

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

June 24, 2009

10:15 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

1
2 HEARING re Debtors' Motion for Authorization to (i) Assume
3 Unexpired Lease of Nonresidential Real Property; and (ii)
4 Assume and Assign Unexpired Leases of Real Property
5

6 HEARING re Debtors' Motion to Restructure Certain Loans with
7 Broadway Partners Fund Manager, LLC, et. al.
8

9 HEARING re Motion of Unclaimed Property Recovery Service, Inc.
10 for Compelling Payment of Unclaimed Funds by the New York State
11 Comptroller
12

13 HEARING re Motion Authorizing Discovery from Barclays Capital,
14 Inc.
15

16 HEARING re Motion of Kalaimoku-Kuhio Development Corp for (i)an
17 Order Compelling Payment of Post-Petition Rent and Charges and
18 (ii)Granting Relief from the Automatic Stay
19

20 HEARING re Debtors Motion for Establishment of the Deadline for
21 Filing Proofs of Claim, Approval of the Form and Manner of
22 Notice Thereof, and Approval of the Proof of Claim Form
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2 ADVERSARY PROCEEDING:

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4 HEARING re Deutsche Bank AG v. Lehman Brothers Holdings Inc.
5 Motion for Summary Judgment

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7 SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDINGS:

8
9 HEARING re Trustee's Application for an Order Pursuant to
10 Section 365(d)(1) of the Bankruptcy Code Further Extending the
11 Time Within Which the Trustee may Assume or Reject Executory
12 Contracts and Certain Unexpired Leases

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P R O C E E D I N G S

THE COURT: Please be seated. Good morning.

MS. FIFE: Good morning, Your Honor. Lori Fife, Weil Gotshal & Manges on behalf of Lehman Brothers and its affiliated debtors. This morning, Your Honor, we have a full courtroom and a crowded agenda.

THE COURT: I think full is an understatement. I am a little concerned just about health and safety issues when a courtroom is quite as packed as this one is. And for those who are standing near the door, unless you truly expect to be coming to the podium and speaking, there's a more comfortable place to be one flight up in Judge Beatty's courtroom which has full audio. If you're just here to audit, you'll be a lot more comfortable upstairs and everybody else in the courtroom will be more comfortable for those who, in an exercise of civility and good judgment choose to leave. So I'm going to take about three minutes to give people an opportunity to leave who don't really need to be here. And you know who you are. If no one leaves, I will expect that you're somebody who actually has a reason to come to the podium. And if it's just to say me, too or I reserve rights, you should be upstairs, too.

(Pause)

THE COURT: Okay.

MS. FIFE: Also, Your Honor, we've been asked if LBI could proceed before LBHI because I'm told they have a very

1 short calendar and that may also free up some of the people to
2 leave earlier, if that's okay.

3 THE COURT: That's fine. We can start with LBI.

4 MS. FIFE: Okay. Thank you, Your Honor. David
5 Wiltenburg, Hughes Hubbard & Reed for the trustee in the SIPA
6 proceeding. And I appreciate the willingness of counsel and
7 the Court to vary the calendar. This morning, as with
8 adjournments, we have only uncontested matter. It appears as
9 item 8 at page 10 of the agenda. And it is the trustee's
10 application for an order further extending the time to assume
11 or reject executory contracts pursuant to Section 365 of the
12 Bankruptcy Code.

13 There was one objection received that has been
14 resolved by means of rejection of the contract in question. So
15 the application this morning is unopposed.

16 Your Honor, as before, the trustee's staff continues
17 to work through the significant project of evaluating executory
18 contracts and contracts continue to be identified that have
19 value either to LBI or to the Holding Company estate. As I
20 say, that process is continuing and we are as we work through
21 rejecting and assuming as appropriate. And accordingly, we
22 would request approval of a further extension of the trustee's
23 time to assume or reject.

24 THE COURT: There's no objection? It's approved as
25 uncontested.

1 MR. WILTENBURG: Thank you, Your Honor. And with
2 that, if I may be excused?

3 THE COURT: You may be. That frees up one spot.

4 MR. WILTENBURG: Thank you, Your Honor.

5 MS. FIFE: Okay.

6 THE COURT: And before Ms. Fife starts, we have any
7 number of people who are participating through CourtCall. I
8 believe most of the people on the line are just listening. To
9 the extent that anybody has a BlackBerry near their
10 speakerphone, please either shut it off or move it away. Also,
11 to the extent that you have an open line, please mute it
12 because we're getting feedback in the courtroom.

13 Please proceed, Ms. Fife.

14 MS. FIFE: Thank you, Your Honor. The first matter
15 on the agenda is the debtors' motion for authorization to
16 assume an unexpired lease and to assume and assign an unexpired
17 lease. The assumption was already heard and granted with
18 respect to 85 10th Avenue. With respect to the assumption and
19 assignment, this relates to a lease at 600 Madison. The
20 debtors are seeking to assume and assume that lease to
21 Neuberger Berman. The landlord had asked for additional
22 information with respect to adequate assurance. We have
23 provided that information to the landlord. And as a result,
24 the landlord has consented to the assumption and assignment. I
25 believe that the landlord, who is represented here in court

1 today, would like to look at the revised order which we have
2 provided or will provide to the landlord. So we need to get
3 him the revised order. But we expect to do that shortly and
4 then submit the revised order to Your Honor by the end of
5 today.

6 THE COURT: So but for that detail, there are no
7 issues, is that right? Mr. Eckstein, do you want to identify
8 yourself for the record?

9 MR. ECKSTEIN: Yes, Your Honor. Andrew Eckstein,
10 counsel for 600 Partners Co, LP. That is a correct
11 representation. There was a little confusion as to who the
12 assignee was given that Neuberger Berman was in a state of flux
13 having had its assets sold and the like. We've asked for
14 adequate assurance, took a couple of months to get it. We now
15 know that Neuberger Berman is known as LB Hercules Holdings LLC
16 but we did receive a letter from Lehman's CFO identifying that
17 it has the financial ability to perform and we're, therefore,
18 satisfied. Just would like to see the order.

19 THE COURT: Okay. Fine. Thank you.

20 MR. ECKSTEIN: Thank you, Your Honor.

21 MS. FIFE: Neuberger changed its name in connection
22 with the sale from LBHI. The next matter on the calendar is
23 the debtors' motion to restructure certain loans with Broadway
24 Partners Fund Manager. This was a loan by LBHI to Broadway
25 Partners in approximately the amount of 450 million dollars.

1 The loan consists of actually two loans, one a bridge A
2 mezzanine loan of 320 million dollars, the other a bridge B
3 mezzanine loan of 137 million dollars. In light of the
4 distressed commercial real estate market that affects these
5 properties, LBHI is seeking to restructure them. And we have
6 agreed to forbear from exercising our rights with respect to
7 these loans until June 2012. We're also agreeing to actually
8 take control of these properties. And we are seeking to make a
9 capital contribution of twenty million dollars in connection
10 with this restructuring.

11 There were no objections to this motion. The
12 proposed order, however, has been modified to make it clear
13 that LBHI cannot reject its obligations under the agreement so
14 that the obligations will survive any confirmation of a plan
15 and also that the order does not affect any of the rights of
16 any of the senior lenders, the lenders that are senior to these
17 mezzanine loans.

18 As there are no objections, we would ask the Court to
19 approve the debtors' motion. I believe the creditors'
20 committee would like to make a statement in support of our
21 motion as well, Your Honor.

22 THE COURT: All right.

23 MR. O'DONNELL: Your Honor, Dennis O'Donnell, Milbank
24 Tweed Hadley & McCloy on behalf of the creditors' committee.
25 As with all significant real estate transactions, the

1 committee's real estate subcommittee evaluated this proposed
2 transaction, spent several weeks, actually, doing diligence on
3 it with the debtors' professionals and, for reasons we need not
4 go into detail here, believe that it is in the best interest of
5 the debtors' estates to proceed with the proposed transaction.

6 THE COURT: Okay. I accept that representation. I
7 took a look at the term sheet which is attached to the motion.
8 It appears to be a complex transaction. It's not obvious to me
9 from having reviewed it exactly what's going on. And I suspect
10 that's probably true for other people who saw this motion and,
11 as a result, there are no objections because nobody understood
12 it.

13 MS. FIFE: Oh, well, I'm not sure that's good.

14 THE COURT: I'm only slightly exaggerating. But as I
15 understand it, there are mezzanine pieces. There are
16 underlying properties being divided into different pools of --

17 MS. FIFE: Pools, right.

18 THE COURT: -- 1, 2 and 3. I thought twenty million
19 dollars was being advanced by Broadway entities for the benefit
20 of Lehman and that Lehman was going to receive twenty million
21 dollars. But I may have --

22 MS. FIFE: No. You're right. I was incorrect, Your
23 Honor.

24 THE COURT: All right. I'm glad I brought that up
25 then because that's actually the correct way the money moved.

1 MS. FIFE: Yes. You're right.

2 THE COURT: And I accept that this is a good
3 transaction and I am comforted by the independent diligence of
4 the creditors' committee. It's approved.

5 MS. FIFE: Thank you, Your Honor. The next motion on
6 the calendar is a motion of Unclaimed Property Recovery
7 Services Inc. This motion was actually heard at the June 3rd
8 hearing. The Court denied the motion. There is a consensual
9 order that we have agreed to with the Unclaimed Property
10 Recovery Services Inc. And that order denies the motion with
11 respect to the Chapter 11 debtors' estates or their nondebtor
12 affiliates provided that the denial is without prejudice to any
13 relief that the UPRS is seeking with respect to LBI and any of
14 the trustee's objections thereto. With that, we have a
15 consensual order and we would ask the Court to approve that
16 order.

17 THE COURT: It's approved.

18 MS. FIFE: Thank you, Your Honor. The next motion on
19 the calendar is the debtors' motion authorizing discovery from
20 Barclays Capital. Yeah. I was going to say. This is a motion
21 that's being handled by Jones Day. But before we get to that,
22 if possible, I'm just going to go out of order. There is an
23 adversary proceeding which is listed on page 10, B7, Deutsche
24 Bank v. Lehman Brothers. And this was a motion for summary
25 judgment. The matter has been settled and the parties will be

1 presenting an order incorporating the terms of the settlement.
2 So this is going to be settled.

3 THE COURT: Is there a statement to be made by the
4 parties?

5 MR. DORCHAK: Good morning, Your Honor. Joshua
6 Dorchak from Bingham McCutchen on behalf of Deutsche Bank in
7 this matter. Thank you for giving us a slot today on a busy
8 calendar, Your Honor. My clients -- since the summary judgment
9 motion's been pending and ready for hearing for a while now,
10 our clients just wanted to make sure that we put on the record,
11 once and for all, that there was a settlement agreed to in
12 principal. The debtors' are going to return the funds that
13 were mistakenly transferred with any accruals thereon. And
14 we're going to finish up the stipulation and get it to Your
15 Honor as soon as possible.

16 THE COURT: Fine.

17 MR. DORCHAK: Thank you.

18 MR. GAFFEY: Good morning, Your Honor. I'm Robert
19 Gaffey from Jones Day. We're special counsel to Lehman
20 Brothers Holdings Inc. in connection with the Barclays matter.
21 And I'm here on the debtors' motion to authorize discovery from
22 Barclays Capital.

23 Your Honor, I'll be brief and only summarize what I
24 think we've shown in our papers which is that the discovery
25 sought by the estate is focused, is necessary and is well

1 within the ambit of Rule 2004.

2 As we noted in our papers, shortly after the
3 transaction, Barclays announced that it had shown a gain of
4 approximately 4.2 billion dollars on the acquisition of Lehman.
5 And since that time, certain, we think, fairly significant
6 discrepancies in connection with the sales transaction have
7 presented themselves and warrant further examination. They
8 fall into essentially three, possibly four, different
9 categories. The three categories are the accrual for
10 compensation which found its way into the asset purchase
11 agreement in Section 9.1C which, in that agreement, Barclays
12 agreed to pay in the aggregate.

13 The second issue is the amount estimated for the
14 Court at the approval hearing with respect to cure amounts that
15 Barclays would assume which was estimated for the Court at 1.5
16 billion dollars.

17 The third issue has to do with a transaction that was
18 front and center before the Court at the approval hearing. It
19 was going on at the same time. And that is a repurchase
20 agreement between Barclays and Lehman that took place on
21 September 18, 2008 where the Court was informed that Barclays
22 would essentially be stepping into the shoes of the Fed to take
23 over certain overnight financing to finance the debtor pending
24 closing of the asset purchase agreement.

25 And the fourth issue which sort of overrides all of

1 this, Your Honor, is that the debtor needs discovery concerning
2 the negotiations of these various matters in the transaction.

3 Now, one important reason that the debtor needs to do
4 this by way of discovery is it has no access to really any of
5 the former Lehman employees who were involved in the
6 negotiations, who were involved in putting these numbers
7 together. And a large number of them worked for Barclays at
8 this point and, therefore, they're unavailable for interview,
9 they're unavailable for access and, therefore, discovery is
10 necessary for us to question people about these issues.

11 The discrepancies that we have pointed out in our
12 papers, let me briefly review what those are. With respect to
13 the compensation accrual, which was put at two billion dollars,
14 and was recorded in a certain financial schedule to which the
15 APA specifically refers, that financial schedule -- it's
16 annexed as Exhibit A to our motion. Barclays -- the Court was
17 told and the board of LBHI understood that Barclays would
18 assume that two billion dollar liability for bonuses to be paid
19 to the transferred Lehman employees. The asset purchase
20 agreement in Section 9.1C says that they shall do it and
21 they'll do it in the aggregate.

22 Barclays has, at least as far as we've been able to
23 tell, it appears that either the accrual was too high in which
24 case it could well be that the consideration Barclays gave in
25 the transaction was overstated, or Barclays had not met its

1 obligation under the APA to pay the full two billion dollars.
2 And it's an issue we've been trying to track down with Barclays
3 since Alvarez & Marsal -- Bryan Marsal, the chief restructuring
4 officer of LBHI, wrote to Barclays and asked how much have you
5 paid. We've not been able to determine that amount. Now,
6 obviously, that's information solely available to Barclays.

7 The reason that that's important is the accruals that
8 we'll put together, the two billion dollar accrual for
9 compensation, and, at least according to the financial
10 schedule, the 2.25 billion dollar accrual for a cure which, by
11 the next morning, was being put at 1.5 billion were critical
12 components of the consideration that Barclays paid in the deal.
13 They paid 250 million cash. They undertook up to four and a
14 quarter billion dollar liabilities. And if these liabilities
15 were not properly calculated or, worse, simply pulled out of
16 thin air, and I'm not saying that was done -- I'm saying we
17 need discovery to find that out -- then the consideration that
18 Barclays paid in the transaction may have been significantly
19 lower than it should have been.

20 Now where does the repurchase agreement come into
21 this? The repurchase agreement, Your Honor, is an important
22 part of the investigation that we're conducting right now
23 because it appears, at least from some e-mail that we have been
24 able to recover so far, that the repurchase agreement may have
25 been used as a mechanism to move, essentially, fifty billion

1 dollars to Barclays worth of assets in return for forty-five
2 billion dollars. It was supposed to be overnight financing
3 secured for forty-five million dollars, secured by fifty
4 billion dollars in collateral. In the event and in amendments
5 that were made over the weekend after the sale was approved,
6 that repo was canceled. The fifty billions went to Barclays.
7 And as we've said in our papers, it appears that that may have
8 been a mechanism to give Barclays an undisclosed discount in
9 the sales transaction. And, in particular, I'm referring to
10 Exhibit 9 to our papers. And it's an e-mail from Girard Riley,
11 then at Lehman, to Ian Lowitt, then Lehman's CFO, and Michael
12 Gelband, another senior Lehman executive. And what it said in
13 part was "Defaulting on the repo could be the best as a
14 discount could be taken from the haircut." And at the end of
15 that e-mail, I think, is what is a very important sentence with
16 respect to our application: "Would we rather have that be in
17 the sale price tomorrow?"

