

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF DCL CORPORATION (the "**Applicant**")

AFFIDAVIT OF NANCY THOMPSON

(Sworn February 22, 2023)

I, **Nancy Thompson**, of the City of Brampton, in the Regional Municipality of Peel,
MAKE OATH AND SAY AS FOLLOWS:

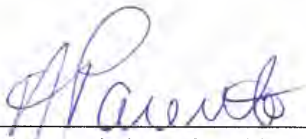
1. I am a law clerk at Blake, Cassels & Graydon LLP ("**Blakes**"), lawyers for the Applicant, and as such have knowledge of the matters deposed to in this affidavit.
2. This affidavit is intended to supplement the affidavit of Scott Davido sworn February 15, 2023 (the "**Third Davido Affidavit**") in support of the Applicant's motion for an order, among other things, authorizing the Applicant to enter into the Stalking Horse APA and approving the Final Bidding Procedures. Capitalized terms not otherwise defined herein have the meaning ascribed to them in the Third Davido Affidavit.
3. I am advised by Linc Rogers of Blakes that at the Second Day Hearing on February 21, 2023, which he attended virtually, certain minor amendments were contemplated to the Stalking Horse APA. Attached hereto as **Exhibit "A"** is a blackline of the contemplated amendments,

with changed page only. I am further advised by Mr. Rogers that, as at the time of swearing, all parties in interest have not formally consented to the amendments, but no issues are anticipated.

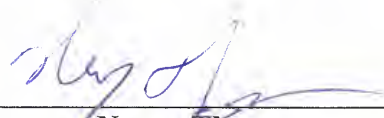
4. Attached hereto as **Exhibit "B"** is a copy of the transcript of the hearing before the Honourable J. Kate Stickles of the US Bankruptcy Court dated February 21, 2023. Her Honour's ruling approving the Final Bidding Procedures begins at line 21 on page 89 of the transcript.

SWORN BEFORE ME

☒ in person OR ☐ by video conference
at the City of Toronto, on February 22, 2023.



A commissioner for taking affidavits, etc.
Alexia Parente
LSO#: 81927G

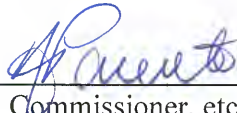


Nancy Thompson

This is **Exhibit "A"** referred to in the

Affidavit of Nancy Thompson

sworn before me
this 22nd day of February, 2023



A Commissioner, etc.

Alexia Parente (LSO #81927G)

“Critical Vendor Order” means either the final Order entered in the US Bankruptcy Cases or the final Order entered in the CCAA Proceeding authorizing Sellers to pay Critical Vendor Claims.

“Cure Costs” means all cash amounts that, pursuant to section 365 of the US Bankruptcy Code or section 11.3(4) of the CCAA, will be required to be paid as of the Closing Date to cure any monetary defaults on the part of Sellers under the Purchased Contracts, in each case to the extent such Contract was entered into prior to the commencement of the Bankruptcy Cases and as a prerequisite to the assumption of such Purchased Contracts under section 365 of the US Bankruptcy Code or as a prerequisite to the assignment of such Purchased Contracts under section 11.3(1) of the CCAA; *provided, however*, in the case of any Contract, such Contract is executory and, in the case of any Lease, such Lease is unexpired.

“Debt Financing” means any debt financing incurred by Purchaser in connection with the transactions contemplated by this Agreement.

“Designated Amount” means \$2,000,000, which shall be utilized solely to conduct an orderly wind-down of Sellers after the Closing, of which \$575,000 shall be delivered to the Monitor, on behalf of the Canadian Seller, and \$1,425,000 shall be delivered to the US Sellers. For the avoidance of doubt, if the reasonable and documented costs incurred by either the US Sellers or the Canadian Seller in connection with the orderly wind-down of applicable Sellers after the Closing and the administration (including any claims reconciliation), closing, conversion or dismissal of the US Bankruptcy Cases and CCAA Proceeding (and any subsequent proceedings), as applicable, are less than the Designated Amount with respect to such Sellers (i) the US Seller shall return (if any) any remaining amounts to Purchaser, and (ii) the Canadian Seller shall transfer any remaining amounts to the CCAA Cash Pool.

“Designated Location” means the facilities of the Canadian Seller referenced on Section 1.1 of the Seller Disclosure Schedule.

“DIP Credit Agreement” means the debtor in possession credit agreement provided in accordance with the terms, and subject to the conditions, set forth thereof and in the DIP Orders, each of which shall be acceptable to Purchaser.

“DIP Facility” means the debtor in possession credit facility provided in accordance with the terms, and subject to the conditions, set forth in the DIP Credit Agreement and the DIP Orders, each of which shall be acceptable to Purchaser.

“DIP Lenders” means all Persons who are lenders under the DIP Credit Agreement, each in its capacity as such.

“DIP Orders” means, together, the US DIP Order and the CCAA DIP Order.

“Dutch Deed of Transfer” means the notarial deed of transfer, in substantially the form attached as Exhibit A, to effect the transfer of the Dutch Shares to Purchaser.

“Dutch Shares” means six hundred thousand (600,000) ordinary shares in the share capital of DCL Corporation (NL) B.V., with a nominal value of 1 euro (EUR 1) numbered 1 up to and including 600,000.

This is **Exhibit "B"** referred to in the

Affidavit of Nancy Thompson

sworn before me
this 22nd day of February, 2023



A Commissioner, etc.

Alexia Parente (LSO #81927G)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Chapter 11
. Case No. 22-11319 (JKS)
DCL HOLDINGS (USA), Inc., .
et al., . (Jointly Administered)
. .
. Courtroom No. 6
. 824 Market Street
Debtors. . Wilmington, Delaware 19801
. .
. Tuesday, February 21, 2023
. . 2:09 p.m.
.

TRANSCRIPT OF ZOOM HEARING
BEFORE THE HONORABLE J. KATE STICKLES
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Amanda R. Steele, Esquire
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-and-

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Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

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INDEX

MOTIONS:

PAGE

Agenda

Item 1:	Motion of the Debtors for Entry of an Order Approving Debtors' Key Employee Incentive Program	15
	[Docket No. 82 - filed December 29, 2022]	

Agenda

Item 2:	Motion of Debtors for Entry of Interim and Final Orders Authorizing (I) Debtors to Pay Claims of Critical and Foreign Vendors and Shippers and Warehousemen in the Ordinary Course of Business and (II) Financial Institutions to Honor and Process Related Checks and Transfers	18
	[Docket No. 11 - filed December 20, 2022]	

Agenda

Item 3:	Debtors' Application for Authority to Retain King & Spalding LLP as Counsel to the Debtors and Debtors in Possession Nunc Pro Tunc to the Petition Date	20
	[Docket No. 85 - filed December 29, 2022]	

Agenda

Item 4:	Debtors' Motion for Entry of Interim and Final Orders (I) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Utility Services, (II) Determining Adequate Assurance of Payment for Future Utility Services, (III) Establishing Procedures for Determining Adequate Assurance of Payment, and (IV) Granting Related Relief	21
	[Docket No. 10 - filed December 20, 2022]	

Court's Ruling:	23
-----------------	----

INDEXMOTIONS:PAGE

Agenda

Item 5: Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors and Debtors in Possession to (A) Obtain Post-petition Financing, (B) Use Cash Collateral, (C) Grant Liens and Super-Priority Claims, and (D) Grant Adequate Protection; (II) Modifying the Automatic Stay; (III) Scheduling a Final Hearing; and (IV) Granting Related Relief [Docket No. 27 - filed December 21, 2022]

Court's Ruling: 44

Agenda

Item 6: Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into and Perform Under the Stalking Horse Asset Purchase Agreement, (II) Approving Bidding Procedures for the Sale of the Debtors' Assets, (III) Scheduling Hearings and Objection Deadlines with Respect to the Sale, (IV) Scheduling Bid Deadlines and an Auction, (V) Approving the Form and Manner of Notice Thereof, (VI) Approving Contract Assumption and Assignment Procedures, and (VII) Granting Related Relief [Docket No. 74 - filed December 22, 2022]

Court's Ruling: 89

Agenda

Item 7: Cooper River Partners, LLC's Motion to Clarify the Inapplicability of the Automatic Stay [Docket No. 245 - filed February 18, 2023]

8

INDEXMOTIONS:PAGE

Agenda

Item 8:	Cooper River Partners, LLC's Motion to Exclude Evidence and Testimony of Scott Davido and Tabb Neblatt, or in the Alternative, Compel the Depositions of Scott Davido and Tabb Neblatt and Adjourn the Hearing [Docket No. 251 - filed February 21, 2023]	8
---------	--	---

EXHIBITSDECLARATIONS:PAGE

1) Declaration of Tabb Neblatt	62
Transcriptionists' Certificate	92

1 (Proceedings commence at 2:08 p.m.)

2 (Call to order of the Court)

3 THE COURT: Good afternoon, everyone. Please be
4 seated.

5 For those on Zoom, I'm Judge Stickles. We're on
6 the record in DCL Holdings (USA), Inc., Case Number 22-11319.

7 I'll turn the virtual podium over to debtors'
8 counsel.

9 MS. STEELE: Good after --

10 THE COURT: Ms. Steele.

11 MS. STEELE: Good afternoon, Your Honor. For the
12 record, Amanda Steele, Richards, Layton & Finger, on behalf
13 of the debtors.

14 Thank you, Your Honor, for giving us additional
15 time this afternoon. It has become fruitful, and we hope
16 that it will be an uncontested hearing.

17 I'm turning the podium over to my co-counsel from
18 King & Spalding Jeff Dutson to go through --

19 THE COURT: Okay.

20 MS. STEELE: -- the agenda.

21 THE COURT: Great. Thank you, Ms. Steele.

22 MR. DUTSON: Good afternoon, Your Honor. Jeff
23 Dutson with King & Spalding on behalf of the debtors. I'm
24 joined today by my partner Michael Handler and my colleague
25 Brooke Bean, at counsel table. Also in the courtroom we have

1 Scott Davido, who serves as the debtors' Chief Restructuring
2 Officer, as well as Tabb Neblett with TM Capital, who is the
3 debtors' investment banker.

4 As Ms. Steele said, we would like to thank the
5 Court very much for accommodating our scheduling issues over
6 the past several weeks. It has been fruitful and we
7 appreciate the Court's accommodation.

8 We also want to thank the other parties-in-
9 interest: Our stalking horse purchaser, our DIP lender, the
10 committee, Cooper River Partners. The parties and their
11 advisors have been working around the clock over the past
12 several weeks to get us where we are today, and the debtors
13 certainly are appreciative of all the support.

14 I think, if it's okay with Your Honor, it may make
15 sense to address the Cooper River Partners agreement first.
16 There was a flurry of activity over the weekend, as you may
17 have seen.

18 THE COURT: Yes. I have -- I'm familiar with the
19 papers, I've read them. So I would appreciate an update of
20 where we stand with that.

21 MR. DUTSON: Yes, absolutely. So I will go ahead
22 and give you that update.

23 Cooper River Partners is the debtors' landlord at
24 the Bushy Park facility. This is one of the debtors'
25 manufacturing facilities, where they manufacture pigments.

1 It's a large industrial facility. On the same -- in the same
2 area, managed by Cooper River Partners, are various other
3 tenants. The debtors operate a wastewater treatment facility
4 that provides services, both for the debtors to process its
5 waste that it's produced in a safe and environmental way --
6 environmentally friendly way, and also services for the
7 tenants and Cooper River Partners.

8 Cooper River Partners filed an objection to our
9 bidding procedures motion, our utilities motion, and our DIP
10 motion. They had also filed notices of deposition, as well
11 as a motion to clarify last week regarding the wastewater
12 services agreement.

13 Again, we're very pleased to report that the
14 parties have reached an agreement to resolve all of those
15 open issues.

16 THE COURT: And the motion in limine?

17 MR. DUTSON: As well as the motion in limine.

18 THE COURT: Okay.

19 MR. DUTSON: So the agreement would resolve all of
20 the papers filed by Cooper River Partners. And if it's okay
21 with Your Honor, I'll state the terms of the deal for the
22 record, but you will also see aspects of the arrangement in
23 revised orders as we go through the agenda.

24 THE COURT: Okay. And I'll add Cooper River
25 raised a couple of comments in a few of their papers, which

1 has led the Court to have a couple of questions. But I'll
2 let you proceed with your presentation; and then, if I still
3 have questions, I'll ask them.

4 MR. DUTSON: Absolutely.

5 So, for purposes of the agreement -- and the
6 parties have been working, again, around the clock over the
7 last several days, constructively, to get to this place.

8 The first element is that the stalking horse
9 purchaser has agreed to designate all seven Cooper River
10 contracts as assumed contracts, provided that the parties
11 will amend and restate one of those contracts, which is known
12 as the "covenants agreement."

13 In addition to that --

14 THE COURT: Weren't there eight contracts?

15 MR. DUTSON: There were -- there's some confusion
16 about that. And Cooper River Partners, I think, confirmed
17 for us today that there are, in fact, seven contracts.

18 THE COURT: So that includes the wastewater
19 contract.

20 MR. DUTSON: It includes the wastewater contract.

21 To the extent there's an eighth, we'll evaluate
22 that. The debtors are free to assume that. But I think,
23 from Cooper River's standpoint, they want to make sure -- I
24 think, from their viewpoint, there's only seven, and those
25 seven are being assumed. The covenants agreement is going to

1 be amended and restated effective upon that assumption and
2 assignment.

