p> <p>18 I'm referring to was in the -- outside the</p> <p>19 courtroom. And there was a -- there were, you</p> <p>20 know, a reaction that I had to the -- to this</p> <p>21 and some suggestions that I thought would be</p> <p>22 useful. And those -- that discussion took</p> <p>23 place once everyone was at the courthouse in</p> <p>24 the room, stepped out of the room.</p> <p>25 And the -- look, I don't remember</p>

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1 LaFORGE
2 whether we had five minutes or fifteen minutes
3 or thirty minutes, but there was a -- we
4 wouldn't have been at the courthouse much
5 earlier than that, and we had to get back in
6 so that when the judge came into the room, we
7 were -- we were prepared.
8 Q. Did you seek to adjourn the
9 hearing or push it back so that you had more
10 time to deal with it?
11 A. No.
12 Q. Okay. And what were your thoughts
13 on the term sheet?
14 MR. RAMOS: Objection.
15 Q. Let me clarify that question.
16 You said that you had some -- some
17 thoughts and suggestions on the term sheet
18 that -- that you raised with the Creditors'
19 Committee.
20 What were those?
21 A. I had hoped for a more global
22 settlement.
23 Q. And can you be more specific on
24 that?
25 MR. RAMOS: Objection.

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1 LaFORGE
2 A. Yeah, I can be. I thought that --
3 that it would have been useful for releases
4 for a broader group of parties.
5 Q. Were there -- aside from -- from
6 seeking releases for a broader group of
7 parties, were there other changes that you
8 thought should be made to the term sheet?
9 MR. RAMOS: Objection.
10 A. My -- my discussion was with --
11 certainly with -- with -- at the courthouse
12 was about releases only.
13 Q. And did you discuss the -- when
14 you received the term sheet at the courthouse,
15 did you discuss it with Mr. Smith?
16 MR. RAMOS: Objection.
17 A. I did not -- I did not speak to
18 Mr. Smith from the courthouse. I believe we
19 saw this at the RLF offices prior -- prior to
20 the courthouse.
21 Q. But immediate -- I'm sorry, I
22 don't want to cut you off.
23 A. Immediately prior, and I don't --
24 I'm sorry, I just don't know what "immediate"
25 is. But I went down that morning. And again,

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1 LaFORGE
2 I went down for the hearing, so for a
3 relatively limited period of time.
4 Q. And were you given -- prior to
5 seeing the actual term sheet that morning
6 before court, had you been informed of the
7 status of any negotiations of the settlement
8 between the Creditors' Committee and the
9 Noteholders?
10 MR. RAMOS: Let me just lodge an
11 objection to this question, this line of
12 questioning. We were talking earlier
13 that you were conflating the term sheet
14 that you presented before the witness,
15 which is filed in September, with the
16 August hearing. And I see that
17 continuing and so I find it confusing.
18 And I apologize for making an
19 express -- what the nature of the
20 objection is. But I thought it might be
21 helpful, if you're going to be
22 continuing to ask questions about term
23 sheet versus the August hearing, that
24 we're clear as to what we're talking
25 about and what the witness is being told

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1 LaFORGE
2 was -- is before him at a given time.
3 MR. KAPLAN: That's fair. Then
4 let me just clarify it.
5 Q. The August hearing, what were you
6 given to show you the terms of the settlement
7 that had been reached?
8 A. I was given nothing in the
9 courthouse. I was -- saw something at the RLF
10 offices, and I assume -- it certainly wasn't
11 this one because this is the execution
12 version, but it was a document substantially
13 similar to this.
14 Q. And are you aware of any material
15 changes between what you saw in August at
16 RLF's offices before entering into court and
17 the execution version?
18 MR. RAMOS: Objection.
19 A. I'm not aware of any substantial
20 changes.
21 Q. Okay. And so just to understand
22 process, you saw a draft term sheet
23 immediately prior to heading into court, then
24 you had a meeting with the Creditors'
25 Committee at -- with the Creditors' Committee

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<p style="text-align: right;">Page 29</p> <p>1 LaFORGE</p> <p>2 counsel at the courthouse; is that fair?</p> <p>3 Okay. Is that a yes?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Aside from that discussion</p> <p>6 with the Creditors' Committee counsel at the</p> <p>7 courthouse, did you have any conversations</p> <p>8 with Creditors' Committee or their counsel</p> <p>9 with respect to the terms of the settlement?</p> <p>10 MR. RAMOS: Objection. Can you</p> <p>11 define the time period?</p> <p>12 MR. KAPLAN: Sure. Prior to</p> <p>13 the -- that hearing.</p> <p>14 A. I did not. There were. I did</p> <p>15 not.</p> <p>16 Q. Okay. And going back to the</p> <p>17 question I was asking earlier, prior to seeing</p> <p>18 that draft term sheet at RLF's offices, had</p> <p>19 you been apprised at all of the status of the</p> <p>20 negotiations between the Creditors' Committee</p> <p>21 and the Noteholder?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. This -- there's a continuum, not a</p> <p>24 series, not necessarily discrete events. The</p> <p>25 continuum began prior to filing, where each</p>	<p style="text-align: right;">Page 31</p> <p>1 LaFORGE</p> <p>2 seeing that term sheet, had you understood</p> <p>3 the -- or been told about the framework --</p> <p>4 A. No.</p> <p>5 Q. -- of this settlement?</p> <p>6 A. I'm sorry to answer too quickly.</p> <p>7 Q. That's all right.</p> <p>8 Were you asked to give any input</p> <p>9 on the framework of the proposed settlement</p> <p>10 prior to receiving that draft term sheet?</p> <p>11 MR. RAMOS: Objection.</p> <p>12 A. I'm having trouble with the time</p> <p>13 frame, Gary. If it was about this particular</p> <p>14 term sheet, the answer is no.</p> <p>15 Q. Okay. Or this settlement -- the</p> <p>16 same question for the settlement embodied in</p> <p>17 this term sheet.</p> <p>18 MR. RAMOS: Objection.</p> <p>19 A. As I said before, it was an</p> <p>20 ever-evolving situation and it was a</p> <p>21 continuum, not necessarily discrete events</p> <p>22 that stand on their own. From the time -- at</p> <p>23 each point we would socialize what would be</p> <p>24 the best outcome, and that effected itself</p> <p>25 ultimately in all the public documents and</p>
<p style="text-align: right;">Page 30</p> <p>1 LaFORGE</p> <p>2 step along the way, with the facts and</p> <p>3 circumstances presented, we tried to do the</p> <p>4 best we could to make decisions to achieve</p> <p>5 objectives; you know, cash ran lower,</p> <p>6 objectives changed; as you get closer to a</p> <p>7 filing, objectives change.</p> <p>8 And so there is no doubt that from</p> <p>9 before we ran out of -- before it became</p> <p>10 apparent we would actually end up with a</p> <p>11 filing, there were discussions about how we</p> <p>12 could have some form of settlement, some way</p> <p>13 to keep moving forward.</p> <p>14 Throughout the process, though,</p> <p>15 of -- that led up to this, there was always an</p> <p>16 encouragement on the part of the Debtors for</p> <p>17 some form of settlement, and there were no --</p> <p>18 I was not -- did not see term sheets. I was</p> <p>19 apprise -- usually -- my best recollection of</p> <p>20 what I was apprised of was not making much</p> <p>21 progress, but yes, I was apprised. And there</p> <p>22 was not a lot to work with until -- until</p> <p>23 this, or just prior to this.</p> <p>24 Q. But going -- but going to the</p> <p>25 specifics of the draft term sheet, prior to</p>	<p style="text-align: right;">Page 32</p> <p>1 LaFORGE</p> <p>2 filings and transactions that you see.</p> <p>3 Specific to this term sheet, I had</p> <p>4 not seen this structure and -- I had not see</p> <p>5 seen this structure at all.</p> <p>6 (Brief off-record discussion.)</p> <p>7 BY MR. KAPLAN:</p> <p>8 Q. And what is your understanding of</p> <p>9 what was being settled by this -- the draft</p> <p>10 term sheet and then the execution version of</p> <p>11 the term sheet?</p> <p>12 A. My objective at that moment in</p> <p>13 time was we were trying to achieve a sale of</p> <p>14 the companies, ongoing -- as ongoing</p> <p>15 businesses. Leading up to that hearing, we</p> <p>16 didn't have a lot of support for the sale</p> <p>17 document we were asking for approval of.</p> <p>18 We had -- we had cash challenges,</p> <p>19 that we needed approval of the -- of the DIP</p> <p>20 to have access to more cash; we had businesses</p> <p>21 where customers were concerned about where</p> <p>22 they were, with no path forward. And this</p> <p>23 settlement provided the -- the support of the</p> <p>24 Committee, which we thought would be important</p> <p>25 to end up, quite frankly, with the outcome we</p>

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<p style="text-align: right;">Page 37</p> <p>1 LaFORGE</p> <p>2 Q. So you said earlier that because</p> <p>3 of the deadline, although you had some</p> <p>4 thoughts on the term sheet, there wasn't</p> <p>5 sufficient time to make any changes to the</p> <p>6 settlement; is that fair?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. The time only determine -- the</p> <p>9 time constraint certainly affected the length</p> <p>10 of the negotiation. If there was an</p> <p>11 indication that this -- that some of my</p> <p>12 thoughts, the company's thoughts could have</p> <p>13 been negotiated into this, we would have -- we</p> <p>14 would have continued to try. It was clear to</p> <p>15 me that -- it was clear to me that at that</p> <p>16 point in time, there would be no changes to</p> <p>17 this document.</p> <p>18 Q. Following the -- that hearing, did</p> <p>19 the Debtors make any efforts to make further</p> <p>20 changes to the term sheet?</p> <p>21 MR. RAMOS: Objection.</p> <p>22 A. Back to the fact that this is a</p> <p>23 continuum of discussions, this didn't resolve</p> <p>24 every matter we had to go forward, and yes,</p> <p>25 the Debtors did have discussions with respect</p>	<p style="text-align: right;">Page 39</p> <p>1 LaFORGE</p> <p>2 A. I certainly remember conversations</p> <p>3 with the Noteholders that specifically</p> <p>4 addressed some things that I would have liked</p> <p>5 in the term sheet. It wasn't necessarily</p> <p>6 framed as "change this term sheet," but it was</p> <p>7 framed as -- it was framed in a -- you know,</p> <p>8 there were discussions about, again, a more</p> <p>9 global settlement than what this term sheet</p> <p>10 presents.</p> <p>11 Q. And who specifically of the</p> <p>12 Noteholders did you speak with?</p> <p>13 A. Chris Keenan.</p> <p>14 Q. And Chris is with...</p> <p>15 A. Wayzata.</p> <p>16 Q. Okay. When you first saw the term</p> <p>17 sheet, did you have an understanding of how</p> <p>18 the Chapter 11 cases would be concluded?</p> <p>19 MR. RAMOS: Objection.</p> <p>20 A. Other than what is referred to in</p> <p>21 the term sheet, I believe the answer is no,</p> <p>22 no.</p> <p>23 We had, I believe prior to this,</p> <p>24 proposed a dismissal which had been objected</p> <p>25 to, so we did not have a clear direction of</p>
<p style="text-align: right;">Page 38</p> <p>1 LaFORGE</p> <p>2 to matters that might be objectionable to some</p> <p>3 in this, about seeing if we couldn't remedy</p> <p>4 those.</p> <p>5 Q. And did you have any such -- when</p> <p>6 you say the "Debtors had discussions," were</p> <p>7 you involved --</p> <p>8 A. Yeah.</p> <p>9 Q. -- in those discussions?</p> <p>10 A. I had those discussions.</p> <p>11 Q. And with whom did you have those</p> <p>12 discussions?</p> <p>13 A. I'm sure a -- a broad group, not</p> <p>14 the Committee. I -- you know, that was not a</p> <p>15 usual contact point for me much. So any</p> <p>16 conversation among the lawyers would have been</p> <p>17 usually handled by either RLF or Kramer;</p> <p>18 Kramer was probably at that point. And any</p> <p>19 principal discussions with what would have</p> <p>20 been Noteholders would have been me.</p> <p>21 Q. And do you specifically recall</p> <p>22 conversations with Noteholders, following the</p> <p>23 receipt of the term sheet, to seek to amend</p> <p>24 the terms of the term sheet?</p> <p>25 MR. RAMOS: Objection.</p>	<p style="text-align: right;">Page 40</p> <p>1 LaFORGE</p> <p>2 how to -- how to take the cases out of</p> <p>3 bankruptcy.</p> <p>4 Q. And when you say "prior to this"</p> <p>5 you had sought dismissal, do you mean to say</p> <p>6 prior to the settlement term sheet you had</p> <p>7 sought a dismissal?</p> <p>8 A. I recall reviewing a public filing</p> <p>9 where there were objections to the dismissal</p> <p>10 proposal by the company. It's -- it was my</p> <p>11 review of public documents in the last couple</p> <p>12 of days.</p> <p>13 Q. But do you recall that -- and I'm</p> <p>14 not trying to -- the Debtors didn't seek to</p> <p>15 dismiss the case prior to you receiving</p> <p>16 this --</p> <p>17 A. I -- I --</p> <p>18 Q. -- settlement term sheet?</p> <p>19 A. I can't answer that question. I'm</p> <p>20 sorry, Gary, I just don't know. Anything I'm</p> <p>21 referring to was in the public documents.</p> <p>22 Nothing -- I'm not referring to anything that</p> <p>23 was not.</p> <p>24 Q. And is your understanding of</p> <p>25 the -- well, strike that.</p>

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1 LaFORGE
2 The term sheet provides for
3 different distributions to various creditors,
4 right?
5 A. The term sheet takes -- it calls
6 for a contribution of assets that had been
7 negotiated in the APA as part of the sale
8 agreement; contributed those from the buyer's
9 end of that APA, who were in fact prior
10 creditors, to a somewhat broader group of
11 creditors.
12 So if that answers your question,
13 there's -- it allocates those particular
14 assets to a couple of -- a few more creditors.
15 Q. But you're aware that it doesn't
16 allocate the value to all the creditors,
17 right?
18 A. I am --
19 MR. RAMOS: Objection.
20 A. I'm aware of that.
21 Q. Okay. And did you or anyone on
22 the Debtor's behalf ever attempt to negotiate
23 for allocation to all creditors?
24 MR. RAMOS: Objection.
25 A. We're speaking again in the time

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1 LaFORGE
2 frame of a term sheet. There -- the
3 discussion around the causes of action that
4 are being contributed here, the discussion
5 around that took place mostly around the
6 negotiation of the APA. The company, the
7 Debtors, would have preferred to keep many of
8 those causes of action, and we were unable to
9 negotiate that in the APA. At that point,
10 they were not ours to -- at that point, they
11 were not ours to -- or certainly upon approval
12 of sale, they were not ours to allocate.
13 Q. I understand. But you understand
14 that the settlement term sheet does attempt to
15 allocate those assets and some others to
16 certain creditors, right?
17 MR. RAMOS: Objection.
18 A. Well, I don't know what "some
19 others" means, but I do -- again, I -- the
20 term sheet's not that long. It says what it
21 says.
22 I am aware of the contributions of
23 the causes of action to the Trust and I'm
24 aware of the recipients on the other side of
25 the Trust, and I'm aware also that those are

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1 LaFORGE
2 not all the creditors.
3 Q. And so you're aware, for example,
4 that priority creditors don't receive anything
5 from the Trust, correct?
6 MR. RAMOS: Objection.
7 A. Can we speak specifically about
8 who the creditors are so I don't trip up on a
9 terminology of a separate group?
10 Q. Sure. The IRS, which --
11 A. I'm aware --
12 Q. -- have a priority claim --
13 A. I'm aware of that.
14 Q. So you're aware they don't receive
15 the value from the Trust?
16 MR. RAMOS: Objection. Are you
17 making that representation to the
18 witness?
19 MR. KAPLAN: Am I making what
20 representation?
21 MR. RAMOS: Are you representing
22 that the IRS will receive nothing from
23 the proceeds of the Trust?
24 MR. KAPLAN: I'm asking the
25 question --

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1 LaFORGE
2 MR. RAMOS: Whether he knows --
3 MR. KAPLAN: He's the Debtors'
4 witness with respect to the settlement.
5 MR. RAMOS: Yes.
6 MR. KAPLAN: I am asking him his
7 understanding of how the settlement
8 works.
9 MR. RAMOS: We refer you to our
10 objections to your deposition topics and
11 we object to the question.
12 MR. KAPLAN: Okay. So I'll go
13 back to my question.
14 Q. Are you -- do you understand that
15 priority creditors receive distributions from
16 the Trust?
17 MR. RAMOS: Objection.
18 A. I don't want to get caught up on
19 "priority creditors" and a definition that I
20 am not -- have more than a -- that I don't
21 have more than a general understanding of.
22 I am aware that there are
23 creditors like the IRS that are not
24 participating in this Trust, yes.
25 Q. And why are those creditors not

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<p style="text-align: right;">Page 49</p> <p>1 LaFORGE</p> <p>2 allocation of value in the settlement to some</p> <p>3 creditors and not others is fair?</p> <p>4 MR. RAMOS: Objection, misstates</p> <p>5 his testimony.</p> <p>6 A. The -- I can't answer that</p> <p>7 question. It's -- it -- it's not</p> <p>8 representative of what we're talking about.</p> <p>9 It's representative of a hypothetical that I</p> <p>10 could have controlled, which I could not at</p> <p>11 that point. I do not opine on the fairness of</p> <p>12 what somebody does with what they own once</p> <p>13 they buy it from me.</p> <p>14 I -- if I -- the hypothetical that</p> <p>15 I think would be an interesting question, but</p> <p>16 no need to answer it because it's</p> <p>17 hypothetical, is if the Debtors owned those</p> <p>18 assets, what would be fair? And that would be</p> <p>19 a consideration.</p> <p>20 A consideration in negotiating the</p> <p>21 APA of was it fair to go forward with that as</p> <p>22 an APA while giving up -- while making those</p> <p>23 causes of action part of the APA, that</p> <p>24 decision was behind us. That was the APA we</p> <p>25 had.</p>	<p style="text-align: right;">Page 51</p> <p>1 LaFORGE</p> <p>2 point in time.</p> <p>3 The point in time, the settlement</p> <p>4 agreement had no relevance, zero, unless the</p> <p>5 APA was approved. So to suggest that I can</p> <p>6 consider the settlement agreement in the</p> <p>7 absence of an APA is not -- is not a question</p> <p>8 that's answerable in my mind. The decision we</p> <p>9 made, what -- we wanted that APA to be</p> <p>10 approved that day. We undoubtedly,</p> <p>11 unquestionably wanted it, and I know to this</p> <p>12 day it was the right thing to do at that point</p> <p>13 in time.</p> <p>14 The way to achieve what we thought</p> <p>15 was the right thing to do was to agree to an</p> <p>16 imperfect settlement term sheet, imperfect in</p> <p>17 our minds for matters that I've spoken about.</p> <p>18 I would have much preferred a more global</p> <p>19 settlement, selfishly, because it would have</p> <p>20 been better for the Debtors and probably some</p> <p>21 personal perspective too.</p> <p>22 But nonetheless, my -- we had a</p> <p>23 choice at the time, and the choice was yes or</p> <p>24 no on the term sheet. And we could have gone</p> <p>25 in and played chicken and seen what happened,</p>
<p style="text-align: right;">Page 50</p> <p>1 LaFORGE</p> <p>2 I wish there was a different</p> <p>3 outcome to this term sheet, and I expressed</p> <p>4 that as strongly as I could. It's not -- but</p> <p>5 that's -- I can't answer the question any</p> <p>6 better than that.</p> <p>7 Q. And let me just -- maybe help me</p> <p>8 out with this.</p> <p>9 You testified earlier that this</p> <p>10 settlement was resolving objections to the</p> <p>11 sale so that you could actually get approval</p> <p>12 of your APA, correct?</p> <p>13 A. That's correct.</p> <p>14 Q. Okay. So the APA wasn't already</p> <p>15 behind you at the time that the Debtor decided</p> <p>16 to go forward with the settlement term sheet,</p> <p>17 right?</p> <p>18 MR. RAMOS: Objection.</p> <p>19 A. There is a, you know, interesting</p> <p>20 sequencing in the objections that were raised</p> <p>21 to the settlement term sheet, which primarily</p> <p>22 the ones I remember are the DDTL Parties and</p> <p>23 the U.S. Trustee. And I appreciate the points</p> <p>24 that are being made, but we've got real</p> <p>25 companies and real decisions to make at a</p>	<p style="text-align: right;">Page 52</p> <p>1 LaFORGE</p> <p>2 but that didn't seem like a responsible thing</p> <p>3 to do.</p> <p>4 Q. The Debtor has a choice today,</p> <p>5 doesn't it?</p> <p>6 MR. RAMOS: Objection.</p> <p>7 A. I would prefer -- I'd like to -- I</p> <p>8 would like to speak to counsel, you know, to</p> <p>9 know what choices we -- I mean -- and the</p> <p>10 choice for what. But, I mean, certainly we</p> <p>11 have -- we maintain fiduciary rights and</p> <p>12 things throughout this agreement, if that's</p> <p>13 what you're speaking to.</p> <p>14 Other than that, that's -- I</p> <p>15 don't -- you know, we have a choice. We --</p> <p>16 unfortunately, the choices continue and we</p> <p>17 make them every day, or nearly, less</p> <p>18 frequently but still more often than I'd like.</p> <p>19 Q. Doesn't the Debtor have the choice</p> <p>20 to say, we're done seeking approval of the</p> <p>21 settlement?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. Every -- I would certainly want to</p> <p>24 ask our team of the consequences of doing</p> <p>25 that. We -- we said to the parties, and at</p>

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<p style="text-align: right;">Page 105</p> <p>1 LaFORGE</p> <p>2 There was constant back-and-forth</p> <p>3 with our counsels and the board - it was just</p> <p>4 two guys, it's pretty easy - about where we</p> <p>5 were headed. But most of the time it was</p> <p>6 "we're not getting very far on a settlement."</p> <p>7 Q. So is it your testimony -- because</p> <p>8 I'm not sure if I understand it. Is it your</p> <p>9 testimony that counsel for the Debtors was</p> <p>10 involved in the negotiations between the</p> <p>11 Committee and the Noteholders and the</p> <p>12 Purchasers prior to receiving the draft term</p> <p>13 sheet, before the sale hearing in August?</p> <p>14 MR. RAMOS: Objection.</p> <p>15 A. The -- it is my testimony that our</p> <p>16 counsel spoke to the other counsels about</p> <p>17 resolving objections.</p> <p>18 That term sheet that we were</p> <p>19 looking at moments ago was a new structure to</p> <p>20 all of us at that point in time, what elements</p> <p>21 I can't speak to, because I didn't partake in</p> <p>22 those.</p> <p>23 Q. Were you aware, prior to receiving</p> <p>24 the draft term sheet, that the Committee and</p> <p>25 the Noteholders and the Purchasers were in</p>	<p style="text-align: right;">Page 107</p> <p>1 LaFORGE</p> <p>2 in releases.</p> <p>3 Q. What parties did you want to</p> <p>4 participate in the releases?</p> <p>5 A. All those parties that were not</p> <p>6 named on that -- on that sheet.</p> <p>7 Q. Okay. Did you ask to invite them</p> <p>8 in to negotiate to be part of those releases</p> <p>9 on --</p> <p>10 A. Can you repeat the question?</p> <p>11 Q. You said that you wished to have</p> <p>12 all of the parties who objected to be</p> <p>13 providing [sic] the releases in the draft term</p> <p>14 sheet; is that correct?</p> <p>15 MR. RAMOS: Objection.</p> <p>16 A. I'm sorry, I'm not -- I do want to</p> <p>17 follow you, I just -- sorry, I'm not.</p> <p>18 Q. I'll just ask my question again.</p> <p>19 What parties did you want to be</p> <p>20 added to the releases in the draft term sheet</p> <p>21 when you were discussing it at the sale</p> <p>22 hearing, or right before the sale hearing?</p> <p>23 A. There was not a specific</p> <p>24 discussion that named individual parties --</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">Page 106</p> <p>1 LaFORGE</p> <p>2 negotiations for a settlement that would</p> <p>3 provide payment from the Noteholders and/or</p> <p>4 the Purchasers to a GUC Trust, even though you</p> <p>5 weren't involved in the actual negotiations?</p> <p>6 A. I had not heard of a GUC Trust or</p> <p>7 contribution of assets or of cash.</p> <p>8 Q. Okay. You had -- when you</p> <p>9 received the draft term sheet in -- right</p> <p>10 before the sale hearing in August, you</p> <p>11 indicated that you were more interested in a</p> <p>12 global settlement.</p> <p>13 Is it my understanding of your</p> <p>14 testimony that, at that time, at that -- on</p> <p>15 that day before the sale hearing, the only</p> <p>16 thing you discussed was the releases, and</p> <p>17 that's what you meant by "interested in a more</p> <p>18 global settlement"?</p> <p>19 MR. RAMOS: Objection.</p> <p>20 A. That certainly was the -- the</p> <p>21 primary discussion.</p> <p>22 Q. What did you mean by broader</p> <p>23 release -- first of all, am I correct that</p> <p>24 what you wanted was broader releases?</p> <p>25 A. I meant more parties participating</p>	<p style="text-align: right;">Page 108</p> <p>1 LaFORGE</p> <p>2 A. -- or corporate parties or others.</p> <p>3 My -- you know, there's no real</p> <p>4 principal to deal with at the Committee, so</p> <p>5 it's the lawyer, the law firm. And I went out</p> <p>6 and I spoke to that law firm, with our counsel</p> <p>7 present, and I said that the narrowness of the</p> <p>8 agreement was unacceptable and that it had to</p> <p>9 be more broad, more broad releases, for us to</p> <p>10 be able to move forward on it.</p> <p>11 Q. And when you mean -- when you say</p> <p>12 "more broad releases," you mean additional</p> <p>13 parties granted releases?</p> <p>14 A. Additional parties who were</p> <p>15 beneficiaries of a release.</p> <p>16 Q. Okay. And were those additional</p> <p>17 parties -- did those additional parties</p> <p>18 include parties who had objected to the sale?</p> <p>19 A. We didn't speak specifically about</p> <p>20 who they were on that day. You know, it's</p> <p>21 somewhat hypothetical of what I -- how I would</p> <p>22 create one of those settlement agreements, but</p> <p>23 certainly parties who -- sure, it -- it -- you</p> <p>24 know, I have a -- I have a very strong</p> <p>25 perspective of, at least from the time I was</p>