18 Now, as we've outlined in our papers, Your Honor, if
19 it turns out that the repo was used as a mechanism to give a
20 five billion dollar discount to Barclays, that raises
21 disclosure issues and it raises fairness, equivalence and other
22 issues that need to be examined by the estate.

23 Now we've had no choice but to pursue this by way of
24 an application under Rule 2004 because our attempts to resolve
25 this cooperatively with Barclays have, unfortunately, been

1 unsuccessful to date. We've met with their counsel. They're
2 not willing to provide to us all of the documents that we've
3 asked for. And we've laid out the documents that we need in
4 Exhibit F to our papers.

5 They have, in their reply, said that they may be
6 willing to give us some information that's been given to the
7 creditors' committee and some information that, by
8 happenstance, also has been given to the examiner. And I'm
9 happy to get that to the extent it overlaps with the request
10 that we've made. But I think we need to proceed by way of an
11 order, Your Honor, in order to move expeditiously and to ensure
12 the estate gets the information necessary to pursue these
13 discrepancies and to determine whether or not, and I emphasize
14 both sides of that, whether or not the estate has claims that
15 it should assert or other means by which it should revisit the
16 sale order.

17 That, Your Honor, is essentially a summary of our
18 position in the papers. I'm happy to rest on our papers unless
19 Your Honor has any questions.

20 THE COURT: I have a couple of questions. To what
21 extent is the discovery that you seek comparable to the
22 discovery that is being undertaken by the examiner in
23 connection with the examiner's pursuit of his undertakings to
24 develop a report which, among other things, is to touch upon
25 the Barclays sale.

1 MR. GAFFEY: The short answer to that, Your Honor, is
2 I don't know because I don't know what the examiner has asked.
3 I don't know what the examiner's particular requests are
4 although I do understand there's some overlap. I know the
5 examiner is looking at the Barclays transaction as well. I
6 would suggest, though, that it's appropriate for the debtor to
7 look independently at that issue because there may be a
8 different end result and may form a different conclusion about
9 what claims it has an obligation to bring or to decide not to
10 bring.

11 To the extent Your Honor might be concerned about
12 burden or duplicativeness or overlap here, we have offered to
13 Barclays and would be happy to deal with the examiner, to make
14 sure they don't have to produce things twice. For example, I
15 understand that Barclays may recently have made a production to
16 the examiner although I don't know what's in it because the
17 examiner is bound by a confidentiality order which doesn't
18 allow the examiner to share with the estate what it received.

19 It would seem to me, at least as a first step toward
20 giving us the 2004 discovery that we want, Barclays can either
21 go through what it's already produced to the examiner and pull
22 out that which is responsive to what I've asked us or give it
23 to us and let us do that job. But that's the way to deal with
24 the efficiency and the burden point that Barclays has raised.
25 I would add -- I would say the same thing with respect to

1 requests made by the creditors' committee.

2 THE COURT: Okay. And I have, I guess, a more
3 fundamental question which is where can this lead. Let's just
4 assume for the sake of discussion that you conduct court-
5 authorized 2004 discovery obtained information and discover a
6 smoking gun or some other piece of information that gives you
7 reason to think that Barclays ended up with too good a deal
8 during that week we all remember. Those of us who participated
9 remember it well. But the order approving that transaction was
10 affirmed at the district court level by Judge Cote and was
11 ultimately final by virtue of the disposition of the Second
12 Circuit of the appeal. The appeal is now dismissed. And so, I
13 have a final sale order and so do you. So let's just assume
14 you find something that gives you reason to question whether or
15 not Barclays got too good a deal. Then what?

16 MR. GAFFEY: I think the answer to that, Your Honor,
17 is with respect to the sale order itself, I think I still have
18 an opportunity although it may not be the mechanism that's
19 required here to come back under Rule 60, Rule 9024 on grounds
20 of either mistake -- for example, if the smoking gun Your Honor
21 refers to shows, as some of our documents appear to indicate,
22 that the two billion dollars was actually the firm wide accrual
23 for comp, not the North American operations. Let's take that
24 as purely a hypothetical. I think I have an opportunity to
25 come back under Rule 60 and revisit the sale order at that

1 point on the grounds of mistake.

2 Should a smoking gun indicate grounds of
3 misrepresentation or fraud, I also have that opportunity. And
4 Rule 60 also allows the Court to give relief from the order for
5 any other reason that justifies relief.

6 Now, with respect to the first two components there,
7 the debtor has a year to do it. That doesn't apply to the
8 third. But it does apply to the first two which goes to the
9 need for expedition and efficiency on the discovery we seek.
10 But I think I can come back, I could come back conceivably and
11 ask the Court to revisit the sale order under Rule 60 as
12 Barclays, by the way, has done twice.

13 I think we're not restricted to Rule 60 relief,
14 however. There could be claims. There could be claims to be
15 asserted against Barclays. For example, and this is just by
16 way of example, and, again, Your Honor, I emphasize subject to
17 what discovery we get and what facts we see. There could be
18 the imposition of a constructive trust over assets that were
19 given to Barclays that were meant for a particular purpose and
20 not used for such. There could be a claim for conversion on
21 the same grounds. If a tangible fund was given to Barclays in
22 the transaction, again, for an annotated earmarked purpose and
23 it's not used for that purpose, I think, under New York State
24 law, a conversion claim could lie.

25 There could be breach of fiduciary duty claims. One

1 of the things we've raised in our papers is that some of the
2 discovery we seek goes to compensation offers made to and
3 compensation subsequently paid to former Lehman executives who
4 were near or in the negotiations to determine whether or not
5 they abided by their duties to the corporation or whether they
6 gave away points they shouldn't have given away concerned more
7 about their own financial wherewithal.

8 Again, Your Honor, I emphasize we are just looking at
9 what the possibilities could be and what the early indications
10 are. But I think if I have a breach of fiduciary duty claim, I
11 could look to Barclays for an aiding and abetting claim. I
12 think -- in other words, Your Honor, I don't think the sale
13 order, with respect to independent claims that could be
14 assertive in a complaint is the be all and the end all of that.
15 I think there may a breach of contract claim under the asset
16 purchase agreement.

17 Now, Barclays have said in their opposition that they
18 have no obligation to pay two billion dollars. That's just not
19 what the contract says. The contract is mandatory. The
20 contract says they shall pay it.

21 So it's a fair question, Your Honor, most absolutely,
22 and it's one that I gave a lot of thought to as we proceeded
23 down the Rule 2004 path. Again, at the risk of repetitive, I
24 don't want what I'm saying today to be an announcement that we
25 have such claims. I want it to be an announcement that we need

1 to take discovery to make a responsible determination as to
2 whether (a) the estate has them and (b) should proceed with
3 those claims.

4 THE COURT: All right. Thank you.

5 MR. GAFFEY: Thank you, Your Honor.

6 THE COURT: I see people coming from two sides. Are
7 you -- do you represent different parties?

8 MR. HUME: Yes, Your Honor.

9 MR. DUNN: Yes.

10 THE COURT: And who do you represent?

11 MR. DUNN: Westernbank.

12 THE COURT: And you represent Barclays?

13 MR. HUME: Correct, Your Honor.

14 THE COURT: I think Barclays might be the key person
15 to hear from right now.

16 MR. HUME: Thank you, Your Honor. Hamish Hume from
17 Boies, Schiller & Flexner. I'm here with our managing partner,
18 Jonathan Schiller. I'll be handling the argument today, Your
19 Honor.

20 Your Honor, in paragraph 1 of their reply, LBHI
21 disclaims that they are undertaking a wholesale attack on the
22 sale order or trying to retrade the deal. I think in the
23 answer you were just given, Your Honor, respectfully, you see
24 that that isn't, in fact, what this discovery is intended to
25 do. This Court found that the sale was undertaken in the best

1 interest of the estate, that fair consideration was provided,
2 that Barclays made the highest and best offer, paragraphs (i),
3 (k) and (l) of your sale order. In their brief, they say they
4 want discovery as to whether there was adequate consideration,
5 whether there was good faith and whether or not there were
6 conflicts of interest that prevented the transaction from being
7 conducted at arms' length. They want discovery precisely into
8 the issues this Court has already determined and ruled upon by
9 saying that it was a good faith transaction, it was conducted
10 at arms' length and Barclays did make the highest and best bid.
11 The Court should not allow it.

12 THE COURT: What if they made a huge mistake because
13 of the pressure of time?

14 MR. HUME: Your Honor --

15 THE COURT: It's possible that I make mistakes, you
16 know.

17 MR. HUME: Your Honor, they've given you no reason,
18 none whatsoever, to believe that there might be any kind of
19 mistake. There are two things they keep pointing to. Bonus
20 and cure are completely mischaracterized and do not come close
21 to showing the basis of this kind of wholesale attack.

22 The bonus payments? First of all, we're going to
23 provide the information showing how much we paid in bonuses.
24 We think they should see what we've provided and then see
25 whether they have anything to say about it. There is an

1 obligation to pay accrued bonuses. Barclays complied with that
2 obligation. No one has said otherwise. If we hadn't complied,
3 you would have heard about it. We complied. We paid
4 significant amounts in those bonuses and in all of the other
5 compensation. The schedule refers to a comp number of 2.0, two
6 billion. It is obviously an estimate. Every single time
7 anyone came before this Court in those days leading up to the
8 closing and referred to the bonus number or the cure payment
9 number, they used the word "estimate", "approximately",
10 "potential exposure". These were not presented to Your Honor
11 as this is the consideration. No one ever said that. The
12 agreement itself in Section 3.1 of the APA defines
13 consideration as the cash paid, over a billion dollars for the
14 real estate, 250 million in cash, which ended up being
15 deposited with the DTCC and the assumed liabilities which were
16 defined as the liabilities of operating the business going
17 forward. And I can assure you, Your Honor, those liabilities
18 have been assumed. The payment of 10,000 employees, their
19 compensation on a going forward basis, the contractual
20 counterparty payments. The business is operating. The
21 liabilities have been assumed. The consideration has been
22 provided.

23 THE COURT: I hear you. But you're not really going
24 to the issue of discovery as much as what you're telling me is
25 the good faith of your client in the transaction. This is a

1 very unusual procedural setting we find ourselves in. I can't
2 recall another instance of a transaction of this magnitude
3 being questioned in this manner nine months after the
4 transaction was approved by highly motivated special counsel
5 because it's obvious that Weil Gotshal can't do this. And what
6 I'm being told, it's not that there's anything out there that
7 Barclays needs to be concerned about so much as we just have
8 some concerns on behalf of the estate based upon some
9 representations that have been made publicly by Barclays
10 concerning what appears to be a two billion dollar benefit,
11 accounting benefit, associated with the acquisition in a 2008
12 Barclays earnings report. I looked at that.

13 I don't think that anybody at Jones Day is saying
14 that there are claims. In fact, counsel was very clear in
15 saying I'm not saying there are claims. All he's saying is we
16 want an opportunity to investigate whether there might be
17 claims. What's wrong with that?

18 MR. HUME: Your Honor, it's a question of what's
19 justified in light of that representation and how much they've
20 shown as to what those potential claims may be. Remember, Your
21 Honor -- I mean, the issue before the Court, we submit, is, is
22 the full scope of what they request even remotely justified?
23 We have argued that none of it is justified. But we've already
24 offered to produce the information showing how much was paid in
25 bonus, the information showing how much was paid in cure

1 payments. They say that they need more than that. And the
2 argument they made in their papers and to you today was we
3 don't have access to the Lehman people. And they want to
4 understand how the estimates came about to the extent there may
5 be a discrepancy between the estimate and the actual number
6 paid. That has nothing to do with the twenty document requests
7 they asked for which, I think, should fairly be understood by
8 the Court to be every single document having anything to do
9 with Lehman at Barclays. Anything. It covers everything
10 including every single compensation agreement, bonus paid to
11 any of those 10,000 employees. They want it all. Every e-
12 mail, every negotiation with any mid-level manager who might be
13 important to a business. Hey, why did you send him? How did
14 you keep him at Lehman? How did you prevent him to go to
15 another firm? They want it all. It's exceptionally broad,
16 it's hugely intrusive and it's not justified. If they want the
17 aggregate number, fine. We'll give it to them. If they think
18 there's a basis to come back for more, we'll talk about it but
19 we don't think there is. If they need to speak to a couple of
20 Lehman employees, we can arrange that. We were offering to
21 arrange those things when they ran to court. We do need a
22 protective order. We think that this bonus information is
23 confidential.

24 But their thesis in their reply brief is that
25 something's amiss because the estimates generated by their

1 client originally, or Weil Gotshal's client before the
2 transaction, those estimates seem off in light of what was
3 actually paid. That's the thesis of why they think there's
4 something to investigate.

5 Their reply brief demonstrates they have all the
6 documents from Lehman Brothers from before the deal. They
7 don't need Barclays' documents. There's no need for any
8 document discovery to explore what they're saying they want to
9 explore. They may need to speak to the people involved who
10 generated those estimates. We don't think there's any basis
11 for it. I want to be clear about that. But, at most, that
12 would be what we think they could argue they may be justified
13 to.

14 And, Your Honor, all of this talk that they have in
15 their brief and today again about confusion on the repo,
16 respectfully submitted, it's just simply not credible. The
17 Weil Gotshal lawyers were involved in the repo. They submitted
18 to Your Honor the schedule of securities that were in the
19 collateral that were going to be transferred to Barclays in the
20 repo. It was not a gratuitous transfer of five billion
21 dollars. It was a repo in which there was collateral declining
22 by the day precipitously in value that we took in exchange for
23 forty-five billion dollars in cash which they call mere
24 interday financing. It was not mere; it was not interday.
25 Forty-five billion dollars in cash that Barclays fronted and

1 didn't get back. They got collateral in the form of securities
2 that were plummeting in value. And then it didn't even get all
3 those. And as Your Honor knows, had to come to this Court for
4 a settlement in which it didn't receive the full amount that it
5 was supposed to. And the Federal Reserve, through Shari
6 Leventhal's affidavit, told the Court that she had evaluated
7 the whole thing and thought it was a fair settlement.

8 None of this is news to the Court. None of this is
9 confusing or should be a source of confusion or allegations
10 that there is --

11 THE COURT: It's not news but it is confusing. And I
12 think that one of the problems -- I'm just giving you a very
13 candid appraisal. In talking about something that's this
14 massive from the perspective of looking back at it nine months
15 later is that I know from having sat here during that week that
16 it was an extraordinary time in the history of global finance.
17 And things were happening very, very quickly. Very skillful
18 lawyers and businesspeople put together an extraordinary
19 transaction in virtually no time. And it's conceivable that
20 mistakes were made. As has been pointed out by special counsel
21 for the debtors and as you know, Barclays itself sought 60(b)
22 relief on two separate occasions having to do with contracts
23 listed on the list for assumption and the Amex Barclays
24 litigation continues, although I believe it to be close to
25 resolution.

1 So the notion that there may have been either a
2 misunderstanding or even an innocent misrepresentation as
3 opposed to a willful one is entirely possible. Where it leads
4 is another question. And whether the discovery which is being
5 currently sought is well geared to the objectives of getting to
6 the truth remains to be seen. But we will get to the truth.

7 MR. HUME: Your Honor, we understand that and we want
8 to cooperate with that and we are cooperating with that. And
9 we have multiple parties with whom we are speaking, you may
10 hear from the creditors' committee in a moment, the examiner's
11 present to a question Your Honor asked counsel for LBHI, how
12 much of the discovery sought is covered by what the examiner is
13 looking at.