3 The bidding procedure order will be amended to
4 provide that any qualified bidder must designate these
5 contracts as assumed contracts. One of the contracts, of
6 course, is the lease for the facility. So we think this is a
7 reasonable approach and one that's in the best interests of
8 the estates.

9 The debtors have agreed with Cooper River that the
10 cure costs under the lease agreement is \$1,229,328.98, plus
11 reasonable and documented attorneys' fees in an amount not to
12 exceed \$300,000, which would be paid at closing. That would
13 be the cure costs related to the assumption and assignment of
14 the seven contracts.

15 The debtors have agreed to pay Cooper River's
16 January invoice and the remaining portion of the December
17 invoice within four business days of today.

18 The debtors will pay --

19 THE COURT: Is that the million dollars referenced
20 in one of the pleadings? I think it was the objection.

21 MR. DUTSON: It is approximately a million
22 dollars. And I think the -- until recently, there was some
23 confusion about the exact precise amount. The debtors had
24 always intended to pay that amount and are affirmatively
25 agreeing to do so because it's a post-petition obligation and

1 it's provided for in our budget, and we are certainly happy
2 to make that payment.

3 The February invoice -- which, of course,
4 hasn't -- we're still in the midst of February -- will be
5 paid no later than five business days after the receipt of
6 that invoice.

7 And the debtors also agree that the total post-
8 petition amount due prior to weekly billing -- which I'll
9 discuss in just a minute -- will be \$1,125,493.11. This,
10 again, will be incorporated into the DIP order.

11 So, going forward, Cooper River will provide
12 weekly estimated invoices in an amount not to -- in an amount
13 not to exceed \$250,000 per week. The debtors agree to pay
14 those invoices within four business days of receipt. And the
15 first weekly invoice will be sent by Cooper River on March
16 6th. So they'll provide invoices on Monday; we'll pay them
17 on Friday. And again, this is in our existing budget that
18 was filed last week.

19 Those are the terms of the settlement that we've
20 reached with Cooper River Partners.

21 I'm happy to yield the podium of Cooper River or
22 Blackstone would like to clarify or confirm.

23 (Participants confer)

24 MR. DUTSON: And there -- as you may have seen in
25 our utilities order, we did delete one paragraph at their

1 request. I'm not sure if that pertains to one of your
2 questions. But that will be reflected in the next -- when we
3 get to the utilities motion.

4 THE COURT: Okay. Looking -- let me just ask you.
5 So now that the -- what -- where do we stand with wastewater
6 services?

7 MR. DUTSON: So the debtors have continued -- as
8 you probably saw from the papers, in August, I believe, the
9 debtors sent a notice of termination with respect to the
10 wastewater --

11 THE COURT: Right.

12 MR. DUTSON: -- services agreement that would be
13 effective at the end of the year. In that notice, the
14 debtors were very clear that they intended to continue
15 providing wastewater treatment services for Cooper River.
16 The point of the termination was so that the parties could
17 renegotiate a more favorable pricing structure.

18 So the debtors have continued to provide those
19 services and will, through the closing date, continue to
20 provide wastewater services. I think the debtors recognize,
21 if they didn't provide that for Cooper River, it's a bit of a
22 house of cards and a lot of things could go haywire. So it's
23 never been their intention to cease those services.

24 THE COURT: Okay. And so, with respect to the
25 data room.

1 MR. DUTSON: Yes.

2 THE COURT: Are all those agreements related to
3 Bushy Park, are they now in the data room?

4 MR. DUTSON: They either are in the data room; or,
5 if not, they definitely will be. I think the -- I think the
6 correct answer is that they are in the data room.

7 (Participants confer)

8 MR. DEHNEY: Your Honor, Robert Dehney. My
9 understanding is --

10 THE COURT: Mr. Dehney, do you want to come up, so
11 you can be picked up on the recordings?

12 MR. DEHNEY: Robert Dehney for CRP.

13 And my understanding is, as part of our deal, all
14 of these documents, as amended, are going to be in the data
15 room, so any and all buyers will see what they're dealing
16 with now that it's part of the package.

17 THE COURT: Okay. And let me just ask one other
18 question. Is there an amendment required to the debtors'
19 statements and schedules?

20 MR. DUTSON: I think there will be, Your Honor.

21 THE COURT: Okay. I didn't know if the U.S.
22 Trustee had a position on that.

23 MR. DUTSON: Yeah. We had our 341 meeting last
24 week, and there was a fair amount of discussion about
25 contracts in the schedules. And the debtors committed, after

1 evaluating anything, if there needed to be an amendment, we
2 would file an amendment --

3 THE COURT: Okay.

4 MR. DUTSON: -- to the statements and schedules.

5 THE COURT: Okay. Thank you. You may proceed.

6 MR. DUTSON: Thank you, Your Honor.

7 Obviously, the other significant update or item in
8 this case is with respect to the settlement that we've
9 reached with the committee and the purchaser and Wells Fargo.
10 I think probably the best way and most efficient way to
11 address that, actually, is for us to start walking through
12 the agenda.

13 THE COURT: Okay.

14 MR. DUTSON: The central terms of that agreement
15 are reflected in the documents that have been filed, and so
16 we can walk you through that agreement as we go forward. So,
17 if it's okay with Your Honor, I think we'll start with the
18 agenda.

19 THE COURT: Okay.

20 MR. DUTSON: The first item on the agenda is the
21 debtors' key employee incentive program motion which was
22 filed on December 29th.

23 As part of this global settlement with the
24 committee and other parties, the debtors have agreed to
25 withdraw that motion. We filed a notice of withdrawal, and

1 so that's what you see reflected on the agenda.

2 I think Ms. Morabito may have some comments
3 related to this one, as well.

4 THE COURT: Ms. Morabito.

5 MS. MORABITO: Thank you, Your Honor. Erika
6 Morabito, Quinn Emanuel. With me, I have Mr. Eric Monzo at
7 Morris James.

8 Yes, Your Honor. We ordinarily wouldn't jump up
9 on a motion that's being withdrawn. But because Mr. Dutson
10 is going to walk this Court through a global settlement
11 that's been reached and all of those terms and conditions
12 aren't readily apparent in the APA, for example, we thought
13 it would be helpful for the Court and those that were
14 listening to understand other key terms that were certainly
15 important to members of the committee.

16 And this had to do with the KEIP. As Mr. Dutson
17 indicated, this motion was filed on Docket Number 82. It
18 originally had sought \$730,000 of KEIP payments.
19 Subsequently, that was orally modified by the debtors, and I
20 don't think anything formal was filed, but they reduced the
21 amount to \$543,000.

22 The committee's primary concern with this was this
23 was a case that provided zero recovery to unsecured
24 creditors. In the views of the committee from the outset,
25 this was nothing more than the debtors flipping the keys to

1 the purchaser and it being funded by Wells, for Wells to be
2 paid off.

3 That's not our view of the world today, given the
4 negotiations over seven weeks. But the committee's position
5 was, unless we can show evidence that these KEIP payments --
6 which are significant in an extraordinarily tight budget --
7 could be something that the estate could afford and these
8 people were necessary to the successful transition, that we
9 thought it was more appropriate that Blackstone or any other
10 potential purchaser would enter into employment agreements
11 with whatever individuals they deemed would be necessary,
12 once the company was sold. Ultimately, that was a condition
13 to the global resolution that you'll hear about; and,
14 therefore, the KEIP has been withdrawn.

15 THE COURT: Okay. Thank you.

16 MS. MORABITO: Thank you, Your Honor.

17 THE COURT: And I do believe I saw a modification
18 in the asset purchase agreement that reflected a modification
19 with respect to employment offers.

20 MR. DUTSON: That's correct. And that was part of
21 our getting comfortable with withdrawing it, certainly,
22 knowing that the key employees will continue to be
23 incentivized to help us through the sale. They're obviously
24 critical to this process and important for all the
25 stakeholders.

1 The next item on the agenda is our critical vendor
2 order. We received informal comments from the committee. It
3 was filed under certification of counsel last week and
4 entered by the Court on February 14th. So, from the debtors'
5 perspective, I don't think we have anything to add, but would
6 yield the podium to Ms. Morabito.

7 MS. MORABITO: Thank you, Your Honor. Again,
8 Erika Morabito, Quinn Emanuel, on behalf of the committee.

9 I think there's no secret, and we represented this
10 to the Court at the next status conference -- at the last
11 status conference hearing about the importance of the
12 critical trade vendors and shippers in this case.

13 At the first-day hearings, I think Your Honor may
14 recall there was a representation by the debtors that there
15 were sufficient funds, a significant amount of funds that
16 were going to be paid out to critical vendors, foreign
17 vendors, and shippers.

18 And I can tell you that the committee was formed
19 on December 27th. Quinn Emanuel was selected as counsel on
20 January 3rd and -- along with Morris James, and Province was
21 selected on January 4th.

22 At the time that we were engaged, there were zero
23 dollars that were paid to critical trade vendors and there
24 were zero agreements executed; with respect to foreign trade
25 vendors, zero agreements executed, zero dollars paid to

1 foreign trade vendors; with respect to warehousemen and
2 shippers, zero dollars paid and zero agreements.

3 We're happy and pleased to report now, with the
4 committee's involvement, along with cooperation because it
5 required cooperation from Wells and the -- Blackstone as the
6 stalking horse purchaser and the debtors and the debtors'
7 advisors, we now have with respect to critical trade four
8 agreements executed in the U.S., which is about 2.25 million
9 that's committed to being paid.

10 With respect to the foreign trade vendors, there
11 is now 11 agreements executed, which is almost \$6 million
12 that have been committed to being paid.

13 And then you have the warehousemen and shippers.
14 That's about 1.48 million. And Your Honor may see in the
15 final critical trade vendor there was a cap at 1.5, so that's
16 pretty much where you would be.

17 So you've gone from zero on January 4th to,
18 roughly six and a half weeks, you now have \$9.7 million
19 that's being -- has been committed to paying critical and
20 foreign trade vendors for this company. And our
21 understanding is that there is at least two more agreements
22 that are being negotiated, so that number could rise.

23 Again, we think this is important because you will
24 see in the APA that there is a creation of a trust as part of
25 a pre-petition settlement. And we think that, when we get to

1 the global settlement, and certainly at the sale hearing and
2 anything that Your Honor wants to discuss today, that you're
3 going to see that this certainly supported a business
4 justification of the debtors.

5 There was clearly a stalemate going on when we got
6 involved between the debtors and the shippers. They just
7 weren't going to ship under any terms and conditions,
8 frankly, which is why you saw an interim critical -- a second
9 interim -- a second amended, and then, ultimately, you saw a
10 final. So we had to find a way to do something to get that
11 impasse moving forward because, without that, this case -- we
12 would have nothing, this case would be done.

13 I'm happy to answer any questions, Your Honor;
14 otherwise, I just wanted to make that statement for the
15 record.

16 THE COURT: No. Thank you. That's very helpful.

17 MS. MORABITO: Thank you.

18 MR. DUTSON: Your Honor, nothing further from us
19 on that motion.

20 And if it's okay with the Court, we'll move to
21 Item Number 3, which is the debtors' retention for -- or
22 application for authority to retain K&S, which I see the
23 Court entered an order this morning. We're thankful for that
24 and we don't have anything to add on that application, and I
25 don't think the committee does, as well.

1 So the next item on the agenda is -- unless Your
2 Honor has any questions, the next item on the agenda is our
3 utilities motion. And if it's okay with the Court, Brooke
4 Bean, an associate at our firm who's been a valuable member
5 of the team representing the debtors, is going to present
6 that motion to the Court.

7 THE COURT: Certainly.

8 MR. DUTSON: Thank you, Your Honor.

9 THE COURT: Thank you.

10 MS. BEAN: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MS. BEAN: I'm Brooke Bean on behalf of the
13 debtors.

14 As Mr. Dutson mentioned, the next item on the
15 agenda is the utilities motion, which was originally filed at
16 Docket Number 10. The debtors filed a revised form of
17 proposed final order at Docket Number 249.

18 As previously noted by Mr. Dutson, as well, any
19 objections -- the objections to the utilities motion from
20 Cooper River has been resolved as part of the settlement.

21 Your Honor, by this motion, the debtors seek a
22 final order prohibiting utility providers from altering,
23 refusing, or discontinuing services and establishing
24 procedures for determining adequate assurance for utility --
25 for payment for future utility services.

1 As we noted at the first-day hearing, the debtors
2 pay approximately \$1 million, on average, for utility
3 services per month, which is a reflection of the 12 months
4 immediately prior to the petition date. Following entry of
5 the interim order, the debtors also deposited approximately
6 \$531,000 in a segregated account as adequate assurance for
7 future utility services.

8 Your Honor, we also received an informal request
9 from U.S. Water to increase their portion of the adequate
10 assurance deposit. We're still working through the details
11 with U.S. Water, but the debtors have offered to increase
12 that portion -- their portion of the deposit to \$150,000. It
13 was previously just under 44,000. And that deposit will be
14 held by U.S. Water. We expect to have a final agreement with
15 U.S. Water in the coming days, but wanted to share that for
16 purposes of the record.

17 Your Honor, the proposed order authorizes
18 procedures whereby utility providers can request adequate
19 assurance -- additional adequate assurance, and the debtors
20 can negotiate, if need be, and, if needed, seek an order from
21 this Court. We believe that these procedures will be helpful
22 to the debtors and necessary as they continue their business.

23 As Your Honor will see in the revised proposed
24 order, we made minimal changes. But we're certainly happy to
25 walk the Court through those changes if helpful.