Exhibit 10

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<p>1 IN THE UNITED STATES BANKRUPTCY COURT 2 FOR THE DISTRICT OF DELAWARE 3 -----x 4 In re: 5 Constellation Enterprises LLC, et al., 6 Debtors. 7 Chapter 11 Case No. 16-11213(CSS) 8 -----x 9 One New York Plaza 10 New York, New York 11 April 27, 2017 12 10:42 a.m. 13 14 DEPOSITION of DANA LaFORGE on behalf of 15 Debtors, taken pursuant to Notice before Marianne 16 Witkowski-Smith, a Shorthand Reporter and Notary 17 Public of the State of New York. 18 19 20 21 22 23 ELLEN GRAUER COURT REPORTING CO. LLC 24 126 East 56th Street, Fifth Floor 25 New York, New York 10022 212.750.6434 REF: 114775</p>	<p>1 APPEARANCES: (Cont'd) 2 3 SQUIRE PATTON BOGGS, L.L.P. 4 Attorneys for Creditors' Committee 5 30 Rockefeller Plaza 6 New York, New York 10112 7 BY: NAVA HAZAN, ESQ. 8 212.872.9800 9 nava.hazan@squirepb.com 10 11 12 AKIN GUMP STRAUSS HAUSER & FELD, L.L.P. 13 Attorneys for Ad Hoc Noteholder Group 14 One Bryant Park 15 New York, New York 10036 16 BY: JASON P. RUBIN, ESQ. 17 212.872.1000 18 jrubin@akingump.com 19 20 21 22 23 24 25</p>
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<p style="text-align: right;">Page 5</p> <p>1 ----- I N D E X -----</p> <p>2 WITNESS EXAMINATION BY PAGE</p> <p>3 DANA LaFORGE MR. KAPLAN 6</p> <p>4 MS. CASEY 102</p> <p>5 MR. BENSON 119</p> <p>6</p> <p>7</p> <p>8 ----- E X H I B I T S -----</p> <p>9 DDTL DESCRIPTION FOR I.D.</p> <p>10 Exhibit 1 Notice of Deposition 15</p> <p>11 Exhibit 2 Settlement Term Sheet 17</p> <p>12</p> <p>13</p> <p>14 (EXHIBITS TO BE PRODUCED)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 7</p> <p>1 LaFORGE</p> <p>2 transcribed. She can only take down verbal</p> <p>3 things, so headshakes and all of that she's</p> <p>4 not going to be able to get down.</p> <p>5 Also, she's not going to be able</p> <p>6 to get down if we talk over each other. I</p> <p>7 will try very hard not to interrupt you, but</p> <p>8 also let me finish my questions. And if your</p> <p>9 counsel has an objection, let him voice that</p> <p>10 before you answer.</p> <p>11 You know we're trying to get a</p> <p>12 clean record. So if you don't understand a</p> <p>13 question, if you think that it's poorly</p> <p>14 worded, please, I'll rephrase it. I'd rather</p> <p>15 not have to spend a lot of time trying to</p> <p>16 figure out if you're answering the question</p> <p>17 that I was intending for you to answer.</p> <p>18 Is all that clear?</p> <p>19 A. It is, yes.</p> <p>20 Q. Okay. And also, obviously to the</p> <p>21 extent you need a break at any time, obviously</p> <p>22 not while a question is pending but otherwise,</p> <p>23 we're happy to give you a break.</p> <p>24 A. Thank you.</p> <p>25 Q. Is there any reason you can't</p>
<p style="text-align: right;">Page 6</p> <p>1 DANA LaFORGE,</p> <p>2 the witness herein, having first been</p> <p>3 duly sworn by the Notary Public, was</p> <p>4 examined and testified as follows:</p> <p>5</p> <p>6 MR. KAPLAN: Good morning,</p> <p>7 Mr. LaForge. As you know, I'm Gary</p> <p>8 Kaplan from Fried Frank and we represent</p> <p>9 the DDTL Parties, as they're known in</p> <p>10 the case.</p> <p>11 EXAMINATION</p> <p>12 BY MR. KAPLAN:</p> <p>13 Q. Could you, for the record, state</p> <p>14 your full name?</p> <p>15 A. Dana LaForge.</p> <p>16 Q. Have you been deposed before?</p> <p>17 A. I have.</p> <p>18 Q. Okay. How many times?</p> <p>19 A. Once for sure that I can remember</p> <p>20 in this case.</p> <p>21 Q. Okay. Well, then I'm going to go</p> <p>22 through some ground rules. You've heard them</p> <p>23 before, you've done this before, but just a</p> <p>24 couple of things.</p> <p>25 First, obviously this is being</p>	<p style="text-align: right;">Page 8</p> <p>1 LaFORGE</p> <p>2 testify fully and truthfully today?</p> <p>3 A. No.</p> <p>4 Q. You're not taking any</p> <p>5 medications or anything --</p> <p>6 A. No.</p> <p>7 Q. -- that would interfere --</p> <p>8 A. No.</p> <p>9 MR. RAMOS: Let him finish his</p> <p>10 question.</p> <p>11 MR. KAPLAN: Yeah, don't take</p> <p>12 offense to that.</p> <p>13 Q. Just to go over some background,</p> <p>14 could you just describe your educational</p> <p>15 background, beginning with college?</p> <p>16 A. Sure. I went to Washington & Lee,</p> <p>17 was a major in commerce and accounting, and</p> <p>18 then after that went on to business school at</p> <p>19 Harvard.</p> <p>20 Q. Okay. And can you -- and did you</p> <p>21 get a degree from Harvard?</p> <p>22 A. I got a degree from both the</p> <p>23 schools, yes.</p> <p>24 Q. Okay. An MBA from --</p> <p>25 A. MBA from Harvard, yeah.</p>

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<p style="text-align: right;">Page 9</p> <p>1 LaFORGE</p> <p>2 Q. And can you briefly describe your</p> <p>3 work experience since receiving your -- your</p> <p>4 MBA?</p> <p>5 A. Sure. So I got out, I ran a</p> <p>6 mortgage finance group, so I had some trading</p> <p>7 responsibility then and some security</p> <p>8 structuring capability; went on to work on</p> <p>9 bank mergers during troubled bank times; ended</p> <p>10 up running the Financial Institutions Group at</p> <p>11 Bankers Trust, which became Bankers Trust</p> <p>12 Alex. Brown and then subsequently Deutsche</p> <p>13 Bank Alex. Brown; and spun out of there in</p> <p>14 2002 with a small private equity portfolio</p> <p>15 that I had originated, and since then I've</p> <p>16 been in the private equity business.</p> <p>17 Q. And in the private equity</p> <p>18 business, do you regularly serve on boards of</p> <p>19 directors?</p> <p>20 A. I do.</p> <p>21 Q. Okay. How many boards do you</p> <p>22 currently serve on?</p> <p>23 A. Well, they're the -- the ones in</p> <p>24 this case, which I'd have to count, which is</p> <p>25 Constellation and -- well, I guess I only</p>	<p style="text-align: right;">Page 11</p> <p>1 LaFORGE</p> <p>2 Q. No other board members.</p> <p>3 And how long have you been on the</p> <p>4 board of Constellation?</p> <p>5 A. I joined the board as an official</p> <p>6 director in September of 2015.</p> <p>7 Q. And what was your involvement, if</p> <p>8 any, with Constellation prior to that time?</p> <p>9 A. Prior to that I was an observer to</p> <p>10 the board of Constellation, as an observer.</p> <p>11 Q. And when did you become an</p> <p>12 observer?</p> <p>13 A. I believe in early 2012.</p> <p>14 Q. And you said that you're currently</p> <p>15 the only director of Constellation.</p> <p>16 Have you always been the sole</p> <p>17 director since 2015, when you first joined the</p> <p>18 board?</p> <p>19 A. No, there was certainly one other</p> <p>20 director until some time after the closing of</p> <p>21 the sale of the three companies. His name is</p> <p>22 Dennis Smith. He was a designee of the</p> <p>23 Noteholders.</p> <p>24 And prior -- so prior there was a</p> <p>25 period between the time I joined the board,</p>
<p style="text-align: right;">Page 10</p> <p>1 LaFORGE</p> <p>2 serve on two now. No, Columbus is -- I'm --</p> <p>3 so let me talk about the ones outside this</p> <p>4 case and come back to what should be the</p> <p>5 easiest but seems to be the hardest.</p> <p>6 I serve now -- and we're talking</p> <p>7 corporate boards, correct?</p> <p>8 Q. Corporate boards, yes.</p> <p>9 A. So I'm the chairman of a company</p> <p>10 called GAB Robins, and that's -- that's the</p> <p>11 only corporate board other than those in this</p> <p>12 case.</p> <p>13 Those in this case obviously</p> <p>14 remain Constellation, and I don't honestly</p> <p>15 know where Columbus stands. I was the</p> <p>16 chairman of Columbus. I suspect it's -- I</p> <p>17 suspect I'm still the chairman of Columbus.</p> <p>18 Q. Okay. And when you say</p> <p>19 "Constellation," you mean Constellation</p> <p>20 Enterprises LLC?</p> <p>21 A. Correct.</p> <p>22 Q. And how many other board members</p> <p>23 are there currently at Constellation</p> <p>24 Enterprises?</p> <p>25 A. No other board members.</p>	<p style="text-align: right;">Page 12</p> <p>1 LaFORGE</p> <p>2 which would be in September of '15, and the</p> <p>3 closing of a transaction that was a dilutive</p> <p>4 effect on the Protostar entity in January of</p> <p>5 '16, where the original Constellation board</p> <p>6 would have been in place.</p> <p>7 But as of January, I believe it</p> <p>8 was January the 25th or thereabouts, Dennis</p> <p>9 Smith and I became -- were the only two</p> <p>10 directors.</p> <p>11 Q. So it's fair to say that during</p> <p>12 the -- from the date of the bankruptcy filing</p> <p>13 until the closing of the sales of the</p> <p>14 businesses of Constellation, there were two</p> <p>15 directors; there was you and Mr. Smith?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. Do you hold any other</p> <p>18 positions at Constellation, aside from being a</p> <p>19 board member?</p> <p>20 A. No.</p> <p>21 Q. Okay. And what, if any, are your</p> <p>22 current responsibilities at Constellation,</p> <p>23 given the closings of the sales?</p> <p>24 A. The op- -- operating -- or the</p> <p>25 remnants of the operations would be -- we've</p>

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<p style="text-align: right;">Page 13</p> <p>1 LaFORGE</p> <p>2 got some employee matters at Columbus that</p> <p>3 continue. There's a WARN Act litigation going</p> <p>4 on. There is -- we've obviously got the</p> <p>5 settlement that's the topic of discussion here</p> <p>6 today. And there are an assortment of other</p> <p>7 relatively minor individual wind-down</p> <p>8 activities.</p> <p>9 Q. Does Constellation have any</p> <p>10 current employees?</p> <p>11 A. No, no employees, but there are</p> <p>12 three people who serve as consultants.</p> <p>13 Tindaro Caputo, who had been a prior CFO. He</p> <p>14 was not the CFO during -- at the time of the</p> <p>15 filing, and he handles the financial matters.</p> <p>16 There is the former CFO of</p> <p>17 Columbus named Joe Blaney, B-L-A-N-E-Y, who is</p> <p>18 integral to the WARN matters and is paid by --</p> <p>19 from the wind-down budget.</p> <p>20 And there is a former IT person at</p> <p>21 Columbus whose name I don't know who manages</p> <p>22 the -- the -- the maintenance, if you will, of</p> <p>23 the information primarily required with</p> <p>24 respect to the WARN.</p> <p>25 Q. And you mentioned that Mr. Blaney</p>	<p style="text-align: right;">Page 15</p> <p>1 LaFORGE</p> <p>2 The IT fellow, there's two costs</p> <p>3 for him. One is a reimbursement of any</p> <p>4 out-of-pockets and then his hourly. His</p> <p>5 hourly is next to nothing, but there have been</p> <p>6 some payments that he's made to, if you will,</p> <p>7 cover the cost of the cloud where the data is.</p> <p>8 MR. KAPLAN: Okay. Thank you.</p> <p>9 (DDTL EXHIBIT 1, Notice of</p> <p>10 Deposition, marked for</p> <p>11 identification.)</p> <p>12 MR. KAPLAN: Now, change a little</p> <p>13 bit, gears for -- I'm going to hand you</p> <p>14 what we've marked as DDTL Exhibit 1.</p> <p>15 And what I've handed you is the Notice</p> <p>16 of Deposition of the Debtors pursuant to</p> <p>17 Federal Rules of Procedure 30(b)(6).</p> <p>18 Q. Have you seen this before?</p> <p>19 A. I don't recall seeing this. Is</p> <p>20 there a date on this?</p> <p>21 Q. Yeah, there is. You'll see on the</p> <p>22 top of page 3 --</p> <p>23 MR. RAMOS: April 12.</p> <p>24 Gary, do you mind if I direct him?</p> <p>25 MR. KAPLAN: I was going to direct</p>
<p style="text-align: right;">Page 14</p> <p>1 LaFORGE</p> <p>2 is paid from the wind-down budget.</p> <p>3 Are Mr. Caputo and the IT person</p> <p>4 also paid from the wind-down budget?</p> <p>5 A. Correct, everybody -- yes.</p> <p>6 Q. And does Constellation have</p> <p>7 contracts with these individuals or are they</p> <p>8 just on an hourly consulting basis?</p> <p>9 MR. RAMOS: Objection.</p> <p>10 A. I don't believe there are</p> <p>11 contracts; I don't recall signing any. Should</p> <p>12 be, maybe, but they're paid hourly, and so</p> <p>13 they bill and we reimburse.</p> <p>14 Q. And do you know roughly how much</p> <p>15 Constellation is spending per month on these</p> <p>16 three consultants?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. On those three, Tindaro is running</p> <p>19 about -- he bills every two weeks. I want to</p> <p>20 say it's \$2,000 a billing period, so about</p> <p>21 \$1,000 a week at a rate of \$125 an hour.</p> <p>22 Joe Blaney I've not actually seen,</p> <p>23 but I would guess it's substantially less than</p> <p>24 Caputo, Tindaro Caputo, and he's paid a little</p> <p>25 bit less.</p>	<p style="text-align: right;">Page 16</p> <p>1 LaFORGE</p> <p>2 him to page...</p> <p>3 Q. Direct you to numbered page 7, if</p> <p>4 you've seen that page?</p> <p>5 A. I've seen that, yes.</p> <p>6 Q. Okay. And you see there's a list</p> <p>7 of -- of deposition topics there?</p> <p>8 A. I do.</p> <p>9 Q. And are you prepared to -- and</p> <p>10 just let me just put on the record, I</p> <p>11 understand that on A and B we had discussion.</p> <p>12 So I'm going to ask you in</p> <p>13 particular topics C through H, and in</p> <p>14 particular, are you prepared to testify about</p> <p>15 the topics listed there?</p> <p>16 MR. RAMOS: Just object, we'll let</p> <p>17 the objection that the Debtor served to</p> <p>18 the deposition notice speak for itself.</p> <p>19 A. I think there was one other that</p> <p>20 was in the same category as A and B, and I'll</p> <p>21 read them and see if I can...</p> <p>22 Q. I believe you may be referring to</p> <p>23 the first line of F, "Negotiation of the APA."</p> <p>24 A. Yes, that's correct.</p> <p>25 Q. Okay.</p>

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<p style="text-align: right;">Page 17</p> <p>1 LaFORGE</p> <p>2 A. Thank you.</p> <p>3 Q. Sure. But other than A, B and --</p> <p>4 A. Other than A, B and the first</p> <p>5 sentence of F, yes.</p> <p>6 Q. Okay. What, if anything, did you</p> <p>7 do to prepare for this deposition?</p> <p>8 A. Read public filings and had a</p> <p>9 couple of conversations with counsel.</p> <p>10 Q. Did you talk to anybody else at</p> <p>11 the Debtors?</p> <p>12 A. No.</p> <p>13 Q. Okay. Did you review any</p> <p>14 documents that were not publicly filed?</p> <p>15 A. No.</p> <p>16 MR. KAPLAN: Okay. Let's just</p> <p>17 jump right into the -- you mentioned</p> <p>18 earlier the settlement agreement, so</p> <p>19 let's jump right into the settlement</p> <p>20 term sheet, if we could.</p> <p>21 (DDTL EXHIBIT 2, Settlement Term</p> <p>22 Sheet, marked for identification.)</p> <p>23 MR. KAPLAN: I'm handing you what</p> <p>24 we've marked as DDTL Parties Exhibit 2.</p> <p>25 Q. Do you recognize that document?</p>	<p style="text-align: right;">Page 19</p> <p>1 LaFORGE</p> <p>2 Q. Okay. Were you involved in the</p> <p>3 negotiation of this term sheet?</p> <p>4 A. No.</p> <p>5 Q. Was anybody on the Debtors' behalf</p> <p>6 involved in the negotiation of the term sheet?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. This was presented to us in, if</p> <p>9 not this form, substantially this form at the</p> <p>10 August hearing. We shared with the parties</p> <p>11 thoughts on it, but -- but none of our -- I</p> <p>12 would not say it was a negotiation. It was</p> <p>13 presented to us as a term sheet prepared and</p> <p>14 discussed by -- between the Noteholders and</p> <p>15 the Creditors' Committee, and it was ours to</p> <p>16 accept or not.</p> <p>17 Q. And who presented it to you?</p> <p>18 A. Well, I got it from our counsel,</p> <p>19 but it was Creditors' -- you know, the -- I</p> <p>20 don't recall any discussion besides with</p> <p>21 Creditors' Committee counsel on it, outside of</p> <p>22 my own counsel.</p> <p>23 Q. And so not to put words in your</p> <p>24 mouth, but effectively the settlement was</p> <p>25 delivered to you as a take-it-or-leave-it?</p>
<p style="text-align: right;">Page 18</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Gary, can you just</p> <p>3 clarify for the witness what -- where</p> <p>4 this was filed in the Debtors'</p> <p>5 bankruptcy case?</p> <p>6 MR. KAPLAN: The docket number</p> <p>7 is -- I believe this was attached to the</p> <p>8 motion seeking approval of the</p> <p>9 settlement, so it's docket 560.</p> <p>10 MR. RAMOS: So attached to the</p> <p>11 joint settlement motion?</p> <p>12 MR. KAPLAN: The joint settlement</p> <p>13 motion, correct.</p> <p>14 THE WITNESS: Can you repeat the</p> <p>15 question?</p> <p>16 BY MR. KAPLAN:</p> <p>17 Q. Yeah. Have you seen this document</p> <p>18 before?</p> <p>19 A. Yes, I have.</p> <p>20 Q. And what is this document?</p> <p>21 A. The settlement term sheet.</p> <p>22 Q. And that's the settlement for</p> <p>23 which the Debtors and the Creditors' Committee</p> <p>24 are seeking approval, correct?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 20</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Objection.</p> <p>3 A. Those words were not used, so I</p> <p>4 don't want to put words in other's mouths, but</p> <p>5 it was presented -- there was -- we were --</p> <p>6 you know, we had a -- we had a time deadline,</p> <p>7 and there was -- and the -- and the initial</p> <p>8 thoughts that I had on it were not going to be</p> <p>9 considered prior to the time deadline that we</p> <p>10 had, which was the court -- you know, the</p> <p>11 timing of the court session.</p> <p>12 Q. And how do you know that the</p> <p>13 thoughts that you had were not going to be</p> <p>14 considered?</p> <p>15 A. I stepped out of the room. I had</p> <p>16 counsel and Committee counsel there, I</p> <p>17 expressed some thoughts about it, and in that</p> <p>18 discussion -- and I don't remember the words</p> <p>19 or -- or -- or exactly who spoke them, I --</p> <p>20 there -- we were unable to make changes, you</p> <p>21 know, we were unable to make changes.</p> <p>22 Q. But just so I understand, when you</p> <p>23 say you were "unable to make changes," was</p> <p>24 that because you made proposals that they</p> <p>25 rejected or they told you it's too late, we're</p>