14 On this point on the repo, I would like to draw the
15 Court's attention to the third bullet point on page 4 of the
16 Court's January, I think, 18th order authorizing the examiner
17 which specifically says one topic for the examiner is the
18 transactions and transfers including but not limited to the
19 pledging or granting of collateral security interest among the
20 debtors pre-Chapter 11 lenders and financial participants
21 including JPMorgan, Bank of America, the Federal Reserve Bank
22 of New York. The repo is clearly covered by that topic is
23 something the examiner is looking at.

24 We have produced documents, e-mails, spreadsheets,
25 what was exchanged in those tumultuous days, we produced them.

1 We'll continue to produce them for the examiner. We've
2 scheduled interviews and we've offered to make all of that
3 available to LBHI in a coordinated process.

4 So there should be no question that, in terms of
5 unraveling all of that complexity, we are cooperating and we
6 can make available what we're giving the examiner and the
7 creditors' committee to LBHI.

8 The creditors' committee may wish to speak. They
9 chimed in on this motion. Our one point on that, which may
10 save a rebuttal, we met with them in February. We've provided
11 them documents. We talked through all of these discrepancies
12 in the numbers they raise in their papers. We haven't heard
13 back since.

14 THE COURT: Let me just cut through your argument, if
15 I may, and I understand your position. Is it your position
16 that there should be no order entered authorizing 2004
17 discovery and instead you should simply be permitted to go
18 about the business of providing informal discovery as you've
19 been doing in the past? Is that your position?

20 MR. HUME: Your Honor, we think --

21 THE COURT: Because I think that's what I heard you
22 say.

23 MR. HUME: That is our position, Your Honor. And we
24 think, at a minimum, Your Honor could stay the motion pending
25 our production of the documents we've offered to produce.

1 Because we don't think there's any need to order production of
2 anything in excess of that. So yes, that is our position.

3 THE COURT: All right. Let me hear from the
4 creditors' committee. I know there are others who wish to be
5 heard and then I'll give counsel for LBHI an opportunity for
6 further comment.

7 MR. DUNNE: Your Honor, may I be heard briefly?

8 THE COURT: Yes, of course.

9 MR. DUNNE: It's Dennis Dunne from Milbank Tweed
10 Hadley & McCloy on behalf of the committee. The reason I asked
11 for permission is we're actually not representing the committee
12 in this matter. I'm going to turn it over to my co-counsel,
13 James Tecce in thirty seconds to address the merits.

14 I rose to address one purely factual issue relating
15 to something we are representing the committee with respect to,
16 which is the examiner. Your Honor had some comments about the
17 scope of the examiner's charge. And we recently were in
18 discussions with the examiner so I was literally looking at the
19 order yesterday. And what it actually says is that -- your
20 order charged the examiner with investigating the transfer of
21 assets from LBHI affiliates, other than LBI, to Barclays. And
22 so the vast bulk of the purchase by Barclays were securities
23 and other assets from LBI. You may remember that the genesis
24 of that was Mr. Bienenstock's concern that his client, which
25 was a nondebtor at this time, may have had assets that were

1 swept up in some broad language that was given to the examiner
2 to take a look at. But they carved out LBI, which my
3 understanding relates to the bulk of what we're talking about
4 today with respect to 2004. And I just wanted to put that --

5 THE COURT: Thanks for that clarification.

6 MR. DUNNE: -- on the record. I'll turn the podium
7 over to my co-counsel.

8 MR. TECCE: Good morning, Your Honor. James Tecce of
9 Quinn Emmanuel on behalf of the official committee. Your
10 Honor, we filed a joinder in support of the 2004 motion because
11 from our perspective it arrives at a propitious time that is
12 coincident with our own investigation at a point that we've
13 reached in our own investigation that suggests that we do need
14 additional information from Barclays.

15 If the Court will remember, we first raised this
16 issue in December of 2008 in the context of a settlement that
17 had been reached between the SIPA trustee, Barclays and
18 JPMorgan Chase. And we had identified certain issues that were
19 raised in a factual affidavit that was submitted in connection
20 with that affidavit that we viewed as being inconsistent or
21 worthy of further investigation from our perspective and the
22 sale transaction as we were reviewing the sale transaction,
23 that order proving that settlement was entered on the 22nd of
24 December, Your Honor. And I think what's important, because
25 the charge has been made that we've really done nothing to

1 follow up with Barclays, just to -- very briefly, and I will be
2 brief Your Honor -- chronicle what we have done with respect to
3 Barclays and what the status of our investigation is with
4 respect to Barclays.

5 The Court admonished, on the 22nd of December, that
6 the parties should work cooperatively to obtain information,
7 specifically the committee to obtain information from Barclays
8 with respect to its questions concerning the sale transaction.
9 And we were very conscious of the Court's remarks. We did not
10 want it to devolve to motion practice so we worked as hard as
11 we could to work cooperatively with Barclays to get the
12 information that we wanted to conduct our investigation.

13 So the order was entered on that settlement and that
14 issue was raised at a hearing on the 22nd of December, Your
15 Honor. On the 26th of December, four days later, we sent
16 Barclays our first request, if you will, an informal request
17 for information. The parties had a short meet and confer
18 session in January to discuss that letter. There was a meeting
19 on the 3rd of February that is referenced in Barclays' papers.
20 I disagree with Barclay's characterization of that meeting. It
21 was not the Rosetta stone that answered all of the committee's
22 questions. We actually emerged from that meeting with
23 additional questions. And to that end, seven days later, we
24 sent a revised document request or a revised request of
25 information that reflected the questions that we had from that

1 meeting in February.

2 Barclays ultimately did produce documents to us in
3 response to those requests on the 20th of March, that's
4 correct. But when the documents were delivered to us they were
5 in a format that made it almost impossible to decipher them.
6 So a period of negotiation with Barclays started as to the
7 format in which the documents would be produced to us.

8 And it wasn't until the 28th of May -- the documents
9 consist of a number of schedules because, as Your Honor will
10 recall from the sale transactions, securities -- a number of
11 securities were transferred. As they were presented to us, it
12 was difficult for us to decipher them. During the period of
13 April we actually reached out to Barclays and worked with them,
14 asking them to provide the documents to us electronically and
15 they wouldn't agree to that initially. So we worked with them
16 through different ways to get the documents that would avoid
17 them having to produce them electronically. Ultimately, they
18 did produce them electronically to us on the 28th of May, three
19 weeks ago.

20 So to say that we haven't followed up with them about
21 the schedules, is really unfair to the extent that number one,
22 they were just produced to us in a way that we can decipher on
23 the 28th of May. And two, we're still reviewing those
24 schedules.

25 But where we are in our investigation, Your Honor, is

1 I think we've reached a point where we have additional
2 questions on the basis of the documents that we've received.
3 And the best way for us to proceed is probably what we really
4 need are depositions of certain individuals. We may have some
5 discrete discovery requests but we would like to take
6 depositions. And in an effort to be efficient and an effort to
7 avoid duplications, we're asking to join in the debtor's 2004
8 motion. They've asked for depositions. They have asked for
9 documents but they have asked for depositions and we would like
10 to attend those depositions and propound questions.

11 We could have filed our own 2004 motion, Your Honor,
12 at any time. But we didn't do that because going back, at
13 least to April, the debtors served discovery on Barclays and
14 requested depositions. And we think that the most efficient
15 and non-duplicative way for us to proceed is to proceed through
16 the Rule 2004 motion.

17 Just one other point, Your Honor. Your Honor asked
18 where does this all go? What is the remedy at? Mr. Gaffey
19 discussed some of the issues that the parties were considering
20 and I provide the same caveat that we don't know that there's a
21 claim yet. But I just would note that to the extent that
22 assets were transferred that were not authorized by the sale
23 order, that it may give rise to 549 post-petition transactions
24 that were not authorized by the Court. So that's just one
25 other area that we're investigating. We don't know that it

1 gives rise to a claim. I provide that same caveat but just to
2 answer Your Honor's question.

3 THE COURT: Okay. Recognizing that there are caveats
4 throughout the courtroom at this moment, is the committee
5 investigating the same subject matter that the debtor intends
6 to investigate assuming the 2004 request that's before me is
7 approved or are you focusing on different subjects?

8 MR. TECCE: Well, that's a fair question Your Honor.
9 I think that we are -- from our perspective we're examining the
10 sale order, the assets transferred and the liabilities assume
11 and whether or not the transaction that's consummated is
12 consistent with the transaction that was represented to the
13 Court and to the committee.

14 THE COURT: Sounds like it's the same thing.

15 MR. TECCE: There are similarities, Your Honor, but I
16 think that we can work with them to avoid the duplication of
17 effort. Already this process is reflected by that to the
18 extent that the debtors have filed their 2004 motion. To the
19 extent that we have additional questions of Barclays, we have
20 not filed a 2004 motion yet because there's one on file already
21 and we've already avoided the duplication of two 2004 motions.

22 I think the reply that Barclays filed telegraphs what
23 their answer will be when we ask them for additional
24 information. And that's that we've given you everything you
25 need to know. They said in their reply that the committee

1 shouldn't have any additional questions because we met with the
2 committee and we answered all their questions and they have no
3 basis to be confused.

4 I think to the extent that we -- if the Court denies
5 the debtor's motion and we go to Barclays and we ask them for
6 additional information, we may be tasked with having to file
7 our own 2004 motion because we'll be met with the answer you
8 have everything you need, go to the Court and prepare a 2004.

9 So we've already avoided that duplication already.
10 The debtor's have filed their motion. We can certainly
11 coordinate with them in the conduct of depositions as to what
12 questions and areas we think are important to focus upon. And
13 that coordination has been working to avoid duplication so far
14 already.

15 THE COURT: Okay.

16 MR. TECCE: Unless Your Honor has any questions, that
17 concludes my presentation.

18 THE COURT: I don't.

19 (Pause)

20 MR. DUNN: Your Honor, my name is David Dunn. I
21 represent Westernbank of Puerto Rico. I'll be very brief.

22 My client has 145 million dollar claim arising from a
23 repurchase contract for approximately 450 million. The assets
24 that were to be repurchased were involved in the repo that is
25 being investigated here. And we have issues and concerns about

1 those transactions; what the classifications were of assets
2 that were transferred; what the consideration was that was paid
3 and how that repo transaction came to be a sale transaction in
4 the period immediately after the time Your Honor --

5 THE COURT: I'm familiar with this theme. It has
6 been raised at multiple times early in the bankruptcy case.

7 MR. DUNN: And the point is that all of this
8 discovery is being taken under confidentiality orders. We're
9 happy to participate but we need this information. We are
10 likely to wind up in a dispute over the status of repurchase
11 transaction participants, as Your Honor is aware. And as long
12 as this is going forward, given the stake of our claim, we just
13 ask for the opportunity to be able to participate and have
14 access.

15 THE COURT: Absolutely not. This is something that
16 was fully vetted during the first probably four months of the
17 bankruptcy case when we had -- I don't have the number off the
18 top of my head -- something like thirty-plus separate requests
19 for 2004 examinations brought by parties similarly situated to
20 your client, all seeking information concerning what happened
21 in respect of particular transactions. None of that 2004
22 discovery has been authorized. All of it has been subsumed
23 under the investigation which is being conducted currently by
24 the examiner. And to the extent it's not subsumed under that
25 examination, it's subsumed under the examination being

1 conducted by the committee.

2 So while I appreciate your remarks, you're not
3 getting any relief from me today, nor are you getting any
4 comfort from me in terms of your reserved rights. They are
5 what they are and they're the same as everybody else's reserved
6 right.

7 MR. DUNN: Your Honor, I'm not looking to get --

8 THE COURT: Then why are you talking to me?

9 MR. DUNN: I was trying to explain what it was I was
10 asking.

11 THE COURT: But I'm trying to understand what
12 position are you asserting that is different from the positions
13 that have been expressed throughout this case and that have
14 been put to one side, appropriately?

15 MR. DUNN: I'm not looking for discovery about my
16 specific transaction. I'm looking for the generic
17 categorization discovery of what was transferred and how it was
18 allocated, which I understand is already going to be the
19 subject of this examination. And because this examination has
20 already been initiated, I think my client has an interest and a
21 standing and a right to participate in that. I'm not talking
22 about what happened to my securities. I'm talking about the
23 categorization of securities and the division of consideration
24 between, for example, LBHI and LBI. What made up the
25 transaction, the stock that was in that repo? Not did it

1 include my stock, I know it included my securities. But what
2 were the components and how was the consideration allocated?

3 It is my understanding that is already what LBHI is
4 seeking to inquire about and obtain. I think I have an
5 interest in that because it's going to affect the pool from
6 which my client ultimately is going to be entitled to recover.

7 I don't want to ask about my securities, I want to
8 ask generally about the categorization, the valuation and the
9 consideration that was paid and how it was allocated. Those
10 are the issues I'm interested in that where level one step
11 above what Your Honor has previously rejected.

12 I think as long as that information is going to be
13 provided, we're willing to sign on to a confidentiality
14 agreement. We have a very serious stake here. This is
15 critical to my client's interests and I think we ought to be
16 entitled to participate at that level. I'm not talking about
17 what happened to my particular securities, which is what I
18 understand Your Honor has previously rejected.

19 THE COURT: There's absolutely no reason for you to
20 separately participate in discovery that's being initiated, if
21 allowed, by the debtor to revisit a transaction if that
22 transaction is revisited and produces information that
23 ultimately needs to the articulation of causes of action.
24 There'll be plenty of opportunities for you and others in the
25 same position to understand what's going on. This is, as I

1 have said from the outset, to be a transparent process but it
2 is also to be an orderly and efficient one. And there's no
3 efficiency associated with having particular parties jump on
4 the bandwagon of discovery. That bandwagon has been moved to
5 the side and will remain as a side issue until such time as the
6 examiner finishes his investigation and produces a report and
7 the committee finishes its investigation.

8 To the extent that you have questions that the
9 committee can answer, I'm sure the committee will be
10 cooperative in responding to any reasonable request that you
11 have. To the extent that after this process has run its
12 course, there is still unanswered questions. No parties in
13 interest, including those of your client, will be adversely
14 affected. You'll have an opportunity to pursue your separate
15 interests either in separate litigation or in separate
16 permitted discovery. But nothing's happening today.

17 MR. DUNN: Okay, Your Honor. Thank you.

18 MR. BYMAN: Your Honor, may I approach on behalf of
19 the examiner?

20 THE COURT: Yes, please. I'd like to hear what the
21 examiner's position is.

22 (Pause)

23 MR. BYMAN: Good morning, Your Honor. Robert Byman
24 on behalf of the examiner. We actually did not file anything
25 and don't take a position on this motion because we don't think

1 it's appropriate for us to have one. But want to make sure
2 that the Court is aware, as I'm sure you had anticipated, that
3 each of the areas that had been discussed that people want to
4 take discovery on are things that we are looking into. We are
5 looking into every one of those factual issues, whether or not
6 we report on them is something that I'm not in a position to
7 say yet because we are still agnostics -- we are still the
8 perfect jury that hasn't tried to form a conclusion. But we
9 are looking into each of those issues. We have already
10 interviewed a number of former LBHI people who are now at
11 Barclays.

12 I would like to simply state for the record that
13 while the course of production of witness interviews and
14 documentation from Barclays hasn't been as fast as I would have
15 liked it. I'm also not as tall as I would have liked to have
16 become. We have gotten cooperation from Barclays. We've
17 gotten everything we've asked for. We've never gotten a no.
18 So we expect to be able to comment on all of these issues.

19 By the same token, we haven't taken a position on
20 this because, as Jones Day points out to you, they have a
21 deadline that doesn't apply to us. If they're looking at one-
22 year deadline under Rule 60, we can't assure them that we'll be
23 able to answer their questions by then. So I think that's
24 something that they have to take up with you but I don't want
25 anybody in this room to think that we're not looking into all

1 of these issues.

2 THE COURT: And indeed from what I read in the Ernst
3 & Young papers, November 2009 continues to be the target date
4 for your report or do you wish to revise that date?