1 THE COURT: No, thank you.

2 MS. BEAN: Okay. With that being said, Your
3 Honor, we would request, for the reasons set forth in the
4 motion, that you would grant the proposed final order.

5 THE COURT: Okay. Well, let me ask: Does anyone
6 wish to be heard with respect to the utilities motion and the
7 revised proposed order that's been filed with the Court?

8 (No verbal response)

9 THE COURT: Okay. I hear none.

10 I'm satisfied based on the record presented that
11 the adequate assurance deposit is appropriate.

12 And I do appreciate the parties' resolution of the
13 Cooper River objection with respect to the utility motion.

14 Further, the proposed adequate assurance
15 protections are reasonable and consistent with procedures
16 that are routinely granted in this district. So I will enter
17 the revised proposed order that has been filed with the
18 Court.

19 MS. BEAN: Thank you, Your Honor.

20 With that, I will hand it over to my colleague
21 Michael Handler for the next --

22 THE COURT: Okay.

23 MS. BEAN: -- agenda item.

24 THE COURT: Thank you.

25 MR. HANDLER: Good afternoon, Your Honor. Michael

1 Handler of King & Spalding, counsel for the debtors and
2 debtors-in-possession.

3 Your Honor, as previewed by Mr. Dutson, I'm very
4 pleased to report that the debtors are seeking approval of
5 the DIP facility on a final basis, pursuant to the terms of
6 the proposed final DIP order filed on the docket at
7 Number 226, on a fully consensual basis. Now, as I will get
8 into, there are a few tweaks to that filed version of the DIP
9 order, but it's substantially final, hopefully.

10 THE COURT: Can you bear with me just a second?

11 MR. HANDLER: Sure.

12 THE COURT: I want to make sure I have the right
13 order in front of me.

14 (Pause in proceedings)

15 THE COURT: I'm looking at a blackline. Is it
16 Docket 226?

17 MR. HANDLER: Exactly.

18 THE COURT: Okay. Terrific.

19 MR. HANDLER: Yes.

20 THE COURT: We're on the same page.

21 MR. HANDLER: Perfect.

22 After much negotiation and hard work, the debtors,
23 the DIP agent, the DIP lender, the pre-petition secured
24 parties, and the creditors' committee were able to agree to
25 modifications to the proposed final DIP order that addressed

1 the creditors' committee's and Cooper River's concerns.

2 In conjunction with the negotiations with the
3 creditors' committee on a proposed final DIP order, the
4 debtors, the DIP lender, and the DIP agent, the pre-petition
5 secured parties have also agreed on an updated DIP budget,
6 which was filed at Docket Number 241. The updated DIP budget
7 includes an increase of committee professional fees by 1.8
8 million and an increase in the U.S. Trustee fees based on the
9 debtors' revised calculation.

10 As Mr. Dutson had said earlier, it's the debtors'
11 position that the DIP budget that was filed at Docket
12 Number 241 doesn't need to be amended to reflect the Cooper
13 River Partners settlement because the payments that we're
14 contemplating making were already included in the DIP budget.
15 We've just changed, you know, the timing of the payments.
16 That being said, we're still confirming with counsel to Wells
17 Fargo that they agree with that position. So I just wanted
18 to put that out there in case we do decide to file an updated
19 budget. I don't think it will be necessary, but just wanted
20 to flag that.

21 Your Honor --

22 THE COURT: Wait. Let me just stop you there.

23 MR. HANDLER: Sure.

24 THE COURT: When would you contemplate having
25 clarity on the DIP budget?

1 MR. HANDLER: I think we would caucus --

2 THE COURT: Today?

3 MR. HANDLER: -- today and --

4 THE COURT: Okay.

5 MR. HANDLER: -- file -- yeah.

6 THE COURT: So that it's --

7 MR. HANDLER: This is not --

8 THE COURT: Okay.

9 MR. HANDLER: -- something that -- no. This would
10 be --

11 THE COURT: I assume you want a DIP order
12 promptly.

13 MR. HANDLER: Exactly.

14 THE COURT: Okay.

15 MR. HANDLER: And I was putting that out there
16 just in respect to Mr. Fiorillo, but I'll -- I don't want to
17 speak for him.

18 THE COURT: Okay.

19 MR. HANDLER: Okay. Your Honor, if it's okay with
20 the Court, I would like to walk through the material changes
21 to the proposed DIP -- final DIP order, and then walk through
22 two changes that are not reflected in the proposed final DIP
23 order, but that we would like to make.

24 So the first change, material change, is to
25 Section 2.1(a), referencing the collateral. So we will

1 see --

2 THE COURT: Can you bear with me?

3 MR. HANDLER: Yeah, sure.

4 THE COURT: Do you have a page number?

5 MR. HANDLER: Page --

6 THE COURT: 23?

7 MR. HANDLER: -- 23 to Page 24.

8 THE COURT: Okay.

9 MR. HANDLER: So the proposed final DIP order
10 reflects the change providing that:

11 "Liens on avoidance actions are subject to
12 marshaling, such that the DIP agent and the DIP lender are
13 only entitled to enforce rights as against avoidance action
14 collateral, to the extent the value of all other collateral
15 is or will be insufficient to satisfy the DIP obligations as
16 determined in the sole discretion of the DIP agent."

17 The next change is in Section 2.3(a).

18 THE COURT: I'm sorry. Could you say that section
19 again?

20 MR. HANDLER: Sure. 2.3(a) on Page 28 of the
21 blackline.

22 THE COURT: Thank you.

23 MR. HANDLER: The carveout trigger cap was revised
24 to provide the committee professional fees, a carveout
25 trigger in an amount equal to the amount of fees and expenses

1 covered in the DIP budget from the trigger date through
2 March 17th, 2023. And the carveout trigger cap amount for
3 the debtors' professionals was revised to -- in an amount to
4 be the lesser of the amount of fees and expenses identified
5 in the DIP budget for the debtors through -- from the trigger
6 date through March 17th, 2023, and 500,000.

7 The next change is Section 2.3(b)(5), and that's
8 on Page 32.

9 THE COURT: Uh-huh.

10 MR. HANDLER: And that reflects our agreement to
11 increase the investigation budget for the committee's
12 professions to 250,000 from 50,000.

13 The next change is Section 2.6(d)(4).

14 (Pause in proceedings)

15 MR. HANDLER: And this -- so there's two changes:
16 One that's reflected in the blackline and one that I'm going
17 to walk you through now.

18 So the first change is we struck the pre-petition
19 term loan lender's right to receive the reporting in
20 Section 5.20 of the DIP credit agreement, and this just
21 relates to the budget reporting.

22 And then the other change, which is really a
23 conforming change, is to reflect the agreed adequate
24 protection amount of \$316,000, as reflected in the DIP
25 budget. I think there was just an inconsistency reflected in

1 the DIP order that we just didn't catch until after we filed
2 the proposed final DIP order.

3 The next change is Section 3.1 on Page 41. And
4 this adds the filing of a challenge as an event of default
5 under the DIP order, which, again, is a conforming change
6 just to match the DIP credit agreement.

7 And the next change is Section 3.4, modification
8 of the automatic stay, on Page 43. We added a proviso to the
9 language requiring that the DIP agent and the DIP lender
10 consent to an emergency hearing during the default notice
11 period, that -- with respect to the language requiring that
12 the DIP agent and the DIP lender consent to an emergency
13 hearing during the default notice period.

14 The sole issue that may be raised by the debtors
15 at such hearing is whether an event of default has occurred
16 or is continuing and providing a waiver of the debtors' right
17 to seek relief at such hearing, including, but not limited to
18 Section 105 of the Bankruptcy Code, in a manner that would
19 impair or restrict the rights and remedies of the DIP agent
20 or the DIP lender.

21 THE COURT: That provision that's limiting on the
22 debtor, that -- the committee's rights are fully reserved?

23 MR. HANDLER: Yes, Your Honor.

24 THE COURT: Okay. And likewise, the Court can
25 raise whatever issues the Court has, right?

1 MR. HANDLER: Yes, Your Honor.

2 THE COURT: Just the debtors.

3 MR. HANDLER: Yes, just the debtors.

4 THE COURT: Okay.

5 MR. HANDLER: The next change, Section 4.1(b),
6 with respect to the challenge period.

7 THE COURT: Yes. Could you explain this to me,
8 how this works, the challenge period works?

9 MR. HANDLER: In the sense of why was it changed
10 to February 23rd?

11 THE COURT: Well, I got confused in the middle of
12 Page 45 in the blackline.

13 MR. HANDLER: Sure.

14 THE COURT: And I just want to make sure I
15 understand it correctly because it's February 23rd, but then
16 it further modifies that. And maybe it's better addressed in
17 the committee. I just want to make sure I understand how
18 this --

19 MR. HANDLER: Sure.

20 THE COURT: -- challenge period works.

21 MR. HANDLER: Well, why don't I explain my -- I
22 will try -- I will try to explain it. And then, if others,
23 the committee or others, want to supplement or clarify, I'm
24 happy to --

25 THE COURT: Okay.

1 MR. HANDLER: -- to cede the podium.

2 So we've changed the challenge period to
3 February 23rd from 60 days from the formation of a committee.
4 So I think, practically speaking, it's 5 days earlier. And
5 then we have added language that, if the stalking horse APA
6 is terminated by the stalking horse purchaser and an
7 alternative bid for substantially all the assets of the
8 company isn't entered into, then the challenge period is
9 extended -- is deemed to be extended to the date that is 14
10 days following notice of termination of the stalking horse
11 APA, or if the Court confirms a plan of reorganization that
12 discharges the pre-petition term obligations. So, if either
13 of those happen, then the fourteen-day challenge period is
14 then deemed to be extended.

15 THE COURT: Okay.

16 MR. HANDLER: And the last change is to
17 Section 506(c), the paragraph covering 506(c) surcharge
18 waiver. I'm just looking for that.

19 (Pause in proceedings)

20 MR. HANDLER: That's on Page 49.

21 And we added language to the paragraph providing
22 that, until the closing of the stalking horse sale, pursuant
23 to which the 503(b)(9) claims are to be assumed, collateral
24 may be surcharged pursuant to Section 506(c) of the
25 Bankruptcy Code, to the extent necessary to satisfy the

1 outstanding 503(b)(9) claims. And any such surcharge shall
2 be made first against the proceeds with the term priority
3 collateral before surcharging any proceeds of ABL priority
4 collateral.

5 The last change that is not reflected in the
6 proposed final DIP order is adding a para -- I'm going to
7 have to refer to my phone because, unfortunately, I don't --
8 it's been happening in real time. Oh, thank you.

9 So the last change is to address the Cooper River
10 objections. Sure. And --

11 THE COURT: Certainly.

12 MR. HANDLER: -- Your Honor, may I ...

13 THE COURT: Uh-huh.

14 MR. HANDLER: Now this language is going to be
15 further tweaked, but the substance of it is ...

16 (Pause in proceedings)

17 MR. HANDLER: So, Your Honor, as you see, we
18 propose to add a new section, 5.14, with the header
19 "Agreements with Cooper River." And again, the language is
20 going to be tweaked a little bit, but the substance will
21 remain the same. And that paragraph provides that:

22 "The debtors will pay the post-petition invoices
23 of Cooper River Partners, LLC, in an amount not to exceed
24 \$1,125,493.11, which shall be paid no later than 5 business
25 days from the date" -- "5 business days from the date hereof.

1 "Cooper River will provide the debtors with weekly
2 estimated invoices in an amount not to exceed 250,000. The
3 debtors agree to pay these invoices within 4 business days of
4 receipt, with a true-up at the end of each month. Cooper
5 River shall send its first weekly invoice by March 6th,
6 2023."

7 So, Your Honor, hopefully, when you approve the
8 DIP, after -- we'll have a chance to caucus and I think agree
9 amongst the parties on final language that we'll send to the
10 Court for your approval.

11 THE COURT: Okay.

12 (Participants confer)

13 THE COURT: Let me ask if anyone wishes to be
14 heard with respect to the financing motion.

15 MS. MORABITO: I'm sorry, Your Honor. Did you say
16 does anybody else want to be heard?

17 THE COURT: Yes.

18 MS. MORABITO: Yes.

19 THE COURT: I'm sorry.

20 MS. MORABITO: The committee --

21 THE COURT: Did I just --

22 MS. MORABITO: -- would, please.

23 THE COURT: -- trail off? My apologies.

24 MS. MORABITO: Sorry.

25 THE COURT: I was just looking at my notes. I

1 think he answered all my questions, but I wanted to make
2 sure.

3 (Participants confer)

4 MS. MORABITO: Hi, Your Honor. Good afternoon
5 again. Erika Morabito, Quinn Emanuel, with my colleague Eric
6 Monzo at Morris James, on behalf of the committee.

7 The committee had just a couple of comments with
8 respect to the DIP motion. As Your Honor indicated, we are
9 looking at the blackline version, Document 226-2, which was
10 filed on February 14th.

11 I'm going to start with the provisions that I
12 think were relevant to the committee as part of the
13 negotiation, but we'll start backwards because Your Honor
14 raised it, which was Section 4.1(b), which is on Page 46 of
15 65, dealing with the challenge period.

16 We agree with what Mr. Handler stated, but I do
17 think there's a distinction here that I'm sure, if I don't
18 raise, Wells Fargo's lawyers are going to raise. If you look
19 at, on Page 45, right before you see the date, February 23rd,
20 the difference -- because you asked why the "provided
21 therefore" is there. Right above that, you will see that it
22 deals with the ABL agent and the pre-petition ABL lenders.