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<p style="text-align: right;">Page 21</p> <p>1 LaFORGE</p> <p>2 not making any changes?</p> <p>3 MR. RAMOS: Objection.</p> <p>4 A. There were -- it was a reading and</p> <p>5 a -- on my part, a discussion with -- with</p> <p>6 counsel and of course, I'm sure, the other</p> <p>7 director, but I don't recall that. And it --</p> <p>8 it -- I'm -- I'm trying to...</p> <p>9 MR. RAMOS: Let me just caution</p> <p>10 you not to disclose any attorney-client</p> <p>11 or privileged information. So if you</p> <p>12 can't answer the question without the</p> <p>13 benefit of it, don't disclose such</p> <p>14 information.</p> <p>15 MR. KAPLAN: But just to be clear,</p> <p>16 if counsel's relaying what the Committee</p> <p>17 says or a third party says, that's not</p> <p>18 attorney-client privilege. So if it's</p> <p>19 advice --</p> <p>20 MR. RAMOS: We'll let the witness</p> <p>21 try to answer the question.</p> <p>22 MR. KAPLAN: Understood.</p> <p>23 MR. RAMOS: I'm reminding him</p> <p>24 about the privilege issue.</p> <p>25 MR. KAPLAN: That's fine.</p>	<p style="text-align: right;">Page 23</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Are you represent --</p> <p>3 okay. Your question is about the term</p> <p>4 sheet.</p> <p>5 MR. KAPLAN: My question is about</p> <p>6 the term sheet.</p> <p>7 MR. RAMOS: All right. So you're</p> <p>8 not representing to the witness that the</p> <p>9 hearing occurred in September --</p> <p>10 MR. KAPLAN: No.</p> <p>11 MR. RAMOS: -- we're talking about</p> <p>12 August --</p> <p>13 MR. KAPLAN: We're talking about</p> <p>14 the August hearing --</p> <p>15 MR. RAMOS: So just so the witness</p> <p>16 is clear, your question is focused fully</p> <p>17 on the term sheet?</p> <p>18 MR. KAPLAN: My question is</p> <p>19 focused on the term sheet.</p> <p>20 MR. RAMOS: Thank you.</p> <p>21 A. It was -- it was Committee counsel</p> <p>22 who was not prepared to make changes that I</p> <p>23 thought would be helpful to making this -- to</p> <p>24 change -- to making this a document that might</p> <p>25 be termed as a better document from a number</p>
<p style="text-align: right;">Page 22</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: And perhaps it makes</p> <p>3 sense at this point, since we</p> <p>4 interfered, for you to restate the</p> <p>5 question so the witness knows</p> <p>6 specifically what you're asking and the</p> <p>7 time period in which you're asking it.</p> <p>8 MR. KAPLAN: Sure.</p> <p>9 Q. We were talking about when the</p> <p>10 term sheet was presented to you at the</p> <p>11 hearing, or immediately prior to the hearing.</p> <p>12 And my question was, when you say</p> <p>13 you were "unable to make changes" to the term</p> <p>14 sheet, was that because you made proposals and</p> <p>15 they were rejected or because they told you</p> <p>16 it's too late and they're not making any</p> <p>17 changes?</p> <p>18 MR. RAMOS: And let me lodge an</p> <p>19 objection to that question. Gary, just</p> <p>20 for point of fact, you're referring to</p> <p>21 the term sheet which was filed on</p> <p>22 September 8, but your question is about</p> <p>23 the hearing. And --</p> <p>24 MR. KAPLAN: My question is about</p> <p>25 the term sheet.</p>	<p style="text-align: right;">Page 24</p> <p>1 LaFORGE</p> <p>2 of points of view.</p> <p>3 Q. And do you know whether the</p> <p>4 Noteholders were willing to engage any</p> <p>5 discussions about changes to the document?</p> <p>6 A. I don't know that.</p> <p>7 Q. And --</p> <p>8 A. We're talking about this term</p> <p>9 sheet at this time?</p> <p>10 Q. Correct.</p> <p>11 A. I don't know that.</p> <p>12 Q. Okay. And you mentioned earlier</p> <p>13 in one of your answers that there was a time</p> <p>14 deadline that you were dealing with.</p> <p>15 What was that time deadline?</p> <p>16 A. Well, there was -- we were in</p> <p>17 Delaware in the -- the last of the discussion</p> <p>18 I'm referring to was in the -- outside the</p> <p>19 courtroom. And there was a -- there were, you</p> <p>20 know, a reaction that I had to the -- to this</p> <p>21 and some suggestions that I thought would be</p> <p>22 useful. And those -- that discussion took</p> <p>23 place once everyone was at the courthouse in</p> <p>24 the room, stepped out of the room.</p> <p>25 And the -- look, I don't remember</p>

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<p style="text-align: right;">Page 25</p> <p>1 LaFORGE</p> <p>2 whether we had five minutes or fifteen minutes</p> <p>3 or thirty minutes, but there was a -- we</p> <p>4 wouldn't have been at the courthouse much</p> <p>5 earlier than that, and we had to get back in</p> <p>6 so that when the judge came into the room, we</p> <p>7 were -- we were prepared.</p> <p>8 Q. Did you seek to adjourn the</p> <p>9 hearing or push it back so that you had more</p> <p>10 time to deal with it?</p> <p>11 A. No.</p> <p>12 Q. Okay. And what were your thoughts</p> <p>13 on the term sheet?</p> <p>14 MR. RAMOS: Objection.</p> <p>15 Q. Let me clarify that question.</p> <p>16 You said that you had some -- some</p> <p>17 thoughts and suggestions on the term sheet</p> <p>18 that -- that you raised with the Creditors'</p> <p>19 Committee.</p> <p>20 What were those?</p> <p>21 A. I had hoped for a more global</p> <p>22 settlement.</p> <p>23 Q. And can you be more specific on</p> <p>24 that?</p> <p>25 MR. RAMOS: Objection.</p>	<p style="text-align: right;">Page 27</p> <p>1 LaFORGE</p> <p>2 I went down for the hearing, so for a</p> <p>3 relatively limited period of time.</p> <p>4 Q. And were you given -- prior to</p> <p>5 seeing the actual term sheet that morning</p> <p>6 before court, had you been informed of the</p> <p>7 status of any negotiations of the settlement</p> <p>8 between the Creditors' Committee and the</p> <p>9 Noteholders?</p> <p>10 MR. RAMOS: Let me just lodge an</p> <p>11 objection to this question, this line of</p> <p>12 questioning. We were talking earlier</p> <p>13 that you were conflating the term sheet</p> <p>14 that you presented before the witness,</p> <p>15 which is filed in September, with the</p> <p>16 August hearing. And I see that</p> <p>17 continuing and so I find it confusing.</p> <p>18 And I apologize for making an</p> <p>19 express -- what the nature of the</p> <p>20 objection is. But I thought it might be</p> <p>21 helpful, if you're going to be</p> <p>22 continuing to ask questions about term</p> <p>23 sheet versus the August hearing, that</p> <p>24 we're clear as to what we're talking</p> <p>25 about and what the witness is being told</p>
<p style="text-align: right;">Page 26</p> <p>1 LaFORGE</p> <p>2 A. Yeah, I can be. I thought that --</p> <p>3 that it would have been useful for releases</p> <p>4 for a broader group of parties.</p> <p>5 Q. Were there -- aside from -- from</p> <p>6 seeking releases for a broader group of</p> <p>7 parties, were there other changes that you</p> <p>8 thought should be made to the term sheet?</p> <p>9 MR. RAMOS: Objection.</p> <p>10 A. My -- my discussion was with --</p> <p>11 certainly with -- with -- at the courthouse</p> <p>12 was about releases only.</p> <p>13 Q. And did you discuss the -- when</p> <p>14 you received the term sheet at the courthouse,</p> <p>15 did you discuss it with Mr. Smith?</p> <p>16 MR. RAMOS: Objection.</p> <p>17 A. I did not -- I did not speak to</p> <p>18 Mr. Smith from the courthouse. I believe we</p> <p>19 saw this at the RLF offices prior -- prior to</p> <p>20 the courthouse.</p> <p>21 Q. But immediate -- I'm sorry, I</p> <p>22 don't want to cut you off.</p> <p>23 A. Immediately prior, and I don't --</p> <p>24 I'm sorry, I just don't know what "immediate"</p> <p>25 is. But I went down that morning. And again,</p>	<p style="text-align: right;">Page 28</p> <p>1 LaFORGE</p> <p>2 was -- is before him at a given time.</p> <p>3 MR. KAPLAN: That's fair. Then</p> <p>4 let me just clarify it.</p> <p>5 Q. The August hearing, what were you</p> <p>6 given to show you the terms of the settlement</p> <p>7 that had been reached?</p> <p>8 A. I was given nothing in the</p> <p>9 courthouse. I was -- saw something at the RLF</p> <p>10 offices, and I assume -- it certainly wasn't</p> <p>11 this one because this is the execution</p> <p>12 version, but it was a document substantially</p> <p>13 similar to this.</p> <p>14 Q. And are you aware of any material</p> <p>15 changes between what you saw in August at</p> <p>16 RLF's offices before entering into court and</p> <p>17 the execution version?</p> <p>18 MR. RAMOS: Objection.</p> <p>19 A. I'm not aware of any substantial</p> <p>20 changes.</p> <p>21 Q. Okay. And so just to understand</p> <p>22 process, you saw a draft term sheet</p> <p>23 immediately prior to heading into court, then</p> <p>24 you had a meeting with the Creditors'</p> <p>25 Committee at -- with the Creditors' Committee</p>

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<p style="text-align: right;">Page 29</p> <p>1 LaFORGE</p> <p>2 counsel at the courthouse; is that fair?</p> <p>3 Okay. Is that a yes?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Aside from that discussion</p> <p>6 with the Creditors' Committee counsel at the</p> <p>7 courthouse, did you have any conversations</p> <p>8 with Creditors' Committee or their counsel</p> <p>9 with respect to the terms of the settlement?</p> <p>10 MR. RAMOS: Objection. Can you</p> <p>11 define the time period?</p> <p>12 MR. KAPLAN: Sure. Prior to</p> <p>13 the -- that hearing.</p> <p>14 A. I did not. There were. I did</p> <p>15 not.</p> <p>16 Q. Okay. And going back to the</p> <p>17 question I was asking earlier, prior to seeing</p> <p>18 that draft term sheet at RLF's offices, had</p> <p>19 you been apprised at all of the status of the</p> <p>20 negotiations between the Creditors' Committee</p> <p>21 and the Noteholder?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. This -- there's a continuum, not a</p> <p>24 series, not necessarily discrete events. The</p> <p>25 continuum began prior to filing, where each</p>	<p style="text-align: right;">Page 31</p> <p>1 LaFORGE</p> <p>2 seeing that term sheet, had you understood</p> <p>3 the -- or been told about the framework --</p> <p>4 A. No.</p> <p>5 Q. -- of this settlement?</p> <p>6 A. I'm sorry to answer too quickly.</p> <p>7 Q. That's all right.</p> <p>8 Were you asked to give any input</p> <p>9 on the framework of the proposed settlement</p> <p>10 prior to receiving that draft term sheet?</p> <p>11 MR. RAMOS: Objection.</p> <p>12 A. I'm having trouble with the time</p> <p>13 frame, Gary. If it was about this particular</p> <p>14 term sheet, the answer is no.</p> <p>15 Q. Okay. Or this settlement -- the</p> <p>16 same question for the settlement embodied in</p> <p>17 this term sheet.</p> <p>18 MR. RAMOS: Objection.</p> <p>19 A. As I said before, it was an</p> <p>20 ever-evolving situation and it was a</p> <p>21 continuum, not necessarily discrete events</p> <p>22 that stand on their own. From the time -- at</p> <p>23 each point we would socialize what would be</p> <p>24 the best outcome, and that effected itself</p> <p>25 ultimately in all the public documents and</p>
<p style="text-align: right;">Page 30</p> <p>1 LaFORGE</p> <p>2 step along the way, with the facts and</p> <p>3 circumstances presented, we tried to do the</p> <p>4 best we could to make decisions to achieve</p> <p>5 objectives; you know, cash ran lower,</p> <p>6 objectives changed; as you get closer to a</p> <p>7 filing, objectives change.</p> <p>8 And so there is no doubt that from</p> <p>9 before we ran out of -- before it became</p> <p>10 apparent we would actually end up with a</p> <p>11 filing, there were discussions about how we</p> <p>12 could have some form of settlement, some way</p> <p>13 to keep moving forward.</p> <p>14 Throughout the process, though,</p> <p>15 of -- that led up to this, there was always an</p> <p>16 encouragement on the part of the Debtors for</p> <p>17 some form of settlement, and there were no --</p> <p>18 I was not -- did not see term sheets. I was</p> <p>19 apprise -- usually -- my best recollection of</p> <p>20 what I was apprised of was not making much</p> <p>21 progress, but yes, I was apprised. And there</p> <p>22 was not a lot to work with until -- until</p> <p>23 this, or just prior to this.</p> <p>24 Q. But going -- but going to the</p> <p>25 specifics of the draft term sheet, prior to</p>	<p style="text-align: right;">Page 32</p> <p>1 LaFORGE</p> <p>2 filings and transactions that you see.</p> <p>3 Specific to this term sheet, I had</p> <p>4 not seen this structure and -- I had not see</p> <p>5 seen this structure at all.</p> <p>6 (Brief off-record discussion.)</p> <p>7 BY MR. KAPLAN:</p> <p>8 Q. And what is your understanding of</p> <p>9 what was being settled by this -- the draft</p> <p>10 term sheet and then the execution version of</p> <p>11 the term sheet?</p> <p>12 A. My objective at that moment in</p> <p>13 time was we were trying to achieve a sale of</p> <p>14 the companies, ongoing -- as ongoing</p> <p>15 businesses. Leading up to that hearing, we</p> <p>16 didn't have a lot of support for the sale</p> <p>17 document we were asking for approval of.</p> <p>18 We had -- we had cash challenges,</p> <p>19 that we needed approval of the -- of the DIP</p> <p>20 to have access to more cash; we had businesses</p> <p>21 where customers were concerned about where</p> <p>22 they were, with no path forward. And this</p> <p>23 settlement provided the -- the support of the</p> <p>24 Committee, which we thought would be important</p> <p>25 to end up, quite frankly, with the outcome we</p>

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<p style="text-align: right;">Page 33</p> <p>1 LaFORGE</p> <p>2 achieved at that hearing and to achieve the</p> <p>3 end goals that I mentioned.</p> <p>4 Q. Yeah, I -- thank you, I understand</p> <p>5 that. But I guess what I'm going to is this</p> <p>6 is a -- this term sheet is a settlement term</p> <p>7 sheet, right?</p> <p>8 MR. RAMOS: Objection.</p> <p>9 A. Right.</p> <p>10 Q. And my question is, what was being</p> <p>11 settled?</p> <p>12 MR. RAMOS: Objection, asked and</p> <p>13 answered.</p> <p>14 A. What was being settled in the term</p> <p>15 sheet?</p> <p>16 Q. Yes.</p> <p>17 A. I think the term sheet speaks for</p> <p>18 itself. I can't -- I could repeat what's in</p> <p>19 there, but the -- the -- I don't know how I</p> <p>20 can be productive answering the question</p> <p>21 beyond to read the term sheet, which I don't</p> <p>22 think is what you're driving me to.</p> <p>23 Q. I'm just trying to understand,</p> <p>24 when you were delivered this draft term sheet</p> <p>25 prior to the hearing in mid August - I just</p>	<p style="text-align: right;">Page 35</p> <p>1 LaFORGE</p> <p>2 A. No, nothing's settled and goes --</p> <p>3 no, there -- no.</p> <p>4 Q. Okay. And so did you -- did you</p> <p>5 authorize Debtors and their counsel to support</p> <p>6 the term sheet?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. The board would have considered</p> <p>9 the term sheet and made a determination, in</p> <p>10 its business judgment, that it was better to</p> <p>11 support this than not to. And I'm one of two</p> <p>12 members of the board.</p> <p>13 Q. Was there a board meeting held to</p> <p>14 make that determination?</p> <p>15 A. I would have to see if it was --</p> <p>16 you know, if there was a minuted board</p> <p>17 meeting, but it would have been that morning</p> <p>18 and it would have been on the phone with</p> <p>19 Dennis Smith.</p> <p>20 Q. I thought you said earlier you did</p> <p>21 not -- so --</p> <p>22 A. I did speak to Dennis Smith.</p> <p>23 Q. Okay. So when you received the</p> <p>24 term sheet, you then had a discussion with</p> <p>25 Mr. Smith?</p>
<p style="text-align: right;">Page 34</p> <p>1 LaFORGE</p> <p>2 want to understand - what is your</p> <p>3 understanding of what was actually being</p> <p>4 settled?</p> <p>5 MR. RAMOS: Objection.</p> <p>6 A. I -- I don't have -- again, this</p> <p>7 term sheet speaks for itself as to the</p> <p>8 relationship between each of the parties who</p> <p>9 are signatories toward -- towards it.</p> <p>10 What we got out of that</p> <p>11 immediately was the support of the Committee</p> <p>12 with respect to the DIP and the -- and the</p> <p>13 approval of the APA; which, in my mind, were</p> <p>14 critical to achieving the objectives that we,</p> <p>15 as the board, had -- the business objectives</p> <p>16 we had set out at that point.</p> <p>17 Q. Other than resolving an objection</p> <p>18 to the DIP and the APA, were there any other</p> <p>19 actions, cause of actions, lawsuits or</p> <p>20 anything else that you believe were being</p> <p>21 settled by the term sheet?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. Settled, meaning they go away</p> <p>24 completely?</p> <p>25 Q. Yes.</p>	<p style="text-align: right;">Page 36</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Objection.</p> <p>3 A. During that morning I would have</p> <p>4 had a discussion with Mr. Smith.</p> <p>5 Q. You -- do you specifically recall</p> <p>6 having that discussion with him?</p> <p>7 A. I'm not specifically recalling the</p> <p>8 discussion.</p> <p>9 Q. Do you recall whether you raised</p> <p>10 with Mr. Smith any concerns with the term</p> <p>11 sheet?</p> <p>12 A. I don't recall the conversation,</p> <p>13 so it's hard to recall the specifics.</p> <p>14 Q. And sitting here today, you can't</p> <p>15 say definitively that you did speak to</p> <p>16 Mr. Smith that morning before the hearing?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. I can definitively say that the</p> <p>19 Debtors would not have given their support for</p> <p>20 this term sheet without the discussion among</p> <p>21 the two directors. I saw the term sheet that</p> <p>22 morning. The only plausible way to have had</p> <p>23 that would be to have had that conversation</p> <p>24 that morning. I do not specifically remember</p> <p>25 the conversation.</p>

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<p style="text-align: right;">Page 37</p> <p>1 LaFORGE</p> <p>2 Q. So you said earlier that because</p> <p>3 of the deadline, although you had some</p> <p>4 thoughts on the term sheet, there wasn't</p> <p>5 sufficient time to make any changes to the</p> <p>6 settlement; is that fair?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. The time only determine -- the</p> <p>9 time constraint certainly affected the length</p> <p>10 of the negotiation. If there was an</p> <p>11 indication that this -- that some of my</p> <p>12 thoughts, the company's thoughts could have</p> <p>13 been negotiated into this, we would have -- we</p> <p>14 would have continued to try. It was clear to</p> <p>15 me that -- it was clear to me that at that</p> <p>16 point in time, there would be no changes to</p> <p>17 this document.</p> <p>18 Q. Following the -- that hearing, did</p> <p>19 the Debtors make any efforts to make further</p> <p>20 changes to the term sheet?</p> <p>21 MR. RAMOS: Objection.</p> <p>22 A. Back to the fact that this is a</p> <p>23 continuum of discussions, this didn't resolve</p> <p>24 every matter we had to go forward, and yes,</p> <p>25 the Debtors did have discussions with respect</p>	<p style="text-align: right;">Page 39</p> <p>1 LaFORGE</p> <p>2 A. I certainly remember conversations</p> <p>3 with the Noteholders that specifically</p> <p>4 addressed some things that I would have liked</p> <p>5 in the term sheet. It wasn't necessarily</p> <p>6 framed as "change this term sheet," but it was</p> <p>7 framed as -- it was framed in a -- you know,</p> <p>8 there were discussions about, again, a more</p> <p>9 global settlement than what this term sheet</p> <p>10 presents.</p> <p>11 Q. And who specifically of the</p> <p>12 Noteholders did you speak with?</p> <p>13 A. Chris Keenan.</p> <p>14 Q. And Chris is with...</p> <p>15 A. Wayzata.</p> <p>16 Q. Okay. When you first saw the term</p> <p>17 sheet, did you have an understanding of how</p> <p>18 the Chapter 11 cases would be concluded?</p> <p>19 MR. RAMOS: Objection.</p> <p>20 A. Other than what is referred to in</p> <p>21 the term sheet, I believe the answer is no,</p> <p>22 no.</p> <p>23 We had, I believe prior to this,</p> <p>24 proposed a dismissal which had been objected</p> <p>25 to, so we did not have a clear direction of</p>
<p style="text-align: right;">Page 38</p> <p>1 LaFORGE</p> <p>2 to matters that might be objectionable to some</p> <p>3 in this, about seeing if we couldn't remedy</p> <p>4 those.</p> <p>5 Q. And did you have any such -- when</p> <p>6 you say the "Debtors had discussions," were</p> <p>7 you involved --</p> <p>8 A. Yeah.</p> <p>9 Q. -- in those discussions?</p> <p>10 A. I had those discussions.</p> <p>11 Q. And with whom did you have those</p> <p>12 discussions?</p> <p>13 A. I'm sure a -- a broad group, not</p> <p>14 the Committee. I -- you know, that was not a</p> <p>15 usual contact point for me much. So any</p> <p>16 conversation among the lawyers would have been</p> <p>17 usually handled by either RLF or Kramer;</p> <p>18 Kramer was probably at that point. And any</p> <p>19 principal discussions with what would have</p> <p>20 been Noteholders would have been me.</p> <p>21 Q. And do you specifically recall</p> <p>22 conversations with Noteholders, following the</p> <p>23 receipt of the term sheet, to seek to amend</p> <p>24 the terms of the term sheet?</p> <p>25 MR. RAMOS: Objection.</p>	<p style="text-align: right;">Page 40</p> <p>1 LaFORGE</p> <p>2 how to -- how to take the cases out of</p> <p>3 bankruptcy.</p> <p>4 Q. And when you say "prior to this"</p> <p>5 you had sought dismissal, do you mean to say</p> <p>6 prior to the settlement term sheet you had</p> <p>7 sought a dismissal?</p> <p>8 A. I recall reviewing a public filing</p> <p>9 where there were objections to the dismissal</p> <p>10 proposal by the company. It's -- it was my</p> <p>11 review of public documents in the last couple</p> <p>12 of days.</p> <p>13 Q. But do you recall that -- and I'm</p> <p>14 not trying to -- the Debtors didn't seek to</p> <p>15 dismiss the case prior to you receiving</p> <p>16 this --</p> <p>17 A. I -- I --</p> <p>18 Q. -- settlement term sheet?</p> <p>19 A. I can't answer that question. I'm</p> <p>20 sorry, Gary, I just don't know. Anything I'm</p> <p>21 referring to was in the public documents.</p> <p>22 Nothing -- I'm not referring to anything that</p> <p>23 was not.</p> <p>24 Q. And is your understanding of</p> <p>25 the -- well, strike that.</p>

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<p style="text-align: right;">Page 41</p> <p>1 LaFORGE</p> <p>2 The term sheet provides for</p> <p>3 different distributions to various creditors,</p> <p>4 right?</p> <p>5 A. The term sheet takes -- it calls</p> <p>6 for a contribution of assets that had been</p> <p>7 negotiated in the APA as part of the sale</p> <p>8 agreement; contributed those from the buyer's</p> <p>9 end of that APA, who were in fact prior</p> <p>10 creditors, to a somewhat broader group of</p> <p>11 creditors.</p> <p>12 So if that answers your question,</p> <p>13 there's -- it allocates those particular</p> <p>14 assets to a couple of -- a few more creditors.</p> <p>15 Q. But you're aware that it doesn't</p> <p>16 allocate the value to all the creditors,</p> <p>17 right?</p> <p>18 A. I am --</p> <p>19 MR. RAMOS: Objection.</p> <p>20 A. I'm aware of that.</p> <p>21 Q. Okay. And did you or anyone on</p> <p>22 the Debtor's behalf ever attempt to negotiate</p> <p>23 for allocation to all creditors?</p> <p>24 MR. RAMOS: Objection.</p> <p>25 A. We're speaking again in the time</p>	<p style="text-align: right;">Page 43</p> <p>1 LaFORGE</p> <p>2 not all the creditors.</p> <p>3 Q. And so you're aware, for example,</p> <p>4 that priority creditors don't receive anything</p> <p>5 from the Trust, correct?</p> <p>6 MR. RAMOS: Objection.</p> <p>7 A. Can we speak specifically about</p> <p>8 who the creditors are so I don't trip up on a</p> <p>9 terminology of a separate group?</p> <p>10 Q. Sure. The IRS, which --</p> <p>11 A. I'm aware --</p> <p>12 Q. -- have a priority claim --</p> <p>13 A. I'm aware of that.</p> <p>14 Q. So you're aware they don't receive</p> <p>15 the value from the Trust?</p> <p>16 MR. RAMOS: Objection. Are you</p> <p>17 making that representation to the</p> <p>18 witness?</p> <p>19 MR. KAPLAN: Am I making what</p> <p>20 representation?</p> <p>21 MR. RAMOS: Are you representing</p> <p>22 that the IRS will receive nothing from</p> <p>23 the proceeds of the Trust?</p> <p>24 MR. KAPLAN: I'm asking the</p> <p>25 question --</p>
<p style="text-align: right;">Page 42</p> <p>1 LaFORGE</p> <p>2 frame of a term sheet. There -- the</p> <p>3 discussion around the causes of action that</p> <p>4 are being contributed here, the discussion</p> <p>5 around that took place mostly around the</p> <p>6 negotiation of the APA. The company, the</p> <p>7 Debtors, would have preferred to keep many of</p> <p>8 those causes of action, and we were unable to</p> <p>9 negotiate that in the APA. At that point,</p> <p>10 they were not ours to -- at that point, they</p> <p>11 were not ours to -- or certainly upon approval</p> <p>12 of sale, they were not ours to allocate.</p> <p>13 Q. I understand. But you understand</p> <p>14 that the settlement term sheet does attempt to</p> <p>15 allocate those assets and some others to</p> <p>16 certain creditors, right?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. Well, I don't know what "some</p> <p>19 others" means, but I do -- again, I -- the</p> <p>20 term sheet's not that long. It says what it</p> <p>21 says.</p> <p>22 I am aware of the contributions of</p> <p>23 the causes of action to the Trust and I'm</p> <p>24 aware of the recipients on the other side of</p> <p>25 the Trust, and I'm aware also that those are</p>	<p style="text-align: right;">Page 44</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Whether he knows --</p> <p>3 MR. KAPLAN: He's the Debtors'</p> <p>4 witness with respect to the settlement.</p> <p>5 MR. RAMOS: Yes.</p> <p>6 MR. KAPLAN: I am asking him his</p> <p>7 understanding of how the settlement</p> <p>8 works.</p> <p>9 MR. RAMOS: We refer you to our</p> <p>10 objections to your deposition topics and</p> <p>11 we object to the question.</p> <p>12 MR. KAPLAN: Okay. So I'll go</p> <p>13 back to my question.</p> <p>14 Q. Are you -- do you understand that</p> <p>15 priority creditors receive distributions from</p> <p>16 the Trust?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. I don't want to get caught up on</p> <p>19 "priority creditors" and a definition that I</p> <p>20 am not -- have more than a -- that I don't</p> <p>21 have more than a general understanding of.</p> <p>22 I am aware that there are</p> <p>23 creditors like the IRS that are not</p> <p>24 participating in this Trust, yes.</p> <p>25 Q. And why are those creditors not</p>