5 MR. BYMAN: It is our target. But I will tell you
6 that we expect to talk to you sometime in August when we have a
7 better understanding of what our target is. It's becoming less
8 and less likely that that's possible because of unanticipated
9 delays in production of documents, being able to interview
10 witnesses as quickly as we thought.

11 THE COURT: So you're telling me it's not going to be
12 November, it'll be some time later than that.

13 MR. BYMAN: I suspect it will, Your Honor.

14 THE COURT: All right.

15 MR. DUNN: Your Honor, just a follow up to this, and
16 today is not the day for this but I suspect we're going to be
17 back in front of you on the scope issue. As Your Honor knows
18 we spent hours and hours carefully calibrating the scope to
19 avoid duplication of efforts and the cost that would go into
20 duplicating those efforts. And what I just heard is that
21 they're exceeding the scope as the order is currently drafted
22 and I suspect that we'll be back in front of Your Honor on an
23 appropriate motion.

24 THE COURT: I think that's probably a good idea that
25 it be brought sooner rather than later.

1 MR. DUNN: I agree, Your Honor.

2 MR. KOBAK: Good morning, Your Honor. James Kobak on
3 behalf of the SIPA trustee. Your Honor, I'll be very brief.
4 My purpose for rising now is because we submitted a statement.
5 We think the issues that are being pursued here are relevant to
6 things that we need to look into for various purposes,
7 including disputes we have with Barclays and the report that we
8 need to prepare. And I think, consistent with the way we've
9 been dealing with some of the other parties in their
10 investigations, all that we would ask is whatever Your Honor
11 order we be permitted to attend depositions, to receive copies
12 of documents and so forth. I think in the long run that will
13 avoid a lot of duplication of effort by us and I would think by
14 Barclays. I don't know if Barclays is willing to agree to that
15 voluntarily or not. But if they're not and if Your Honor does
16 order some production and some discovery, we would hope that we
17 would be permitted to participate in that way rather than
18 having to reduplicate the effort ourselves.

19 THE COURT: Understood.

20 MR. KOBAK: Thank you.

21 MS. SCHINDLER-WILLIAMS: Good morning, Your Honor.
22 Sara Schindler-Williams of Kramer Levin on behalf of the Bank
23 of New York Mellon as indentured trustee for the Main Street
24 bonds. I would just like to highlight a few points, although
25 I'm not -- I understand Your Honor's concerns about the

1 duplication and the efforts of individual creditors coming in.
2 But the indentured trustee is an unusual position of being the
3 creditor of a debtor that was -- of an entity that was not a
4 debtor at the time of the sale and whose assets, therefore, if
5 they were wrongfully transferred to Barclays would not have
6 done so subject -- would have done so subject to any claims of
7 the indentured trustee.

8 THE COURT: I remember specifically denying a motion
9 brought by your client requesting 2004 relief. It must have
10 been six months ago.

11 MS. SCHINDLER-WILLIAMS: Yes, Your Honor. That's
12 right. It was on January 14th and you did give us -- you
13 denied it without prejudice given the pending investigation to
14 the creditors' committee and the examiner. But we just would
15 feel that the current filings of the debtors and the committee
16 highlight that the same concerns of the indentured trustee's
17 own motion that excess assets may have been transferred to the
18 estate in error. And that to the extent discovery is uncovered
19 by the parties that is relevant to the indentured trustee's own
20 discovery requests, now filed November 2008, we would like to
21 share in that.

22 THE COURT: I understand the request.

23 MS. SCHINDLER-WILLIAMS: Thank you.

24 MR. GAFFEY: Robert Gaffey again, Your Honor, for --

25 THE COURT: Your motion certainly has opened a

1 Pandora's Box, hasn't it?

2 MR. GAFFEY: It appears to have, Your Honor, but for
3 good reason. I rise just briefly, Your Honor to address a few
4 points that Barclays has raised. One is, respectfully Your
5 Honor, I think at this point we really do need to proceed under
6 order from the Court. As I said, Barclays has, several times,
7 said they would produce. I still haven't seen what they gave
8 the creditors' committee. I can't get it from the creditors'
9 committee because they've got them tied up in a confidentiality
10 agreement. And if it were produced back in March in whatever
11 form it was produced to Quinn Emmanuel and then later in
12 electronic form, if Barclays wanted to resolve these issues
13 they would have turned that over to me by now.

14 I think an order will have a good, cleansing effect
15 on how everyone proceeds here. I have no interest in taking
16 any more deposition then I need. If an interview makes sense,
17 we'll do that. But I think it makes sense, especially giving
18 the debtor's timing issues here, to proceed by order rather
19 than by promises of cooperation. Inevitably, I think Your
20 Honor, we will be back, if that's the basis on which we
21 proceed.

22 Secondly, Your Honor, to the extent there has been a
23 suggestion that we, the debtor, are merely curious about the
24 fact that Barclays declared that gain, it's hardly that. I
25 think we've made the showing in our papers and let me just say

1 out loud, we have some serious concerns about the discrepancies
2 that have arisen here. If there's a 1.5 billion dollar
3 estimate for cure amounts to be spent by Barclays as part of
4 the consideration paid. And if, as it appears, no more than
5 200 million and probably less than that has been spent, that's
6 a big difference that needs to be investigated.

7 If a two billion dollar compensation amount was
8 estimated and put in as a firm number in the agreement and if
9 as it appears, from best we can tell, probably no more than 700
10 million was spent. That's a huge discrepancy that needs to be
11 pursued.

12 And the repurchase agreement, Your Honor, is a
13 serious, serious matter. If, as these e-mails indicate, it was
14 used to give an undisclosed discount, that's beyond mere
15 curiosity. That's an issue that we, the debtor, have an
16 obligation to pin down.

17 Lastly, Your Honor, ask for a moment on the issue of
18 confidentiality. One of the things we noted in our papers is
19 I've been asking since first meeting in an attempt to resolve
20 this with Barclays' counsel, for them to propose a
21 confidentiality agreement that they could agree to. And I did
22 that to try and avoid the, sort of, half-need negotiation of
23 this paragraph and that paragraph. I did not hear back from
24 them. Finally on June 16th I sent a draft and Monday afternoon
25 I had a counterproposal. I think we're going to be able to

1 work that out but I just wanted to, sort of, put a marker down
2 that one issue that will be important to us.

3 And I think that goes to the efficiency point that
4 you've heard the debtor address and the creditors' committee
5 address and the SIPA trustee address, is we need to be able to
6 share amongst those three constituencies what Barclays
7 produces. It will do no good if Barclays is able to put us, by
8 dint of separate confidentiality agreements, in different
9 silos. That's a recipe for duplicative discovery. So we may
10 be back to Your Honor, I hope we're not but we may be back to
11 Your Honor asking that a confidentiality order on those terms
12 be entered.

13 THE COURT: All right.

14 MR. GAFFEY: Thank you, Your Honor.

15 THE COURT: Is there anyone else who wishes to be
16 heard at this point?

17 MR. WAISMAN: Your Honor, purely procedural point.
18 This protective order point is a little ironic. That's the
19 only reason they haven't received what we've offered. They
20 sent us a protective order completely different from the one we
21 have with the examiner. We want to harmonize the protective
22 orders. They changed the designations up so we'd have to
23 redesignate everything.

24 So if we get a protective order we can proceed.
25 We've cooperated with everyone, just as you've heard with the

1 examiner. These spreadsheets the creditors' committee couldn't
2 open, we've now sent them to them in native format so they
3 could actually alter them, which is highly unusual, to overcome
4 that formatting issue. So we have cooperated fully, we will
5 continue to do so.

6 THE COURT: Appreciate that representation of a
7 willingness to be fully cooperative in this effort to discover
8 the truth. I'm going to grant the motion brought by debtors'
9 special counsel for authority to take discovery under
10 Bankruptcy Rule 2004.

11 I am concerned, however, about some of the things
12 I've heard this morning that suggest that this really may be a
13 revisiting of some of the issues that I had thought had been
14 put to rest, at least pending the completion of the examiner's
15 report relating to the needed individual creditors to know more
16 than they currently know about the status of collateral or know
17 more than they think they currently know about how the sale
18 transaction with Barclays impacted their rights.

19 As to the discovery that might be initiated by
20 individual creditors, I reiterate points I've made in the past
21 that this is not the time for particularized discovery.
22 Instead, discovery for the benefit of all parties in interest
23 concerning fundamental transactions should be conducted by, as
24 the case may be, the examiner, the creditors' committee, the
25 SIPA trustee and now the debtor in possession itself.

1 But I am troubled, as I have been in the past, about
2 duplication of effort and inefficiencies associated with doing
3 multiple times what can be most efficiently done once. And so
4 as was the case at the time of the appointment of the examiner,
5 and my direction that parties in interest meet and confer for
6 purposes of developing a workable, informal protocol to
7 coordinate the efforts to uncover the truth.

8 I believe that a similar meet and confer session
9 would be appropriate in respect of the 2004 discovery to be
10 initiated by the debtor by reason of this new order. I believe
11 that it would be entirely appropriate for the SIPA trustee to
12 be a participant, particularly because as has already been
13 noted on the record today, the LBI assets represent a
14 significant percentage of what was transferred pursuant to the
15 sale order. And I also think it important that the creditors'
16 committee, which has sought to join in the 2004 discovery,
17 coordinate its efforts with the efforts of special counsel for
18 LBHI.

19 To the extent that there is overlap with what the
20 examiner is already doing, the examiner's counsel should also
21 be part of this process. And to the extent that existing
22 confidentiality agreements and restrictions need to be modified
23 in order to permit the sharing of information with other
24 parties who would agree to be bound by comparable
25 confidentiality restrictions if appropriate, that would be a

1 way to avoid having to produce, again, material that has
2 already been produced once before.

3 I suggest that that effort at coordination take place
4 as a priority item between today's date and the date of the
5 next omnibus hearing. And if there is a need for either a
6 status report or guidance from the Court concerning any issues
7 of disagreement that may arise, there'll be an opportunity for
8 discussion on the record at that time.

9 I'll entertain an appropriate order. We'll move on
10 to the next --

11 MR. HUME: I beg your pardon --

12 THE COURT: Did you have an order in there?

13 MR. GAFFEY: Well, I did Your Honor, but it does
14 not -- it's the form of order -- excuse me, Your Honor. It's
15 the form of order that we proposed as an exhibit to our papers.
16 It does not address the meet and confer requirement Your Honor
17 just described but I think we all understand it.

18 THE COURT: I think everybody understands what I've
19 just said. And you can make a slight adjustment to the order
20 that you have prepared by incorporating into the order the
21 statements that I've made just now.

22 MR. GAFFEY: We will do that and we'll submit it when
23 that's finished, Your Honor. Thank you.

24 THE COURT: Okay.

25 MR. GAFFEY: May I be excused, Your Honor?

1 THE COURT: Yes. If there are people who feel that
2 it's a good time to leave because this matter has been
3 addressed, people can leave. We'll take a -- just two minutes
4 of quiet time; I'm not moving.

5 (Pause)

6 MR. WAISMAN: Good morning, Your Honor. Shai
7 Waisman, Weil Gotshal & Manges --

8 THE COURT: Good morning.

9 MR. WAISMAN: -- for the debtors. Two remaining
10 items on the agenda. The first one being listed as agenda item
11 number 5 on page 4 of the agenda that was filed this morning,
12 the motion of -- I'm going to botch this -- Kalaimoku-Kuhio
13 Development Corp. I understand --

14 THE COURT: I don't think you did that right.

15 MR. WAISMAN: I'm certain I did not and I apologize
16 to any that are offended. And I'll gladly take instruction on
17 how to pronounce that appropriately. I understand counsel to
18 the movant is either in the room or standing right behind me.

19 THE COURT: Why don't you pronounce it?

20 MR. NEALE: Good morning, Your Honor. David Neale of
21 Levene, Neale, Bender, Rankin & Brill. I believe it's
22 Kalaimoku-Kuhio Development Corporation.

23 MR. WAISMAN: Not even close.

24 MR. NEALE: One of the hazards of working in Los
25 Angeles, you do have to learn a little Hawaiian, Your Honor. I

1 don't think that there's anything particularly controversial or
2 groundbreaking from the legal standpoint about our motion. We
3 are simply seeking compliance with the requirements of Section
4 365(d)(3). The debtor has been in bankruptcy now for in excess
5 of sixty days. There has been no post-petition rent paid to my
6 client. The evidence before the Court suggests that the debtor
7 is incapable of making any rent payments. There is only,
8 approximately 150,000 dollars or so in the debtors' bank
9 account. The building is nearly empty, soon to be entirely
10 empty. We understand that Nike Town, which is the last
11 remaining tenant in the building, is on its way out. So we are
12 sort of at a loss to understand what the debtor is up to with
13 this property, what the debtor intends to do with this
14 property.

15 THE COURT: They say they're selling it.

16 MR. NEALE: Well, they said they might be selling it,
17 Your Honor.

18 THE COURT: They said they're trying to sell it.

19 MR. NEALE: Well, they've been trying to sell it for
20 months and months, Your Honor. They've been trying to sell it
21 since before the bankruptcy case was filed. They asked for a
22 continuance without giving any sort of information about what
23 kind of deal they're pursuing, who the buyer might be, whether
24 there is a buyer, whether there's a series of bidders. We
25 don't know anything about what's happening with this property

1 from the debtor's perspective. The only thing we know, Your
2 Honor, is that at this point my client is financing this
3 estate. At this point it's over 600,000 dollars and in about a
4 week or so it's going to be 800,000 dollars. We have about
5 400,000 dollars that's owing from a prepetition period. So at
6 this point my client is an involuntary lender to this estate in
7 excess of a million dollars.

8 Simply saying that we're trying to sell the property,
9 I don't think, excuses compliance with the mandatory language
10 of Section 365(d)(3). It does say in (d)(3) that the debtor
11 shall or the trustee shall comply with the terms of the lease
12 within sixty days following the petition date. As I read the
13 debtors' response, it was some sort of an equitable plea to the
14 Court to say please don't make us comply with the Bankruptcy
15 Code because there might be an upside here.

16 Well, if that were true there'd never be relief under
17 Section 365(d)(3) because presumably with properties there
18 generally might be an upside somewhere down the road. We don't
19 know whether it could be six months down the road, a year down
20 the road or, you know, two years down the road.

21 THE COURT: Well, there are different consequences
22 that flow from a failure to make a required payment under 365
23 (d)(3). Sometimes it can become grounds for a motion to
24 dismiss a case. Sometimes it can become grounds for a motion
25 to convert a case. Sometimes it can become a basis for

1 financing. Sometimes it can become the basis for an adequate
2 protection claim which is secured. But it isn't necessarily
3 grounds for relief from the automatic stay.

4 MR. NEALE: I understand that, Your Honor. As our
5 motion is phrased in the alternative, I mean, the basic
6 objective of my client is to get paid. There's really no
7 mystery to that. We've asked for relief from the automatic
8 stay in order to affect what Hawaii law allows to occur in the
9 event of a continued default under this lease. The issue that
10 we have is that there are these outstanding defaults. The
11 motion, in the first instance, seeks an order compelling the
12 payment of the outstanding post-petition rent. Failing that,
13 I'm not sure what the debtor is proposing to us because the
14 debtor can't provide adequate protection of our interest under
15 the lease.

16 THE COURT: What if the order that you seek said that
17 you'll be paid the rent that you're owed at the time that the
18 building is sold. And if the building isn't sold within a
19 reasonable period of time, you can come back in court.

20 MR. NEALE: Well, Your Honor, that opens all kinds of
21 issues about what a reasonable time is.

22 THE COURT: Let's just say, for the sake of
23 discussion, it's six months.

24 MR. NEALE: Well, Your Honor, then my client has
25 financed this property. My client has its own financing

1 obligations. This is a property that itself is financed by my
2 client. And to the extent we're not receiving rent; we're
3 being put in a financial bind with our lenders. My client
4 never entered into this lease with the expectation of extending
5 two or three million dollars worth of credit to this tenant.