23 THE COURT: Uh-huh.

24 MS. MORABITO: That's Wells.

25 If you look at the following part, it's pre-

1 petition term loan agent or pre-petition term loan lenders.
2 That's Blackstone.

3 When you look at what this original document said,
4 everybody wanted releases and for the challenge period to
5 have been expired in order for this DIP to go forward. If
6 you look down to the language that was modified, you'll see
7 who this extra 14 days applies to is the pre-petition term
8 loan agent and the pre-petition term loan lenders. You don't
9 see that 14 days extending out to Wells as the ABL agent. So
10 it's not universally provided that for everybody that's
11 involved.

12 And part of that was that Wells Fargo wanted
13 certainty, understandably. They've given a lot of
14 concessions as part of the global agreement. We knew that,
15 if we had an increase in the amount of the investigation
16 budget, and partly because this case is very heavily
17 intellectual property --

18 THE COURT: Uh-huh.

19 MS. MORABITO: -- and you've had multiple name
20 changes with the companies, and then it's a -- obviously
21 across different parts of the world; that, if they wanted us
22 to increase our period for us to be able to challenge, so
23 that they could have finality with respect to the DIP going
24 forward, A, we needed an increase in the budget.

25 And B, we wanted to make sure that, if we had a

1 deal coming to you now -- and again, this was supposed to be
2 back in January -- there wasn't going to be a large extension
3 of time before there was a final sale because too many things
4 could go wonky, right? So we didn't want Wells to have the
5 ability to back out if we were going to do this challenge.

6 So this was negotiated so that Wells could get
7 certainty. As Mr. Handler pointed out, it's really only five
8 more days from when the original challenge period was. But
9 we didn't want Blackstone or the proposed APA stalking horse
10 purchaser to be able to just universally -- especially when
11 we've given up rights with respect to Wells, and that was
12 part of the global deal. We didn't want to have Blackstone,
13 as the stalking horse purchaser, have the ability to walk
14 after we've already given releases and agreed not to
15 challenge with respect to any of their liens.

16 So this was a compromise that was added in that
17 said, okay, Wells, we've already reviewed your stuff and we
18 feel comfortable, but we can't -- we have to make sure that
19 Blackstone -- which we do believe is committed to get through
20 this in the end. And if they do, then we will provide the
21 same releases to them. I hope that clarifies.

22 THE COURT: Okay. No, that's helpful.

23 Is the U.S. Trustee -- is this provision
24 acceptable to the U.S. Trustee? Because I don't think it's
25 the standard 75 days --

1 MR. SCHANNE: Your Honor, John --

2 THE COURT: -- as I calculate the time.

3 MR. SCHANNE: John Schanne on behalf of the United
4 States Trustee.

5 Your Honor, in the context of the global
6 settlement, we do not have an objection to that provision.

7 THE COURT: Okay. Thank you.

8 MR. SCHANNE: Thank you, Your Honor.

9 MS. MORABITO: So, Your Honor, the second
10 provision of the DIP which was important to the committee can
11 be found in Section 4.3, which is Page 50 of 65 of the
12 blackline. And that says that the order -- the DIP order
13 provides safeguards for the payment of 503(b)(9) claims by
14 providing that the debtors may continue to surcharge the
15 secured lenders collateral until any sale is consummated
16 and 503(b)(9) claims are assumed under the APA.

17 This was important because the original DIP budget
18 did not include 503(b)(9). Your Honor obviously knows
19 Delaware law and you can't just -- a debtor can't obfuscate
20 its obligations to pay 503(b)(9) to a potential purchaser, so
21 we wanted to make sure that we had those included in the
22 budget. But because the budget is tight, if we had it back-
23 ended with assurances from Blackstone, our potential
24 purchaser, if it's not Blackstone, that those 503(b)(9)
25 payments would be covered.

1 As Mr. Handler pointed out, there was adequate
2 carveout for all professionals in this case -- that's
3 Section 2.3, Page 28 through 30 -- and an increase in the
4 investigation budget, as I pointed out the reasons for same.

5 And then, finally, Your Honor, what isn't
6 contained in here was the real revised DIP budget that we've
7 seen. It was clear in negotiations on the DIP there was
8 issues with respect to feasibility and the ability for the
9 debtors to be able to perform under the current budget that
10 was on the table. We wanted to ensure that the DIP budget
11 was, in fact, going to support this case on a going forward
12 concern, and also protect, to the extent that it could,
13 liabilities with respect to post-petition agreements entered
14 into and also 503(b) (9).

15 I would say that -- I know that Mr. Handler said
16 that Wells Fargo needs to look at a revised DIP order. We
17 also want our, the committee's, advisors, which would be
18 Province, to make sure that any agreements that were
19 negotiated with respect to Cooper River are not going to make
20 any modifications to the current DIP budget which we've all
21 agreed to. Our understanding is that they're not, and in
22 which case we won't have any concerns.

23 Secondly, there was clearly a decrease in the
24 sales from the debtors in connection with the DIP budget.
25 And for good or for bad, I guess the silver lining was: Once

1 those sales started to come down, it obviously caused
2 concerns with respect to Wells because that's their
3 collateral, both on the revenue, the operating cash, and the
4 inventory; also concerns to Blackstone on the back end, if
5 they were going to be the ones purchasing the company;
6 certainly to the debtors. But that, too, is going to be a
7 crucial component why, if these shippers and vendors didn't
8 continue to ship and have that protection built in as part of
9 a global settlement, then we wouldn't have been able to get
10 past the DIP.

11 So, with all of that, I think, on balance and
12 given where the APA picks up on any deficiencies for coverage
13 with respect to what should be paid for and provided in the
14 budget, that the committee believes that this revised DIP
15 budget, assuming no changes with respect to Cooper River and
16 the 2/14/22 [sic] blackline are certainly sufficient in this
17 particular case; and, therefore, the committee would ask for
18 the motion to be approved.

19 THE COURT: Thank you.

20 Does anyone else wish to be heard with respect to
21 the DIP motion?

22 MR. FIORILLO: Your Honor, this is Dan Fiorillo
23 from Otterbourg. Can you hear me?

24 THE COURT: I can, Mr. Fiorillo.

25 MR. FIORILLO: Okay.

1 THE COURT: Good afternoon.

2 MR. FIORILLO: Good afternoon. And thank you for
3 accommodating my remote access. I attempted to get down to
4 Delaware today, but Amtrak didn't cooperate.

5 Your Honor, I wanted to confirm the recitation of
6 the global settlement that was read into the record by
7 Mr. Handler and Ms. Morabito, with her clarification on the
8 challenge period language in the DIP order, in section -- in
9 Paragraph 4.1, which we agreed with the way she had described
10 the fourteen-day additional time frame for a challenge for
11 the pre-petition term loan agent lenders. That fourteen-day
12 period does not apply to Wells, and for the reasons that
13 Ms. Morabito explained.

14 Your Honor, we are also interested in seeing the
15 final draft of the final DIP financing order before it's
16 submitted for entry. A lot of parties have worked around the
17 clock on the global resolution. We just want to make sure
18 it's properly reflected in the order that Your Honor gets to
19 approve.

20 And also, with respect to the budget, while it is
21 true it is the understanding of the parties that the amounts
22 under the budget that everyone signed off on and approved to
23 get to this hearing today are -- is not changing with respect
24 to the Cooper River settlement, there is a line item within
25 the budget that does need to be modification to reflect a

1 reallocation of timing of certain payments that is responsive
2 to the Cooper River settlement. And it is for that reason
3 that we did ask for the budget to be revised, solely with
4 respect to that issue, Your Honor.

5 Again, we've worked really hard to get to this
6 point. We don't want something that gets done in a rushed
7 way to jeopardize the work that everyone has done to get
8 here.

9 So that -- Your Honor, with that, I'll rest for
10 now.

11 THE COURT: Okay.

12 MR. HARVEY: Good afternoon, Your Honor. Matthew
13 Harvey from Morris, Nichols, Arsht & Tunnell on behalf of
14 Cooper River Partners.

15 Echoing the comments just now about everybody
16 moving quickly and making sure we want to capture everything,
17 there was one thing -- and I'm looking on my phone, Your
18 Honor, and I apologize because I have the language in front
19 of me. There was one thing on the DIP language -- and this
20 is in real time, so I just emailed it to the debtors and they
21 may have comments on it.

22 There was some ambiguity, potentially, that the
23 \$1,125,493.11 that's for post-petition invoices, that that
24 could be read to capture the two fifty a week going forward,
25 so we wanted to add language to clarify that. I'm not wed to

1 this exact language, Your Honor, but the language we propose
2 would be that that amount is:

3 "-- on account of issued and outstanding post-
4 petition invoices."

5 And I've just sent that language to the debtor,
6 and I just wanted to make that comment for the record. We'll
7 work with the debtor offline if they have issues with the
8 language. But I wanted to get the concept on the record.

9 THE COURT: Okay. Do the debtors want to comment?

10 MR. DUTSON: Thank you, Your Honor. Jeff Dutson
11 with King & Spalding on behalf of the debtors.

12 The way the budget worked is that it covered all
13 post-petition payments that were due and payable to Cooper
14 River, including a two-hundred-and-fifty-thousand-dollar per
15 week plug number, which was already in the budget. It's an
16 accrual budget, not a cash budget, so we had that amount
17 accruing each day. That two-hundred-and-fifty-thousand-
18 dollar accrual will now become a weekly payment.

19 The deal with Cooper River is that the first
20 invoice for that payment will come to us on March 6th. We
21 have four business days, so until Friday, to pay that
22 payment. The amount that Mr. Harvey just mentioned, in terms
23 of the post-petition amounts, that would be separate and
24 apart from these weekly payments. They're the amounts due
25 prior to that.

1 And our understanding is that the budget fully --
2 the budget on file fully captures all of that, but --

3 THE COURT: It's just a matter of allocation and
4 timing. Is that correct?

5 MR. DUTSON: That's what some people are
6 asserting, and we will get to the bottom of it and --

7 THE COURT: Would it help --

8 MR. DUTSON: -- get everyone --

9 THE COURT: -- to have a --

10 MR. DUTSON: -- on the exact --

11 THE COURT: -- break?

12 MR. DUTSON: -- same page.

13 (Participants confer)

14 MR. DUTSON: I think we can keep going.

15 UNIDENTIFIED: I don't --

16 MR. DUTSON: People are working in the background
17 to get --

18 THE COURT: Okay.

19 UNIDENTIFIED: Yeah.

20 MR. DUTSON: -- on the same page. I think we can
21 keep going. And we'll -- we definitely don't want a DIP
22 order entered that's not fully approved by our key
23 stakeholders --

24 THE COURT: Well, if it --

25 MR. DUTSON: -- so we will --

1 THE COURT: If it helps, I'm not going to enter a
2 DIP order that doesn't make a representation that everybody
3 in here who wants to see the order has seen it, including the
4 lenders, the committee, the United States Trustee --

5 MR. DUTSON: Absolutely.

6 THE COURT: -- Cooper River, et cetera.

7 MR. DUTSON: Absolutely.

8 THE COURT: Does anyone else wish to be heard with
9 respect to the DIP motion or the proposed form of order?

10 (No verbal response)

11 THE COURT: Okay. Is there anything further
12 before I rule?

13 MR. DUTSON: I'm sorry. Before you?

14 THE COURT: Before I rule on the DIP.

15 MR. DUTSON: Nothing from us, Your Honor.

16 THE COURT: Okay. So, based on the record before
17 me -- and I am relying upon the first-day declaration of
18 Mr. Davido at Docket 26, and Mr. Davido's declaration in
19 support of the financing motion at Docket 28 -- and the fact
20 that all objections to the motion have been resolved, I am
21 prepared to enter the final order.

22 The relief requested is necessary and appropriate
23 and is the best interests of the debtors, their estates and
24 creditors. Immediate access to the funds available from the
25 credit facility and the debtors continued use of cash

1 collateral is necessary here to avoid value disruptive
2 interruptions to the debtors' business and eliminate -- and
3 it would also eliminate the best chance of the debtor
4 negotiating and consummating a going concern sale.

5 So, based on the declarations that were before me,
6 there is no alternative financing available which wouldn't
7 require priming here. The loan interest rate is reasonable
8 and customary for DIP financing of this type. The roll-up
9 was a material component of the credit facility required by
10 the lenders and was a condition to providing finance. And
11 finally, the DIP facility is a product of arm's length, good
12 faith negotiation with the DIP lenders and is warranted by
13 the debtors' sound business justification.

14 So, if the debtors submit a proposed clean and
15 blackline order with the representation of all parties having
16 signed off, together with a copy of the modified budget, I'll
17 enter the order when it's submitted.

18 MR. DUTSON: Thank you very much, Your Honor.

19 If it's okay with the Court, we'll move to the
20 last substantive item on the agenda.

21 THE COURT: Oh, can I make one edit? You had
22 answered all my questions, but I think there's a typo in
23 Paragraph 5 of the DIP order related to the final hearing
24 date. I think it says final hearing date was the 15th. And
25 I might have misread it, but I have a note here to double-

1 check it.

2 MR. DUTSON: We'll confirm that and correct it to
3 the 21st.

4 (Participants confer)

5 MR. DUTSON: Anything else before we move on to --

6 THE COURT: No.

7 MR. DUTSON: Okay.

8 THE COURT: You may proceed.

9 MR. DUTSON: Thank you very much, Your Honor.

10 So we've gone through the bulk of the agenda.
11 We've talked about our KEIP motion, our critical vendor
12 motion, the DIP, and the relevant components of the global
13 settlement.