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<p style="text-align: right;">Page 45</p> <p>1 LaFORGE</p> <p>2 participating in the Trust?</p> <p>3 A. I think the better -- that's</p> <p>4 better to ask the folks that negotiated this,</p> <p>5 the credit -- the Unsecured Credit Committee</p> <p>6 and the Noteholders, because those are the</p> <p>7 folks that gave us the term sheet.</p> <p>8 Q. I understand. But the Debtors</p> <p>9 ultimately agreed to sign the term sheet,</p> <p>10 right?</p> <p>11 A. The Debtors agreed to support the</p> <p>12 term sheet, yes.</p> <p>13 Q. Okay. Well, let me ask you, do</p> <p>14 you think it's fair that certain creditors do</p> <p>15 not get to benefit from the distributions from</p> <p>16 the Trust?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. Gary, I had the benefit of</p> <p>19 watching some of the Supreme Court nominee</p> <p>20 hearings. And I have to leave at home at the</p> <p>21 breakfast table, as he said, what I think is</p> <p>22 fair and do what I think is right and import</p> <p>23 my own perspective on these things.</p> <p>24 I have told you that I preferred a</p> <p>25 far -- I preferred a more global settlement.</p>	<p style="text-align: right;">Page 47</p> <p>1 LaFORGE</p> <p>2 or so, and very few make their point and say</p> <p>3 "when taken as a whole." That's something</p> <p>4 that, unfortunately, I need to do.</p> <p>5 And yes -- yes, we approved this</p> <p>6 term sheet because, taken as a whole, and</p> <p>7 where we were and what would have happened to</p> <p>8 the diminution of value had we not come out of</p> <p>9 that hearing with a good outcome - in my mind,</p> <p>10 in the mind of the directors, which is why</p> <p>11 they supported this - was that we accepted</p> <p>12 something that might be -- that we preferred</p> <p>13 was different, certainly thought was not</p> <p>14 perfect, would have drafted something</p> <p>15 different ourselves but were unable to</p> <p>16 achieve.</p> <p>17 Q. And what -- well, let me just keep</p> <p>18 on that line before I...</p> <p>19 I'm just going to the fairness,</p> <p>20 and I understand that you say sometimes life</p> <p>21 isn't fair, but I'm just going to whether you</p> <p>22 believe that the allocation of value to some</p> <p>23 creditors and not others is fair?</p> <p>24 A. Once --</p> <p>25 MR. RAMOS: Objection. This --</p>
<p style="text-align: right;">Page 46</p> <p>1 LaFORGE</p> <p>2 There was a reason I preferred a more global</p> <p>3 settlement. It would have been good for the</p> <p>4 Debtors, it would have been good for the</p> <p>5 Debtors and probably would have -- could have</p> <p>6 addressed matters that -- that were important</p> <p>7 to more people who were -- to some of those</p> <p>8 people who were objecting to this.</p> <p>9 I was unsuccessful in that. So</p> <p>10 clearly, my preference would have been to have</p> <p>11 something different.</p> <p>12 Q. And I understand your preference,</p> <p>13 but what I'm really -- what I'm going to is</p> <p>14 as -- you said that as a director, you</p> <p>15 approved the term sheet, right?</p> <p>16 A. As a director, I agreed to support</p> <p>17 the term sheet, sure.</p> <p>18 Q. And so in making the determination</p> <p>19 whether to support the term sheet, did you</p> <p>20 consider the fairness of the term sheet to the</p> <p>21 effected creditors?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. I consider the fairness of every</p> <p>24 action we take to the group as a whole. I've</p> <p>25 heard of a lot of -- a lot over the last year</p>	<p style="text-align: right;">Page 48</p> <p>1 LaFORGE</p> <p>2 Gary, respectfully, I think you're just</p> <p>3 arguing with the witness now. He's</p> <p>4 given you the answer.</p> <p>5 MR. KAPLAN: Your objection is</p> <p>6 noted.</p> <p>7 Q. You can answer the question.</p> <p>8 A. Once those assets -- the</p> <p>9 settlement would only take place -- my</p> <p>10 understanding, the settlement would only take</p> <p>11 place if the APA was approved. Once the APA</p> <p>12 was approved, those were not the Debtors'</p> <p>13 assets.</p> <p>14 What the buyer of those assets</p> <p>15 chooses to do with them I certainly can have</p> <p>16 an opinion of, I certainly can have an opinion</p> <p>17 of the merit of some of them, but that's --</p> <p>18 that was a bridge that the board crossed</p> <p>19 earlier and negotiated as well as it could -</p> <p>20 unsuccessfully - to maintain those causes of</p> <p>21 action so that this discussion would have a</p> <p>22 lot more meaning to it today than it did once</p> <p>23 those were sold to someone else.</p> <p>24 Q. But sitting here today, you're not</p> <p>25 prepared to say that the settlement is -- the</p>

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<p style="text-align: right;">Page 49</p> <p>1 LaFORGE</p> <p>2 allocation of value in the settlement to some</p> <p>3 creditors and not others is fair?</p> <p>4 MR. RAMOS: Objection, misstates</p> <p>5 his testimony.</p> <p>6 A. The -- I can't answer that</p> <p>7 question. It's -- it -- it's not</p> <p>8 representative of what we're talking about.</p> <p>9 It's representative of a hypothetical that I</p> <p>10 could have controlled, which I could not at</p> <p>11 that point. I do not opine on the fairness of</p> <p>12 what somebody does with what they own once</p> <p>13 they buy it from me.</p> <p>14 I -- if I -- the hypothetical that</p> <p>15 I think would be an interesting question, but</p> <p>16 no need to answer it because it's</p> <p>17 hypothetical, is if the Debtors owned those</p> <p>18 assets, what would be fair? And that would be</p> <p>19 a consideration.</p> <p>20 A consideration in negotiating the</p> <p>21 APA of was it fair to go forward with that as</p> <p>22 an APA while giving up -- while making those</p> <p>23 causes of action part of the APA, that</p> <p>24 decision was behind us. That was the APA we</p> <p>25 had.</p>	<p style="text-align: right;">Page 51</p> <p>1 LaFORGE</p> <p>2 point in time.</p> <p>3 The point in time, the settlement</p> <p>4 agreement had no relevance, zero, unless the</p> <p>5 APA was approved. So to suggest that I can</p> <p>6 consider the settlement agreement in the</p> <p>7 absence of an APA is not -- is not a question</p> <p>8 that's answerable in my mind. The decision we</p> <p>9 made, what -- we wanted that APA to be</p> <p>10 approved that day. We undoubtedly,</p> <p>11 unquestionably wanted it, and I know to this</p> <p>12 day it was the right thing to do at that point</p> <p>13 in time.</p> <p>14 The way to achieve what we thought</p> <p>15 was the right thing to do was to agree to an</p> <p>16 imperfect settlement term sheet, imperfect in</p> <p>17 our minds for matters that I've spoken about.</p> <p>18 I would have much preferred a more global</p> <p>19 settlement, selfishly, because it would have</p> <p>20 been better for the Debtors and probably some</p> <p>21 personal perspective too.</p> <p>22 But nonetheless, my -- we had a</p> <p>23 choice at the time, and the choice was yes or</p> <p>24 no on the term sheet. And we could have gone</p> <p>25 in and played chicken and seen what happened,</p>
<p style="text-align: right;">Page 50</p> <p>1 LaFORGE</p> <p>2 I wish there was a different</p> <p>3 outcome to this term sheet, and I expressed</p> <p>4 that as strongly as I could. It's not -- but</p> <p>5 that's -- I can't answer the question any</p> <p>6 better than that.</p> <p>7 Q. And let me just -- maybe help me</p> <p>8 out with this.</p> <p>9 You testified earlier that this</p> <p>10 settlement was resolving objections to the</p> <p>11 sale so that you could actually get approval</p> <p>12 of your APA, correct?</p> <p>13 A. That's correct.</p> <p>14 Q. Okay. So the APA wasn't already</p> <p>15 behind you at the time that the Debtor decided</p> <p>16 to go forward with the settlement term sheet,</p> <p>17 right?</p> <p>18 MR. RAMOS: Objection.</p> <p>19 A. There is a, you know, interesting</p> <p>20 sequencing in the objections that were raised</p> <p>21 to the settlement term sheet, which primarily</p> <p>22 the ones I remember are the DDTL Parties and</p> <p>23 the U.S. Trustee. And I appreciate the points</p> <p>24 that are being made, but we've got real</p> <p>25 companies and real decisions to make at a</p>	<p style="text-align: right;">Page 52</p> <p>1 LaFORGE</p> <p>2 but that didn't seem like a responsible thing</p> <p>3 to do.</p> <p>4 Q. The Debtor has a choice today,</p> <p>5 doesn't it?</p> <p>6 MR. RAMOS: Objection.</p> <p>7 A. I would prefer -- I'd like to -- I</p> <p>8 would like to speak to counsel, you know, to</p> <p>9 know what choices we -- I mean -- and the</p> <p>10 choice for what. But, I mean, certainly we</p> <p>11 have -- we maintain fiduciary rights and</p> <p>12 things throughout this agreement, if that's</p> <p>13 what you're speaking to.</p> <p>14 Other than that, that's -- I</p> <p>15 don't -- you know, we have a choice. We --</p> <p>16 unfortunately, the choices continue and we</p> <p>17 make them every day, or nearly, less</p> <p>18 frequently but still more often than I'd like.</p> <p>19 Q. Doesn't the Debtor have the choice</p> <p>20 to say, we're done seeking approval of the</p> <p>21 settlement?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. Every -- I would certainly want to</p> <p>24 ask our team of the consequences of doing</p> <p>25 that. We -- we said to the parties, and at</p>

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<p style="text-align: right;">Page 53</p> <p>1 LaFORGE</p> <p>2 the time it was only my counsel and Unsecured</p> <p>3 Creditor counsel at that hearing, that we</p> <p>4 would support the agreement.</p> <p>5 How -- you know, it wasn't signed,</p> <p>6 right? So certainly we -- now, I don't -- I</p> <p>7 don't know exactly what our choices are now,</p> <p>8 but we -- but we have certainly reflected on</p> <p>9 the fact that we said we would support it and</p> <p>10 we've looked to see what might have changed</p> <p>11 since then.</p> <p>12 And our conclusion, and now it's</p> <p>13 my conclusion because I'm the sole director,</p> <p>14 is that we gave our word we would support this</p> <p>15 and that's what we're doing.</p> <p>16 Q. So is the only reason that you're</p> <p>17 continuing to support it because you gave your</p> <p>18 word to do so?</p> <p>19 MR. RAMOS: Objection.</p> <p>20 A. I think -- again, I don't believe</p> <p>21 that's a fair question. I would think that if</p> <p>22 there was a reason not to support it that was</p> <p>23 new information and I understood the</p> <p>24 consequences of that, I would certainly, in my</p> <p>25 responsible -- in the role that I have, the</p>	<p style="text-align: right;">Page 55</p> <p>1 LaFORGE</p> <p>2 A. I can't say specifically I know</p> <p>3 what the agreement was that created an</p> <p>4 obligation to reimburse expenses at one point.</p> <p>5 What I -- what I believe to be the case is</p> <p>6 that our obligations to reimburse at this</p> <p>7 point don't exist.</p> <p>8 Q. But you don't know why they</p> <p>9 wouldn't exist?</p> <p>10 A. I don't know why they would exist.</p> <p>11 Q. Well, I can represent to you that</p> <p>12 under the Bankruptcy Code, the debtor is</p> <p>13 required to pay the fees and expenses of a</p> <p>14 creditors' committee.</p> <p>15 And so what I'm trying to</p> <p>16 understand is what, in -- if there is anything</p> <p>17 that you're aware of that changes that, that</p> <p>18 alleviates the Debtors' obligation to</p> <p>19 reimburse the Creditors' Committee?</p> <p>20 A. We --</p> <p>21 MR. RAMOS: Objection, asked and</p> <p>22 answered.</p> <p>23 Gary, do you want to refer him to</p> <p>24 the term sheet?</p> <p>25 MR. KAPLAN: No. I'm asking</p>
<p style="text-align: right;">Page 54</p> <p>1 LaFORGE</p> <p>2 responsibility I'm charged with, I would</p> <p>3 certainly have to consider that.</p> <p>4 Q. Is the Debtor currently able to</p> <p>5 pay Creditors' Committee counsel fees?</p> <p>6 A. Creditors' Committee counsel fees?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. We are not -- I am -- the Debtor</p> <p>9 is not incurring costs right now it cannot</p> <p>10 afford to pay.</p> <p>11 Q. Does the -- what does that mean,</p> <p>12 not incurring?</p> <p>13 The Creditors' Committee is</p> <p>14 present today and will be present in a</p> <p>15 deposition on Monday. Is the Debtor not</p> <p>16 reimbursing the Creditors' Committee at all?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. To the best of my knowledge, the</p> <p>19 Debtor is not reimbursing the Creditors'</p> <p>20 Committee at the moment.</p> <p>21 Q. And why is the Debtor not doing</p> <p>22 so?</p> <p>23 A. It was not part of the agreement.</p> <p>24 Q. When you say "the agreement," part</p> <p>25 of the term sheet?</p>	<p style="text-align: right;">Page 56</p> <p>1 LaFORGE</p> <p>2 him --</p> <p>3 THE WITNESS: Can you repeat the</p> <p>4 question, please?</p> <p>5 BY MR. KAPLAN:</p> <p>6 Q. As I said, I can represent to you</p> <p>7 that under the Bankruptcy Code, a debtor is</p> <p>8 required to pay the fees and expenses of a</p> <p>9 creditors' committee.</p> <p>10 Is there anything that you're</p> <p>11 aware of that changes that and that obviates</p> <p>12 the Debtors' obligation to reimburse the</p> <p>13 Creditors' Committee?</p> <p>14 MR. RAMOS: Objection.</p> <p>15 A. Those are legal/law requirements,</p> <p>16 whatever they are, statutes. I'm not familiar</p> <p>17 enough with those to answer -- to answer that</p> <p>18 question. You've asked me, I think, about our</p> <p>19 expenses. I'm gravely concerned about our</p> <p>20 expenses. Expenses have actually been managed</p> <p>21 reasonably well.</p> <p>22 I'm more gravely concerned about</p> <p>23 the cash balance that we have. We have been</p> <p>24 very cautious to make sure we are not running</p> <p>25 up tabs that we cannot afford to pay, and we</p>

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<p style="text-align: right;">Page 57</p> <p>1 LaFORGE</p> <p>2 have not been given an invoice that we are</p> <p>3 unable to pay.</p> <p>4 Q. And what is the Debtors' current</p> <p>5 cash balance?</p> <p>6 MR. RAMOS: Objection.</p> <p>7 A. I don't know that at the moment.</p> <p>8 Q. Do you roughly know what the cash</p> <p>9 balance is?</p> <p>10 MR. RAMOS: Gary, what topic does</p> <p>11 this relate to?</p> <p>12 MR. KAPLAN: The Debtors'</p> <p>13 post-position liabilities and</p> <p>14 administrative solvency, F, which was</p> <p>15 agreed -- one of the agreed topics.</p> <p>16 MR. RAMOS: Objection.</p> <p>17 A. The cash are the assets, Gary.</p> <p>18 Q. Pardon?</p> <p>19 A. Cash is the asset.</p> <p>20 Q. No, I understand, but solvency</p> <p>21 goes to the asset.</p> <p>22 And so you said you're gravely</p> <p>23 concerned about the Debtors' cash balance, but</p> <p>24 sitting here today, you have no idea what the</p> <p>25 Debtors' cash balance is?</p>	<p style="text-align: right;">Page 59</p> <p>1 LaFORGE</p> <p>2 Q. Do you have any estimate of how</p> <p>3 long that will last?</p> <p>4 A. A while.</p> <p>5 Q. Okay. And you talked about paying</p> <p>6 counsel.</p> <p>7 Have you paid Kramer -- all of</p> <p>8 Kramer Levin's invoices in full?</p> <p>9 MR. RAMOS: Objection.</p> <p>10 A. I will tell you what I prepared</p> <p>11 myself for on this, and the other -- you know,</p> <p>12 if we're looking for a ledger, I don't have</p> <p>13 that in my mind, and obviously it's -- it</p> <p>14 exists.</p> <p>15 We have not received and do not</p> <p>16 expect to receive bills from counsel that we</p> <p>17 cannot pay.</p> <p>18 Q. Is that because there is a deal</p> <p>19 with counsel not to invoice you or --</p> <p>20 A. Kramer -- look, it's -- I can tell</p> <p>21 you - you chose Kramer Levin; it will be</p> <p>22 different for every firm - we have asked</p> <p>23 people to work as little as possible.</p> <p>24 We are trying to get -- you know,</p> <p>25 we -- you know the dates on the documents that</p>
<p style="text-align: right;">Page 58</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Objection.</p> <p>3 A. I'm not, under oath, going to tell</p> <p>4 you what the cash balance is because I haven't</p> <p>5 checked it.</p> <p>6 Q. When was the last time you checked</p> <p>7 the balance?</p> <p>8 A. The way we check the balance is by</p> <p>9 understanding what counsel costs will be and</p> <p>10 other costs will be between now and a point in</p> <p>11 time we have to make a decision, and so I</p> <p>12 can't say I know what the balance was on our</p> <p>13 last discussion on that.</p> <p>14 I do know that we've talked to</p> <p>15 counsel. And it's really handled by Conway</p> <p>16 MacKenzie, who is not currently being paid but</p> <p>17 is working off a retainer that they were given</p> <p>18 some time ago, who keeps me apprised of where</p> <p>19 we stand on that.</p> <p>20 Q. And do they also keep you apprised</p> <p>21 of where they stand using up their retainer?</p> <p>22 A. They do.</p> <p>23 Q. Okay. And how much more room is</p> <p>24 left on their retainer?</p> <p>25 A. Single-digit thousands.</p>	<p style="text-align: right;">Page 60</p> <p>1 LaFORGE</p> <p>2 you've shared with me and you have in front of</p> <p>3 you. We did not, on our own accord,</p> <p>4 intentionally create a delay from August to</p> <p>5 the date where we are today, and now I</p> <p>6 understand it's not even May the 4th but</p> <p>7 another couple of weeks. Those keep being</p> <p>8 thrust upon us, and like the decisions we've</p> <p>9 made all throughout, we adjust.</p> <p>10 And we adjust to try to get to the</p> <p>11 end goal that we said we would, which is to</p> <p>12 get through this WARN action, if we can, and</p> <p>13 to see that all of the parties get a chance to</p> <p>14 have their words heard on the settlement and</p> <p>15 the other matters, and the court gets to</p> <p>16 decide.</p> <p>17 That's what we'd like to do. I</p> <p>18 hope we're able to do that. At the moment I</p> <p>19 don't see why we can't, but that's -- you</p> <p>20 know, it's something we reflect on with -- you</p> <p>21 know, frequently.</p> <p>22 Q. You are aware that the Debtor</p> <p>23 could have stopped incurring all of these</p> <p>24 costs by simply either converting the case to</p> <p>25 Chapter 7 or dismissing the case months ago --</p>

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<p style="text-align: right;">Page 61</p> <p>1 LaFORGE</p> <p>2 A. I am.</p> <p>3 Q. -- correct?</p> <p>4 A. Converting -- I've -- since, we've</p> <p>5 had more ability on conversion. We have</p> <p>6 causes of action at Columbus which may</p> <p>7 complicate a dismissal a little bit.</p> <p>8 Q. And why hasn't the Debtor simply</p> <p>9 proceeded with converting the case?</p> <p>10 MR. RAMOS: Objection.</p> <p>11 A. We haven't converted the case in</p> <p>12 order to continue to work on the things that</p> <p>13 get pushed out, again, but the WARN and the</p> <p>14 settlement agreement.</p> <p>15 Q. And you mentioned that there are</p> <p>16 causes of action at Columbus that may</p> <p>17 complicate dismissal a little bit.</p> <p>18 Can you just explain that?</p> <p>19 A. To the best of my knowledge, those</p> <p>20 are payments in the ordinary course of</p> <p>21 operations that were made during a period</p> <p>22 where there may be a clawback, and there's --</p> <p>23 we don't really have the resources to go out</p> <p>24 and value them, to litigate them, et cetera.</p> <p>25 So we were unaware of those at one</p>	<p style="text-align: right;">Page 63</p> <p>1 LaFORGE</p> <p>2 that we have been unable to really get at,</p> <p>3 again, because of the cash-preservation mode</p> <p>4 that we are in.</p> <p>5 Q. Wouldn't a -- to the best of your</p> <p>6 knowledge, why wouldn't that lead you to --</p> <p>7 let's strike that and start again.</p> <p>8 So if there are these potential</p> <p>9 assets, why not simply convert the case to</p> <p>10 Chapter 7 and let a Chapter 7 trustee go</p> <p>11 collect those assets?</p> <p>12 A. Well, a Chapter 7 trustee, if</p> <p>13 named, would ultimately collect those assets.</p> <p>14 We've not stated what we plan to do, but</p> <p>15 certainly Chapter 7 is -- is a -- you know,</p> <p>16 one of the alternatives and certainly the</p> <p>17 easier one to understand how that can all</p> <p>18 work.</p> <p>19 Q. And to your knowledge, what is the</p> <p>20 value of these amounts that can potentially be</p> <p>21 clawed back?</p> <p>22 MR. RAMOS: Objection.</p> <p>23 A. I don't know.</p> <p>24 Q. Under the construct of the current</p> <p>25 settlement, what would happen to those amounts</p>
<p style="text-align: right;">Page 62</p> <p>1 LaFORGE</p> <p>2 point, and I won't be able to tell you when,</p> <p>3 but we've become aware of those in the last,</p> <p>4 you know, handful of months, probably four,</p> <p>5 five, six months ago.</p> <p>6 Q. Those were -- those were payments</p> <p>7 made by the Debtor that they may be able to</p> <p>8 claw back or those were payments made to the</p> <p>9 Debtor that could be clawed back? I'm just</p> <p>10 trying to understand the --</p> <p>11 A. To the best of my knowledge, Gary,</p> <p>12 they are -- it was AP -- operating AP at</p> <p>13 Columbus, where payments were made to pay</p> <p>14 bills that we may be able to claw back. If</p> <p>15 I've got that wrong, I've got it wrong, but...</p> <p>16 Q. And that's if -- so what you were</p> <p>17 saying was that if you were to dismiss the</p> <p>18 case, you would not be able to seek to claw</p> <p>19 back those payments; is that what your</p> <p>20 testimony is?</p> <p>21 MR. RAMOS: Objection.</p> <p>22 A. I think that my understanding is</p> <p>23 that to dismiss a case, we have to resolve</p> <p>24 the -- all the assets that we may have at that</p> <p>25 point in time. These are assets of the Estate</p>	<p style="text-align: right;">Page 64</p> <p>1 LaFORGE</p> <p>2 if they were clawed back?</p> <p>3 A. They're property of the Estate,</p> <p>4 not the -- not the Purchaser, and only assets</p> <p>5 of the Purchaser are being contributed to the</p> <p>6 GUC.</p> <p>7 Q. So then what is the Debtors'</p> <p>8 plan -- let's assume that the settlement is</p> <p>9 approved.</p> <p>10 What's the Debtors' plan to then</p> <p>11 try to recapture those assets for the benefit</p> <p>12 of the Estate?</p> <p>13 MR. RAMOS: Objection.</p> <p>14 A. In the absence of being able to</p> <p>15 fund, the time it would likely take to</p> <p>16 litigate those - if it went there - or settle</p> <p>17 those, it would be hard to necessarily see how</p> <p>18 we could -- how it would be economically</p> <p>19 prudent to keep the Estate going to achieve</p> <p>20 that outcome.</p> <p>21 So if there is not a way to handle</p> <p>22 those and achieve a dismissal or some other</p> <p>23 way out of bankruptcy, then it would be the</p> <p>24 Chapter 7 trustee, if we went that route.</p> <p>25 Q. You are aware that the Debtors</p>