6 The issue that we have is if the debtor came in today
7 and said, Your Honor we have a sale that we've negotiated to a
8 five star company who can provide adequate assurance of future
9 performance, it's not a special purpose entity that's not
10 capitalized. It's a real tenant who can takeover our space and
11 takeover the lease obligations, I would agree with Your Honor
12 that that would be a perfectly suitable outcome. And we
13 probably would have agreed to allow that to occur. In fact,
14 there were discussions prior to the hearing today about ways in
15 which we could resolve this motion that would involve a sale of
16 the property.

17 Unfortunately, there's no one here. There's no one
18 here with a check saying we're ready to buy the property.
19 There's no one on the horizon that's been identified with a
20 check that's ready to buy the property.

21 THE COURT: In that sense, this is almost a classic
22 single-asset real estate case that's residing within a very
23 large global bankruptcy.

24 MR. NEALE: That's correct, Your Honor. That's
25 correct. It's a single-asset real estate case with a property

1 that generates little or no rental income; where the tenant is
2 unable to pay the landlord the rent; where there's only 150,000
3 dollars of cash in the bank which would not even be sufficient
4 to cure the post-petition defaults. It's not even enough to
5 pay one month's rent. So the question, Your Honor, is what
6 would my client be required to do under those circumstances?
7 We've moved to compel payment of the rent. We've moved for
8 relief from the automatic stay. We've moved to compel
9 assumption or rejection of the lease. Those, to us, are the
10 three most legitimate approaches to dealing with the situation.

11 So if the Court would compel the payment of rent,
12 that may be a somewhat meaningless act if the debtor doesn't
13 have the cash to do that. We've moved for relief from stay
14 because if they can't pay the rent we'd like to have our
15 remedies. And finally, we've asked that the Court compel them
16 to assume or reject because some time has passed in this case,
17 time has passed prior to the bankruptcy petition being filed
18 where the debtor was marketing the property for sale but no
19 sale was identified. And so we want an outside date. We want
20 to know when our problems come to an end with this tenant. We
21 don't think that's unreasonable under the circumstances.

22 If the facts were different, if we had something
23 concrete we might be singing a different tune. But as we sit
24 here today, Your Honor, we don't see how there's really any
25 alternative.

1 THE COURT: Okay.

2 MR. NEALE: Thank you, Your Honor.

3 MR. WAISMAN: Your Honor, Shai Waisman again for LB
4 2080, the debtor in question in this dispute. First of all,
5 just to correct some statements that were made at the beginning
6 of counsel's presentation, there is no evidence in the record,
7 there are statements of counsel as to the status of the
8 property. What the papers make clear is that the debtor, LB
9 2080, has invested over forty-five million dollars in this
10 property. Given the state of real estate the world over,
11 that's not likely to be dollar for dollar value. But the
12 debtor does believe that there is value to be had in a sale of
13 the ground lease and that that value inures to the benefit of
14 all creditors, not just the landlord.

15 What has become evident to the debtor, in the course
16 of trying to work with the landlord through this situation, and
17 the parties have spent a great deal of time trying to come to
18 an amicable resolution and avoid a hearing today, is that
19 ultimately it appears the landlord very much would like the
20 building with the improvement and the forty-five million
21 dollars expended by LB 2080. And by way of its motion, and
22 many of the statements made today, it's not willing to and it's
23 not going to accept, and we'll get to the issue of the buyer
24 and the status of the sale in just a moment, but is not going
25 to accept any proposed purchaser here and is going to try as

1 hard as possible to block any assumption of assign and sale of
2 the lease in order to effect a forfeiture on the debtor to the
3 detriment of all creditors and end up with the building.

4 And point in fact, the history of the property is
5 that LB 2080 or Lehman was originally the lender on the
6 property. The original owner defaulted and LB -- the loan was
7 transferred to this special purpose entity, LB 2080 which
8 foreclosed and now owns the property. So the current tenant is
9 an SPE and that, of course, will go to if and when we come
10 forward with a motion to assume, assign and sell.

11 The debtors have told counsel for the objector, in
12 detail, the steps they have taken to market and sell the
13 property, have explained that they are in negotiations with one
14 particular proposed purchaser. And in fact, very late last
15 night, New York time, still early Hawaii time, the debtors
16 received a signed -- an executed purchase agreement by a
17 proposed purchaser who would pay three million dollars for an
18 assignment of the lease.

19 There is one open issue and the debtors will either
20 be countersigning or working to resolve that issue to see if
21 they can countersign and have a fully executed purchase
22 agreement for the assumption, assignment and sale of the lease
23 to the proposed purchaser. We will, of course, provide the
24 objector with any and all information necessary on adequate
25 assurance. And if we can't resolve that issue we will be back

1 before Your Honor. But the effect of lifting the automatic
2 stay, which is not warranted under the cases, would be to
3 affect a horrible forfeiture when we have in hand an ability
4 not just to pay the landlord everything he's owed and provide a
5 continuing cash stream in accordance with the original existing
6 lease that he negotiated but an opportunity to provide a
7 meaningful creditor -- a meaningful distribution to the
8 creditors of the estate.

9 Seeing as that's -- those are the facts and that's
10 where we are given the timing of this hearing, we would simply
11 request, as we did in the papers, that the matter be adjourned
12 until the next omnibus date. And we did, in fact, make that
13 request of the objector for a one-time adjournment which
14 certainly is an accommodation that most provide and they were
15 not willing to. So we would ask the Court to adjourn the
16 matter to the next omnibus date to see if we can reach a
17 conclusion on the sale for the benefit of the estate and all of
18 its creditors.

19 THE COURT: Okay. This is what I'm going to do here.
20 This is not a situation that calls for relief from the
21 automatic stay, in my view. But it is a situation in which the
22 moving party has made a prime facie case of entitlement to
23 post-petition rent which is mandatory under 365(d)(3); it's not
24 optional. And as I suggested in my comments to movant's
25 counsel earlier there are a variety of consequences that flow

1 from an inability or failure of a debtor in possession to
2 comply with the requirements of the Bankruptcy Code and this is
3 such a requirement.

4 However, this is a balancing process in which I
5 accept the representations of debtor's counsel that there is in
6 fact a transaction in prospect which reasonably could be
7 developed to the point of being acceptable between now and July
8 15th, the next omnibus hearing date. And I say the 15th. I'm
9 not sure if that's the date or if it's some other date in July.
10 Is it the 15th or 16th?

11 MR. WAISMAN: The 15th, Your Honor. The 15th,
12 correct.

13 THE COURT: I'm going to grant you request for an
14 adjournment but I'm going to note, for purposes of what happens
15 between now and then, that there needs to be a means developed
16 to satisfy the landlord's claim either consensually as a result
17 of the landlord's consent to a transaction which will result in
18 payment or the debtor's going to have to come up with a means
19 to fund that payment. This is not the only situation in which
20 a special purpose entity in which Lehman had an interest was
21 short of cash and needed funding and some of them aren't
22 special purpose entities. So I'll let you finesse this for one
23 hearing more but that's it.

24 MR. WAISMAN: Thank you, Your Honor.

25 MR. NEALE: Could I ask? There is cash that's

1 available in the bank account right now. I'm wondering if the
2 Court might fashion an order that requires at least some of
3 that cash to be paid to my client by the end of this month in
4 partial satisfaction.

5 THE COURT: No. An adjournment means an adjournment.
6 It means that relief is not being afforded until July 15. And
7 I've given you some helpful remarks already in terms of some
8 leverage as against the debtor. Why don't you use that and sit
9 down?

10 MR. NEALE: You have, Your Honor. I just -- my
11 client made sure that I had to ask.

12 THE COURT: Okay. Well, you've asked and I've
13 rejected it.

14 MR. NEALE: Thank you, Your Honor. May I be excused,
15 Your Honor?

16 THE COURT: You may be excused.

17 (Pause)

18 MR. WAISMAN: Shai Waisman, again Your Honor, for the
19 debtors. The final matter on the calendar is the debtors'
20 motion pursuant to Section 502(b)(9) of the Bankruptcy Code and
21 Bankruptcy Rule 3003(c)(3) for establishment of the deadline
22 for filing proofs of claim, approval of the form and manner of
23 notice thereof and approval of the proof of claim form.

24 As is evident, Your Honor, the overwhelming majority
25 of creditors and claims or for the overwhelming majority of

1 creditors and claims at question in these cases, the debtors
2 have proposed what are ordinary bar date procedures. For one
3 category of claims, the debtors seek to implement procedures
4 that are not ordinary and those relate to derivatives.

5 As claims based on derivative contracts, and we've
6 heard a lot about the derivatives in these cases so far and
7 likely more to come, as those claims are by no means ordinary
8 the typical procedures for filing proofs of claim simply are
9 not appropriate.

10 This Court well knows that the relief the debtors
11 seek is far from unprecedented. The debtors simply ask that
12 the procedures be modified as to one narrow category of claims
13 to adjust to the context of these totally extraordinary and
14 unprecedented cases and the issues, in accordance with
15 applicable law and precedent.

16 To pick up on Your Honor's comment, I think it was
17 the attorney from Western Bank, the court, the debtors; the
18 creditors' committee have worked very hard over these past nine
19 months to affect orderly and efficient administration of these
20 Chapter 11 cases. The procedures proposed, in particular as it
21 relates to derivatives, are simply consistent with the aim that
22 all parties have worked towards, which is the orderly and
23 efficient administration of these cases. And absent a grant of
24 the relief requested, as it relates to derivative
25 questionnaires, we all fear the result.

1 Just generally, Your Honor, the debtors seek to
2 establish September 1, 2009 at 5 p.m. New York time as the last
3 date and time for each person or entity to file a proof of
4 claim. Bankruptcy Rule 3003(c)(3) provides that the Court
5 shall fix a time within which proofs of claim must be filed in
6 a Chapter 11 case pursuant to Section 501 of the Bankruptcy
7 Code.

8 The debtors, Your Honor may have noticed, filed their
9 original schedules on several dates in March 2009, exception as
10 to one late debtor, actually LB 2080 which subsequently filed
11 its schedules. And those original schedules were amended about
12 two weeks ago, slightly less than that, on June 15th.

13 As creditors in these cases had ample time to review
14 the debtor's schedules or will by the time the bar date comes,
15 it is now appropriate to establish a bar date in these cases.
16 The debtors believe that the proposed procedures for filing
17 proofs of claim will provide ample opportunity to prepare and
18 file proofs of claim and are fair and reasonable under these
19 particular circumstances.

20 Importantly, the debtors anticipate that hundreds of
21 thousands of claims will be filed against their estates. The
22 claims are expected to include claims from creditors with
23 breach of contract claims, tort claims, claims based upon
24 loans, claims based upon bond issuances, wage claims and likely
25 nearly every other form of claim asserted in a typical Chapter

11 case. All of the debtors and all of their creditors would benefit from an efficient claims process.

A claims process that provides the debtors with the basic information to understand and begin to analyze claims and does not result in unnecessary and wasteful claims, discovery, litigation and significant delays in distributions to creditors as a result of the claims resolution process. Such a fair and reasonable claims process is precisely what has been proposed in these cases.

Your Honor, the bar date motion of procedures, in particular the derivatives questionnaire in its original form, all were prepared over a period of well over a month by the debtors working closely with their advisors and with the assistance of the legal and financial advisors to the official committee of unsecured creditors in these Chapter 11 cases. Subsequently, the bar date motion was filed and served, and I believe that occurred on May 26, 2009.

In addition to service of the bar date, numerous publications ran stories about the proposed bar date order. Several law firms sent bulletins to all of their clients regarding the proposed procedures. And a number of banks, indentured trustees and others published or otherwise disseminated descriptions, notices, about the bar date procedures.

In fact, Your Honor, the LBI administrator published

1 notice of the bar date on its website and included on its
2 website a number of documents purporting to be guarantees
3 issued by the debtors with respect to LBIE claims, which
4 documents the LBIE administrator made available to anybody
5 visiting the website to download.

6 I highlight this because these guarantees and similar
7 guarantees, in particular, were obtained by parties subsequent
8 to or other than in connection with the original transaction
9 may become an important issue in the claims process. As
10 further evidence of how widespread notice has been provided, we
11 can take notice of a full courtroom, overflow courtrooms and, I
12 believe, several participants on the telephone today.

13 The original hearing on this bar date motion, as Your
14 Honor knows, was scheduled for June 17, 2009. As I'm sure Your
15 Honor and chambers is well aware, the debtors received a number
16 of formal responses in opposition to the bar date motion before
17 and after the original deadline and also received numerous
18 informal responses and have been in informal conversations with
19 numerous creditors over the last several weeks.

20 The objections raised a number of issues that
21 included allegations of counsel as to factual matters,
22 particularly as it relates to derivatives and derivative
23 termination procedures.

24 In order to properly evaluate the formal, informal
25 objections, to talk to counterparties debtors adjourned the

1 June 17th hearing to today. We spent that time, since the
2 17th, engaged in conversations with counterparties regarding
3 the issues they raised and carefully considered each and every
4 objection, both from a legal perspective and operationally as
5 it would play out in the bar date process and how it would
6 affect the administration of these cases. And throughout, the
7 aim has been the implementation of a reasonable process, fair
8 and reasonable to the debtors and all parties.

9 As a result, and as has been reflected on the docket,
10 the debtors made numerous modifications to the bar date order,
11 the bar date notice, the claim form and the derivatives
12 questionnaire. As I mentioned, those modifications were
13 reflected in the reply which the debtors filed and served
14 yesterday together with an affidavit of Gary Mandelblatt (ph.)
15 a managing director of Lehman Brothers Holdings, Inc., which,
16 pursuant to the Court's instruction, was noticed to all parties
17 in a notice of evidentiary hearing that was filed and served on
18 June 22nd.

19 In addition, through the comments received and
20 informal communications had, the debtors have executed three
21 stipulations that they will hand up to the Court. Those
22 stipulations resolve particular concerns with respect to the
23 bar date and those stipulations are entered into with the
24 Internal Revenue Service, JPMorgan Chase and PIMCO (ph.)
25 resolving most of their disputes although some of their

1 concerns, outside of what was invited in the stipulation, were
2 memorialized in additional objections that those parties filed.

3 Since the reply was filed yesterday at noon, in
4 discussions with the creditors' committee the debtors have made
5 a number of additional modifications to the bar date order and
6 the attachments thereto. A complete black line of where we are
7 right now on all of those documents, as compared to what we
8 originally filed, I believe, was delivered to chambers. We
9 have another copy to hand up if Your Honor would like. And was
10 made available at the commencement of the hearing to all of the
11 parties in the courtroom today.

12 So, with that I think it makes sense to quickly run
13 through the modifications that have been made to the bar date
14 order since the original motion so that we can illustrate where
15 we stand at this moment.

16 THE COURT: Okay.

17 MR. WAISMAN: Does Your Honor have a copy or would
18 you like me to hand one up?

19 THE COURT: I have a lot of material up here. I'm
20 not sure what, in particular, I may be missing.

21 MR. WAISMAN: If I could approach, Your Honor, I --

22 THE COURT: Please. Thank you.

23 MR. ELLENBERG: Your Honor, may I be heard for a
24 minute?

25 THE COURT: Before we -- before going through this

1 form of order?

2 MR. ELLENBERG: Yes, Your Honor, because I'm confused
3 procedurally as to where we are. I understand a request has
4 been made. By the way, Your Honor, for the record, Mark
5 Ellenberg on behalf of Morgan Stanley. A request has been made
6 for an evidentiary hearing. At least two parties have asked
7 that that be adjourned because there's lack of adequate notice.
8 We're --

9 THE COURT: Multiple parties have --

10 MR. ELLENBERG: -- we're one of them.

11 THE COURT: Multiple parties have objected, and I --

12 MR. ELLENBERG: If this is going to be an evidentiary
13 hearing, then I wonder if we're going to hear evidence or we're
14 just hearing argument. I'm just confused about where we are.