14 We now come to the final substantive motion, which
15 is our bidding procedures order. And this also contains
16 several relevant provisions to the settlement with the
17 committee and with the other parties. To reflect that
18 settlement, we filed a revised APA on the 14th, along with a
19 revised bidding procedures order.

20 By this motion, the debtors seek authority to
21 enter into the amended and restated stalking horse APA, as
22 filed on the 14th. We would like the Court to approve our
23 bidding procedures that are attached to the revised bidding
24 procedures order. That includes scheduling an auction, as
25 well as the sale hearing for March 16th, and also setting

1 deadlines for the -- for objections to that sale hearing.

2 We also ask the Court to approve the form and
3 manner of notice of the auction and sale, as well as the
4 potential assumed contracts, and also ask the Court to
5 approve procedures related to the assumption and assignment
6 of executory contracts.

7 In terms of the global settlement, the debtors --
8 when we filed this case, we didn't actually have a stalking
9 horse APA executed. We filed on December 20th, 2002 [sic],
10 and we were still negotiating the terms back and forth with
11 our stalking horse purchaser. We -- on December 22nd, we
12 were able to sign the APA and file the bidding procedures
13 motion seeking approval of that stalking horse APA.

14 In broad strokes, the stalking horse APA provides
15 for the sale of substantially all of the debtors' assets,
16 pursuant to a credit bid by an affiliate of the debtors' pre-
17 petition term lenders.

18 Importantly, the stalking horse --

19 THE COURT: Well --

20 MR. DUTSON: -- purchase --

21 THE COURT: - can I stop you right there?

22 MR. DUTSON: Sure.

23 THE COURT: The assets that are being sold, do
24 they include U.S. and Canadian assets?

25 MR. DUTSON: They do. So the APA is executed by

1 both the debtors, as well as the debtors' nondebtor Canadian
2 affiliate, who's subject to a CCAA proceeding in Canada.

3 And I neglected to mention at the beginning of the
4 hearing that we're joined via Zoom by our Canadian co-
5 counsel, should there be any questions about that.

6 THE COURT: Okay.

7 MR. DUTSON: But the --

8 THE COURT: The reason --

9 MR. DUTSON: Oh, sorry.

10 THE COURT: -- I asked is -- and I don't want to
11 jump ahead too far, but I am going to ask you to explain the
12 comment that's in -- I believe it's in the notices, but
13 maybe -- it's also in the procedures -- about a combined
14 hearing with the Canadian Courts. So, when we get there, but
15 that is one of the questions I had.

16 MR. DUTSON: Sure. And I'm happy to address that
17 now.

18 I think that the debtors would like to hold open
19 that possibility, if the Court is agreeable to that. The
20 bidding procedures for our Canadian case, the hearing is set
21 for tomorrow, I believe. We -- having the cross-border
22 element certainly makes it a bit more complicated, but we
23 think we're well positioned to get the -- hopefully, get the
24 procedures approved today, as well as tomorrow. We don't
25 anticipate any opposition to the procedures in Canada.

1 We don't yet have a sale hearing date in the
2 Canadian proceeding. We'll continue to confer with our
3 Canadian co-counsel and other parties-in-interest. And if --
4 based on the way the next few weeks develop, if it's
5 advisable to have a joint hearing, we would contact
6 chambers --

7 THE COURT: Okay.

8 MR. DUTSON: -- for both courts and seek that
9 possibility if --

10 THE COURT: Okay. I just was curious because it
11 does require a little bit of coordination. I have a lot of
12 confidence that you all would coordinate and get it done, but
13 we need to look ahead a little bit, if that's what we're
14 going to be doing.

15 MR. DUTSON: Absolutely. My personal preference
16 is to not have a joint hearing, but that may change,
17 depending on how things shake out.

18 THE COURT: Okay.

19 MR. DUTSON: And in light of that, I guess this
20 might be a helpful time to flag that we do not anticipate any
21 changes to the bidding procedures based on the Canadian
22 hearing tomorrow. If, unexpectedly, there is some material
23 change that impacts the order entered -- hopefully entered by
24 the Court today, we might need to come back to the Court and
25 ask for our U.S. bidding procedures to be conformed to those.

1 We wouldn't expect it to be anything that would be adverse to
2 parties-in-interest.

3 THE COURT: They're the exact same procedures?

4 MR. DUTSON: That's correct.

5 THE COURT: Okay.

6 MR. DUTSON: And that's our goal is to have the
7 exact same procedures approved by both courts.

8 THE COURT: Okay. I would just ask, if there is a
9 modification, just contact chambers as soon as possible --

10 MR. DUTSON: We will.

11 THE COURT: -- to assure --

12 MR. DUTSON: And I --

13 THE COURT: -- that we can --

14 MR. DUTSON: I think --

15 THE COURT: -- properly --

16 MR. DUTSON: -- our Canadian --

17 THE COURT: -- address it.

18 MR. DUTSON: -- co-counsel is -- will likely make
19 the Canadian Judge -- Justice aware and remind that Court of
20 the proceedings down here. And also, I believe there's
21 procedures for inter-court communication that may be helpful
22 in that instance. We don't anticipate any of that being
23 necessary, but do want to flag it for the Court.

24 THE COURT: No, I appreciate that. Thank you.

25 MR. DUTSON: So we signed our APA on the 22nd of

1 December, just two days afterwards. It provided for the sale
2 of substantially all of the assets, including our -- the
3 assets held by our Canadian affiliate.

4 We -- the committee -- when the committee was
5 appointed, they very quickly analyzed the pleadings and APA
6 and we began a constructive dialogue about certain concerns
7 that they had.

8 As Ms. Morabito alluded to, during the initial
9 weeks of the case, we did have material supply chain issues.
10 I think the fact that we had a credit bid from our pre-
11 petition term lenders and the fact that there is a
12 substantial amount of secured debt on these companies, as
13 well as potential material priority claims, including a
14 priority tax claims, unsecured creditors, understandably,
15 could have been looking at this case and thinking there's no
16 really much that's going to be -- or a vendor could be
17 looking at this case and saying I don't know that I'm really
18 getting anything out of this, I'm hesitant to enter into a
19 critical vendor agreement. Ms. Morabito allude to the fact
20 that, in the early stages, notwithstanding a lot of effort
21 from the debtors and their advisors to negotiate reasonable
22 critical vendor agreements, there seemed to be hesitancy.

23 We began negotiating with the Committee and our
24 purchaser and the DIP lender and we were able to reach
25 several revisions and modifications to the APA that we think

1 are helpful and that we think give vendors, warehousemen,
2 shippers, all the people that are supporting these debtors
3 during the post-petition case, give them a more vested
4 interest in the outcome and the success of the sale process.

5 The debtors are, of course, continuing to market
6 these assets and seeking higher or better offers and that
7 process has been going on and will continue through the bid
8 deadline.

9 In terms of the modifications that I just alluded
10 to, I think one significant one to note is the establishment
11 of a litigation trust. So, in the original APA, the
12 purchaser was acquiring substantially all the assets and
13 explicitly acquiring all claims, including avoidance actions
14 and other claims that the debtors had; they were acquiring
15 all of those.

16 In connection with the negotiations, the current
17 structure in the amended APA provides that certain claims
18 against equity holders, officers, directors, and affiliates,
19 with some limitations, will be assigned to a trust. One
20 limitation that I do want to note for the record is with
21 respect to our chief executive officer. That claim has been
22 carved out and any claim related to payments that are
23 scheduled on our schedules that relate to salaries, bonus,
24 retention payments, those claims will be held by the stalking
25 horse and also released by the stalking horse; those won't be

1 a part of this trust. But the other claims that I just
2 described will be transferred to the trust for the benefit of
3 certain vendors, shippers, warehousemen.

4 The stalking horse purchaser has also agreed to
5 provide \$500,000 of new money that wasn't in the old APA and
6 that new money will be transferred to the trust to help with
7 costs and expenses. As Ms. Morabito alluded to earlier, the
8 other component that we think is important there our critical
9 vendor perspective is that the stalking horse purchaser has
10 agreed to assume the liabilities under the critical vendor
11 agreements entered into by the debtor.

12 The bulk of those agreements provide for payments
13 over time, and so if you think about it from a vendor's
14 perspective, they now know, you know, if they're going to get
15 their payment this week and then when the sale cash flows,
16 the stalking horse purchaser has assumed those obligations
17 and will continue making those payments on behalf of pre-
18 petition claims.

19 In addition to those changes, the stalking horse
20 bidder will leave and to the extent necessary, contribute
21 funds sufficient to leave \$2 million to fund the wind-down
22 expenses of both, the U.S. and the Canadian entities. It's
23 less important for all the people in this room, but it is
24 important to note that they also agreed to paid \$750,000 into
25 the estate of our nondebtor Canadian affiliate.

1 So, those are the summary of the changes to the,
2 the kind of key changes to the APA that are dictated by the
3 settlement. I think we've discussed the DIP and the KEIP and
4 other components, so I won't re-hash those.

5 Your Honor, if I may, we would like to offer -- we
6 do think it's important to establish an evidentiary record
7 regarding this, so I would ask the Court if I can be
8 permitted to proffer the testimony of Scott Davido, the
9 debtors' chief restructuring officer.

10 THE COURT: Does anyone object to Mr. Davido's
11 testimony by proffer?

12 (No verbal response)

13 THE COURT: You may offer proffer.

14 MR. DUTSON: Thank you, Your Honor.

15 THE COURT: Let me just ask, does anyone expect to
16 cross-examine Mr. Davido?

17 (No verbal response)

18 THE COURT: Okay. I hear no one.

19 MR. DUTSON: Thank you, Your Honor.

20 In the courtroom today is Scott Davido, the
21 debtors' chief restructuring officer. If called to testify,
22 Mr. Davido would state under oath, as follows:

23 Mr. Davido is the senior managing director at
24 Ankura Consulting Group. He has over 30 years of experience
25 in senior executive management and financial restructuring

1 advisory roles. Ankura was engaged by the debtors beginning
2 in August of 2022 and I'll note, November 16th of that year,
3 Mr. Davido was appointed by the debtor to serve as our chief
4 restructuring officer.

5 As such, Mr. Davido would testify that he's
6 familiar with the applicant's business, day-to-day
7 operations, and financial affairs.

8 Mr. Davido would further testify that in the
9 months leading up to the petition date, the debtors and their
10 advisors engaged in discussions with the debtors' pre-
11 petition lenders regarding a solution for the debtors'
12 liquidity constraints.

13 Mr. Davido would testify that after exhausting
14 various out-of-court avenues, the parties began extensively
15 negotiating a sale pursuant to a credit bid. Throughout this
16 process, there was substantial negotiations and back-and-
17 forth regarding the terms of that sale.

18 Mr. Davido would testify that in the period of
19 time leading up to the petition date, the debtors were also
20 engaged with material discussions with other parties
21 regarding the possibility of serving as a stalking horse
22 bidder.

23 Ultimately, after considering all doable paths and
24 months of hard-fought negotiations, on December 22nd, the
25 debtors executed an agreement with Pigment Holdings, Inc., an

1 affiliate of the debtors' pre-petition term loan lenders, to
2 acquire substantially all of the debtors' assets on the terms
3 set forth in the original asset purchase -- original stalking
4 horse asset purchase agreement.

5 The original stalking horse APA contemplated a
6 credit bid by the stalking horse bidder and was the product
7 of substantial arm's-length, good faith negotiations between
8 the debtors and the stalking horse bidder.

9 Mr. Davido would further testify that he believes
10 the process that the debtors are running, including
11 meaningful discussions with other third parties, is designed
12 to ensure that the debtors secure the most favorable terms
13 possible under the circumstances.

14 Entry into the original stalking horse APA on
15 December 22nd represented a sound exercise of business
16 judgment. The original stalking horse APA provided
17 substantial benefit to the debtors' estate, including
18 providing a floor upon which other bidders could credit
19 bid -- I'm sorry -- could bid, and affording additional
20 certainty to customers, vendors, and employees, that the
21 debtors' business would emerge from Chapter 11 as a going-
22 concern.

23 Importantly, the original stalking horse APA
24 remains subject to higher or better bids, including a
25 fiduciary-out. It did not require any bid protections in

1 favor of the stalking horse bidder.

2 Mr. Davido would also testify that the debtors are
3 a global manufacturer and reseller of high-performance
4 specialty pigments and dispersions and that this
5 manufacturing business is heavily dependent on certain
6 critical vendors that produce very unique raw materials and
7 products for the debtors' business. These vendors are
8 critical to the debtors' business. These vendors ensure that
9 the debtors are able to deliver their inventory to customers
10 on a timely basis and generate revenue and, therefore, drive
11 value for the benefit of the debtors' estates.

12 Mr. Davido would testify that uninterrupted
13 production and supply chain is important to that business.

14 Mr. Davido would also testify that several of the
15 debtors' vendors and suppliers that provide those unique
16 materials and chemicals expressed hesitancy regarding
17 continuing to do business with the debtors, notwithstanding
18 the offer of critical vendor agreements.

19 MR. SCHANNE: Your Honor, that last statement is
20 hearsay; objection.

21 MR. DUTSON: It goes to the debtors' -- Your
22 Honor, this goes to the debtors' evaluation of what makes
23 sense from a business judgment standpoint, and so it's not
24 offered to prove the truth of the matter, but offered to show
25 the debtors' evaluation of what would constitute a

1 meaningfully improved agreement for the APA.