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<p style="text-align: right;">Page 65</p> <p>1 LaFORGE</p> <p>2 previously filed a motion seeking to dismiss</p> <p>3 the case, right?</p> <p>4 A. I believe that's what I was</p> <p>5 speaking about earlier.</p> <p>6 Q. Right. And -- but if the Debtors</p> <p>7 had -- if those parties hadn't objected and</p> <p>8 the order was entered, then the Debtor</p> <p>9 wouldn't be able to claw back these payments,</p> <p>10 right?</p> <p>11 MR. RAMOS: Objection.</p> <p>12 A. I don't know what would have</p> <p>13 happened if you dismiss a case and, after</p> <p>14 dismissing a case, you find that there was an</p> <p>15 asset, a potential asset. So I don't know</p> <p>16 what would have happened to that.</p> <p>17 As I said earlier, there was a</p> <p>18 point in time at which we didn't know about</p> <p>19 these relatively modest assets, and we have</p> <p>20 become aware of them, which -- which may -- in</p> <p>21 answering your very specific question, which</p> <p>22 is why wouldn't you consider a dismissal, I've</p> <p>23 been told it might complicate a dismissal if</p> <p>24 we didn't have a way to deal with those</p> <p>25 assets.</p>	<p style="text-align: right;">Page 67</p> <p>1 LaFORGE</p> <p>2 some of the things that we had talked about</p> <p>3 earlier, you testified earlier that one of</p> <p>4 your considerations in approving the</p> <p>5 settlement that was presented to you in mid</p> <p>6 August was that there were significant time</p> <p>7 constraints --</p> <p>8 MR. RAMOS: Objection.</p> <p>9 Q. -- correct?</p> <p>10 A. That was one of the considerations</p> <p>11 that -- one of the considerations that</p> <p>12 encouraged me to approve it at that moment in</p> <p>13 time, yes.</p> <p>14 Q. And you also testified that the</p> <p>15 settlement was resolving the Committee's</p> <p>16 objections to the DIP as well as the</p> <p>17 Committee's objections to the sale; is that</p> <p>18 fair?</p> <p>19 A. That's what I said, yes.</p> <p>20 Q. Do you recall what the Committee's</p> <p>21 objections were to the DIP?</p> <p>22 A. The Committee's objections to the</p> <p>23 DIP are well outlined in their public document</p> <p>24 and the follow-up to that. Specifically I</p> <p>25 can't remember, but I know they had -- so no,</p>
<p style="text-align: right;">Page 66</p> <p>1 LaFORGE</p> <p>2 Q. And you said these are relatively</p> <p>3 modest assets.</p> <p>4 Can you give me some scope of how</p> <p>5 much we're talking about?</p> <p>6 MR. RAMOS: Objection.</p> <p>7 A. They're payables, and it's a</p> <p>8 couple of payables, a handful of payables. I</p> <p>9 mean, the biggest payable there is an electric</p> <p>10 bill. I don't even know what the electric</p> <p>11 bill runs.</p> <p>12 Q. Are we talking about \$20,000 or</p> <p>13 hundreds of thousands, just to get some range</p> <p>14 of --</p> <p>15 A. I -- I'm sure it's not hundreds of</p> <p>16 thousands of dollars.</p> <p>17 MR. KAPLAN: Is this a good time</p> <p>18 to take a break - we've been going an</p> <p>19 hour - or you want to keep going? It's</p> <p>20 up to you.</p> <p>21 (Brief off-record discussion.)</p> <p>22 (Recess taken, 11:52 a.m.)</p> <p>23 (On the record, 12:07 p.m.)</p> <p>24 BY MR. KAPLAN:</p> <p>25 Q. Mr. LaForge, just going back to</p>	<p style="text-align: right;">Page 68</p> <p>1 LaFORGE</p> <p>2 I can't specifically recall them.</p> <p>3 Q. Are there any particular</p> <p>4 objections that stand out that were</p> <p>5 problematic?</p> <p>6 MR. RAMOS: Objection.</p> <p>7 A. Problem -- their objections to our</p> <p>8 DIP that was problematic to me?</p> <p>9 Q. Yeah.</p> <p>10 A. None that stand out particularly.</p> <p>11 Q. Okay. And did you attempt to</p> <p>12 negotiate a resolution for any of the specific</p> <p>13 objections raised in -- raised in their</p> <p>14 objection?</p> <p>15 MR. RAMOS: Objection. Are you</p> <p>16 talking about a specific objection at</p> <p>17 this point? Because you've been</p> <p>18 referring, I think, to several.</p> <p>19 Q. I'm focusing on the DIP, on the --</p> <p>20 the Committee objected to the DIP. And what I</p> <p>21 want to know is whether you specifically</p> <p>22 attempted to negotiate a resolution for any of</p> <p>23 the specific concerns that they raised with</p> <p>24 respect to the DIP?</p> <p>25 A. The negotiation of the DIP took</p>

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<p style="text-align: right;">Page 69</p> <p>1 LaFORGE</p> <p>2 place - as we discussed at the hearing, when</p> <p>3 you and I had the opportunity to ask and</p> <p>4 answer questions - primarily through counsels</p> <p>5 keeping the board informed with Noteholder</p> <p>6 counsel. There were -- was not the --</p> <p>7 necessarily the DIP we would have unilaterally</p> <p>8 come up with, and that was the point in time</p> <p>9 that we negotiated what we thought we could</p> <p>10 get.</p> <p>11 To answer your question - which</p> <p>12 was after the Committee filed its objections</p> <p>13 to the DIP, did we then circle back to the</p> <p>14 Noteholders and say look at this objection</p> <p>15 and, you know, it's problematic to us and</p> <p>16 problematic to them - the settlement</p> <p>17 discussions, we chose rather than to deal with</p> <p>18 those by document or by point in a document,</p> <p>19 that our counsels tended to work trying to get</p> <p>20 the parties, first of all, together; and then,</p> <p>21 second of all, to talk about how they might</p> <p>22 get to an overall solution.</p> <p>23 So I did not specifically, after</p> <p>24 seeing those objections, go back and try to</p> <p>25 change the DIP.</p>	<p style="text-align: right;">Page 71</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Objection.</p> <p>3 A. It's my recollection that they</p> <p>4 filed an objection to the bidding procedures,</p> <p>5 and I'm almost certain that they filed an</p> <p>6 objection to the sale, yes.</p> <p>7 Q. And you said that, from at least</p> <p>8 your recollection, the Committee's objections</p> <p>9 to the sale were similar to objections that</p> <p>10 were being presented by other parties,</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And those other objections</p> <p>14 were not resolved at or prior to the hearing,</p> <p>15 correct?</p> <p>16 MR. RAMOS: Objection.</p> <p>17 A. At or prior to the sale, some of</p> <p>18 the objections were about the sale. With</p> <p>19 respect -- the only ones that I think were</p> <p>20 prior to the sale might be, you know, the</p> <p>21 ability to use the credit bid and the bidding</p> <p>22 procedures, which probably were one and the</p> <p>23 same, or at least one was an element of the</p> <p>24 other.</p> <p>25 So can you repeat the question?</p>
<p style="text-align: right;">Page 70</p> <p>1 LaFORGE</p> <p>2 Q. And then let's talk about the sale</p> <p>3 objection.</p> <p>4 You testified earlier that one of</p> <p>5 the things resolved by the settlement</p> <p>6 agreement was it resolved the Committee's</p> <p>7 objections --</p> <p>8 A. Yeah.</p> <p>9 Q. -- to the sale.</p> <p>10 Do you recall what the Committee's</p> <p>11 objections were to the sale?</p> <p>12 A. Slightly better than the DIP but</p> <p>13 not well enough to speak to.</p> <p>14 I know they had objections with</p> <p>15 the bidding approach. You know, lots of</p> <p>16 people had objections to how it actually</p> <p>17 played out from a time standpoint, from a</p> <p>18 credit bid standpoint, and I believe most of</p> <p>19 those were included in their objections too.</p> <p>20 But -- so I am aware, generally</p> <p>21 speaking, of their objections, which were</p> <p>22 consistent with other objections; you know,</p> <p>23 the objections of others.</p> <p>24 Q. Do you recall that the Committee</p> <p>25 actually filed an objection to the sale?</p>	<p style="text-align: right;">Page 72</p> <p>1 LaFORGE</p> <p>2 I'm just trying to, again, put it in a time</p> <p>3 frame.</p> <p>4 Q. Yes. What I was asking was that</p> <p>5 you had said earlier that at least your</p> <p>6 recollection of the Committee's objection was</p> <p>7 that they were raising objections that other</p> <p>8 parties were also raising.</p> <p>9 A. Uh-huh.</p> <p>10 Q. Okay. And so my question was,</p> <p>11 those other objections by those other parties</p> <p>12 that were similar to what the Committee was</p> <p>13 raising, those were not resolved prior to the</p> <p>14 hearing, right?</p> <p>15 MR. RAMOS: Objection.</p> <p>16 A. Generally speaking, there were no</p> <p>17 resolutions just prior to the hearing on</p> <p>18 objections that had been -- well, the</p> <p>19 objections, by the fact that they were raised,</p> <p>20 had to be after the event that they're being</p> <p>21 raised about, right? So it was about the</p> <p>22 sale.</p> <p>23 Between that point and the</p> <p>24 hearing, those objections were not -- were</p> <p>25 not -- I don't recall any that were resolved.</p>

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<p style="text-align: right;">Page 73</p> <p>1 LaFORGE</p> <p>2 Some of them couldn't be resolved because they</p> <p>3 were -- they happened.</p> <p>4 Q. But you still -- what I'm trying</p> <p>5 to understand is, if the settlement term sheet</p> <p>6 wasn't resolving all of the objections and in</p> <p>7 fact you were still going to be facing similar</p> <p>8 objections by other parties, what was the</p> <p>9 benefit gained by the Debtor by agreeing to</p> <p>10 that settlement?</p> <p>11 MR. RAMOS: Objection.</p> <p>12 A. The belief or the conclusion would</p> <p>13 have been that having the unsecured creditors</p> <p>14 support the sale would give us a better chance</p> <p>15 of having it approved, even though not every</p> <p>16 party had -- had withdrawn their objections.</p> <p>17 Q. Okay. And what was the urgency at</p> <p>18 the time -- we're talking the date of the</p> <p>19 hearing, on August 16.</p> <p>20 What was the urgency to get</p> <p>21 approval of the DIP on that date versus</p> <p>22 adjourning for another week or two to try to</p> <p>23 get your concerns over the settlement</p> <p>24 addressed by the parties?</p> <p>25 MR. RAMOS: Objection.</p>	<p style="text-align: right;">Page 75</p> <p>1 LaFORGE</p> <p>2 conclusion that we would be ineffective in</p> <p>3 changing the settlement agreement meaningfully</p> <p>4 and risking whatever the time would be if it</p> <p>5 wouldn't -- you know, I didn't know if it</p> <p>6 would be a week at that point, didn't know the</p> <p>7 judge's schedule would be whatever it was.</p> <p>8 Q. But the Debtors never asked if the</p> <p>9 judge could hear them in a day, even, to give</p> <p>10 you more than an hour to look at the term</p> <p>11 sheet?</p> <p>12 MR. RAMOS: Objection.</p> <p>13 A. I don't recall that happening, so</p> <p>14 I suspect it did not.</p> <p>15 Q. And -- strike that. Let me go to</p> <p>16 another topic.</p> <p>17 You talked about, earlier, that</p> <p>18 there were a number of -- there are a number</p> <p>19 of claims and causes of action that the</p> <p>20 Purchasers are purchasing under the APA,</p> <p>21 right?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. And under the terms of the</p> <p>24 settlement agreement, those claims and causes</p> <p>25 of action are being contributed to the GUC</p>
<p style="text-align: right;">Page 74</p> <p>1 LaFORGE</p> <p>2 A. There was no indication that my</p> <p>3 objections to the settlement would -- would --</p> <p>4 would -- that we would prevail on the ways I</p> <p>5 would have preferred it to, a more global</p> <p>6 settlement. There was zero indication that</p> <p>7 that would prevail.</p> <p>8 The -- the speed challenges, which</p> <p>9 are slightly -- you know, they're -- they're</p> <p>10 always there and overriding, were -- I can't</p> <p>11 tell you what the cash balance was at the</p> <p>12 time, but I can tell you there were people we</p> <p>13 probably weren't paying and needed the</p> <p>14 materials.</p> <p>15 And I also know that we had -- we</p> <p>16 were running into an ever more difficult</p> <p>17 customer environment, where people wanted to</p> <p>18 know when we were coming out of -- when the</p> <p>19 companies would be sold and they would be out</p> <p>20 of bankruptcy.</p> <p>21 And it was simply a trade-off, a</p> <p>22 judgment trade-off, between what we thought we</p> <p>23 could hope to achieve on a discussion in a</p> <p>24 longer time frame, on something where we'd</p> <p>25 been told we had no -- where I drew the</p>	<p style="text-align: right;">Page 76</p> <p>1 LaFORGE</p> <p>2 Trust, right?</p> <p>3 A. Correct.</p> <p>4 Q. And that's according to the terms</p> <p>5 of the settlement agreement, that it's going</p> <p>6 to be effectuated by causing the APA to be</p> <p>7 amended to provide for that, right?</p> <p>8 A. I don't know the mechanic on how</p> <p>9 it gets contributed.</p> <p>10 Q. Okay. Well, if you look at the</p> <p>11 settlement term sheet I think you have in</p> <p>12 front of you, marked as Exhibit 2, if you look</p> <p>13 at page 3 and the "Claims and Causes of</p> <p>14 Action"...</p> <p>15 A. Uh-huh. You'd like me to read</p> <p>16 that paragraph?</p> <p>17 Q. Yeah, you should certainly take</p> <p>18 your time and read it. I'm focusing on</p> <p>19 particularly the beginning language that says</p> <p>20 "The Purchasers shall cause the APA to be</p> <p>21 amended..."</p> <p>22 A. Okay. I don't need to read,</p> <p>23 unless you want me to, A through wherever it</p> <p>24 goes, because I think I'm generally familiar</p> <p>25 with what's down below.</p>

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<p style="text-align: right;">Page 77</p> <p>1 LaFORGE</p> <p>2 You pointed out that the mechanic</p> <p>3 to get it into the GUC is to amend the APA,</p> <p>4 and I see that's here.</p> <p>5 Q. And my question just relates to,</p> <p>6 given that this settlement already</p> <p>7 contemplates amendments to the APA, did you</p> <p>8 have any -- have you had any discussions with</p> <p>9 the Noteholders or the Creditors' Committee to</p> <p>10 make further amendments to the APA such that</p> <p>11 those assets are contributed back to the</p> <p>12 Estate as opposed to the GUC Trust?</p> <p>13 MR. RAMOS: Objection. Gary, are</p> <p>14 you talking about after the filing of</p> <p>15 this term sheet?</p> <p>16 MR. KAPLAN: No.</p> <p>17 Q. I'm talking about from the date</p> <p>18 that you received this term sheet in mid</p> <p>19 August.</p> <p>20 MR. RAMOS: And, I'm sorry, maybe</p> <p>21 let me just read the question again.</p> <p>22 Okay.</p> <p>23 THE WITNESS: May I answer?</p> <p>24 MR. RAMOS: Yes, if you recall the</p> <p>25 question, if I didn't distract you.</p>	<p style="text-align: right;">Page 79</p> <p>1 LaFORGE</p> <p>2 effect that.</p> <p>3 I had -- I did in fact have the</p> <p>4 conversation I spoke about earlier. We didn't</p> <p>5 talk about a mechanic of adjusting the term</p> <p>6 sheet or -- or using the opportunity that the</p> <p>7 APA would be amended to amend it further.</p> <p>8 Q. And I understand that. But my</p> <p>9 understanding of your testimony was that was</p> <p>10 more of a general discussion about "let's try</p> <p>11 to resolve everything" as opposed to a</p> <p>12 specific conversation about modifying the</p> <p>13 specific terms of the settlement; is that</p> <p>14 fair?</p> <p>15 MR. RAMOS: Is that -- I'm sorry?</p> <p>16 Q. Do I understand it correct, that</p> <p>17 your discussion with the Noteholder</p> <p>18 representative was about a more general</p> <p>19 conversation of "let's have a global</p> <p>20 settlement" as opposed to making specific</p> <p>21 changes to the settlement as outlined in the</p> <p>22 term sheet?</p> <p>23 MR. RAMOS: Objection. Are you</p> <p>24 suggesting that's inconsistent with his</p> <p>25 testimony he just gave?</p>
<p style="text-align: right;">Page 78</p> <p>1 LaFORGE</p> <p>2 BY MR. KAPLAN:</p> <p>3 Q. And if you need me to read it to</p> <p>4 you again, I can.</p> <p>5 A. Nope, nope. You asked a question</p> <p>6 earlier about did we have subsequent</p> <p>7 conversations with anyone with respect to</p> <p>8 amending the settlement agreement. And I told</p> <p>9 you about a discussion with Chris Keenan, and</p> <p>10 I said we talked about aspects of -- that --</p> <p>11 conditions that I might have had or not have</p> <p>12 had in the -- preferred not to have in the</p> <p>13 settlement agreement, and we talked</p> <p>14 specifically about -- you know, in a sense, I</p> <p>15 guess it's a negotiation, right, trying to</p> <p>16 make -- trying to get certain things taken</p> <p>17 care of.</p> <p>18 We did not talk about, in that</p> <p>19 circumstance, amending the -- again, the</p> <p>20 mechanic on the way we would do that, it</p> <p>21 was intended to be a more global settlement</p> <p>22 that would accommodate more of the parties,</p> <p>23 and we did not -- I think that kind of holds</p> <p>24 here, is we spoke -- had that same</p> <p>25 conversation. This is just a mechanic to</p>	<p style="text-align: right;">Page 80</p> <p>1 LaFORGE</p> <p>2 MR. KAPLAN: No, no.</p> <p>3 MR. RAMOS: Okay. You're just --</p> <p>4 (Simultaneous speaking.)</p> <p>5 MR. KAPLAN: -- question.</p> <p>6 A. There's -- it's hard for me to</p> <p>7 differentiate between the two. There -- it is</p> <p>8 hard to say that something that is not in</p> <p>9 the -- for me, to say something that is not in</p> <p>10 the settlement agreement that I would have</p> <p>11 liked to see in there that we are now talking</p> <p>12 about is or isn't an amendment of the</p> <p>13 settlement agreement.</p> <p>14 It's -- there are -- the -- you</p> <p>15 have asked me a number of questions about the</p> <p>16 settlement agreement that indicate, probably</p> <p>17 reasonably well, you know, your objections to</p> <p>18 it. I think -- I think that it doesn't -- how</p> <p>19 we get at those objections doesn't matter, the</p> <p>20 mechanic doesn't matter.</p> <p>21 The mechanic is that we get an</p> <p>22 agreement among the parties about how we deal</p> <p>23 with certain particularly sensitive matters.</p> <p>24 And I did have discussions, very direct</p> <p>25 conversations with direct requests, about what</p>

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<p style="text-align: right;">Page 81</p> <p>1 LaFORGE</p> <p>2 I would like to see. I did not prevail.</p> <p>3 Q. And in the settlement term sheet</p> <p>4 it specifically provides that - and I'm</p> <p>5 looking in the middle of page 4 - that the</p> <p>6 settlement funding obligations will not be</p> <p>7 part of the purchase price but be a separate</p> <p>8 cash obligation of the Ad Hoc Group.</p> <p>9 Do you see that?</p> <p>10 A. Uh-huh.</p> <p>11 MR. RAMOS: Can I direct him to</p> <p>12 where --</p> <p>13 MR. KAPLAN: You can direct him to</p> <p>14 that. It's a --</p> <p>15 MR. RAMOS: Starting with this</p> <p>16 paragraph, this preface. And he's</p> <p>17 referring to "Committee Settlement</p> <p>18 Funding Obligations," so you may want to</p> <p>19 review that.</p> <p>20 THE WITNESS: Okay. I didn't need</p> <p>21 to read it, but I did.</p> <p>22 BY MR. KAPLAN:</p> <p>23 Q. Are you aware of any</p> <p>24 conversations -- well, strike that.</p> <p>25 Do you know at whose request that</p>	<p style="text-align: right;">Page 83</p> <p>1 LaFORGE</p> <p>2 amounts, why didn't the Debtor seek to have</p> <p>3 that be an increase in the purchase price?</p> <p>4 MR. RAMOS: Objection. We did not</p> <p>5 agree to provide a witness on behalf of</p> <p>6 the Debtors to re-litigate the sale</p> <p>7 order, and --</p> <p>8 MR. KAPLAN: We're not.</p> <p>9 MR. RAMOS: -- it appears that</p> <p>10 that question is designed to do just</p> <p>11 that.</p> <p>12 In fact, it relates exactly to</p> <p>13 argument that counsel for the DDTL</p> <p>14 Parties made at the hearing when the</p> <p>15 court approved the sale by entry of</p> <p>16 order, which is now a final order.</p> <p>17 MR. KAPLAN: Okay. Then I'll</p> <p>18 re-ask the question, just so the record</p> <p>19 is clear.</p> <p>20 Q. If the Debtor knew the Purchaser</p> <p>21 was willing to fund incremental amounts, why</p> <p>22 didn't the Debtor seek to have that be an</p> <p>23 increase in the purchase price?</p> <p>24 MR. RAMOS: Objection for the same</p> <p>25 reasons.</p>
<p style="text-align: right;">Page 82</p> <p>1 LaFORGE</p> <p>2 provision was put into this agreement?</p> <p>3 A. The provision in the last</p> <p>4 sentence?</p> <p>5 Q. Yes.</p> <p>6 A. I don't.</p> <p>7 Q. Are you aware of any specific</p> <p>8 negotiation that the Debtors were involved in</p> <p>9 over this provision that we're talking about,</p> <p>10 the last sentence?</p> <p>11 A. The -- the -- the -- I am not</p> <p>12 aware of a specific negotiation.</p> <p>13 I am aware that as we spoke about</p> <p>14 this settlement, and probably even more</p> <p>15 broadly, that they -- that we would not be</p> <p>16 using Debtor assets. And my read of this is</p> <p>17 how I understood that -- the transaction;</p> <p>18 which was, whatever the Purchasers might be</p> <p>19 paying, that still got paid, and this was an</p> <p>20 incremental amount that they had to fund</p> <p>21 the -- they had to use to fund the -- these</p> <p>22 amounts that are in the middle of the</p> <p>23 paragraph.</p> <p>24 Q. Well, if the Debtor knew that the</p> <p>25 Purchaser was willing to fund incremental</p>	<p style="text-align: right;">Page 84</p> <p>1 LaFORGE</p> <p>2 A. I don't recall any discussion</p> <p>3 around that. My understanding was this was --</p> <p>4 as I read, it was simply -- it was a</p> <p>5 clarification to make sure that -- that Debtor</p> <p>6 assets were not being used.</p> <p>7 It's -- it's -- can you repeat</p> <p>8 your question? Because I'm not sure I</p> <p>9 understand. If I didn't answer it there, I'm</p> <p>10 not sure I understand it.</p> <p>11 MR. RAMOS: You've answered.</p> <p>12 Q. Sure. The question is, if the</p> <p>13 Debtor knew the Purchaser was willing to fund</p> <p>14 incremental amounts, why didn't the Debtor</p> <p>15 seek to have that be an increase in the</p> <p>16 purchase price?</p> <p>17 MR. RAMOS: Objection. I refer</p> <p>18 counsel for the DDTL Parties to page 7</p> <p>19 of the objections served by the Debtors,</p> <p>20 deposition topic D, "Negotiation of the</p> <p>21 APA," which is the question that you're</p> <p>22 asking, about --</p> <p>23 MR. KAPLAN: You've already --</p> <p>24 you've already stated your objection</p> <p>25 three times.</p>