15 THE COURT: Well, I think you're probably not alone
16 in being a little lost as to precisely where we are. I think
17 all that's happening at this moment, and I'm going to give --
18 why don't you sit down in front of the bar; that way you'll be
19 able to pop up again and it'll be convenient for you.

20 I think that all that's happening at this moment is
21 that Mr. Waisman is reviewing certain changes to the procedures
22 that have been developed in discussions with the creditors'
23 committee since the filing midday yesterday of the global
24 response to the various objections and the declaration in
25 support of the relief being sought today. Nothing is happening

1 yet to deal with the question of what kind of hearing we're
2 having or whether or not we're even going to proceed with an
3 evidentiary hearing today. I'm just getting a status report.

4 MR. ELLENBERG: Thank you, Your Honor.

5 THE COURT: That's all that's happening right now.
6 Do I misunderstand what's going on, Mr. Waisman, or do you have
7 more in mind?

8 MR. WAISMAN: Maybe slightly. I have a little bit
9 more in mind, which is, I was going to take the Court through
10 the order and all of the changes that have been made in
11 response to the objections in consultation with parties and, at
12 the request of the creditors' committee, from the moment we
13 first filed the motion, not limited to the four issues that
14 were reflected from yesterday's accommodation.

15 THE COURT: Fine. You're going to update me and all
16 other parties in interest as to what we're dealing with today,
17 which may be different from what parties thought they were
18 objecting to when the objection deadline came --

19 MR. WAISMAN: That is --

20 THE COURT: -- do I understand this correctly?

21 MR. WAISMAN: That is correct, Your Honor.

22 THE COURT: Fine.

23 MR. WAISMAN: Okay.

24 THE COURT: So let's just view this, as I said, as a
25 status report in which everybody will be updated as to

1 precisely what we're dealing with today.

2 MR. WAISMAN: Your Honor, on the blackline that I've
3 handed up to the Court, as well as the blackline that was
4 handed out to the parties before the commencement of the
5 hearing, the first change appears on page 2. And there we have
6 a -- we pushed back the bar date for one week to accommodate
7 the fact that this hearing is now one week later. And we do,
8 in fact, want to make sure we provide parties-in-interest with
9 at least sixty days' notice of the bar date, ultimately.

10 The next change would appear on page 4 of the
11 blackline. And this is the carve-out as to entities that do
12 not have to file proofs of claim. Paragraph G there was
13 modified just to add (i) and (ii) to make clear who this
14 applies to.

15 Paragraph (h) was a modification made at the request
16 of Wilmington Trust as indentured trustee, and to make clear
17 that the reason we have a master list of securities is that we
18 have been in discussions with several indentured trustees who
19 have represented to us that they intend to file proofs of claim
20 on behalf of an entire issuance and, therefore, there's no
21 reason for individual holders to file what would essentially
22 be, at that point, duplicative claims.

23 And to the extent we've been in those conversations
24 and we have proper representations that those proofs of claim
25 will indeed be filed, we've implemented a process that will

1 avoid, hopefully avoid, probably hundreds of thousands, if not
2 millions, of proofs of claim.

3 I turn to page 5. The modifications on page 5,
4 again, relate back to the master list of securities and go to a
5 number of the comments made in objections that people would
6 like a more formalized process by which they have to submit
7 inquiries as to whether their security is or can be listed on
8 the master list of securities and that the debtors have a
9 deadline by which they have to reply to folks so that they
10 indeed know whether or not they have to file a proof of claim.
11 And we set out here a clear process with deadlines and
12 ultimately a date by which the master list of securities, as
13 posted, is final, and no changes will be made. So people do
14 know when they have to, if they have to, file proofs of claim
15 or they're exempt.

16 In addition, and this is one of the new changes, the
17 first Ordered paragraph subsequent to the larger one on page 5,
18 at the request of the creditors' committee we've inserted an
19 ordered paragraph here that the master list of securities, in
20 its initial form, will be published by no later than tomorrow
21 at noon. In fact, we've represented that we'll endeavor to
22 file it today, but certainly by no later than noon tomorrow so
23 that people can start reviewing it and start submitting their
24 questions. In response to a number of objections, we've made
25 clear that any security listed on the master list of securities

1 is not a derivative contract and therefore does not have to
2 comply with the derivative procedures; and the final ordered
3 paragraph that a holder of a security that is guarantied by a
4 debtor must file a claim against that debtor, again, just
5 clarifying and consistent with the Bankruptcy Code.

6 On page 6, we've made clear that proofs of claim must
7 denominate claims in U.S. dollars. And then in the next
8 addition, at the bottom of that page, in response to many, many
9 of the objections that we include a more precise definition of
10 derivative contract, we have revised the definition, included
11 it here. And this is a definition we've come to in our
12 conversations with many of the objectors.

13 I will note that it's almost impossible to get
14 unanimity of views on this issue, but this definition is one
15 that the debtors believe clearly reflects what are derivative
16 contracts and seems to meet the concerns of many of the
17 parties.

18 There was one additional modification made last night
19 at the request of the creditors' committee, and that's in
20 romanette -- not romanette -- V in the parentheticals towards
21 the end of that paragraph. And that's to insert a repurchase
22 agreement, that a repurchase agreement would be included in the
23 definition of a derivative contract.

24 Page 7, quite important here. The changes on page 7
25 relate to the counterparties to derivative contracts and the

1 procedures they must follow in filing their claims. And an
2 important, and hopefully very helpful, modification here and
3 one made at the request of many of the parties, which is, we
4 understand the procedures and that this information needs to be
5 submitted, but sixty days it not enough and we need additional
6 time. The compromise there is the debtors will have a bar date
7 that will be subject to this Court's approval, a date, a fixed
8 date, hopefully September 1st, by which all parties must file
9 proofs of claim unless otherwise exempted, and that would
10 include counterparties on derivative contracts.

11 However, here, the debtors have given derivative
12 counterparties an additional thirty days to upload their
13 information onto the specialized Web site for derivative
14 contracts and, therefore, folks will not have to -- while
15 they'll have to submit their proof of claim by September 1st,
16 will not have to complete the questionnaire and upload it
17 until -- or will have to submit it and upload it before October
18 1st. So a total of, really, ninety days' worth of notice to
19 comply with the procedures for derivative counterparties.

20 Page 8, modifications there, clarifying language that
21 if you have a claim against a debtor based on a guaranty of a
22 derivative contract that was not issued by a debtor, you do in
23 fact have to complete both the guaranty questionnaire and the
24 derivative questionnaire, but of course you have the
25 additional -- you're afforded the additional thirty days to

1 complete the derivative questionnaire.

2 On page 9, in order to accommodate the numerous
3 international protocols and the general cooperative nature
4 among the various administrators, the debtors do require that
5 such administrators file proofs of claim by September 1st, but
6 they will not need to complete the derivative questionnaire.
7 And those administrators will continue to work through the
8 protocol process in providing information to the debtors and
9 quantifying those claims.

10 The next paragraph, inserted paragraph, on page 9,
11 the claims process we're all familiar with involves a claims
12 agent that has a publicly attestable Web site where one's
13 proofs of claim are submitted; they're available on the Web
14 site to any member of the public. The general proof of claim
15 Web site here maintained by Epiq Systems will not be any
16 different. Proofs of claim that are filed need to be, as part
17 of the Court's records, publicly available. But due to many of
18 the concerns received from counterparties as to the derivative
19 questionnaire specifically, the derivative questionnaire will
20 be a separate Web site. And as parties upload information, it
21 will not be viewable or accessible other than by the party
22 making the submission and by the debtors and the creditors'
23 committee. So no party will be able to go onto the derivative
24 questionnaire Web site and view the submissions information of
25 another party.

1 The next paragraph was a point raised in a couple of
2 objections, and which was a good point, and this is to reflect
3 that, under the Bankruptcy Rules and applicable precedent,
4 parties do have an opportunity to amend proofs of claim. And
5 the process should be no different with respect to the
6 derivative questionnaire, which will be part of the
7 questionnaire.

8 So the modification here is to reflect that parties
9 will make their, and must make their, initial submission by
10 October 1st in compliance with the bar date order but will have
11 an opportunity subsequently to amend and supplement the
12 information. As additional information becomes available to
13 them or they become aware of additional or other information,
14 they will have the opportunity to amend, all consistent with
15 the provisions of the Code and precedent, and subject to the
16 parties' rights to argue whether or not the amendments are in
17 fact appropriate amendments or assertions of new claims, or
18 whatever the kind of lines of demarcation are in the case law.

19 Again, on bottom on page 9, just clarifying the
20 derivative questionnaire deadline.

21 Page 10, in the middle, again, along with the
22 additional thirty days to submit the derivative questionnaire
23 and a number of modifications to the derivative questionnaire
24 itself, one of the more important points raised by
25 counterparties in a typical bar date order, and as per the

1 proposed form of bar date order that this Court has adopted as
2 its proposed form, the order makes clear that parties that do
3 no comply with the bar date order are subject to having their
4 claim expunged, barred for noncompliance.

5 A number of counterparties here objected on the
6 grounds that, by the addition of the derivatives questionnaire
7 and the requirement to comply, in fact the debtors were
8 employing some form of gotcha and were going to object to
9 derivative claims and seek to expunge them, in whole, based
10 solely upon the failure to submit a document. And first and
11 foremost, I think Your Honor understands the manner in which
12 the debtors and their counsel have been proceeding in these
13 cases. The debtors do not seek to play a game of Gotcha on
14 anybody. The counterparties are required to comply with Your
15 Honor's bar date order, once it's entered, and as to whatever
16 it says. And the debtors will exercise good faith in reviewing
17 submissions and determining whether parties made an effort to
18 comply with Your Honor's order, as they do in every case.

19 And the ultimate arbiter of whether or not --
20 assuming, for some reason, the debtors decide to become -- take
21 an aggressive position on claims submitted, the ultimate
22 arbiter of whether or not a party attempted to comply will be
23 Your Honor. And the debtors have a lot of credibility to lose
24 before this Court in bringing objections when parties have made
25 an effort, a real effort, to comply and seeking to expunge

1 claims on technical grounds.

2 We, of course, would not be doing that. But in order
3 to assuage concerns and in language that's not found in any
4 other bar date order, at least one that I've seen, we have
5 inserted language here to make clear that we will not seek to
6 expunge claims so long as a creditor substantially -- a
7 derivative creditor or a creditor on a derivative contract,
8 substantially and in good faith, complies with the procedures
9 proposed by the order.

10 Again, there will ultimately be an order, and
11 whatever it says folks will have to comply. To the extent it
12 contains a derivative questionnaire, we have represented to
13 parties in our conversations, now on the record, and as a
14 concession and to make sure that this concern is properly
15 addressed. We've inserted this language so that no one should
16 have a concern that we are going to be somehow arbitrary and
17 seek to effect a forfeiture on a party for failure to not be in
18 compliance on technical reasons.

19 THE COURT: I don't have a concern based on this
20 language that you're going to be arbitrary, but, candidly, I
21 have some concern as to whether or not this isn't just an open-
22 ended invitation to endless litigation over whether or not
23 there is or is not substantial good-faith compliance with the
24 procedures. And I don't know how one objectively determines
25 that a failure to comply fits the exception. I'm a little

1 concerned that it's a desirable saving paragraph but that it
2 may have unintended horrible consequences in terms of case
3 administration.

4 MR. WAISMAN: Your Honor, the debtors could not agree
5 more and really didn't think this was necessary and thought
6 that what should suffice is the debtors' representation and the
7 fact that the judge, the Court, will ultimately be the arbiter
8 of whether folks complied. But in an effort to assuage the
9 continuing concerns, this was what was proposed. And, of
10 course, in the theme of no good deed, a number of objections
11 have been filed, suggesting that the language proposed, as Your
12 Honor points out, is vague and will lead to additional concerns
13 as to what is substantial and good-faith compliance.

14 Your Honor, again, our effort to streamline the
15 process and avoid needless discussion of this issue on the
16 record, although I suspect, as the Court points out, that
17 parties will not be satisfied, and of course the debtors share
18 the Court's concern that this is actually, if not an open door
19 to do other (sic) than comply to the best of one's ability in
20 accordance with a Court order, to at least argue later on as to
21 what this language means. And we, of course, leave it to Your
22 Honor's direction on that point.

23 THE COURT: If it were up to me, I'd cross it out.
24 But, of course, it is up to me, isn't it?

25 MR. WAISMAN: It is. It is. It is. On page 10,

1 just a technical change given the week's delay in hearing this
2 matter. We have revised the date by which we will serve the
3 bar date notice from June 24th to July 1st.

4 Page 12, a change that was necessitated by a number
5 of the objections that pointed out, you know, inartful
6 language, probably, on our part. And the language now comports
7 with the provisions of the Bankruptcy Code, that only parties
8 authorized by the Bankruptcy Code and the Bankruptcy Rules can
9 submit proofs of claim, and parties cannot submit proofs of
10 claim if they are not so authorized by the holder of such
11 claim.

12 The deletion in the middle -- the next two changes,
13 really, are at the request of the creditors' committee. As
14 Your Honor may be aware, there's a motion to dismiss the
15 Chapter 11 case of PAMI Statler Arms LLC that was pending
16 before this Court. The deletion is to make clear, at the
17 committee's request, that the bar date be permitted to run so
18 that there's a quantification of the claims against PAMI
19 Statler and only thereafter will the case be dismissed, if
20 appropriate.

21 And, finally, the insertion in -- at the request of
22 the creditors' committee, the debtors have agreed that, from
23 this moment forward through the bar date, any modification
24 provided to a -- or relief from the procedures approved by the
25 Court with respect to the bar date that the debtors enter into

1 or agree to with a creditor will only be done at the consent of
2 the creditors' committee. And, of course, that's agreeable to
3 us.

4 Those were the only changes to the order itself. The
5 modifications to the proof-of-claim form are made to reflect
6 the changes in the order.

7 The next set of modifications to be discussed,
8 really, are on Exhibit C and D, which are the derivative
9 questionnaire and the guaranty questionnaire.

10 And to the extent parties are noticing strange kind
11 of pagination and margining on the proof of claim, it's solely
12 due to the blackline, and it will not look like that.

13 Your Honor, picking up with Exhibit C, derivative
14 questionnaire, the additional language at the top of the
15 derivative questionnaire is there to reflect that this is a
16 submission in connection with, and as part of, a proof of
17 claim, and mirrors the language that is found in every proof-
18 of-claim form.

19 From there, page 2 at the top, Your Honor, the
20 debtors are parties to derivative contracts that were or have
21 been terminated since the commencement date. And there are a
22 number of derivative contracts that in fact have not been
23 terminated. The deletion at the top there is make clear that
24 parties to derivative contracts that have not been terminated
25 need to file a proof of claim for their contingent unliquidated

1 claim but do not need to comply with the various other
2 provisions of the derivative questionnaire as to calculation of
3 their termination claim and delivery of termination notices.
4 Obviously, those wouldn't apply in those circumstances.

5 Question 4(a), the changes there really, I think, go
6 to the heart of the overwhelming number of objections that were
7 made as to the questionnaire. First, as to confirmations, the
8 debtors heard from a number of parties that they really are
9 bothered by the request to provide confirmations. The debtors
10 consulted with their operational personnel and others and
11 concluded that they could in fact live without the
12 confirmations. And that has been struck.

13 And, of course, all of these changes are subject to
14 the fact that this is the information the debtors need to form
15 their baseline analysis of claims and subject to the regular
16 claims resolution process, which could include discovery and
17 litigation where the debtors reserve all rights to seek any and
18 all information, including the information that they've
19 eliminated from the derivative questionnaire.