2 MR. SCHANNE: That the debtors believe they're
3 critical is in from the prior testimony. What the vendors
4 have said to the debtors, the vendors aren't here.

5 THE COURT: Can you restate his proffer.

6 MR. DUTSON: Sure. I've lost my place. One
7 second.

8 (Pause)

9 MR. DUTSON: Certain vendors did not immediately
10 enter into critical vendor agreements with the debtors.

11 MR. SCHANNE: No objection.

12 MR. DUTSON: It's Mr. Davido's opinion that this
13 hesitancy was caused by the bankruptcy filing, coupled with
14 the low probability of a distribution to general unsecured
15 creditors. Because of the debtors' financial performance, it
16 is unlikely that the sale process will yield proceeds that
17 exceed the debtors' secured debt, plus potential priority
18 claims, including a potential material priority tax claim.

19 Given these dynamics, it is understandable that
20 some vendors were unwilling to provide favorable trade terms
21 during these Chapter 11 cases. In the face of these
22 challenging circumstances, the debtors have engaged in
23 substantial negotiations with the Official Committee of
24 Unsecured Creditors, the stalking horse bidder, and the
25 lenders under the debtors' DIP credit facility in an effort

1 to resolve concerns raised by the Committee and also in an
2 effort to generate broad support for the debtors' going-
3 concern sale process.

4 Those efforts have been successful and are
5 reflected in amendments to the original stalking horse APA,
6 amendments to the proposed form of bidding procedures,
7 amendments to the DIP credit agreement, and revisions or
8 withdrawals of certain other relief that was sought by the
9 debtors in the Chapter 11 cases. These amendments reflect
10 the global settlement with the Committee.

11 The amended stalking horse APA provides a variety
12 of new benefits to the debtors' estates and their vendors
13 which have helped to incentivize vendor support for the
14 debtors' business. Specifically, the amended stalking horse
15 APA provides that the stalking horse bidder will assume all
16 liabilities under critical vendor agreements and establishes
17 a litigation trust in favor of certain vendors, shippers,
18 suppliers, and warehousemen.

19 Pursuant to the amended stalking horse APA, at
20 closing, the purchaser under the amended stalking horse APA,
21 shall transfer the following to the trust: first, \$500,000
22 in cash; second, they will assign certain claims against
23 equity holders, sponsors, insiders, directors, and officers
24 of the debtors.

25 Over the past few weeks, as the debtors have been

1 negotiating and documenting the global settlement, the
2 debtors' vendor relationships have materially improved and
3 certain vendors that initially appeared hesitant to enter
4 into critical vendor agreements have now executed those
5 agreements and have commenced shipping to the debtors on more
6 favorable trade terms.

7 The amended stalking horse APA, including the
8 trust and the assumption of additional liabilities, including
9 the critical vendor liabilities, gives vendors an even
10 greater incentive to support the debtors' business through
11 the sale process. With a greater stake in the outcome of
12 these cases, vendors are more likely to engage with the
13 debtors, execute critical vendor agreements, and provide
14 goods and services on favorable terms.

15 The debtors have not had to make any concessions
16 to the stalking horse bidder in order to gain these more
17 advantageous terms and because the original stalking horse
18 APA contemplated the assigned claims would be acquired by the
19 stalking horse bidder, the transfer of these assigned claims
20 to the trust does not negatively impact the debtors' estates.
21 Moreover, given the debtors' constrained resources, the
22 debtors do not anticipate that they would have sufficient
23 funds available to pursue such claims.

24 The amended stalking horse APA remains subject to
25 higher or better offers and sets an appropriate floor for the

1 debtors' sale process. And as with the original stalking
2 horse APA, there are no bid protections granted in favor of
3 the stalking horse bidder. The stalking horse bidder is a
4 sophisticated purchaser that is familiar with the business
5 and operations of the debtors. This signals confidence to
6 the marketplace that benefits the debtors and their
7 businesses.

8 The amended stalking horse APA also engenders
9 stability. Stability enhances value that will accrue to the
10 debtors' stakeholders as a whole, including employees,
11 suppliers, and customers.

12 In short, the amended stalking horse APA
13 demonstrates that the debtors have secured a going-concern
14 solution to the financial challenges and are utilizing these
15 cross-border restructuring proceedings to implement that
16 solution.

17 Accordingly, Mr. Davido would testify that the
18 debtors entered into the amended stalking horse bidder APA as
19 reasonable and appropriate, and represents the best method
20 for maximizing the value for the benefit of the debtors'
21 estates. Entry into the amended stalking horse APA
22 represents the sound exercise of the debtors' business
23 judgment and is in the best interests of their estates and
24 creditors.

25 That concludes the proffer, Your Honor, and we'd

1 ask that it be admitted into evidence.

2 THE COURT: Any objection?

3 (No verbal response)

4 THE COURT: It's admitted into evidence.

5 MR. DUTSON: Thank you, Your Honor.

6 We also filed shortly before the hearing, the
7 affidavit of Tabb Neblett, a member of TMA -- I'm sorry, not
8 TMA -- TM Capital --

9 UNIDENTIFIED SPEAKER: Yeah.

10 MR. DUTSON: He may be a member of TMA.

11 -- the debtors' investment banker. We would ask
12 that that be admitted into evidence, as well.

13 THE COURT: Okay. Does anyone object to
14 Mr. Neblett's admission into evidence and Mr. Neblett's
15 declaration, which is at Docket --

16 MR. DUTSON: It's at Docket 253, Your Honor.

17 THE COURT: Docket 253?

18 MR. DUTSON: Yes.

19 THE COURT: Okay. Hearing none, the declaration
20 is admitted.

21 (Neblett Declaration received in evidence)

22 MR. DUTSON: Okay. Thank you, Your Honor.

23 THE COURT: Does anyone wish to cross-examine Mr.
24 Neblett regarding the content of his declaration?

25 (No verbal response)

1 THE COURT: I hear none.

2 MR. DUTSON: Your Honor, the bidding procedures
3 set forth a timeline for bids to be received, a potential
4 auction, and a sale hearing. I think working backwards,
5 you'll see that the last few dates are a bit tight and we
6 think they're doable. It contemplates a sale hearing on
7 March 16th, the day before, at 5:00 p.m., a deadline to
8 object to the identity of a successful bidder. Objection --
9 earlier objections not related to the identity of actual
10 bidder are due earlier on March 10th.

11 On March 14th, by 5:00 p.m., the debtors are
12 required to serve a financial notice of the successful
13 bidder -- that's one business day after the auction. We
14 would contemplate having an auction on March 13th at
15 10:00 a.m. March 10, as I mentioned, would be the deadline
16 for the debtors to identify the baseline bid and provide all
17 copies of the applicable qualified bid documents to each
18 qualified bidder. March 10th is also the bid deadline, as
19 well as the sale and cure objection deadline.

20 THE COURT: I had a question regarding that,
21 because in the motion itself there was also a March 15
22 deadline to object to the conduct of the auction, the sale to
23 the successful bidder, and to provide adequate assurance --
24 or objections to adequate assurance and that date is not in
25 the order itself. So, there is no mechanism for someone to

1 object to adequate assurance of future performance after the
2 March 10 deadline, which is before the auction.

3 So, it seems to me that in preparing an order, a
4 date was taken out and that, to me, is a critical date in
5 terms of having a successful hearing that addresses
6 objections.

7 MR. DUTSON: Thank you, Your Honor. We can
8 certainly add that date into the order. I think the one
9 nuance would be if there is, those objections would be solely
10 with respect to a new bidder. If there isn't an auction or
11 if the successful bidder is our stalking horse, we would ask
12 that objections with respect to that bidder, be filed on
13 the 10th.

14 THE COURT: Well, I think you need to look at any
15 objection in conjunction with paragraph 24 of your sale order
16 or your bidding procedures order. Because, are you going to
17 be giving adequate assurance before the 10th of March?

18 MR. DUTSON: I can confirm that, but we should be
19 able to provide adequate assurance from our stalking horse by
20 that date, but not with respect to other bidders.

21 THE COURT: Right.

22 MR. DUTSON: So part of their bid package would
23 have to include that adequate assurance. If we get a
24 different bidder that wins the auction, when we file the
25 notice of successful bidder, we would then file the adequate

1 assurance package. And, of course, objections to that
2 adequate assurance package could not be on the 10th.

3 THE COURT: Right.

4 MR. DUTSON: It would have to be on the 15th.

5 THE COURT: So, I think you, yeah, need to provide
6 for another date because, obviously, if you don't have the
7 information, you can't object.

8 MR. DUTSON: We can make that change, Your Honor.

9 I think that highlights the primary dates within
10 the order. There were some changes to the order. We filed
11 it on the docket. I don't know that we necessarily need to
12 go through it page by page, unless Your Honor would like us
13 to, or have to answer any specific questions that the Court
14 has with respect to the order, or any of the changes
15 reflected in the redline.

16 THE COURT: I just want to make sure I'm looking
17 at the correct order. 202?

18 MR. DUTSON: This would be the order filed at
19 Docket 227.

20 THE COURT: All right. Hang on. I worked off of
21 two of them, so just --

22 MR. DUTSON: And we have a baseline attached to
23 that, so this would be 227-2.

24 THE COURT: Okay. We're good.

25 MR. DUTSON: Okay. Your Honor -- oh,

1 (indiscernible) right now. Perfect timing -- Your Honor, if
2 I may approach the bench?

3 THE COURT: Certainly.

4 MR. DUTSON: That's one change that's not
5 reflected in that order that was agreed to this morning --

6 THE COURT: Okay.

7 MR. DUTSON: -- that's reflected in that. It's
8 just the change pages. It's a change with respect to the
9 agreement with Cooper River to make it clear that any
10 qualified bidder like our stalking horse needs to assume
11 those agreements, you know, the very important lease
12 agreement, wastewater services, and the other -- the seven,
13 in total, documents/agreements with Cooper River provide --
14 and these will, if they're not already, we'll make sure
15 they're there -- and then the amended and restated
16 wastewater -- I'm sorry -- the amended and restated
17 wastewater covenants agreement will also be posted to the
18 data site so that parties can see that.

19 Your Honor, the order contemplates that the APA,
20 the amended and restated APA would be attached as an exhibit.
21 We'll also make sure that that's posted in the data room so
22 that parties know what APA to use for purposes of submitting
23 additional bids.

24 THE COURT: I had a question. We're going a
25 little bit out of order here, but on the bid procedures on

1 page 8, the minimum overbid is \$2,250,000?

2 MR. DUTSON: Yes, Your Honor. I can give you a
3 little context and clarity for that one.

4 THE COURT: Please.

5 MR. DUTSON: And it relates to the fee that would
6 be payable to TM Capital in the event that there's a
7 qualified bidder. So TM Capital is not entitled to a fee on
8 account of the pre-petition term lender's credit bid. So,
9 when the debtors are evaluating new bids and looking at
10 apples-to-apples, a higher or better bid would have to have
11 sufficient cash to exceed the existing bid by approximately
12 \$2 million because that's the amount that would then need to
13 be paid to TM Capital as a fee, so it helps us identify,
14 truly, apples-to-apples bids, because the stalking horse
15 purchaser, with that bid, we are not required to pay a fee.
16 So, if there is a qualified bid, it would need to be higher
17 or better and that's why that amount went from \$250,000,
18 which is a more standard minimum overbid amount. At the
19 stalking horse purchaser's request, we clarified that it
20 would need to be \$2,250,000 to account for that new fee that
21 would be payable.

22 THE COURT: Well, I'm a little concerned about the
23 impact that that has on bidding.

24 MR. DUTSON: I think the --

25 THE COURT: It's not an insignificant amount.

1 MR. DUTSON: It isn't.

2 I think the other way to look at it is, the credit
3 bid is not nearly all of the pre-petition term loan lender's
4 debt that they're credit bidding. They still have a little
5 bit of head room. So, I think from our perspective, they
6 could have come to us and said, you know, Hey, we'll increase
7 the credit bid portion of our bid by \$2 million, and it would
8 have the same effect on bidders in terms of raising the bar
9 that they have to hit.

10 But they also make the very appropriate point that
11 from the debtors' perspective, if there is a new bid, in
12 order to be truly higher or better, it would have to have
13 sufficient cash to clear that new fee that would be payable
14 by another bidder.

15 THE COURT: Does anyone else wish to be heard on
16 the minimum bid amount?

17 MR. PAWLITZ: Good afternoon, Your Honor. Jeff
18 Pawlitz of Willkie Farr & Gallagher, on behalf of the pre-
19 petition term loan lenders and the proposed stalking horse.

20 I think the point you're making is entirely
21 logical. I think what we're hearing from Mr. Dutson and the
22 debtors is, if they were to receive, for example, a bid that
23 was \$250,000 above the current stalking horse bid, then they
24 would have to take into account a payment owed to TM Capital.
25 And so when they, then, look at those two bids, the bid that

1 is \$250,000 greater than the stalking horse bid on paper
2 actually provides less benefit to the estate.

3 So, I agree with you that the number looks, to use
4 the technical term "wonky," but what it's meant to capture
5 is, as Mr. Dutson used, an apples-to-apples comparison, such
6 that if there is another qualified bid, which I would state
7 on the record, we would very much welcome, then the estate
8 knows that the ultimate consideration that's being provided
9 to the estate is, in fact, better than the stalking horse
10 consideration on the table.

11 THE COURT: Well, let me ask you this, so let's
12 say there are multiple rounds of bidding and the stalking
13 horse is the successful bidder, then does TM still get its
14 fee?