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<p style="text-align: right;">Page 85</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: -- about which the</p> <p>3 Debtors did not agree to provide a</p> <p>4 witness for this deposition.</p> <p>5 Accordingly, your continued</p> <p>6 questioning in this area is</p> <p>7 inappropriate and, by definition, only</p> <p>8 can be wasting Estate resources and be</p> <p>9 considered harassment of this witness.</p> <p>10 MR. KAPLAN: Okay. Fine. I'm</p> <p>11 going to ask the question again. Your</p> <p>12 objection is noted. If you want to</p> <p>13 direct the witness not to answer, you're</p> <p>14 free to do that and we can decide</p> <p>15 whether to go to Judge Sontchi, but I'm</p> <p>16 entitled to an answer from your witness.</p> <p>17 Q. So my question again is, if the</p> <p>18 Debtor knew the Purchaser was willing to fund</p> <p>19 incremental amounts, why didn't the Debtor</p> <p>20 seek to have that be an increase in the</p> <p>21 purchase price?</p> <p>22 MR. RAMOS: First, the witness --</p> <p>23 objection. The witness has answered</p> <p>24 your question.</p> <p>25 Second, you're not entitled to an</p>	<p style="text-align: right;">Page 87</p> <p>1 LaFORGE</p> <p>2 MR. KAPLAN: Okay.</p> <p>3 Q. If the Debtor knew the Purchaser</p> <p>4 was willing to fund incremental amounts, why</p> <p>5 didn't the Debtor seek to have that be an</p> <p>6 increase in the purchase price?</p> <p>7 A. The incremental amounts were for a</p> <p>8 specific purpose.</p> <p>9 Q. And that specific purpose, though,</p> <p>10 was for distributions to certain unsecured</p> <p>11 creditors, right?</p> <p>12 MR. RAMOS: Objection.</p> <p>13 A. I can tell you what the settlement</p> <p>14 agreement -- where the settlement agreement</p> <p>15 says the money goes. For me to get into what</p> <p>16 purposes were -- look, again, we were -- we</p> <p>17 were handed this -- this was reasonably fully</p> <p>18 baked when we got it.</p> <p>19 The -- it doesn't strike me -- we</p> <p>20 didn't do it. I don't have a reason why we</p> <p>21 didn't do it. We just didn't do it.</p> <p>22 Q. And you also said earlier that you</p> <p>23 read this language as sort of a clarification</p> <p>24 that these assets were not coming into the</p> <p>25 Estate, right?</p>
<p style="text-align: right;">Page 86</p> <p>1 LaFORGE</p> <p>2 answer from a witness about a topic that</p> <p>3 the deponent was not agreed to be</p> <p>4 presented --</p> <p>5 MR. KAPLAN: You're wrong. He is</p> <p>6 a testifying witness at a hearing.</p> <p>7 There is a 30(b)(6). He is also your</p> <p>8 witness at the hearing.</p> <p>9 MR. RAMOS: I'm sorry, did you --</p> <p>10 MR. KAPLAN: I'm entitled to take</p> <p>11 a deposition --</p> <p>12 MR. RAMOS: Did you serve a notice</p> <p>13 on him in his individual capacity?</p> <p>14 MR. KAPLAN: We sought him and you</p> <p>15 agreed up front that he was going to be</p> <p>16 your testifying witness and that we were</p> <p>17 going to be deposing him.</p> <p>18 We had this conversation. We can</p> <p>19 do this again, if you want, but he is</p> <p>20 your testifying witness and we are</p> <p>21 entitled to ask him questions about it.</p> <p>22 MR. RAMOS: Same objections. To</p> <p>23 the extent that the witness needs to</p> <p>24 answer the question again, perhaps you</p> <p>25 can ask it to him again.</p>	<p style="text-align: right;">Page 88</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: Objection.</p> <p>3 A. No, I read this as a clarification</p> <p>4 that assets would not be going out of the</p> <p>5 Estate.</p> <p>6 Q. Right. That assets would not be</p> <p>7 going out of the Estate or into the Estate?</p> <p>8 A. Out of the Estate.</p> <p>9 Q. Okay. And why did you think such</p> <p>10 a clarification was necessary?</p> <p>11 A. I didn't add the clarification. I</p> <p>12 told you how I read a clarification that I saw</p> <p>13 on the page.</p> <p>14 Q. And did you have any understanding</p> <p>15 at the time as to why the assets would not</p> <p>16 come out of the Estate?</p> <p>17 A. We were never asked for assets.</p> <p>18 Q. When you say "we were never asked</p> <p>19 for assets," can you just explain that?</p> <p>20 A. Sure. The question, I think, was</p> <p>21 why did assets not come out of the Estate.</p> <p>22 The -- it comes back to how the</p> <p>23 analytic process, the analysis process went on</p> <p>24 with respect to the settlement agreement and</p> <p>25 the APA. The settlement agreement would only</p>

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<p style="text-align: right;">Page 89</p> <p>1 LaFORGE</p> <p>2 be in effect if the APA was approved. Once an</p> <p>3 APA is approved, then those are not -- the</p> <p>4 assets that are being contributed to the GUC</p> <p>5 are not the Estate's assets, those would be</p> <p>6 the assets of the Purchaser.</p> <p>7 The Estate was not one of the</p> <p>8 sale -- one of the -- one of the reasons --</p> <p>9 one of the points that were made strongly to</p> <p>10 us on why it would be easier for the Estate to</p> <p>11 accept this is that assets -- is that the only</p> <p>12 way the settlement agreement would be</p> <p>13 effective is if -- look, the APA had to</p> <p>14 happen, but those would not then be Estate</p> <p>15 assets.</p> <p>16 So we were not asked to provide</p> <p>17 assets. We were not -- we -- it would only be</p> <p>18 hypothetical to say what we would have done if</p> <p>19 we had been asked. And this, in my mind as I</p> <p>20 read it, and I continue as I read it now,</p> <p>21 said -- makes the point that this is new money</p> <p>22 from the providers of the money, not a</p> <p>23 reduction, if you will, coming out of the</p> <p>24 purchase price that they might have otherwise</p> <p>25 agreed to pay.</p>	<p style="text-align: right;">Page 91</p> <p>1 LaFORGE</p> <p>2 then, but I think that you're interested in</p> <p>3 the period of what led up to the approval of</p> <p>4 this.</p> <p>5 And during that, it was clearly</p> <p>6 pointed out to me - and I'm sure initially by</p> <p>7 Kramer Levin, who, you know, was -- I don't --</p> <p>8 again, I don't recall if somebody handed me</p> <p>9 something to read an hour before the meeting;</p> <p>10 I don't recall if there was a discussion about</p> <p>11 how it was coming together.</p> <p>12 I believe there was a discussion</p> <p>13 about how -- you know, what the big pieces</p> <p>14 would be all in this very narrow time frame</p> <p>15 while I was sitting in the RLJ offices,</p> <p>16 heading over to the courthouse.</p> <p>17 So I've forgotten the question</p> <p>18 now.</p> <p>19 Q. Well, my question was just who was</p> <p>20 making -- who was making that point.</p> <p>21 You said that it was being made</p> <p>22 strongly to you, and I was just going to the</p> <p>23 question of who was it that was making this</p> <p>24 point strongly to you, that these are not</p> <p>25 Estate assets?</p>
<p style="text-align: right;">Page 90</p> <p>1 LaFORGE</p> <p>2 Q. You said that one of the points</p> <p>3 that was made strongly to you on why it would</p> <p>4 be easier for the Estate to accept it is that</p> <p>5 the assets -- is that the only way the</p> <p>6 settlement agreement would be effective --</p> <p>7 well, let me -- that's the wrong testimony --</p> <p>8 strike that.</p> <p>9 You said that one of the points</p> <p>10 that was made strongly to you is why it would</p> <p>11 be easier for the Estate to accept this is</p> <p>12 that they would not be Estate assets.</p> <p>13 Who made that point to you?</p> <p>14 A. I don't recall, in the sessions --</p> <p>15 look, it was made over and over and over</p> <p>16 again. I can't imagine anyone didn't make it</p> <p>17 to me, although I can't recall specifically</p> <p>18 when it -- you know, who made it and -- who</p> <p>19 made it where or when.</p> <p>20 Q. But when you say those "sessions,"</p> <p>21 are you referring to the meeting --</p> <p>22 A. All before we --</p> <p>23 Q. -- prior to the August --</p> <p>24 A. Right. All before, and it's been</p> <p>25 a continuing -- continuing discussion since</p>	<p style="text-align: right;">Page 92</p> <p>1 LaFORGE</p> <p>2 MR. RAMOS: I think he's answered</p> <p>3 that question.</p> <p>4 A. It was a condition of a</p> <p>5 settlement, we -- that we wouldn't provide</p> <p>6 Estate -- we wouldn't -- we just wouldn't</p> <p>7 provide Estate assets to go to some creditors.</p> <p>8 We wouldn't do that. I mean, it's hard to</p> <p>9 answer why I wouldn't do something that I</p> <p>10 can't imagine why I would ever do it.</p> <p>11 So your question -- I'm sorry, but</p> <p>12 your question was who told us. It was a</p> <p>13 condition, it was a -- it was just a known</p> <p>14 fact that didn't really need to be discussed</p> <p>15 and was pointed out in the analysis of this,</p> <p>16 including the -- what I might have thought</p> <p>17 were the shortcomings and what might have been</p> <p>18 the strengths of this. And it was pointed out</p> <p>19 certainly by Kramer Levin as a strength of</p> <p>20 the --</p> <p>21 MR. RAMOS: Don't divulge your</p> <p>22 discussions with counsel.</p> <p>23 Q. Okay. So what I'm struggling</p> <p>24 with, Mr. LaForge, is if this exact construct</p> <p>25 is something that you say the Debtors would</p>

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<p style="text-align: right;">Page 93</p> <p>1 LaFORGE</p> <p>2 never do with Estate assets, why is the Debtor</p> <p>3 supporting a settlement and seeking approval</p> <p>4 of a settlement that pays certain creditors</p> <p>5 and doesn't pay other creditors?</p> <p>6 MR. RAMOS: Objection, misstates</p> <p>7 his testimony, and asked and answered.</p> <p>8 Q. You can answer.</p> <p>9 A. It's -- would you -- would you</p> <p>10 like me to go back over why I support this?</p> <p>11 Q. Well, I'd like --</p> <p>12 A. I'm happy to.</p> <p>13 Q. -- I would just like to know why a</p> <p>14 Debtor who says "I would never do this with</p> <p>15 Estate assets" is willing to seek court</p> <p>16 approval and continue to spend valuable and</p> <p>17 limited Estate assets on a settlement that</p> <p>18 they said, if it was Estate assets, "I would</p> <p>19 never do this"?</p> <p>20 MR. RAMOS: Objection.</p> <p>21 A. I said earlier that once I have</p> <p>22 sold assets, what happens to them is not --</p> <p>23 I've sold them. It's not my right, my job to</p> <p>24 determine what gets done with them.</p> <p>25 I tried hard not to sell these</p>	<p style="text-align: right;">Page 95</p> <p>1 LaFORGE</p> <p>2 Q. And when the Debtor makes a</p> <p>3 determination to continue to pursue approval</p> <p>4 of a settlement, you're doing that through the</p> <p>5 exercise of your fiduciary duties, correct?</p> <p>6 A. I am.</p> <p>7 Q. Okay. And when you decide to</p> <p>8 continue to pursue approval of the</p> <p>9 settlement -- the sale has long closed,</p> <p>10 correct?</p> <p>11 A. Correct.</p> <p>12 Q. There's no impact to the Debtor if</p> <p>13 this settlement is approved or not approved -</p> <p>14 to the Debtors' business operations if this</p> <p>15 settlement is approved or not approved,</p> <p>16 correct?</p> <p>17 MR. RAMOS: Objection.</p> <p>18 A. I don't know the -- I don't have</p> <p>19 an answer to that. I don't know the</p> <p>20 ramifications, as we spoke earlier, of not</p> <p>21 going forward. I would need to study that.</p> <p>22 Q. But are you aware of any</p> <p>23 ramifications -- sitting here today, are you</p> <p>24 aware of any negative ramifications if you</p> <p>25 were to decide "we're not going forward"? Are</p>
<p style="text-align: right;">Page 94</p> <p>1 LaFORGE</p> <p>2 assets. I tried hard. I failed. We have the</p> <p>3 APA we have.</p> <p>4 The only way this would be</p> <p>5 effective is if the sale went forward. At</p> <p>6 that point in time, the best outcome for the</p> <p>7 Estate - taken as a whole - was to have the</p> <p>8 APA approved. This was the way to get there.</p> <p>9 And the question for us was, given the</p> <p>10 imperfections in it, would we agree to support</p> <p>11 that or would we not? And the decision was</p> <p>12 made to support it.</p> <p>13 I -- you can't -- it's a</p> <p>14 hypothetical to say what I would have done</p> <p>15 with Estate assets. It wasn't even a</p> <p>16 consideration to do something like this with</p> <p>17 our assets, and we haven't done it with the</p> <p>18 assets that we subsequently found out we had.</p> <p>19 Q. You're still a fiduciary -- you're</p> <p>20 still a member of the board, right, of</p> <p>21 Constellation?</p> <p>22 A. I am.</p> <p>23 Q. You still have fiduciary duties,</p> <p>24 correct?</p> <p>25 A. I do.</p>	<p style="text-align: right;">Page 96</p> <p>1 LaFORGE</p> <p>2 you aware of any negative ramifications to the</p> <p>3 Debtors' business if you were to make such a</p> <p>4 decision?</p> <p>5 MR. RAMOS: Objection.</p> <p>6 A. There are none specific that I can</p> <p>7 mention.</p> <p>8 Q. Have the Debtors contemplated</p> <p>9 filing a Chapter 11 plan to conclude these</p> <p>10 cases?</p> <p>11 A. Again, back to a longer period of</p> <p>12 discussions, it certainly would have been</p> <p>13 the -- the best of the alternatives if we</p> <p>14 could have filed a Chapter 11 plan.</p> <p>15 There were -- basically, at the</p> <p>16 time that we were initially considering that,</p> <p>17 we were unaware of assets that we would have,</p> <p>18 number one. And number two is, to get a plan</p> <p>19 confirmed, I understood that we needed</p> <p>20 substantially more money than we had.</p> <p>21 Q. And has anything changed in that</p> <p>22 regard, in terms of having -- needing more</p> <p>23 money than you have in order to confirm a</p> <p>24 Chapter 11 plan?</p> <p>25 A. No.</p>

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<p style="text-align: right;">Page 97</p> <p>1 LaFORGE</p> <p>2 Q. Do you see any possibility that</p> <p>3 the Debtors file a Chapter 11 plan to conclude</p> <p>4 these cases?</p> <p>5 A. I'd rather say it's extremely</p> <p>6 unlikely. It would take something that I'm</p> <p>7 not aware of at the moment.</p> <p>8 Q. So is it fair to say that unless</p> <p>9 something extremely unlikely happens, the</p> <p>10 Debtors only choice to emerge from Chapter 11</p> <p>11 will be either to convert to a Chapter 7 or to</p> <p>12 dismiss these cases?</p> <p>13 A. I think those are --</p> <p>14 MR. RAMOS: Objection.</p> <p>15 Go ahead.</p> <p>16 A. I think those are the two options</p> <p>17 that are the most likely outcomes, yes.</p> <p>18 Q. And you're aware that originally</p> <p>19 the Debtor was seeking to have the dismissal</p> <p>20 of the cases heard at the same time as the</p> <p>21 motion to approve the settlement, right?</p> <p>22 A. I am.</p> <p>23 Q. And you're aware that now the</p> <p>24 Debtors have separated the two, right?</p> <p>25 A. I am.</p>	<p style="text-align: right;">Page 99</p> <p>1 LaFORGE</p> <p>2 the matters that we believed we could</p> <p>3 reasonably resolve, only leaving those that</p> <p>4 would be best handled in that -- in that</p> <p>5 manner.</p> <p>6 We thought we were best at</p> <p>7 handling the outstanding issues, most of which</p> <p>8 we've talked about today. There's a point in</p> <p>9 time where, with those extending out, we just</p> <p>10 won't get there.</p> <p>11 Q. And is approval of the settlement</p> <p>12 one of the accomplishments that's needed</p> <p>13 before you convert to Chapter 7?</p> <p>14 MR. RAMOS: Objection.</p> <p>15 A. We have -- we -- it is one of the</p> <p>16 actions/accomplishments. I used the word</p> <p>17 "accomplishments," so it's fair in the</p> <p>18 question; I probably wouldn't use that word</p> <p>19 again. But it's one of the tasks that we</p> <p>20 would like to clean up before we -- we make a</p> <p>21 final -- before we make a final decision.</p> <p>22 And the -- you know, at the</p> <p>23 moment, we -- we've been able to -- to get</p> <p>24 there and we think we're still okay. But, you</p> <p>25 know, there's -- the last two-week extension</p>
<p style="text-align: right;">Page 98</p> <p>1 LaFORGE</p> <p>2 Q. Do you know why the Debtors have</p> <p>3 separated those?</p> <p>4 A. The -- the reason comes back to, I</p> <p>5 believe -- and I don't -- I think it's</p> <p>6 consistent with the timing, but -- is that</p> <p>7 we've got these causes of action at Columbus</p> <p>8 that we need to deal with in one manner or</p> <p>9 another.</p> <p>10 Q. Okay. And we talked, earlier,</p> <p>11 that the way that you think is most likely to</p> <p>12 deal with them is going to be a conversion to</p> <p>13 Chapter 7?</p> <p>14 A. I think that's -- it's easier for</p> <p>15 me to make that case than any of the other</p> <p>16 cases, yes.</p> <p>17 Q. Okay. And do you have a time</p> <p>18 frame in mind as to when the Debtor will seek</p> <p>19 to convert these cases to Chapter 7?</p> <p>20 MR. RAMOS: Objection.</p> <p>21 A. It is -- we didn't set a time</p> <p>22 frame. We set a series of accomplishments,</p> <p>23 each of which we would have thought -- thought</p> <p>24 would have happened earlier. Those</p> <p>25 accomplishments would have been resolving all</p>	<p style="text-align: right;">Page 100</p> <p>1 LaFORGE</p> <p>2 is new and, you know, we've got to -- we</p> <p>3 continue to stay on top of it.</p> <p>4 Q. Other than approval of the</p> <p>5 settlement, what remaining tasks are there</p> <p>6 before you make the determination whether to</p> <p>7 convert to Chapter 7?</p> <p>8 A. So we've got this meaningful</p> <p>9 employee matter, of which there's an escrow of</p> <p>10 \$4.6 million that all are aware of. And there</p> <p>11 are -- you would think it's easier to figure</p> <p>12 out the allocation of that at different levels</p> <p>13 of settlement, or complete settlement or not.</p> <p>14 It has not been. And we have spent time going</p> <p>15 through corporate records and data to figure</p> <p>16 how we allocate that money; and then, of</p> <p>17 course, to negotiate with the Plaintiff in</p> <p>18 that case.</p> <p>19 So that is another -- that is --</p> <p>20 those are the -- really the two -- only two</p> <p>21 tasks worth -- worth raising.</p> <p>22 Q. And how long do you think it will</p> <p>23 take to resolve the issues with the WARN Act</p> <p>24 claimants?</p> <p>25 MR. RAMOS: Objection.</p>

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<p style="text-align: right;">Page 101</p> <p>1 LaFORGE</p> <p>2 A. Like other dates that we haven't</p> <p>3 been able to achieve here, I would have told</p> <p>4 you an earlier date at an earlier time.</p> <p>5 We are in active discussions,</p> <p>6 including several this week, with the</p> <p>7 Plaintiff. And I'm waiting for a response</p> <p>8 that may or may not be coming, and we have</p> <p>9 to -- you know, we'll have to accelerate that</p> <p>10 response or make an assumption about the</p> <p>11 response in the next -- you know, we'll have</p> <p>12 to see what the response is to see what the --</p> <p>13 the time frame and whether it's something that</p> <p>14 we can continue to be helpful on or not.</p> <p>15 Q. And is there any reason a Chapter</p> <p>16 7 trustee couldn't resolve these WARN Act</p> <p>17 claims, when the funds are already sitting in</p> <p>18 escrow?</p> <p>19 A. I don't know the answer to that.</p> <p>20 I don't know of any reason they couldn't.</p> <p>21 MR. KAPLAN: You want to take a</p> <p>22 couple-minute break?</p> <p>23 (Brief off-record discussion.)</p> <p>24 MS. CASEY: I do have a few</p> <p>25 questions, and first I want to</p>	<p style="text-align: right;">Page 103</p> <p>1 LaFORGE</p> <p>2 group. The Noteholders, I did not speak</p> <p>3 specifically about the objections of the</p> <p>4 parties, I spoke more about -- I didn't speak</p> <p>5 specifically about the objections, no.</p> <p>6 The idea of a settlement wasn't -</p> <p>7 I don't mean to sound -- in any way, you know,</p> <p>8 make light of it - didn't come up on that day.</p> <p>9 That structure, those terms, that contribution</p> <p>10 of assets came up that day to me, but we had</p> <p>11 been -- we had authorized counsel -- maybe I</p> <p>12 can't talk about this.</p> <p>13 But there were discussions for a</p> <p>14 long time. And what the back-and-forth was, I</p> <p>15 didn't know, but mostly the -- the board had,</p> <p>16 you know, strong interest of what it would</p> <p>17 like to see in a settlement, and some things</p> <p>18 came to bear and some things didn't.</p> <p>19 Q. That actually leads me to my other</p> <p>20 question.</p> <p>21 Are you aware of anybody else,</p> <p>22 besides yourself, on behalf of the Debtors who</p> <p>23 participated in the settlement discussions</p> <p>24 with the Committee and the Noteholders and the</p> <p>25 Purchasers to resolve the sale and the DIP</p>
<p style="text-align: right;">Page 102</p> <p>1 LaFORGE</p> <p>2 understand more about the negotiations.</p> <p>3 EXAMINATION</p> <p>4 BY MS. CASEY:</p> <p>5 Q. Am I correct that your testimony</p> <p>6 was that you were not personally involved in</p> <p>7 the negotiations between the Committee and the</p> <p>8 Noteholders and the Purchasers that ultimately</p> <p>9 led to the August draft term sheet that you</p> <p>10 were presented right before the hearing?</p> <p>11 A. That's correct.</p> <p>12 Q. Were you in any way involved with</p> <p>13 negotiations to resolve the DIP objections and</p> <p>14 the sale objections before the August hearing</p> <p>15 that were other than resulting into the DIP --</p> <p>16 the August term sheet?</p> <p>17 MR. RAMOS: With the Creditors'</p> <p>18 Committee?</p> <p>19 MS. CASEY: With the Creditors'</p> <p>20 Committee or the Noteholders and the</p> <p>21 Purchasers.</p> <p>22 A. I did not specifically speak to</p> <p>23 the principals, the Noteholders; rare that I</p> <p>24 spoke to the Committee. I was before the</p> <p>25 Committee a couple of times but in a large</p>	<p style="text-align: right;">Page 104</p> <p>1 LaFORGE</p> <p>2 objections prior to the August -- prior to</p> <p>3 receiving the August draft of the term sheet,</p> <p>4 prior to the sale hearing?</p> <p>5 MR. RAMOS: Objection.</p> <p>6 Go ahead.</p> <p>7 A. Other than counsel?</p> <p>8 Q. Including counsel. Are you aware</p> <p>9 of anyone that -- I don't want to know what</p> <p>10 was said to you, I just -- are you aware that</p> <p>11 anybody on behalf of the Debtors was involved</p> <p>12 in the negotiations between the Committee and</p> <p>13 the -- with the Committee and the Noteholders</p> <p>14 and the Purchaser to resolve either the</p> <p>15 Committee's DIP objections or the sale</p> <p>16 objections prior to -- right before the</p> <p>17 hearing on -- in August?</p> <p>18 A. We needed a sale and a DIP. We</p> <p>19 had objections, we had to get through that.</p> <p>20 There were, I am certain, frequent discussions</p> <p>21 among our counsel and the counsels for the</p> <p>22 other two -- for at least the other two</p> <p>23 parties, but I was not party to those, as I</p> <p>24 said to Mr. Kaplan's questions back at the</p> <p>25 hearing.</p>

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1 **LaFORGE**
 2 **There was constant back-and-forth**
 3 **with our counsels and the board - it was just**
 4 **two guys, it's pretty easy - about where we**
 5 **were headed. But most of the time it was**
 6 **"we're not getting very far on a settlement."**
 7 Q. So is it your testimony -- because
 8 I'm not sure if I understand it. Is it your
 9 testimony that counsel for the Debtors was
 10 involved in the negotiations between the
 11 Committee and the Noteholders and the
 12 Purchasers prior to receiving the draft term
 13 sheet, before the sale hearing in August?
 14 **MR. RAMOS: Objection.**
 15 **A. The -- it is my testimony that our**
 16 **counsel spoke to the other counsels about**
 17 **resolving objections.**
 18 **That term sheet that we were**
 19 **looking at moments ago was a new structure to**
 20 **all of us at that point in time, what elements**
 21 **I can't speak to, because I didn't partake in**
 22 **those.**
 23 Q. Were you aware, prior to receiving
 24 the draft term sheet, that the Committee and
 25 the Noteholders and the Purchasers were in

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1 **LaFORGE**
 2 negotiations for a settlement that would
 3 provide payment from the Noteholders and/or
 4 the Purchasers to a GUC Trust, even though you
 5 weren't involved in the actual negotiations?
 6 **A. I had not heard of a GUC Trust or**
 7 **contribution of assets or of cash.**
 8 Q. Okay. You had -- when you
 9 received the draft term sheet in -- right
 10 before the sale hearing in August, you
 11 indicated that you were more interested in a
 12 global settlement.
 13 Is it my understanding of your
 14 testimony that, at that time, at that -- on
 15 that day before the sale hearing, the only
 16 thing you discussed was the releases, and
 17 that's what you meant by "interested in a more
 18 global settlement"?
 19 **MR. RAMOS: Objection.**
 20 **A. That certainly was the -- the**
 21 **primary discussion.**
 22 Q. What did you mean by broader
 23 release -- first of all, am I correct that
 24 what you wanted was broader releases?
 25 **A. I meant more parties participating**

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1 **LaFORGE**
 2 **in releases.**
 3 Q. What parties did you want to
 4 participate in the releases?
 5 **A. All those parties that were not**
 6 **named on that -- on that sheet.**
 7 Q. Okay. Did you ask to invite them
 8 in to negotiate to be part of those releases
 9 on --
 10 **A. Can you repeat the question?**
 11 Q. You said that you wished to have
 12 all of the parties who objected to be
 13 providing [sic] the releases in the draft term
 14 sheet; is that correct?
 15 **MR. RAMOS: Objection.**
 16 **A. I'm sorry, I'm not -- I do want to**
 17 **follow you, I just -- sorry, I'm not.**
 18 Q. I'll just ask my question again.
 19 What parties did you want to be
 20 added to the releases in the draft term sheet
 21 when you were discussing it at the sale
 22 hearing, or right before the sale hearing?
 23 **A. There was not a specific**
 24 **discussion that named individual parties --**
 25 Q. Okay.