20 So, confirmations have been eliminated. And then the
21 debtors tighten the language at the end of that paragraph. It
22 previously had said "and other documents related to the
23 transactions", which, we agree, was probably much more vague
24 and broad than intended and now seeks "agreements", again,
25 other than confirmations to make clear and not give anybody

1 unnecessary concern, "evidencing the transactions"; again, the
2 documents relating -- the very documents that form the
3 contractual relationship between the parties.

4 In 4(b), termination notice, the second sentence has
5 been completely struck, relating to conditions to be satisfied,
6 evidence of the conditions to be satisfied. And the debtors
7 clarified that they don't in fact need the original termination
8 notice, because in some instances I'm not sure anyone knows
9 where those are, but at least a copy of the termination notice
10 provided.

11 4(c), again, a copy of a valuation statement and
12 just, really, clarifying language.

13 In 4(d), specific transaction-level information that
14 is needed, fixing a typo and making clear what we were
15 referring to with the submission being in Excel.

16 4(e), the changes in 4(e), I think throughout, are
17 really meant to conform to industry standards and the need to
18 provide reference market-maker quotations. The, kind of,
19 narrative request at the very end there has been completely
20 struck, requesting a description of the methodology used to
21 determine the valuation and how the quotations played into the
22 valuation itself.

23 Again, the balance, which kind of runs through the
24 rest of page 3, just clarifying that we are looking for, kind
25 of, the industry standard reference market-maker quotations, as

1 set forth in ISDA.

2 In 4(f), replacement transaction. To the extent a
3 party went out and replaced the transaction, we do need those
4 confirmations to illustrate that those replacement transactions
5 did in fact take place. But we've eliminated the request for
6 external communications and will rely on the contracts and
7 agreements themselves.

8 4(g), eliminating the request for supporting
9 documentation as to unpaid amounts.

10 And 4(h), eliminating some of the requests there as
11 to additional information and clarifying Microsoft Excel.

12 Those are the changes to the derivative
13 questionnaire. And with those changes, we've gotten down to,
14 kind of, where we believe to be a fair and reasonable request
15 that would enable the debtors to kind of begin to form a
16 baseline understanding of the claims and, from there, decide
17 what actions to take next.

18 Finally, Your Honor, and very quickly, Exhibit D, the
19 guaranty questionnaire, again, the addition of the language at
20 the top, making clear it's being submitted in connection with a
21 proof of claim.

22 And, finally, there was a question number 8, which
23 was initially inserted at the request -- surprisingly, at the
24 request of a number of the objectors, or some of the informal
25 comments we received, but also at the request of the creditors'

1 committee, and that was a certification from parties that they
2 in fact relied on the guaranty for which they're submitting the
3 claim in connection or at the time of the underlying
4 transaction with the nondebtor entity, going back to the early
5 discussion of the LBIE situation.

6 Given that this was inserted after the initial draft
7 was circulated, the creditors' committee had some concern that
8 perhaps it was too late and that the debtors should endeavor to
9 verify the reliance subsequent to the submission of guaranties.
10 It may be obvious, it may not be obvious, and more questions
11 may need to be asked, but their view was that this is not the
12 time given how far down the road we were. And, as a result, we
13 removed question number 8 last night and no longer have a
14 requirement that folks certify in a specific question that they
15 relied upon the guaranty. Of course, it would be the debtors'
16 view that any submission in connection with a proof of claim
17 submitted under penalty of perjury is done with the utmost
18 veracity and folks would submit guaranties only to the extent
19 that they relied upon them in the underlying transaction.

20 So those modifications are the ones that were made
21 and reflected in the filing on the docket yesterday and further
22 reflected in the distributions today here in court.

23 From there, it may be useful to walk through the
24 objection chart attached to the reply to illustrate how the
25 changes we've just run through relate back to the objections

1 raised.

2 THE COURT: That may be helpful, but I think Mr.
3 Ellenberg has raised, not only on behalf of his own client but
4 on behalf of a number of other similarly situated parties, a
5 fundamental question as to where we're going today. And I
6 think it's entirely appropriate for you to continue your
7 presentation that ties in the chart to the objections and which
8 demonstrates how you've attempted to satisfy the objections,
9 but it's pretty clear that anybody who is following the case
10 closely has probably had a chance to at least take a look at
11 the attachment and see whether or not their particular
12 objection has been satisfied, and if it hasn't been I'll hear
13 from them.

14 So I think we'll get to that. I'm not suggesting we
15 shouldn't go there, but I think it's important as a threshold
16 matter, particularly because we're getting close to a time when
17 at least I like to eat lunch, that we understand where we're
18 going today and whether or not we are moving forward with an
19 evidentiary hearing, whether or not issues relating to the
20 evidentiary record are going to be heard another day as a
21 result of objections to the timing and requests for
22 adjournment. And it seems to me that that's an important issue
23 for us to address.

24 MR. WAISMAN: Your Honor, the debtors are moving
25 forward with their motion to have this Court approve the bar

1 date procedures that have been proposed. The motion was filed;
2 due notice was provided. Parties had every opportunity to
3 object; many of them did object. Given the lengthy opportunity
4 to object, not one of them elected to submit any evidence in
5 connection with their objection.

6 Solely in response to the numerous assertions of
7 counsel made in pleadings, the debtors submitted a declaration
8 on a very narrow issue: the procedures -- the background as to
9 derivatives in this case and the procedures for terminating
10 derivative contracts in this case. It is a very narrow issue
11 and submitted solely in reply to the objections. Entirely
12 appropriate.

13 The declaration has now been in the hands of the
14 objectors for nearly a day. They have -- the witness is --

15 THE COURT: That wasn't intended to be a laugh line,
16 I suspect.

17 MR. WAISMAN: In the context of these cases where
18 folks filed objections up to the objection deadline, well
19 through the objection deadline and pretty much every day and
20 every hour past that objection deadline to this point in time,
21 including well into last night, it actually wasn't meant to
22 generate the laughter that it did because, quite seriously, as
23 Your Honor points out, people are laser-focused on this case;
24 they're focused on this issue. They had enough time to sit
25 back, consider their objections and their requests, to draft

1 them, to get their clients' consent and to submit them, at
2 which time I presume they had plenty of time to review the
3 declaration on a very narrow issue and decide whether or not
4 they wanted to question the witness on any of those issues.

5 The witness is here. The witness is available for
6 cross-examination. We would rest on the declaration, although
7 we are prepared to proffer the witness's testimony. And it is
8 part and parcel of our motion. And the debtors would seek to
9 go forward on the procedure as proposed and have this Court
10 rule on the motion.

11 THE COURT: Okay. Let me make a couple of comments
12 in reference to where we are procedurally and then allow other
13 parties to be heard, who may wish to be heard. Ordinarily, the
14 first hearing in a contested matter, under the Local Rules, is
15 not an evidentiary hearing. And on Friday I received word from
16 chambers that the debtor was requesting that this be an
17 evidentiary hearing so that the declaration that you've just
18 referenced and any examination of the declaration could be part
19 of today's hearing.

20 I was off-site at the time that that request was made
21 and, through my clerk, confirmed that I would permit today's
22 hearing to be an evidentiary hearing provided that notice was
23 given to the world, and most particularly to every party who
24 had objected. That notice generated yet another flurry of
25 objections, not just to the substance of what's being requested

1 today but to the procedure.

2 I'm concerned, as I have been throughout this case,
3 about the most basic question of due process: that parties
4 have, under the circumstances of the case, a full and fair
5 opportunity to present their positions and to be heard and, in
6 terms of my role, that I'm fully informed relative to what it
7 is that I need to decide.

8 The contested matter that relates to the approval of
9 the bar date order has generated more objections than, I think,
10 anything in this case since the original sale hearing. I
11 haven't done the math, but my review of the record demonstrates
12 that, both in terms of substantive objections, procedural
13 objections, me-too objections, reservation-of-right objections,
14 amicus objections, that this particular ordinarily
15 uncontroversial aspect of the case is quite obviously very
16 controversial.

17 So one of the initial questions that I have,
18 particularly since, Mr. Waisman, you urged that a plain-vanilla
19 matter be adjourned to July 15th rather than be heard today:
20 What is the genuine urgency that everybody be forced to have an
21 evidentiary hearing today when we have another spillover Lehman
22 hearing date on the 29th to accommodate the Aurora funding
23 request? And we have another omnibus hearing on July 15th.
24 And even though my schedule is, as many know, increasingly
25 tight, I have the ability to specially schedule evidentiary

1 hearings, and I have throughout this case.

2 So that's a long wind-up to get you to answer the
3 question: Why now?

4 MR. WAISMAN: Your Honor, I understand, and have
5 heard since the first week and into some very late hours, the
6 Court's concern as to due process. And it is an issue that
7 comes up often in the bankruptcy context. And many litigators
8 are often astounded when they sit through bankruptcy hearings.
9 In the context of this bar date motion where the local rules of
10 this Court already provide that no notice of a bar date motion
11 need be provided and that a bar date motion can be submitted,
12 upon the consent of the creditors' committee, directly to
13 chambers and approved by the judge, we've provided more than
14 that.

15 The motion was filed. It was served on the entirety
16 of the master service list. It has received much publicity.
17 And the original date for the hearing, the 17th, was adjourned
18 for an additional week to try and advance the ball. So, from
19 our perspective, folks have had more than ample notice, more
20 notice than is required by the rules of this Court, by the
21 bankruptcy rules or by the Bankruptcy Code.

22 The sole issue is the submission of a declaration on
23 a very narrow issue. First of all, we would think that we
24 could proceed without the declaration because the facts and
25 circumstances of these cases illustrate why the proposed

1 procedures as to one narrow type of claim are appropriate and
2 necessary.

3 But that aside, the declaration is submitted in
4 response to the objections that were filed, objections that --
5 objectors that had every opportunity to submit their own
6 declarations, their own evidence, elected not to, instead made
7 assertions of counsel as to factual matters. And the debtors
8 offer a declaration on those narrow points.

9 The declaration is not -- cannot serve as the reason
10 to delay the implementation of a bar date and the continued
11 forward progress of these cases. And, I submit, Your Honor
12 very well knows the manner in which things happen in these
13 cases. Any delay as to a declaration which ultimately likely
14 isn't necessary but, if it is, is submitted in response and is
15 very narrow, will lead to full-blown discovery on a bar date
16 motion, which wouldn't be appropriate, but there's no doubt
17 that that's where this will end up.

18 THE COURT: Let me break in and just mention that, in
19 effect, we define away the problem by talking about this as if
20 it's just a bar date motion. The evidentiary problem, I think,
21 is that the premise underlying the debtors', in my view,
22 reasonable request that there be some extraordinary procedures
23 applicable to proofs of claim relating to derivatives
24 nonetheless, as they used to say on Perry Mason, assumes a fact
25 not in evidence. It assumes that, in fact, the procedures that

1 you have cobbled together, I'm confident with the utmost of
2 good faith, and having called upon a tremendous amount of
3 skillful and knowledgeable people, in fact represent the right
4 approach under the circumstances.

5 The fact that there are so many objections that have
6 been generated by this process can lead to a number of possible
7 conclusions on my part, and I'm not going to assume the
8 motivation of the parties who have objected. I assume that
9 parties object in good faith because they're concerned that the
10 procedures that are being proposed are either inappropriate,
11 contrary to law, require a level of effort that's not required
12 under applicable rules, changes the burden.

13 And so it seems to me that the evidentiary issue that
14 we're talking about is not quite as narrowly drawn as you've
15 just articulated. I actually think that in order for me to
16 give you the order that you want, and I recognize that a
17 tremendous amount of work has gone into adjusting the form of
18 relief to accommodate objections, you also need to demonstrate
19 that extraordinary provisions are appropriate in the case of
20 derivatives and guaranty claims. I'm confident you're right.
21 The problem is, as with most people in the room, I was trained
22 as a lawyer. I didn't spend any of my adult life on Wall
23 Street. I know what a derivative is, I think.

24 MR. WAISMAN: You're ahead of me.

25 THE COURT: But in terms of the actual work

1 associated with the six-step derivatives unwind processes
2 described in the affidavit, and whether or not six steps as
3 opposed to four steps as opposed to ten steps may be the right
4 approach, I don't have good answers. Additionally, what I
5 don't know, because there's no evidence on it, and maybe
6 there's no need for evidence on it, is the burden, if any,
7 which is being imposed on counterparties in having to comply
8 with this questionnaire.

9 And since I've already indicated that I understand
10 the philosophy that underlies that saving paragraph that you
11 stuck into the order, I think the saving paragraph about
12 substantial compliance is an invitation to gaming the system,
13 and I don't like it. Any procedures that we adopt will be
14 strictly enforced. There'll be no slippery slopes so that the
15 procedures that I want to adopt are the procedures that
16 everybody will comply with. But in order to develop those
17 procedures, I need to be assured that they're right and
18 appropriate and that they balance, under the circumstances of
19 this case, the relative burden.

20 I'm fully comfortable that under 105 and other
21 applicable provisions, given the unique circumstances of this
22 case, I have the authority to adopt specific procedures
23 relative to derivatives and guaranty claims and to deviate from
24 the standard proof-of-claim form. That's not the issue. The
25 issue is making sure that we do it right and that the right

1 input has been put into the mix. I recognize that there has
2 been dialogue with the creditors' committee, that, no doubt,
3 you've had dialogue with various aggressive objectors, and that
4 the ultimate order may in fact be, under the circumstances, if
5 not perfect, close to workable.

6 I have questions whether we can get where we want to
7 get today because the record that I want to have established is
8 more than just the declaration on the six-step process. I want
9 a record in which the debtor proves up the extraordinary nature
10 of the derivatives claims, the million transactions, the ten
11 thousand counterparties, the extraordinary burden on the estate
12 if procedures specially crafted to deal with the problem are
13 not adopted.

14 The nature of the derivative transactions that we're
15 talking about here, what's involved conventionally in
16 determining breakage associated with such transactions? What
17 are the varying approaches to value? What are the varying
18 approaches to claims articulation? What proof is ordinarily
19 required in connection with presenting such claims? What
20 happens in a nonbankruptcy setting when parties in the market
21 are involved in swap termination or derivative termination or
22 whatever may be the terminated contract? I suspect that it may
23 be possible to analogize, from the free market approach, how
24 parties actually value these things when a party is out of the
25 money and exposed to a claim. But I also expect that there may

1 be differences when parties are alive and functioning and have
2 multiple transactions. So you can give a little on one in the
3 hope of getting one on another.

4 Here we're talking about dead Lehman Brothers. This
5 is your one-time shot to maximize your recovery. And it raises
6 questions in my mind as to how counterparties are going to
7 approach this process. I want to know what Lehman's people
8 think about that process and how it can be most efficiently
9 managed, because we're not just talking about a questionnaire;
10 we're talking about the biggest administrative headache in this
11 case. And for that reason, I want to make sure that when I
12 approve the procedures I don't, nine months from now, have a
13 hearing like I had today on the sale hearing in which somebody
14 says we didn't think of something we should have thought of.

15 So I'm not suggesting for a moment that a tremendous
16 amount of topflight work hasn't gone into where we are right
17 now. I want a record that allows me to comfortably approve
18 those procedures. And I don't think we're going to get it
19 today if all we're doing is cross-examining the witness whose
20 declaration I have. Now, it could happen, and if everybody
21 consents to it we can do it at 2 o'clock, but that means that
22 the parties who have sought an adjournment of today's hearing
23 will all waive their objections. And I'm prepared to have an
24 evidentiary hearing at 2. I'll be here all afternoon. But I'm
25 also prepared to do it another day when everybody who's

1 involved in this process can give some thought not only to
2 things I've said pretty much off the top of my head but also to
3 things that maybe I didn't think of, and maybe to the things
4 that I did wrong, so that we actually have a record relating to
5 proof of claim procedures as it relates to the derivative and
6 guaranty claims that supports the entry of an order that
7 provides for some extraordinary requirements which I view as
8 appropriate in concept but I need to be assured are appropriate
9 in application.