15 MR. PAWLITZ: If there are multiple rounds of
16 bidding; yes, TM Capital would be entitled to a fee.

17 If, on the other hand, a qualified bidder was
18 qualified because, for example, they topped our bid by
19 250,000, just to pick a number, and we did not have multiple
20 rounds of bidding, then the estate would be worse off on
21 account of the delta between TM's fee.

22 THE COURT: I appreciate what you're saying. My
23 concern is that this chills even someone to outbid the
24 initial bid, the stalking horse bid. You need over
25 \$2 million to come to the table.

1 MR. PAWLITZ: And I think that's, again, a very
2 logical position to take. Looking at the big picture, we
3 obviously reserved a lot of dry powder here, and, candidly,
4 Your Honor, we were very thoughtful on where we set the
5 stalking horse bid to maximize the likelihood that we would
6 produce multiple bidders and have the luxury of an auction.

7 That said, we are serving to try to give the
8 vendors the firm backbone necessary during these cases. We
9 are setting our qualified bid, our stalking horse bid at a
10 level that, again, we think is trying to maximize the
11 likelihood of a competitive process.

12 To the extent there are certainly other things we
13 could have done to truly chill, and I think taking a 30-
14 second step back, I'm a "less is more" kind of person in this
15 seat. I learned early, you're never more vulnerable than
16 when you're speaking.

17 My clients are original lenders here. They're
18 hundred cents. They've been in from the get-go. They're not
19 insiders. They are here, and as was proffered in
20 Mr. Davido's proffer by Mr. Dutson, the company was talking
21 to two other proposed stalking horse bidders. These were
22 really hard-fought negotiations. Ultimately, we stepped up.
23 Ultimately, we were strategic to try to put a stalking horse
24 out there that was going to encourage other bidders.

25 I don't want to make more out of this provision

1 than is necessary, and I can see that that number in a
2 vacuum, does look high, but I'm hopeful, Your Honor, that
3 with the broader context of what I just provided and the fact
4 that we're trying to get to a point that any overbid is, in
5 fact, better for the estate, the Court may find that this
6 provision is appropriate, nonetheless.

7 THE COURT: Thank you.

8 MR. PAWLITZ: Thank you.

9 THE COURT: Does anyone else wish to be heard on
10 this point? Does the Committee or trustee take a position?

11 MS. MORABITO: Your Honor, Erika Morabito of Quinn
12 Emanuel, on behalf of the Committee.

13 If we wound the clock back seven weeks, we'd have
14 an issue with this provision. If we didn't get to where we
15 are today and what I'm happy to walk the Court through in
16 terms of what the Committee thinks makes this a true, real
17 stalking horse bid that's not setting it up for a result, I
18 would agree with the Court that the number would seem high.

19 But again, we are where we are today. We don't
20 believe that it will chill bids. We do believe that this
21 floor that's been set and all the terms and conditions in the
22 APA would more than make up for a provision that had an
23 amount that, in other cases, would seem as though it would be
24 intended to chill bidding.

25 And we were supercautious -- no disrespect to

1 Blackstone, but we've been on the other side of Blackstone
2 before -- we were supercautious with respect to them being
3 the stalking horse purchaser and, frankly, grateful that in
4 this particular case, they had, you know, a hundred cents on
5 the dollar all in, which require them to make concessions
6 that they wouldn't otherwise. So on this particular
7 provision and given what we know about potential bidders in
8 the room when we were looking and what we've talked to, we
9 don't believe that it chills bidding.

10 THE COURT: Thank you. That's helpful.

11 MR. SCHANNE: Your Honor, John Schanne on behalf
12 of the United States Trustee.

13 Your Honor, we understood the context of this
14 minimum overbid from prior discussions with the parties and
15 we did not raise an objection to it within the context of
16 this case. Thank you, Your Honor.

17 THE COURT: Thank you.

18 Is there anything further?

19 MR. DUTSON: No, Your Honor. I think for the
20 reasons stated on the record, we would ask the Court to enter
21 the revised bidding procedures order with the amended
22 stalking horse APA attached as an exhibit. We do have that
23 one change which hasn't been reflected in the filed version,
24 which we will provide to the Court.

25 THE COURT: Let me -- oh, Mr. Lawton, did you want

1 to be heard? I'm sorry, I just saw your hand.

2 MR. LAWTON: Yes, Your Honor, but not with respect
3 to the overbid.

4 David Lawton with Morgan Lewis, on behalf of
5 Kemira Chemicals, Inc. Kemira has a raw materials agreement
6 with the debtors, which was renegotiated last summer, but not
7 disclosed in the SOFAs inadvertently, according to the
8 debtors.

9 We're working very well with them. We are
10 currently finalizing the insurance for their wastewater
11 agreement with the debtors and we would just ask that the
12 bidding procedures at least allow the debtors to provide
13 similar protections, as offered to Cooper River Partners,
14 after entry of the bidding procedures order; namely, and I
15 think this is probably already provided, that the debtors may
16 designate other renegotiated agreements with counterparties
17 at the Bushy Park facility as assigned contracts at any time,
18 even after initially publishing the lists of assigned
19 contracts. And then the second, that the bidding procedures
20 may be amended to provide that any bidder will designate such
21 agreements as assigned contracts, without further order of
22 the Court.

23 I don't think this would be too onerous on the
24 debtors. It just allows them to do it, but I just wanted to
25 get that on the record.

1 MR. DUTSON: Your Honor, I do think we have the
2 ability to add the contracts already, but to the extent that
3 that's not there, we can certainly make that clarification.

4 I don't know that, while I'm certainly happy for
5 the debtors to have all the discretion in the world with
6 respect to amending the bidding procedures, I'm not entirely
7 sure that everyone in the room is comfortable with that. We
8 do have language in the order that allows us to modify the
9 rules of the auction in consultation, and sometimes with the
10 consent of other parties in interest.

11 So, think we would be resistant to that second
12 change. The first change that he requested, adding contracts
13 that are renegotiated, those would obviously be contracts
14 that are only effective upon the actual closing. And we, as
15 Mr. Lawton alluded to, we've been working well with his
16 client to that end, and if that's not already clear in the
17 bidding procedures order, we can make that clear.

18 MR. LAWTON: I appreciate the concession on the
19 first. I do think it's probably there. I would appreciate,
20 maybe, just being a little bit more explicit. You know, we
21 could go over language if you want.

22 On the second, if there are parties that do
23 object -- the debtors said that others may -- if others do,
24 we can address that, but if they don't, it seems fair to
25 allow the bidders to provide similar protections that they

1 think is meritorious.

2 MR. DUTSON: And just to make sure we're all on
3 the same page as what you're requesting, it would be a
4 provision in the bidding procedures order that requires
5 qualified bidders to assume contract X.

6 MR. LAWTON: Correct.

7 MR. DUTSON: I think from our perspective, Your
8 Honor, the way that we would think about that is different
9 bidders may have different aspects of their bids. Some may
10 provide for the assumption of certain contracts and others
11 may not, and the debtors should have the liberty to evaluate
12 new bids as they come in and the differences between those
13 bids. And also, potential bidders should have the liberty to
14 assume or assign, or not have assigned, certain contracts.

15 So, we certainly are going to be working with
16 folks like Mr. Lawton's client and negotiating agreements
17 that we think are in the best interests of the company on a
18 go-forward basis and are very supportive of. And at the end
19 of the day, if we get to that arrangement, we are confident
20 that any buyer would want those, I don't know that we have to
21 come back before the Court and actually amend our bidding
22 procedures order to require bidders to take that action.

23 I think Mr. Lawton is simply asking that we have
24 the ability to do that.

25 MR. LAWTON: Right.

1 MR. DUTSON: I think, subject to a different view
2 from the Court, I think we always have the ability to come
3 back and seek an amendment from the Court for our bidding
4 procedures. I don't view this change as particularly
5 necessary in these circumstances.

6 THE COURT: Well, it seems to me that you're
7 accurate in that it's a little premature at this point to
8 make that determination. But Mr. Lawton, I think you wanted
9 to be heard. Sorry.

10 MR. LAWTON: So, I -- the request was that the
11 debtors not have to go back before the Court to make kind of
12 a simple change like that, given the -- the order would be
13 ostensibly entered today or tomorrow, and if we're still
14 negotiating those contracts, as well as other counterparties
15 negotiating their contracts, having the ability to seek those
16 additional protections, as well, instead of it being
17 foreclosed because we weren't aware that Cooper River
18 Partners had entered into those agreements a prior to this
19 hearing.

20 THE COURT: The concern I have, and I'll just put
21 it out there, is that things are never as simple as they
22 seem. And it seems to me that things have been very fluid
23 and there's been a lot of negotiation, and I certainly
24 appreciate that and I applaud parties for reaching
25 resolutions, but sitting here right now, I can't tell what

1 might be material and what might not be material, so I'm
2 hesitant at this point to give the go ahead, not knowing what
3 the issues are.

4 MR. LAWTON: Understood, Your Honor.

5 THE COURT: And I think that Cooper River very
6 much demonstrated that, that, you know, I don't know if
7 there's seven or eight agreements, and there's very different
8 terms now than probably 48 hours ago.

9 MR. LAWTON: That's acceptable, Your Honor. As
10 long as we can come back to the Court and -- with any
11 additional requests later to amend, that's fine.

12 THE COURT: Is there anyone else who wishes to be
13 heard with respect to the bid procedures motion, the proposed
14 form of order?

15 MS. MORABITO: Yes, Your Honor. And, Your Honor,
16 good afternoon, for the record, Erika Morabito of Quinn
17 Emanuel, on behalf of the Unsecured Creditors Committee.

18 I echo many of the statements made by Mr. Dutson,
19 so I don't want to repeat the arguments that he made about
20 the arm's-length and good faith negotiations. A couple of
21 things that we wanted to point out to Your Honor is we view
22 the bid procedures motion, really, into two parts. The first
23 one is the procedural part of the motion and then the second
24 one is the actual APA from the stalking horse bidder.

25 From the Committee's perspective, and, Your Honor,

1 I'm looking at Docket 227-2, filed on February 14th, '23, and
2 I'm looking at paragraph 16, which is page 10 of 46, this
3 particular provision, Your Honor, ensures that the debtors
4 have the right to modify the bidding procedures, to waive or
5 extend deadlines, or develop new actions or self-processes to
6 maximize value and promote competitive bidding. It sort of
7 hits on Your Honor's last point about making sure that this
8 is something that's intended to elicit bids, as opposed to
9 chill bids.

10 The other thing that was important to us from a
11 procedural standpoint can be found in paragraphs 15, 16,
12 and 22 of the proposed blacklined order, which is on page 10
13 and 11, and that does give a broad reservation of rights for
14 the Committee, including noticing requirements, and where
15 appropriate, consultation rights that provide Committee
16 oversight to ensure the fairness of the sales process.

17 We also require that to the extent that there are
18 additional bids, that, unlike other cases, those bids will
19 not be shared with the DIP lender or with the term lenders,
20 in order to, again, make sure that this is a fair process.

21 We also ensured notice rights for all parties in
22 the event the auction is not conducted and the stalking horse
23 bidder is ultimately selected; that's paragraph G of the bid
24 procedures motion.

25 And with those changes from a procedural

1 standpoint, we think that that does provide for a fair
2 process. It allows the Committee important oversight to try
3 to encourage bidders beyond what the stalking horse has put
4 forth.

5 With respect to the actual APA, I'm not going to
6 go through all the terms that Mr. Dutson hit on, but I do
7 want to say a couple of things. First and foremost,
8 Mr. Monzo and I did speak with the United States Trustee's
9 Office on three occasions, and we spoke with Mr. Schanne on
10 February 10th, February 14th, and February 15th.

11 As Your Honor knows, the redlined orders were
12 actually not presented to the Court until February 14th.
13 Mr. Schanne reached out, had very helpful comments and
14 suggestions that we actually shared with other colleagues and
15 did make changes both, in our presentations today and with
16 the redlines that will ultimately be submitted for approval.

17 There was one change that Mr. Dutson referenced
18 that hadn't yet gotten picked up, but I do think it's an
19 important one. It can be found in the blackline, proposed
20 APA, Docket 228-2, filed February 14th. It's page 15 of 100
21 on top, page 9 on the bottom, and it's the definition of
22 "designated amount" and I'll wait. Your Honor, when you're
23 there, I'm happy to walk you through the change.

24 THE COURT: Okay.

25 MS. MORABITO: You all set?

1 THE COURT: Yes.

2 MS. MORABITO: Okay. So, with respect to this,
3 this is the amount, again, something that Blackstone is
4 contributing that you heard Mr. Dutson talk about, which
5 would be, really, a wind-down amount that would be provided
6 both, to the Canadian administration and also here in the
7 U.S. And one of the things that Mr. Schanne pointed out was
8 at the end of it, you can see that it says any remaining
9 amounts that are left would go to the purchaser.

10 And the question was, you have 1.425 million, are
11 there really going to be money going back to the purchaser?
12 What is the purpose of these wind-down loans?

13 And while that is standard language, I can
14 represent to the Court, and hopefully this change will, as
15 well, we expect the full 1.425 million to be gone and nothing
16 to be reverted to the purchaser. But the bigger point where
17 we think it could use some clarification is if you look at
18 one, two, three, four, five, six lines down, it starts with
19 "Applicable sellers, after the closing and the
20 administration." That word "administration" is a little bit
21 ambiguous, so we're going to put parenthesis in there that
22 says, "including claims reconciliation," because the idea was
23 always intended that if people did submit proofs of claim in
24 the bankruptcy case to be paid, there are actual dollars
25 there now that could, in fact, be able to pay a portion of

1 some of those claims.