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1 **LaFORGE**
 2 **A. -- or corporate parties or others.**
 3 **My -- you know, there's no real**
 4 **principal to deal with at the Committee, so**
 5 **it's the lawyer, the law firm. And I went out**
 6 **and I spoke to that law firm, with our counsel**
 7 **present, and I said that the narrowness of the**
 8 **agreement was unacceptable and that it had to**
 9 **be more broad, more broad releases, for us to**
 10 **be able to move forward on it.**
 11 Q. And when you mean -- when you say
 12 "more broad releases," you mean additional
 13 parties granted releases?
 14 **A. Additional parties who were**
 15 **beneficiaries of a release.**
 16 Q. Okay. And were those additional
 17 parties -- did those additional parties
 18 include parties who had objected to the sale?
 19 **A. We didn't speak specifically about**
 20 **who they were on that day. You know, it's**
 21 **somewhat hypothetical of what I -- how I would**
 22 **create one of those settlement agreements, but**
 23 **certainly parties who -- sure, it -- it -- you**
 24 **know, I have a -- I have a very strong**
 25 **perspective of, at least from the time I was**

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<p style="text-align: right;">Page 109</p> <p>1 LaFORGE</p> <p>2 involved, of what went on and the behavior of</p> <p>3 people.</p> <p>4 And quite frankly, there's a</p> <p>5 deposition of me already that talks to most of</p> <p>6 those points and, you know, I wanted to see --</p> <p>7 I didn't want to see continued arguing over</p> <p>8 points that it -- you know, over points at</p> <p>9 all, but certainly in some cases points that I</p> <p>10 thought would go nowhere ultimately.</p> <p>11 So -- but yeah, I think if there</p> <p>12 were -- you know, it should have been broad,</p> <p>13 and I would have preferred it to be broad and</p> <p>14 global.</p> <p>15 Q. Okay. You also testified, if I</p> <p>16 recall, that after the August hearing you</p> <p>17 continued to try to get the settlement</p> <p>18 agreement changed, although it wasn't.</p> <p>19 Is that correct, that you</p> <p>20 continued those discussions after the hearing?</p> <p>21 A. I tried to get certain elements</p> <p>22 that we all might have -- think been in the</p> <p>23 settlement agreement taken care of, yeah,</p> <p>24 that's correct.</p> <p>25 Q. Can you tell me what those</p>	<p style="text-align: right;">Page 111</p> <p>1 LaFORGE</p> <p>2 negotiating a settlement, and I said our</p> <p>3 counsel did. Then I also said that the</p> <p>4 structure that we were presented that day was</p> <p>5 new to both me and our counsel.</p> <p>6 So following that, why did -- why</p> <p>7 did a couple -- at least a couple of parties</p> <p>8 get together, come up with a settlement</p> <p>9 agreement and not ask us to participate? I</p> <p>10 don't know. You'll have to ask them.</p> <p>11 Q. Okay. Am I correct that your</p> <p>12 testimony was that a significant reason you</p> <p>13 were able to agree to the term sheet is that</p> <p>14 it did not require the Debtor to contribute</p> <p>15 any of the Debtors' assets?</p> <p>16 A. Yes.</p> <p>17 Q. So if I can draw your attention to</p> <p>18 DDTL 2, page 3 under -- the first paragraph</p> <p>19 under "Claims and Causes of Action," the last</p> <p>20 full sentence, it says: "Notwithstanding the</p> <p>21 foregoing, in the event and to the extent that</p> <p>22 any of the Specified Causes of Action are not</p> <p>23 Acquired Assets under the APA, the Debtors</p> <p>24 shall contribute such Specified Causes of</p> <p>25 Action to the GUC Trust."</p>
<p style="text-align: right;">Page 110</p> <p>1 LaFORGE</p> <p>2 elements were that you tried to get taken care</p> <p>3 of?</p> <p>4 A. Simply broader releases.</p> <p>5 Q. Did you reach out to any of the</p> <p>6 objecting parties to see if they would</p> <p>7 negotiate to give broader releases?</p> <p>8 A. Well, the objecting parties -- I</p> <p>9 think the people that needed to give the</p> <p>10 releases were -- it was part of the</p> <p>11 settlement, so the only people I would have</p> <p>12 reached out to would have been signatories to</p> <p>13 the settlement, and --</p> <p>14 Q. And you wanted them to give</p> <p>15 broader releases?</p> <p>16 A. Yes.</p> <p>17 Q. And you wanted them to give</p> <p>18 releases to additional parties?</p> <p>19 A. Correct.</p> <p>20 Q. Okay. Why did the Debtors not</p> <p>21 participate in the negotiations prior to the</p> <p>22 August hearing that resulted in the settlement</p> <p>23 term sheet?</p> <p>24 A. Now, I said -- you asked me if</p> <p>25 anyone else worked on our behalf in</p>	<p style="text-align: right;">Page 112</p> <p>1 LaFORGE</p> <p>2 A. Yeah, yeah.</p> <p>3 Q. Why would you agree to that</p> <p>4 sentence?</p> <p>5 A. So the -- the agreement was to a</p> <p>6 structure. The structure was that none of our</p> <p>7 assets would go. I think -- and I'm not going</p> <p>8 to get into the legal way to read this</p> <p>9 paragraph from beginning to end, but there are</p> <p>10 elements -- and this wasn't where I was that</p> <p>11 morning, I can tell you. My -- where I was</p> <p>12 that morning was on, conceptually, what are we</p> <p>13 doing and why are we doing it.</p> <p>14 I think if you read this, there is</p> <p>15 a -- you know, some things in the beginning</p> <p>16 that maybe can help explain that, number one.</p> <p>17 Number two, there was, in the actual</p> <p>18 settlement agreement - and I think it's the</p> <p>19 top of page 4 - there will be a -- or the</p> <p>20 settlement trust agreement, it makes it clear</p> <p>21 and spells out that no Debtor assets will be</p> <p>22 used. And because that is the concept under</p> <p>23 which we approved this, we will put that in</p> <p>24 any document. If it's not clear, we'll make</p> <p>25 it clear, that we will not -- we will not do</p>

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2 that.
3 Q. Then why did you agree to this
4 sentence, because this sentence does --
5 A. I agreed --
6 Q. -- require the Debtor to
7 provide --
8 A. I had --
9 MR. RAMOS: One second.
10 Objection.
11 Go ahead.
12 A. I agreed to a concept, to support
13 a concept that a term sheet represented, okay?
14 This sentence -- and I -- again, this -- it
15 would -- I think that there's a language up
16 above that defines "Specified Causes of
17 Action" that can -- that can narrow the
18 conclusion you're drawing by reading that
19 sentence on your own.
20 If I'm wrong in that, then I
21 haven't read it properly. But that doesn't
22 matter to me, because what matters to me is
23 that I agreed to a trans- -- to this with
24 the -- with the assumption that no Debtor
25 assets would be used.

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1 LaFORGE
2 Q. Was the APA amended, after the
3 entry -- after the sale hearing, to include
4 causes of action that hadn't been included
5 prior to the sale hearing?
6 A. No.
7 Q. Okay.
8 A. The August 16 sale hearing,
9 correct?
10 Q. Correct, I'm sorry, the August 16
11 hearing.
12 A. The answer's still no.
13 It wasn't amended at all, to my
14 knowledge, but...
15 Q. So there are some obligations of
16 the Debtors in this settlement agreement. The
17 Debtors have to support the settlement, the
18 Debtors have to make good faith efforts to
19 minimize future administrative costs, they
20 have to provide mutual releases and other
21 terms, and the settlement says what it says.
22 What did the Debtors receive in
23 return for those agreements?
24 MR. RAMOS: Objection.
25 A. What did -- what did we receive

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1 LaFORGE
2 from this?
3 Q. Uh-huh.
4 A. We received the support of the
5 Committee to accomplish two things that were
6 critically important to preserving value for
7 the Estate overall.
8 Q. Did the Debtors receive anything
9 in addition to that?
10 A. Is there something we received
11 that's not in the agreement?
12 Q. Other than those two things, did
13 the -- the agreement of the Committee to
14 support two critical -- I'm assuming you mean
15 the DIP objection and the sale objection.
16 Was there anything else that
17 was --
18 A. There were normal, you know, kind
19 of usual releases in there, narrowly applied
20 but some usual releases. I'd almost want to
21 go through it and read it, but no, nothing
22 that I can think of.
23 Q. Did the Debtors analyze the
24 Committee's DIP objections to determine
25 what -- its views on the strengths of the

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1 LaFORGE
2 Committee's objections to the DIP?
3 MR. RAMOS: Objection.
4 A. Did the Debtors -- there's not
5 been a lot of perfect documents and
6 agreements, from my perspective, in this case.
7 There were objections. Some probably had more
8 reason to be on paper than simply, you know,
9 trying to change the outcome of things.
10 So we knew the things we were
11 trying to negotiate, and to the point we were
12 unable to negotiate them in the DIP and
13 someone raised them, then, you know, we have
14 an opinion on it. But, you know, there was
15 no -- at that point, that was our DIP. We had
16 no other DIPS. We had no other funding. That
17 DIP was already drawn, to some degree.
18 In the absence of getting through
19 that and getting the incremental funding,
20 there would have been a catastrophic event
21 with the companies.
22 Q. Did the Debtors analyze the
23 strength of the Committee's objections to the
24 sale?
25 A. There was no separate -- we did

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1 LaFORGE
2 not separately analyze them. Again, as I
3 said, anecdotally, there were things we tried
4 to negotiate in the sale. And I suppose there
5 were elements of that there, but we did not --
6 that was our sale. That was the sale we had
7 and that's what we tried to get approved at
8 that point.
9 Q. Is there -- did the Debtors
10 encourage or seek to include any of the other
11 objecting parties in a global settlement
12 negotiation prior -- at any point, but
13 certainly prior to the August sale hearing?
14 A. That would -- yes.
15 Q. Who did they encourage to
16 participate in a global settlement prior to
17 the August sale hearing?
18 A. Those discussions were with
19 counsel, so I probably -- does that mean I
20 can't share them?
21 Q. I don't want to hear anything that
22 you spoke about just to your counsel.
23 I want to know, did the Debtors go
24 out to any other parties and encourage them to
25 participate in global settlement negotiations?

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1 LaFORGE
2 A. Well, the Debtors aren't --
3 MR. RAMOS: I'm sorry, could you
4 define your time period?
5 MS. CASEY: Prior to the August
6 sale hearing.
7 MR. RAMOS: Any time prior to the
8 sale hearing?
9 MS. CASEY: Any time prior, yes.
10 MR. RAMOS: Post-petition date,
11 prior to the sale hearing?
12 MS. CASEY: Absolutely,
13 post-petition, prior to the sale
14 hearing.
15 THE WITNESS: Prior to filing --
16 BY MS. CASEY:
17 Q. No, not prior to the filing of --
18 A. I understand. But prior to
19 filing, we were trying to settle the
20 differences, right? We did it in November of
21 '15. We did it in January -- did it in
22 December, which closed January 25 of '16. We
23 then had, you know, draws that -- we were back
24 and forth because there were certain covenants
25 that, in the revised amended and extended

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1 LaFORGE
2 debt, we needed changed in order to get things
3 done.
4 We had objecting parties and
5 parties to this together - trying to get them
6 together - all the time. It was one continual
7 attempt to do that. So to try to pick a point
8 in time and say, "Did you do it then?", I
9 mean, I don't remember what we did on a
10 specific day or a specific week, but that was
11 all -- this -- we would have preferred to have
12 all the parties that were interested to come
13 up with a settlement that we could all agree
14 on as it -- and we didn't.
15 Q. Okay. Are you aware of any
16 informal objections that the Committee raised
17 to the sale that aren't part of the filed
18 objections?
19 A. I'm not aware of any.
20 MS. CASEY: I don't have any more
21 questions.
22 EXAMINATION
23 BY MR. BENSON:
24 Q. Just a very few questions. And I
25 have to sort of create a clean logical record,

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1 LaFORGE
2 which may result in going over areas we've
3 already gone over, so --
4 A. Understood, no worries.
5 Q. -- I apologize for that --
6 A. No worries.
7 Q. -- but if you think at any time
8 I'm misconstruing what you or the other
9 attorneys said, please let me know.
10 Do you know if at any point there
11 was any -- any point up until the United
12 States filed an objection to the settlement,
13 was there any attempt by the Debtor or the
14 Debtors' counsel to reach out to DOJ or IRS to
15 involve them in the negotiations over the
16 settlement term sheet?
17 MR. RAMOS: Objection.
18 A. So the term sheet, we weren't
19 involved in the negotiations, so we couldn't
20 have done that.
21 I am not aware, other than the
22 agreement that was put in place by the
23 obligor, which was one of the operating
24 companies to the U.S. Government with respect
25 to back taxes, where some were paid and there

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<p style="text-align: right;">Page 121</p> <p>1 LaFORGE</p> <p>2 was a payment plan put in place.</p> <p>3 Post that, as we were talking</p> <p>4 about, you know, filing and things, I'm not</p> <p>5 aware of any.</p> <p>6 Q. Okay. When you said "obligor" and</p> <p>7 "payment plan," was that before the bankruptcy</p> <p>8 was filed?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. From the time that you were</p> <p>11 presented with the term sheet through when I</p> <p>12 filed an objection, did you ever or did your</p> <p>13 counsel ever reach out to anyone at the IRS or</p> <p>14 DOJ to notify them that there was this</p> <p>15 proposed settlement that would result in</p> <p>16 distribution to the general unsecured</p> <p>17 creditors but not to the priority creditors?</p> <p>18 MR. RAMOS: Objection.</p> <p>19 A. I did not.</p> <p>20 Q. Do you know if your counsel</p> <p>21 reached out to anyone at DOJ or IRS?</p> <p>22 A. I don't know.</p> <p>23 Q. Do you know if anyone representing</p> <p>24 the Committee reached out to the IRS?</p> <p>25 A. I don't know.</p>	<p style="text-align: right;">Page 123</p> <p>1 LaFORGE</p> <p>2 For the reasons that I've given already, I</p> <p>3 said in spite of it being imperfect, I felt</p> <p>4 that we could support the settlement</p> <p>5 agreement.</p> <p>6 But the alternative of going to</p> <p>7 the sale hearing and not being successful and</p> <p>8 not also being able to have the DIP, the</p> <p>9 parts of the DIP we did not have access to</p> <p>10 prior to the approval, would be catastrophic</p> <p>11 to the companies. And taken as a whole, that</p> <p>12 was just too great a risk.</p> <p>13 Q. Now, you made a comment about how</p> <p>14 some of the objections had -- more or less</p> <p>15 weren't appropriate for being put on paper, I</p> <p>16 think you said?</p> <p>17 A. Sorry?</p> <p>18 Q. You said something to the effect</p> <p>19 that the -- certain arguments, I think,</p> <p>20 shouldn't have been put on paper in this case.</p> <p>21 I'm just -- do you think that the</p> <p>22 majority of the creditors' arguments were</p> <p>23 meritless?</p> <p>24 MR. RAMOS: Objection, misstates</p> <p>25 his testimony.</p>
<p style="text-align: right;">Page 122</p> <p>1 LaFORGE</p> <p>2 Q. Was there any time where you</p> <p>3 thought it would be appropriate to reach out</p> <p>4 to the IRS?</p> <p>5 A. Any time after filing?</p> <p>6 Q. Yeah, any time after being</p> <p>7 presented with the term sheet.</p> <p>8 A. I don't recall a discussion about</p> <p>9 whether it would or wouldn't be appropriate.</p> <p>10 Q. Did you ever - not even discussing</p> <p>11 it with anyone else - think yourself, maybe we</p> <p>12 should reach out to the IRS?</p> <p>13 A. I was a director, not -- we had</p> <p>14 operating companies with CFOs, normal</p> <p>15 relationships. I -- as a director, I would</p> <p>16 not think to reach out to the IRS.</p> <p>17 Q. Okay. You mentioned the</p> <p>18 possibility of, in your words, playing chicken</p> <p>19 with the Creditors' Committee's objections.</p> <p>20 Why didn't you choose to play</p> <p>21 chicken, which I assume means tell them "we're</p> <p>22 going to go to the court and fight your</p> <p>23 objection"?</p> <p>24 A. It simply comes down to a balance</p> <p>25 of risks and which would be more catastrophic.</p>	<p style="text-align: right;">Page 124</p> <p>1 LaFORGE</p> <p>2 MR. BENSON: Okay.</p> <p>3 A. Yeah. Look, I don't recall saying</p> <p>4 that. I'm sure we could read and see, you</p> <p>5 know, what the context was and what it meant.</p> <p>6 I think I said two things - if I'm</p> <p>7 getting at it; if I'm not, stop me - that in</p> <p>8 some of the preliminary statements of the</p> <p>9 objections, there well could have been said</p> <p>10 things in those that we were -- either would</p> <p>11 have negotiated in a settlement agreement, if</p> <p>12 we had -- we might have done -- again, if it</p> <p>13 was a unilateral transaction and I was -- you</p> <p>14 know, could do that, maybe there were elements</p> <p>15 of that we would have incorporated.</p> <p>16 I just -- but the sequencing is</p> <p>17 what is the element that's hard to -- hard</p> <p>18 to -- needs to be remembered, and why one</p> <p>19 would make a decision at one point in time.</p> <p>20 And where we were, what our funding was, where</p> <p>21 we were with the companies and the people and</p> <p>22 the vendors and the customers, in a sense,</p> <p>23 drove where we were until we didn't have them</p> <p>24 anymore.</p> <p>25 I -- I -- if I said there were</p>

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<p style="text-align: right;">Page 125</p> <p>1 LaFORGE</p> <p>2 arguments that shouldn't have been put on</p> <p>3 paper, I did not mean that.</p> <p>4 Q. Does anything stop you from</p> <p>5 removing or withdrawing your support for the</p> <p>6 settlement motion?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. So the two things that I mentioned</p> <p>9 earlier, I don't know the ramifications if we</p> <p>10 were to withdraw, if any; and second, we</p> <p>11 have -- every step along the way in a</p> <p>12 difficult situation, you try to give your word</p> <p>13 and live by it. We gave our word here.</p> <p>14 And that doesn't -- we've retained</p> <p>15 a fiduciary "out" in certain -- maybe it's</p> <p>16 not -- so if something came up that would lead</p> <p>17 us to not do that, we would have to, you know,</p> <p>18 act accordingly. But I haven't -- nothing's</p> <p>19 come up to date that would lead me to that</p> <p>20 conclusion.</p> <p>21 Q. Does anything stop you from going</p> <p>22 to the Committee and saying, hey, Committee,</p> <p>23 this whole litigation process is turning out</p> <p>24 to be way more expensive than we thought; can</p> <p>25 you amend your settlement term sheet to give</p>	<p style="text-align: right;">Page 127</p> <p>1 LaFORGE</p> <p>2 A. I know of no prohibition to stop</p> <p>3 me from doing that.</p> <p>4 Q. Okay. At a certain point, would</p> <p>5 it be more beneficial to the Estate to simply</p> <p>6 withdraw your support for the settlement and</p> <p>7 convert to a 7 or dismiss?</p> <p>8 MR. RAMOS: Objection.</p> <p>9 A. A couple of parts to that. Are</p> <p>10 there circumstances that could make it more</p> <p>11 beneficial to the Estate to withdraw? I'm not</p> <p>12 aware of them at the moment, but I suspect</p> <p>13 that's a possibility.</p> <p>14 And second was Chapter 7, you</p> <p>15 know, conversion to Chapter 7; which is -- you</p> <p>16 know, that's not necessarily related to the</p> <p>17 first one. That will -- it's very possible</p> <p>18 that will happen at -- at, you know, some</p> <p>19 point for the obvious reasons, which is if the</p> <p>20 Estate can't -- you know, if the Estate</p> <p>21 couldn't go on or it resolved everything</p> <p>22 except what it couldn't resolve.</p> <p>23 Q. Okay. And so if this litigation</p> <p>24 continues for a substantial period of time,</p> <p>25 there are appeals, do you think at a certain</p>
<p style="text-align: right;">Page 126</p> <p>1 LaFORGE</p> <p>2 some distribution to the IRS so that they</p> <p>3 withdraw their objection and we get all this</p> <p>4 taken care of?</p> <p>5 A. Does anything stop me?</p> <p>6 Q. Yes.</p> <p>7 A. There's no prohibition from that,</p> <p>8 to the best of my knowledge, correct.</p> <p>9 Q. So it is possible to make many of</p> <p>10 the objections go -- there's no obstacle to</p> <p>11 making many of these objections go away by</p> <p>12 asking the Creditors' Committee to share the</p> <p>13 wealth, so to speak?</p> <p>14 MR. RAMOS: Objection. Are you</p> <p>15 representing your objection will go away</p> <p>16 if he asks?</p> <p>17 MR. BENSON: No.</p> <p>18 THE WITNESS: Can you repeat the</p> <p>19 question, please?</p> <p>20 BY MR. BENSON:</p> <p>21 Q. So is there any reason why you</p> <p>22 could not ask the Creditors' Committee to at</p> <p>23 least try to offer a distribution to all the</p> <p>24 objecting creditors in return for settling all</p> <p>25 this?</p>	<p style="text-align: right;">Page 128</p> <p>1 LaFORGE</p> <p>2 point it would be beneficial to the Estate to</p> <p>3 simply withdraw support for the settlement --</p> <p>4 MR. RAMOS: Objection.</p> <p>5 Q. -- and allow a conversion or</p> <p>6 dismissal?</p> <p>7 MR. RAMOS: Objection.</p> <p>8 A. That's a hypothetical that I'm not</p> <p>9 prepared to answer. I'm not -- I don't know.</p> <p>10 I don't have an answer.</p> <p>11 Q. Okay. So, I mean, to make that</p> <p>12 much more simple, at a certain point will</p> <p>13 litigation costs as part of this settlement</p> <p>14 motion become so large that it would be easier</p> <p>15 or better for the Estate to simply withdraw?</p> <p>16 A. To withdraw?</p> <p>17 Q. To withdraw its support for the</p> <p>18 motion.</p> <p>19 A. I think the action step for the</p> <p>20 Estate is how it gets out of bankruptcy, and</p> <p>21 that -- and the circumstances you're leading</p> <p>22 to would be to go to -- convert to a Chapter</p> <p>23 7. At that point, there's a trustee who's got</p> <p>24 responsibility for the Estate and not the</p> <p>25 people that have the responsibility now.</p>

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1 LaFORGE
 2 I don't see -- you know, I don't
 3 see, absent some other information, a
 4 withdrawal and then conversion to Chapter 7.
 5 I don't understand that distinction.
 6 Q. In the sense of -- so the Estate
 7 continues whether it's in 11 or 7; it's the
 8 same Estate, correct?
 9 MR. RAMOS: Objection.
 10 A. I don't know the answer to that.
 11 Q. Okay. Whether it's a Chapter 11
 12 or Chapter 7, the Debtor remains the same
 13 legal entity; is that right?
 14 MR. RAMOS: Same objection.
 15 A. I'm happy to try to answer your
 16 question. I don't want to get caught on
 17 something that sounds like there's a legal
 18 definition of those two that I may or may not
 19 know. I'm happy to try to answer your
 20 question in a different manner.
 21 Q. To the best of your knowledge, is
 22 there a different Estate?
 23 You can say no. I just need an
 24 answer to the question.
 25 A. I would think the Estate, from a

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1 LaFORGE
 2 commercial, practical stand- -- not a legal
 3 standpoint, the Estate is currently in
 4 bankruptcy and it would simply convert to a
 5 Chapter 7 plan.
 6 Q. Okay.
 7 A. Yes, I would assume that it stays
 8 the same.
 9 Q. Okay. And so you said, well, you
 10 know, down the road, conversion, that's a
 11 different trustee.
 12 But at this point, you are a
 13 fiduciary of the Estate. And you think that
 14 as a fiduciary of the Estate, you need to
 15 consider the longterm future of the Estate,
 16 not just right now; is that fair?
 17 MR. RAMOS: Objection.
 18 A. I don't like to narrow my
 19 fiduciary responsibilities in any manner. I
 20 think about -- everything I do is taken as a
 21 whole. That would include now and later.
 22 Q. Okay. And so then you would agree
 23 that you need to think about what's economical
 24 for the Estate longterm?
 25 A. I would agree.