2 And the other change that Mr. Schanne requested is
3 that second-to-last line that says, "The seller shall
4 retain . . ." We had, in parenthesis "if any remaining
5 amounts to the purchaser" just to give better clarification
6 to people if they, you know, have any questions about what
7 intent was and, particularly, with respect to what the
8 obligations are of the purchaser. So, there's that one
9 change.

10 And I'm sure Mr. Schanne will tell me if I'm
11 missing anything else, but --

12 MR. DUTSON: Did you say -- I'm sorry to
13 interrupt -- did you say the seller shall retain or --

14 MS. MORABITO: Yeah. So, the -- let me see. I
15 said that "seller shall return" -- thank you for the
16 correction -- "shall return, if any, any remaining amounts to
17 the purchaser," yes.

18 The stalking horse APA, we talked about these.
19 Again, we have a sale hearing coming up, so it's truly just
20 to approve the bid procedures and the stalking horse APA as a
21 baseline. The things that were important certainly to the
22 Committee, as Mr. Dutson discussed -- and I won't go into
23 detail, but it is important -- that it's Sections 2.1(u) and
24 (r) of the proposed blackline, and that is the assignment of
25 all the debtors' interests in past, present, or future claims

1 to Blackstone. And that included the avoidance actions and
2 claims against equity holders, insiders, sponsors of the
3 sellers, in addition to claims against the seller's current
4 and former officers and directors.

5 Typically, that provision would be something that
6 a Committee would jump up and scream about as to why is the
7 purchaser getting these and the Committee not retaining
8 those? That is the primary reason why you'll see what we
9 would call a "gift," right. So, this money was going over.
10 These assets were being transferred to Blackstone. It was
11 important for Blackstone to develop credibility with respect
12 to these purchasers, shippers, and vendors, everything that
13 we've been talking about from the beginning of this hearing
14 until now.

15 And in an effort to provide them comfort that this
16 was truly something that Blackstone -- and it was committed
17 to trying to make work on the back end and to get them to
18 ship, and shipping was also important because there'd be no
19 bids if there were no relationships between the vendors and
20 the debtors. And so Blackstone said, As a sign of good
21 faith, we will, with our own money -- not credit bidding
22 money -- but we'll come out-of-pocket \$500,000 -- it has
23 nothing to do with the amount that we've agreed to credit
24 bid -- we'll come out \$500,000. We will create a trust. We
25 will put claims, and they're specified very clearly

1 in 7.6(d), we will gift those to the trust to be able to be
2 pursued, and to the extent that there's any recovery, you
3 vendors, shippers, suppliers, vendors would be entitled to
4 those because we know that you would not have shipped if you
5 were not being paid 100 percent on the dollar on your pre-
6 petition amounts.

7 There's no liquidity in the budget for that to
8 happen, so it gave them an opportunity to be able to at
9 least, possibly, get a portion more on the trust side. So,
10 that was something that was important as a gift from
11 Blackstone.

12 Additionally, the \$2 million wind-down budget, we
13 do think that this also offers the potential to have an
14 orderly wind-down and potentially for people to be able to
15 file proofs of claim, to the extent they have them, in a
16 bankruptcy and have those claims reconciled.

17 Another key provision is if you look at page 26 in
18 the blacklined order, there's a definition of the word
19 "preserve." One of the things you keep seeing over and over
20 again in 7.6(d) when you talk about the trust is
21 "preservation, maintaining, and protecting the assets."
22 That's because it included insurance proceeds. And so it was
23 important that there weren't going to be things that would
24 hold back the ability of those claims to be able to be
25 prosecuted, so that was an additional definition section that

1 was inserted in order to fully describe what was happening
2 with respect to 7.6(d).

3 The agreement not to pursue claims against the
4 vast majority of avoidance actions, that's also in 7.6(d).
5 To be clear, those are claims against vendors. It wouldn't
6 make sense to allow the purchaser to turn around and bring
7 Chapter 5 or avoidance claims against the very vendors that
8 are supporting this case, and certainly don't want to have
9 them brought against the employees. So, those are the types
10 of claims that would not be pursued.

11 The payment in full of critical vendor agreements
12 and orders for critical vendors, shippers, and warehousemen,
13 that's Section 2.3(B)(i); obviously, again, extraordinarily
14 important. If you wanted to get people to ship, there needed
15 to be some sort of certainty, even with the DIP gone, a very
16 short DIP budget for the amount of time that this case
17 extended, there had to be something on the back end, because
18 there would be no ability for the vendors or shippers, even
19 if the debtors defaulted on those critical trades, to be able
20 to get any sort of recourse, because there'd be no DIP lender
21 and there's be nobody to look to.

22 So Blackstone, stepping up and agreeing to be able
23 to assume the liabilities and post-petition agreements, we
24 think, was huge. And I would note on that one point, that
25 causes a little concern at first only because we -- if

1 Blackstone was going to assume the liabilities of any post-
2 petition agreements, our concern was whether or not
3 Blackstone would influence the decision of the debtors to
4 enter into agreements, because they would ultimately be on
5 the hook for any liability.

6 I think, as I offered earlier to the Court, the
7 fact that those agreements have gone up exponentially and
8 almost all the dollars available shows that Blackstone has
9 not only not chilled anything, with respect to negotiations
10 of the agreements, and have allowed the debtors to do their
11 job and exercise their business judgment, but, you know, they
12 were not -- there was no cap on what the liability would be
13 to them with respect to post-petition obligations, and yet
14 the debtors were still able to get up to the maximum amount
15 allowed under the critical trade vendors, and I think that
16 that's important.

17 And then lastly, we had talked about this earlier,
18 was the assumption and payment of the 503(b)(9) claims within
19 seven business days of the closing; that's Section 2.3(b)(2).
20 We think that that clears up any issue with respect to
21 Delaware law to make sure that we have Wells Fargo on the
22 hook under a carve-out under the 506(c) waiver until such
23 time as there has been a sale of the business, in which case
24 the purchaser would pick up those 503(b)(9) claims.

25 So, with that, Your Honor, we think the

1 protections benefit all the unsecured creditors in this case
2 and ensures the sale of the debtors' business as a going-
3 concern. We think that if anybody has objections, they can
4 raise them at the sale hearing, but we think this is a pretty
5 darn good floor for the APA, and so the Committee is -- would
6 request that the Court grant the motion.

7 THE COURT: Thank you.

8 MS. MORABITO: I'm happy to answer any questions.

9 THE COURT: Thank you, that was very helpful.

10 MR. SCHANNE: Your Honor, John Schanne, on behalf
11 of the UST.

12 Your Honor, this will largely be a reservation of
13 rights, as we thank counsel for the time in getting us to
14 where we are today, where we have no objection to approval of
15 the bidding procedures. But that is where we are, this is
16 bidding procedures, and the debtors have provided evidence
17 that this process is intended to generate the highest and
18 best recovery for the estates.

19 Approval and consummation of the APA itself,
20 that's not before the Court today. And the terms of the APA
21 provide not just for the consideration to be offered, but
22 they also seek to set how that consideration will be
23 allocated to creditors. The APA, as you heard, provides for
24 the creation of a trust. That trust will receive cash,
25 certain causes of action, and that will be for the favored

1 unsecured creditors. The creditors picked up by the critical
2 vendor, it seems, is the intent. Other unsecured creditors,
3 they will receive a different and separate pot of cash.

4 So, again, Your Honor, you heard evidence today
5 that the sale process will ensure the fairness and
6 reasonableness of the consideration to be paid and the UST
7 has no objection to that value-maximizing process, but,
8 however, when we get to the sale hearing, the debtors will
9 still need to carry their burden that approval of the APA
10 itself is appropriate, including approval of the distribution
11 mechanism in the APA or any similar mechanism in any
12 competing bid.

13 The concerns are, this is a *sub rosa* plan outside
14 the safeguards of the confirmation process. There's no --
15 you have to make sure creditors have adequate information.
16 Here, they won't have the ability to vote. We need to make
17 sure they have the availability to weigh in.

18 At this point, just because we're not at the sale
19 hearing, we don't have evidence about what is the valuation
20 of these causes of action? Is this trust actually a better
21 deal for the creditors? How do they evaluate that? How do
22 they make their opinion heard?

23 So, we have no problem with the process generating
24 the highest, fairest, most reasonable consideration for the
25 assets, but what is done with that consideration thereafter

1 is for the debtors' burden to be carried at the sale hearing.
2 I know the parties have worked very hard to reach the terms
3 in the APA and, again, we thank them for getting us to a
4 point where we understand what the terms are and what we're
5 seeking approval of today, but the Third Circuit requires
6 that settlements not short circuit the requirements of
7 Chapter 11 by establishing the terms of a plan *sub rosa* in
8 connection with a sale of assets. That's Energy Future
9 Holdings, straight from the Third Circuit.

10 So, in sum, the UST has no objection with this
11 process, with the testimony that was provided today as to
12 whether the bidding procedures are appropriate, but we
13 reserve all rights with respect to the debtors' burden at the
14 sale hearing stage. Thank you, Your Honor.

15 THE COURT: Thank you.

16 Does anyone else wish to be heard, other than the
17 debtor, with respect to the bidding procedures motion?

18 (No verbal response)

19 THE COURT: Okay. I hear none.

20 MR. DUTSON: Thank you, Your Honor. Just a quick
21 comment on Mr. Schanne's response and his comments. We
22 certainly appreciate the U.S. Trustee's support of this
23 motion and this order and moving this case forward. We
24 certainly have a slightly different view in terms of the way
25 that the trust works and the way that we think about the APA

1 and the consideration provided under the APA.

2 We certainly have a burden to meet at the sale
3 hearing and between now and then, we'll continue to discuss
4 with the U.S. Trustee's Office, as well as any other creditor
5 that raises objections or concerns about this APA. We do
6 view it as the right floor to go out and seek higher or
7 better offers. We're going to continue to do that.

8 And then we'll be back -- if the Court grants our
9 motion today, we'll be back on the 16th for approval of a
10 sale of substantially all of the debtors' assets in a way
11 that complies with the Bankruptcy Code and applicable law.

12 MR. SCHANNE: And, Your Honor, the parties have
13 kept us very close through this process, so I have no doubt
14 that they will continue to keep us fully informed, so thank
15 you.

16 THE COURT: Anything further?

17 MR. DUTSON: Nothing further, Your Honor.

18 THE COURT: Okay. Does anyone else wish to be
19 heard before I rule?

20 (No verbal response)

21 THE COURT: Okay. Hearing none, I am prepared to
22 enter the revised bidding procedures order with the
23 modification we discussed earlier. Based on the
24 representation of counsel and the Davido proffer, I'm
25 satisfied the debtors have demonstrated a compelling and

1 sound business justification for the entry of the proposed
2 order.

3 Significantly, all of the objections to the relief
4 sought have been resolved. The debtors, United States
5 Trustee -- excuse me -- the debtors, the Committee, the
6 lenders, the stalking horse purchaser have negotiated a
7 global resolution here. I believe that the timeline that's
8 set forth in the motion and the proposed order, given the
9 lead-up from today and the process that is expected to go
10 forward from today to the sale hearing is sufficient and
11 appropriate to implement a sale-and-marketing process that's
12 designed to maximize value and hopefully lead to a robust,
13 active, and competitive auction.

14 Based on the proffer of Mr. Davido, the stalking
15 horse APA was negotiated at arm's-length and in good faith.
16 It is the sound exercise of the debtors' business judgment.
17 The stalking horse APA will serve as a minimum, or floor, and
18 it remains subject to higher and better bids.

19 And, finally, the stalking horse APA is
20 reasonable, appropriate, and represents the best method for
21 maximizing value for the benefit of the debtors' estates.
22 So, I will enter that order when it's submitted under
23 certification of counsel, reflecting that the parties have
24 reviewed it, together with a clean and blackline copy of the
25 order.

1 MR. DUTSON: Thank you very much, Your Honor.

2 The only other items on the agenda for today
3 relate to the pleadings of Cooper River, which have been
4 resolved, pursuant to our agreement with that party.

5 THE COURT: Okay. Could I ask that those
6 pleadings be withdrawn from the docket or notice of
7 withdrawal be filed on the docket, just to maintain a clean
8 docket.

9 And let me just add to the parties, I do
10 appreciate the tremendous amount of work that went into
11 getting to this hearing today and resolving all objections.
12 And I do appreciate counsel keeping the Court apprised of
13 what was transpiring. It's very helpful.

14 And congratulations on resolving those objections.

15 MR. DUTSON: Thank you, Your Honor.

16 THE COURT: So, with that, we are resolved for the
17 afternoon. If anything comes up and you need the Court's
18 time or attention, please let us know; otherwise, I'll look
19 forward to receiving your orders and we stand adjourned.
20 Thank you.

21 COUNSEL: Thank you, Your Honor.

22 (Proceedings concluded at 4:00 p.m.)
23
24
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CERTIFICATION

We certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of our knowledge and ability.

/s/ William J. Garling

February 22, 2023

William J. Garling, CET-543

Certified Court Transcriptionist

For Reliable

/s/ Coleen Rand

February 22, 2023

Coleen Rand, CET-341

Certified Court Transcriptionist

For Reliable

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DCL CORPORATION

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

AFFIDAVIT OF NANCY THOMPSON
(SWORN FEBRUARY 22, 2023)

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