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1 LaFORGE
 2 Q. And so at a certain point, if you
 3 think the expense of this litigation is so
 4 great that it's going to be detrimental to the
 5 Estate in the longterm, it might be wise for
 6 the Debtor to terminate its involvement in
 7 this litigation?
 8 A. Taken as a whole -- again, that's
 9 a bit of a hypothetical because we're not
 10 there. And as we've learned, everything plays
 11 out with its own set of facts and
 12 circumstances at the time.
 13 But one can create that
 14 hypothetical, where that would be not only the
 15 prudent choice but the only choice.
 16 MR. BENSON: That's all I have.
 17 Thank you very much.
 18 MR. RAMOS: We will read and sign.
 19
 20 (Time Noted: 1:26 p.m.)
 21
 22
 23
 24
 25

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1 ACKNOWLEDGMENT
 2
 3 STATE OF)
 4 :ss
 5 COUNTY OF)
 6
 7 I, DANA LaFORGE, hereby certify that
 8 I have read the transcript of my testimony taken
 9 under oath in my deposition of April 27, 2017;
 10 that the transcript is a true, complete and
 11 correct record of my testimony, and that the
 12 answers on the record as given by me are true
 13 and correct.
 14
 15
 16
 17 DANA LaFORGE
 18
 19
 20 Signed and subscribed to before me,
 21 this _____ day of _____, 2017.
 22
 23
 24
 25 Notary Public, State of _____

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1 C E R T I F I C A T E

2

3 STATE OF NEW YORK)

4) ss:

5 COUNTY OF NEW YORK)

6

7 I, MARIANNE WITKOWSKI-SMITH, a Notary

8 Public within and for the State of New York,

9 do hereby certify:

10 That DANA LaFORGE, the witness whose

11 deposition is hereinbefore set forth, was

12 duly sworn by me and that such deposition is

13 a true record of the testimony given by such

14 witness.

15 I FURTHER CERTIFY that I am not related

16 to any of the parties to this action by blood

17 or marriage and that I am in no way interested

18 in the outcome of this matter.

19 IN WITNESS WHEREOF, I have hereunto set

20 my hand this 28th day of April, 2017.

21

22

23

24 _____

25 MARIANNE WITKOWSKI-SMITH

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1 ***ERRATA***

2 ELLEN GRAUER COURT REPORTING CO. LLC

3 126 East 56th Street, Fifth Floor

4 New York, New York 10022

5 212.750.6434

6 NAME OF CASE: IN RE CONSTELLATION ENTERPRISES

7 DATE OF DEPOSITION: APRIL 27, 2017

8 NAME OF WITNESS: DANA LaFORGE

9 PAGE LINE FROM TO REASON

10 _____

11 _____

12 _____

13 _____

14 _____

15 _____

16 _____

17 _____

18 _____

19 _____

20 _____

21 _____

22 Subscribed and sworn before me

23 this _____ day of _____, 20____.

24 _____

25 (Notary Public) My Commission Expires:

[illegible]

In re: Constellation Enterprises LLC, et al.

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Ellen Grauer Court Reporting Co. LLC

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(14) wish - 8

Exhibit 11

From: Hazan, Nava
To: Rubin, Jason; Alberino, Scott L.
CC: Kinel, Norman N.; Lerner, Stephen D.
Sent: 8/15/2016 8:07:07 PM
Subject: RE: Term Sheet - FINAL PDF
Attachments: SettlementTerm Sheet8@15_1082574943_1 - SettlementTerm Sheet8@15_1082574....pdf;
SettlementTerm Sheet8@15_1082574943_2.docx

SUBJECT TO FRE 408

-
Scott and Jason,

Attached please find a revised draft of the term sheet. We are available to discuss as soon as you can.

Thank you.

SQUIRE
PATTON BOGGS

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Partner
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From: Rubin, Jason [mailto:jrubin@AKINGUMP.com]
Sent: Monday, August 15, 2016 4:15 PM
To: Lerner, Stephen D.
Cc: Hazan, Nava; Kinel, Norman N.; Alberino, Scott L.
Subject: RE: Term Sheet - FINAL PDF

SUBJECT TO FRE 408

-
Stephen,

As discussed, attached is a revised draft of the term sheet. We remain available to discuss.

Thanks.

Jason

Jason P. Rubin
Direct: [+1 212.872.7489](tel:+12128727489) | Internal: [37489](tel:37489)

From: Rubin, Jason
Sent: Monday, August 15, 2016 7:43 AM
To: Alberino, Scott L.; Lerner, Stephen D.
Cc: Hazan, Nava; Kinel, Norman N.
Subject: RE: Term Sheet - FINAL PDF

SUBJECT TO FRE 408

Attached is a revised draft of the term sheet and a redline vs. the draft you circulated on Saturday.

We're available to discuss.

Thanks.

Jason

Jason P. Rubin

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From: Alberino, Scott L.
Sent: Sunday, August 14, 2016 2:53 PM
To: Lerner, Stephen D.
Cc: Rubin, Jason; Hazan, Nava; Kinel, Norman N.
Subject: Re: Term Sheet - FINAL PDF

We are trying to set up a call for today.

Scott Alberino

On Aug 14, 2016, at 2:48 PM, Lerner, Stephen D. <stephen.lerner@squirepb.com> wrote:

???

From: Lerner, Stephen D.
Sent: Sunday, August 14, 2016 10:34 AM
To: 'Rubin, Jason'; Hazan, Nava; Kinel, Norman N.; Alberino, Scott L.
Subject: RE: Term Sheet - FINAL PDF

Any update on whether we can talk today?

From: Rubin, Jason [<mailto:jrubin@AKINGUMP.com>]
Sent: Saturday, August 13, 2016 3:32 PM
To: Hazan, Nava; Lerner, Stephen D.; Kinel, Norman N.; Alberino, Scott L.
Subject: RE: Term Sheet - FINAL PDF

Thank you. We will send to our clients and let you know when we're ready to discuss. Presume it will be tomorrow.

Jason P. Rubin

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From: Hazan, Nava [<mailto:nava.hazan@squirepb.com>]
Sent: Saturday, August 13, 2016 3:10 PM
To: Rubin, Jason; Lerner, Stephen D.; Kinel, Norman N.; Alberino, Scott L.
Subject: RE: Term Sheet - FINAL PDF

This is our word version. Thank you.

From: Rubin, Jason [<mailto:jrubin@AKINGUMP.com>]
Sent: Saturday, August 13, 2016 3:08 PM
To: Lerner, Stephen D.; Kinel, Norman N.; Alberino, Scott L.
Cc: Hazan, Nava
Subject: RE: Term Sheet - FINAL PDF

Can you please send a word version, as well as a redline vs our prior draft? Thank you.

Jason P. Rubin

Direct: [+1 212.872.7489](tel:+1212.872.7489) | Internal: [37489](#)

From: Lerner, Stephen D. [<mailto:stephen.lerner@squirepb.com>]
Sent: Saturday, August 13, 2016 3:06 PM
To: Rubin, Jason; Kinel, Norman N.; Alberino, Scott L.
Cc: Hazan, Nava; Lerner, Stephen D.
Subject: RE: Term Sheet - FINAL PDF

SUBJECT TO FRE 408

Scott and Jason, Attached for settlement purposes only is a counter-offer to your recent proposal which we are prepared to recommend to the Committee, which has not yet reviewed or approved it. In order to move the process along, we would be happy to schedule a call to discuss either before 6 pm ET today or any time tomorrow. Thank you.

Best,
Stephen

From: Rubin, Jason [<mailto:jrubin@AKINGUMP.com>]
Sent: Friday, August 12, 2016 1:01 PM
To: Kinel, Norman N.; Alberino, Scott L.
Cc: Lerner, Stephen D.; Hazan, Nava
Subject: RE: Term Sheet - FINAL PDF [I-AMS.FID3638389]

SUBJECT TO FRE 408

Attached is a revised draft of the term sheet, with a redline against the version you circulated on Wednesday. Please note that this is subject to ongoing internal and client review.

We are available to discuss.

Thanks.

Jason

Jason P. Rubin

Direct: [+1 212.872.7489](tel:+1212.872.7489) | Internal: [37489](#)

From: Kinel, Norman N. [<mailto:norman.kinel@squirepb.com>]
Sent: Wednesday, August 10, 2016 6:23 PM
To: Alberino, Scott L.; Rubin, Jason
Cc: Lerner, Stephen D.; Hazan, Nava
Subject: Term Sheet - FINAL PDF [I-AMS.FID3638389]

FRE 408

Dear Scott and Jason,

Attached, for settlement purposes only, is a term sheet approved this afternoon by the Committee, which would resolve all outstanding issues between the Committee, on the one hand, and the Debtors and the Noteholders, on the other.

As already communicated by Stephen, we are available to meet or discuss tomorrow. You should also feel free to contact us with any questions today.

Best,

Norman

<image001.jpg> **Norman N. Kinel**
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**SPB DRAFT TO AGSH&F COMMENTS 8/15/16
CONFIDENTIAL- FOR SETTLEMENT DISCUSSION PURPOSES ONLY
SUBJECT TO FRE 408**

In re Constellation Enterprises LLC, et al.

Settlement Term Sheet

This settlement term sheet (the "Term Sheet") summarizes the terms of the settlement (the "Settlement") among the Debtors, the Purchaser, the Creditors' Committee and the Ad Hoc Noteholder Group (each, respectively, as defined below, and, collectively, the "Parties").

Parties:

Constellation Enterprises LLC and its direct and indirect subsidiaries that are debtors and debtors in possession in Case No. 16-11213 (CSS) (the "Debtors").

The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the Debtors.

The ad hoc group (the "Ad Hoc Noteholder Group") of unaffiliated holders (the "Noteholders") of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the "Notes"). The Ad Hoc Noteholder Group and the Creditors' Committee are collectively referred to herein as the "Creditor Parties."

CE Star Holdings, LLC, a Delaware limited liability company ("Purchaser").

**Resolution of
Creditors'
Committee
Objections:**

The Creditors' Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order") and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,200,000 on the allowed professional fees of the Creditors' Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors' Committee investigation pursuant to the Final DIP Order).

**Creditors’
Committee Support
for Sale:**

The Creditors’ Committee (a) shall affirmatively support, and not object to the approval of the proposed sale (the “Sale”) of substantially all of the assets of the Debtors (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company) to Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (as amended, modified or supplemented, the “APA”), (b) will affirmatively support, and not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale, and (c) shall affirmatively support, and not object to the approval of the proposed sale of the assets of Debtors Columbus Holdings Inc. and Columbus Steel Casting Company to 476 Bridge Street LLC.

**Claims and Causes
of Action:**

The Purchaser shall cause the APA to be amended at closing so that the following shall be “Excluded Assets” under the APA and shall be contributed to the GUC Trust: (a) all causes of action under chapter 5 of title 11 of the United States Code against those unsecured creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the companies acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) former directors and officers, (ii) current and former shareholders and their affiliates and (iii) other parties, and the Debtors shall contribute any estate causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief (collectively, “Specified Causes of Action”).

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity shall be contributed to the GUC Trust.

The Purchaser shall pay to the Debtors or the GUC Trust (as defined below) the amount required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies relating to the Specified Causes of Actions in an amount of not less than \$475,000 as currently described in the Wind Down Budget (as defined in the APA).

The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA.

GUC Trust:

In consideration for the Creditors’ Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the

“Closing Date”) a trust to be established on terms, and with an oversight committee, the majority of the members of which shall be selected and approved by the Creditors’ Committee (the “Oversight Committee”) and with a trustee (the “Trustee”) and professionals to be selected and approved by the Creditors’ Committee and the Ad Hoc Noteholder Group (the “GUC Trust”) and deposit the following cash amounts in a trust account specifically designated by the Creditors’ Committee: (i) \$2,500,000 (the “GUC Recovery Trust Fund Contribution”), (ii) \$750,000 (the “GUC Professional Fees Contribution”) and together with the GUC Recovery Trust Fund Contribution, the “Committee Settlement Funding Obligations”), subject to the Purchaser’s option to fund additional amounts if the GUC Trust’s pursuit of the Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the “GUC Holders”) will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action will be allocated among (i) the GUC Holders, and (ii) the holders of deficiency claims with respect to the Notes (the “Deficiency Holders”) as follows: (i) 100% for the GUC Holders for the first \$1 million of net proceeds from the pursuit of any Specified Causes of Action, and (ii) 60% for the GUC Holders and 40% for the Deficiency Holders for any net proceeds over the first \$1 million of net proceeds from the pursuit of any Specified Causes of Action.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action for the benefit of the GUC Trust.

The Debtors shall bear primary responsibility (and shall consult with the Trustee) to conduct the claims reconciliation process, the professional fees for which shall be deemed Seller Retained Professional Fees as defined in the APA. The Purchaser shall cooperate fully with the Debtors and Trustee in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process. The Purchaser and the Debtors shall cooperate fully with the Trustee in connection with the administration of the Trust, and shall provide

reasonable access to employees and business records in connection with such administration.

Other Terms and Conditions of the Settlement:

Upon agreement by the parties to the terms hereof and related documentation, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors' chapter 11 cases through the Closing Date.

Conditions to Funding of the GUC Trust:

- The Bankruptcy Court enters the Final DIP Order.
- The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay.
- The Closing Date occurs.
- The Creditor Parties shall not be in breach of this Term Sheet.

Mutual Release and Exculpation:

The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall exchange full mutual releases and exculpations.

Timing:

The terms of this Term Sheet shall be read into the record at the hearing on the approval of the Sale and incorporated into the Sale Order and shall be binding on all parties in interest, including a Chapter 7 trustee. The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including, if necessary, seeking a separate order of the Court.

Exit:

The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee and the Ad Hoc Noteholder Group.

~~SPB DRAFT TO AGSH&F COMMENTS TO SPB DRAFT 8/15/16~~
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The Official Committee of Unsecured Creditors (the "Creditors' Committee") of the Debtors.

The ad hoc group (the "Ad Hoc Noteholder Group") of unaffiliated holders (the "Noteholders") of the 11.125% First Priority Senior Secured Notes due February 1, 2018 (the "Notes"). The Ad Hoc Noteholder Group and the Creditors' Committee are collectively referred to herein as the "Creditor Parties."

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**Resolution of
Creditors'
Committee
Objections:**

The Creditors' Committee will (a) withdraw any pending objections to the motion seeking approval of the Debtors' debtor-in-possession financing (the "DIP Motion") and the proposed form of final order approving such financing (the "Final DIP Order") and (b) not contest or challenge, or solicit others to contest or challenge the DIP Motion or any stipulations by the Debtors for the benefit of the Noteholders contained in the Final DIP Order, including any stipulations regarding the validity, extent, perfection, priority and/or non-avoidability of obligations evidenced by the Notes or the liens securing the Notes or adequate protection; provided, however, that the Final DIP Order shall provide for a cap of \$2,000,000 on the allowed professional fees of the Creditors' Committee through the DIP Termination Date (as defined in the Final DIP Order), including any amounts incurred in connection with the Creditors' Committee investigation pursuant to the Final DIP Order).

Creditors' Committee Support for Sale:

The Creditors' Committee (a) shall affirmatively support, and not object to the approval of the proposed sale (the "Sale") of substantially all of the assets of the Debtors (excluding the assets of Columbus Holdings Inc. and Columbus Steel Casting Company) to Purchaser pursuant to that certain asset purchase agreement, dated July 14, 2016 (as amended, modified or supplemented, the "APA"), (b) will affirmatively support, and not object to, or solicit others to object to the right of the Ad Hoc Noteholder Group to credit bid the full amount of the Notes in connection with any such Sale, and (c) shall affirmatively support, and not object to the approval of the proposed sale of the assets of Debtors Columbus Holdings Inc. and Columbus Steel Casting Company to 476 Bridge Street LLC.

Claims and Causes of Action:

The Purchaser shall cause the APA to be amended at closing so that the following shall be "Excluded Assets" under the APA and shall be contributed to the GUC Trust: (a) all causes of action under chapter 5 of title 11 of the United States Code against those unsecured creditors of the Debtors which are not vendors, suppliers or service providers that will provide goods and services to the companies acquired by the Purchaser, (b) all commercial tort claims including, without limitation, claims against (i) former directors and officers, (ii) current and former shareholders and their affiliates and (iii) other parties, and the Debtors shall contribute any estate causes of action against Private Equity Opportunity Partners, LP (including any affiliates, subsidiaries, parent companies, officers, directors and agents) or related to the Prepetition DDTL (as defined in the Final DIP Order), including for recharacterization or other relief: (collectively, "Specified Causes of Action").

Any Specified Causes of Action that any member of the Ad Hoc Noteholder Group holds in its own capacity shall be contributed to the GUC Trust.

The Purchaser shall pay to the Debtors or the GUC Trust (as defined below) the amount required to purchase tail insurance (6 years runoff) related to any and all directors and officers insurance policies relating to the Specified Causes of Actions in an amount of not less than \$475,000 as currently described in the Wind Down Budget (as defined in the APA).

The Purchaser agrees not to prosecute any causes of action (including chapter 5 actions) that it acquires under the APA.

GUC Trust:

In consideration for the Creditors' Committee support of the Sale and the DIP Motion, the members of the Ad Hoc Noteholder Group agree to cause the Purchaser to fund on the closing date of the Sale (the

“Closing Date”) a trust to be established on terms, and with a trustee ~~(the “Trustee”)~~, an oversight committee, the majority of the members of which shall be selected and approved by the Creditors’ Committee (the “Oversight Committee”) and with a trustee (the “Trustee”) and professionals, to be selected and approved by the Creditors’ Committee and the Ad Hoc Noteholder Group (the “GUC Trust”) and deposit the following cash amounts in a trust account specifically designated by the Creditors’ Committee: (i) ~~\$1,000~~2,500,000 (the “GUC Recovery Trust Fund Contribution”), (ii) \$750,000 (the “GUC Professional Fees Contribution” and together with the GUC Recovery Trust Fund Contribution, the “Committee Settlement Funding Obligations”), subject to the Purchaser’s option to fund ~~an~~ additional amounts if the GUC Trust’s pursuit of the Specified Causes of Action demonstrates a reasonable likelihood of material recoveries. The Committee Settlement Funding Obligations amount will not be part of the Purchase Price (as defined in the APA), but rather shall be a separate cash obligation of the members of the Ad Hoc Noteholder Group who are capitalizing the Purchaser.

The holders of allowed general unsecured, non-priority claims against the Debtors, excluding deficiency claims of the pre-petition secured creditors (the “GUC Holders”) will be the sole and exclusive beneficiaries of the GUC Recovery Trust Fund Contribution.

The net proceeds recovered from the pursuit of any Specified Causes of Action will be allocated among (i) the GUC Holders, and (ii) the holders of deficiency claims with respect to the Notes (the “Deficiency Holders”); ~~50”) as follows:~~ (i) 100% for the GUC Holders for the first \$1 million of net proceeds from the pursuit of any Specified Causes of Action, and ~~50~~(ii) 60% for the GUC Holders and 40% for the Deficiency Holders for any net proceeds over the first \$1 million of net proceeds from the pursuit of any Specified Causes of Action.

The GUC Professional Fees Contribution shall be used, as determined by the Trustee and the Oversight Committee, for (a) all administrative costs of the GUC Trust, and (b) the investigation and prosecution of the Specified Causes of Action for the benefit of the GUC Trust.

~~The Trustee~~Debtors shall bear ~~sole~~primary responsibility for any and all work-related ~~(and shall consult with the Trustee) to conduct the claims reconciliation and distributions from the GUC Trust process, the professional fees for which shall be deemed Seller Retained Professional Fees as defined in the APA. The Purchaser and the Debtors shall cooperate fully with the Debtors and Trustee in the claims reconciliation process and shall provide reasonable access to employees and business records in connection with such process. The~~

	<u>Purchaser and the Debtors shall cooperate fully with the Trustee in connection with the administration of the Trust, and shall provide reasonable access to employees and business records in connection with such administration.</u>
Other Terms and Conditions of the Settlement:	Upon agreement by the parties to the terms hereof and related documentation, the Creditor Parties shall make good faith efforts to minimize all future administrative costs incurred by them in the Debtors' chapter 11 cases through the Closing Date.
Conditions to Funding of the GUC Trust:	<ul style="list-style-type: none"> • The Bankruptcy Court enters the Final DIP Order. • The Bankruptcy Court approves the Sale (or a Sale to a third party supported by the Ad Hoc Noteholder Group) and the Sale is not subject to a present stay. • The Closing Date occurs. • The Creditor Parties shall not be in breach of this Term Sheet.
Mutual Release and Exculpation:	The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall exchange full mutual releases and exculpations.
Timing:	<p>The terms of this Term Sheet shall be read into the record at the hearing on the approval of the Sale and incorporated into the Sale Order, and the <u>and shall be binding on all parties in interest, including a Chapter 7 trustee.</u> The Creditors' Committee, the Purchaser, the Ad Hoc Noteholder Group and the Debtors shall negotiate in good faith regarding the most efficient and appropriate course of action for implementing the terms hereof including, if necessary, seeking a separate order of the Court.</p>
Exit:	The Debtors' chapter 11 cases shall be dismissed by structured dismissal on terms that are consistent with this Term Sheet and are otherwise acceptable to the Creditors' Committee and the Ad Hoc Noteholder Group.