10 MR. WAISMAN: Based upon Your Honor's comments, it's
11 clear Your Honor understands many of the issues that the
12 parties have struggled with and that have been of concern to
13 the debtors but not necessarily aired in connection with the
14 original presentation, and that's very much appreciated.
15 Perhaps the best way to proceed would be to adjourn to 2
16 o'clock, give the debtors an opportunity to consider the
17 Court's comments --

18 MS. GRANFIELD: Can we just have a --

19 MR. WAISMAN: Can I consult for a moment?

20 THE COURT: Do you want to confer?

21 (Pause)

22 THE COURT: So what came out of that huddle?

23 MR. WAISMAN: That I'm overruled as to the request to
24 an adjournment to 2:00. The recommendation here, Your Honor,
25 would be, to the extent Your Honor's offer of the 29th is open,

1 to adjourn the bar date motion to the 29th and give parties an
2 opportunity to review the blackline to come back in discussion
3 with the debtor as to any remaining points and issues and to be
4 prepared on the 29th to go forward with an evidentiary hearing,
5 at which parties will have an opportunity to examine the
6 witness, should they choose to do so.

7 But it's very important that it be clear that between
8 now and the 29th this is not an invitation for discovery, that
9 there is a narrow -- perhaps not as narrow as I articulated but
10 a narrow issue, and the witness will be available -- will be
11 testifying as to that issue. If we have discovery, it
12 obviously should not be more than the deposition of the witness
13 proposed. But given the reality of the seventy-eight
14 objections embodying the issues articulated by probably well
15 over a hundred parties, I don't think a deposition really makes
16 sense. I think people will have additional time to prepare
17 their examination of the witness, and we should proceed on the
18 29th with an evidentiary hearing.

19 THE COURT: Comments from -- it looks like there are
20 a number of parties who wish to be heard, and this is the time
21 to hear them.

22 MR. DUNNE: Your Honor, for the record, Dennis Dunne,
23 Milbank, Tweed, Hadley & McCloy, on behalf of the official
24 creditors' committee. We are in support of a limited
25 adjournment on this matter. I'd like to just make two

1 representations, one's a clarification.

2 Mr. Waisman alluded to procedures whereby under
3 certain circumstances no notice of a bar date motion need be
4 provided if the committee is in accord with that procedure. We
5 refuse to consent to that convention here because of the
6 complexity and some of the extraordinary provisions. And I
7 just want that to be clear.

8 The second is, while there has been a tremendous
9 amount of collaboration between the debtors and the creditors'
10 committee on the form of order and language insertions, at the
11 end of the day, the debtors did not garner the committee's
12 support to the current form of order. And it has to do with
13 the savings clause which Your Honor struck. We had issues with
14 it as well, but a different fix than striking it. We can
15 reserve that, and hopefully we'll be on board with the revised
16 form of order by Monday. But I wanted Your Honor to know that
17 we still had one remaining issue that went to the heart of one
18 of the committee's concerns.

19 THE COURT: I want to be clear on something. I
20 didn't strike that paragraph.

21 MR. DUNNE: Good to hear.

22 THE COURT: It's not an order. It's just a proposed
23 order. And what I pointed out was that I believed that the
24 philosophy providing flexibility to parties who don't comply,
25 while admirable, is, I think, a fool's errand. I think that

1 what we need are procedures that will be rigidly and strictly
2 applied; procedures that will be known to everybody, and you
3 either comply or take the consequences of failing to comply.
4 Complete proof of claim transparency. You file it and you
5 comply, or you're out of luck.

6 MR. DUNNE: And, Your Honor, we agree with that. We
7 were looking for a different bright-line fix. But we can
8 revisit that on --

9 THE COURT: And by the way, I'm not trying to
10 negotiate the right outcome, here. I'm telling you that I
11 think, in my broad view of this, procedures that are not
12 absolute, are not procedures.

13 MR. DUNNE: Thank you, Your Honor.

14 MS. GRANFIELD: I'm sorry, I'm grabbing the podium
15 from Mr. Ellenberg. Lindsee Granfield of Cleary, Gottlieb,
16 Steen & Hamilton LLP on behalf of Barclays Capital Inc. and
17 Barclays Bank PLC and their affiliates on this objection.

18 I obviously heard Your Honor's comments. With
19 respect to a proposal to simply adjourn the hearing to the
20 29th, which I didn't get out my calendar, whether that's next
21 Monday or Tuesday --

22 THE COURT: It's Monday.

23 MS. GRANFIELD: -- next Monday, a few things. It's
24 not just the proposed witness, to the extent we're having some
25 full-blown evidentiary hearing. It obviously, as Your Honor

1 indicated, partly goes to the burden on the objectors with
2 respect to the proposed procedures. And there's seventy-five
3 of them or eighty or them, and don't know -- have no idea
4 standing here right now, how many of them would be proposing to
5 bring a witness to talk about the --

6 THE COURT: I suspect none of them, because in the
7 end -- and I don't mean to break in -- this is not intended to
8 be an unmanageable hearing. It's intended to be a hearing in
9 which real information is provided to me that I can use to make
10 smart decisions. It's not about posturing; it's not about
11 gamesmanship.

12 MS. GRANFIELD: Bearing in mind --

13 THE COURT: It's about understanding fully the nature
14 of the derivatives market so that reasonable procedures can be
15 applied to all, and everyone should be able, not with
16 witnesses, but with bright lawyers who are diligent, figuring
17 out a way that works. The objections in the real world should
18 wither away if people do their work properly.

19 MS. GRANFIELD: I agree, Your Honor. And I've been
20 trying to be in dialogue for a while about what would work
21 here, and not turn into an unmanageable process. But to the
22 extent that Your Honor's asking for an evidentiary hearing --
23 or you're not asking for it -- to the extent there has to be
24 one --

25 THE COURT: The debtors asked for one, and I simply

1 said sure. If you're going to have it, make it be the hearing
2 I need.

3 MS. GRANFIELD: Sure. But it's not just going to be
4 a monologue by the debtors' witness as to what his view of the
5 derivative market is and what usually happens when derivative
6 claims are being resolved, as they have been in a number of
7 cases that have had a lot of derivatives without a
8 questionnaire tied to the proof of claim.

9 Now, so let me split up into two things. Because I
10 think one is, what are we doing if we're going evidentiary
11 hearing-wise? But I actually have a different suggestion which
12 might do away with the need for that. On the evidentiary
13 hearing, I guess, my proposal would be that there be
14 discussion, because there are a lot of parties. I don't speak
15 for anybody else. Many of them joined in an objection that we
16 wrote -- not all of them. Many of them wrote their own. But I
17 don't speak for any of them.

18 And therefore, in consultation, debtors, creditors'
19 committee, I think there would have to be discussion about what
20 discovery does anybody want. Maybe no one will want discovery.
21 That's going to have to be a question. How many witnesses? Do
22 people want to have witnesses? Is there a date to determine
23 whether you're going to have a witness or not? And if there
24 isn't other resolution that would make an evidentiary hearing
25 not necessary, to come back on the 29th, and if there's still

1 disputes about how the evidentiary hearing is going to work,
2 bring them to you; or if there's agreement about it, tell you
3 what's going to happen and what people propose.

4 With respect to a suggestion as to how to try to
5 bridge the gap, the concerns, I think, of at least my
6 objectors, go to things about the questionnaire, which is not
7 gamesmanship, it's not trying to do anything other than say,
8 for a party that's got tens of thousands of derivative trades
9 because Barclays is a big financial institution that had lots
10 of dealing with Lehman that had nothing to do with the sale in
11 September, that an institution like Barclays and many other of
12 the institutions who are objectors that also have potentially
13 hundreds of thousands. And so the debtor talking about two
14 percent of the people, well, I think if you added up all the
15 trades of the people who objected, I think you're going to get
16 way into the percentage of their trades, that there are real
17 issues about the gargantuan effort that would be involved in
18 doing what that questionnaire asked people to do.

19 So that, ultimately, if it has to be tried, would be
20 part of what would be put before you. And the consequences,
21 Your Honor has said, procedures are going to be the procedures,
22 and at least on the -- if this is tied to the bar date order,
23 it's going to be the procedures for everybody. Of course,
24 we've already heard there are three, maybe, special
25 stipulations that those procedures wouldn't apply to if they

1 were ever ordered. So they're not going to apply to everybody.

2 But if we are going to have procedures, what the
3 suggestion was, is you don't have to tie them to the bar date
4 order. I mean, if the outcome that the debtor, the creditors'
5 committee, and other people would like is to have -- to be able
6 to send out a notice of bar date order and get a bar date in
7 the middle of September, October, right now, that could happen;
8 because as I think all the objectors said, no one is objecting
9 to the setting of a bar date. And if the bar date, as Your
10 Honor had said, had been a plain vanilla bar date order, then
11 it would have been done, potentially without notice and that
12 would have been it.

13 One, the Court, parties, the other alternative, in
14 terms of setting up procedures that all parties could try to
15 get behind in terms of having an efficient and streamlined way
16 to resolve derivative claims, is to have procedures that we
17 would work on right now, so they could be entered definitely
18 before whatever bar date is set, whatever regular bar date is
19 set, to be able to say these are the procedures that are going
20 to apply. And you know, part of the controversy is what's the
21 definition of derivative claims or having a definition that's
22 going to cause a lot of confusion; that, in fact, if you're
23 talking about procedures to resolve claims, you can allow the
24 debtor to decide when people are going into those procedures,
25 who's going into those procedures, so that you could cut out a

1 lot of what people are very concerned about in terms of saying,
2 if you don't comply, your bar date's going to be disallowed
3 because you didn't do this gargantuan thing in the space of a
4 couple of months.

5 Those procedures, though, when you're talking about
6 resolving claims, would need -- they're usually a two-way
7 street, not a one-way street. Because both parties, both sides
8 need the information to try to get to resolution, and
9 resolution that's not going to require trials in front of this
10 Court as to the resolution of derivative claims, and to not
11 have derivative claims simply disallowed because we're not
12 going with whatever standard. We too thought the standard
13 didn't really work, because we agree with Your Honor, it would
14 just create a lot of litigation about was the standard met.

15 We don't think these procedures should be attached to
16 the bar date. The bar date could go forward and all claims
17 could be filed. They've got a lot of work to do on things that
18 aren't derivative claims. But then, have the parties -- we
19 could use the same two-week period that people were talking
20 about in terms of adjournment, potentially, to try to come up
21 with procedures that all people could seek to get behind and
22 obviously have Your Honor order them. And it would be, you've
23 got to comply with the procedures. You've got to comply with
24 the procedures.

25 Just like any bar date order, people might be able to

1 come back and say this or that about any procedure, just like
2 they would if they're getting to the end and they say, oh
3 there's some real issue about extending the bar date. But that
4 is what the suggestion had been, to try to carve out all of
5 this in terms of attaching it to a bar date order that, in
6 general, as to the general bar date, nobody has a problem with.

7 I know this is just a suggestion. And obviously it
8 wasn't taken up by the debtors, and they determined to plow
9 through, and rather than have procedures that would definitely
10 be ordered and have to be complied with by everybody, have a
11 questionnaire that obviously a large group of creditors have
12 real concerns with. So I guess it's two different proposals.

13 If we're going the, you know, we're going to have
14 discovery, we're going to have a full evidentiary hearing,
15 people are obviously not going to try to be presenting
16 information to Your Honor that doesn't make sense or is just
17 gamesmanship. But we'll go to what are the real burdens, not
18 only that the debtor fears, but that the claimants fear. And
19 if it's a contested evidentiary hearing, people have the right
20 to discovery. People have to determine what they're doing.
21 But there is a way to not have this be tied to the bar date,
22 upset the bar date, make the bar date be extended for a long
23 time.

24 THE COURT: I hear your point, Ms. Granfield. It's
25 not your motion. It's a nice suggestion. Obviously it wasn't

1 picked up. And I'm not even sure it's a good suggestion. It's
2 obvious to me that linking the questionnaire to the bar date
3 means that it's coercive if someone fails to file the
4 questionnaire. If someone files a proof of claim and is
5 delinquent in following up with a questionnaire or with
6 required further submissions, the claim is still alive.
7 There's simply been some excusable, perhaps, default. That's
8 not going to work in this Court.

9 We're going to have an up or down on claims. Whether
10 or not there needs to be some timing relief or extension for
11 cause shown for certain parties who are truly burdened and can
12 show the burden, we can deal with that on a case-by-case basis.
13 What we're going to deal with is the motion that's been
14 presented. And the motion that's been presented is for a bar
15 date that includes, as to derivatives and guarantee claims,
16 certain extra added attractions. And what we're really dealing
17 with is the form of those extras in trying to balance the need
18 of the debtor with the burden on those who have to comply. I
19 think I've heard enough from you.

20 MS. GRANFIELD: Thank you.

21 THE COURT: Thank you. You started this, Mr.
22 Ellenberg.

23 MR. ELLENBERG: If the Court please, Mark Ellenberg,
24 Cadwalader, Wickersham & Taft on behalf of Morgan Stanley. I'm
25 sorry to have started it, Your Honor. Perhaps I can finish it.

1 I do understand that it's late. Just a couple of things. And
2 I understand, Your Honor, that this is a procedural opportunity
3 for me to speak, not a substantive one, and I will not argue
4 the merits.

5 However, the Court identified the Perry Mason
6 question as whether it has been demonstrated that extraordinary
7 measures are appropriate with respect to derivatives contracts.
8 And I fully agree that that is a very relevant question for an
9 evidentiary hearing. But I think there's a second one, Your
10 Honor, and that's whether the measures that the debtors are
11 actually offering are the right ones.

12 I don't think there's much disagreement about the
13 fact that they have a problem. I think the question is whether
14 what they've proposed is really the solution to the problem.
15 Morgan Stanley is a very active trader with Lehman and others,
16 and this is not about gamesmanship. This is about having to do
17 substantial additional work that would not normally be done in
18 a nonbankruptcy termination context, and which is totally
19 unnecessary and will be costly and will distract people who are
20 otherwise doing productive things at Morgan Stanley. And
21 that's why, as Your Honor observed, there have been so many
22 objections, because it's just unreasonable.

23 Now, Your Honor correctly identified the need for due
24 process, which obviously is the basis of our concern about
25 timing. And certainly an adjournment till Monday is better

1 than no adjournment. I would think that consistent with
2 notions of due process that if we're having an evidentiary
3 hearing, that would mean that objectors could put on evidence
4 if they so chose. Indeed, one of the problems we had with
5 today is a witness that we might well put on was unavailable to
6 day and would be available on Monday. I would like to have the
7 ability to put on a witness if I see a need to do that.

8 And I would normally think that an evidentiary
9 hearing would include the ability to have notice of who was
10 going to be a witness and the ability to have discovery. Now,
11 most of all, rules need to be symmetrical. So if we're not
12 going to have discovery, or even perhaps notice of the debtors'
13 witnesses, then certainly the same would be true of us. But I
14 would think that normally there would be notice and there would
15 an opportunity for discovery. But most of all, I would like to
16 reserve the right to put on a witness if I feel it's
17 appropriate.

18 THE COURT: Your right is reserved.

19 MR. ELLENBERG: Thank you.

20 MR. SHIMSHAK: Good afternoon, Your Honor. Steve
21 Shimshak, Paul Weiss, for Citi. We are a derivatives counter
22 party as well. We've objected to the procedures, but I'm not
23 going to comment about that. That portion of the discussion is
24 separate. It seems that we're going in the direct of an
25 evidentiary hearing in the near term.

1 I wanted to mention another feature of our objection
2 which is a source of concern, and that is the issues
3 surrounding guaranteed obligations by LBHI that do not relate,
4 necessarily, to derivative products. We are the nominee
5 custodian for over 38,000 individuals around the world who
6 bought, on a retail level, Lehman paper that was issued by its
7 Dutch subsidiary, and had the benefit of an LBHI guarantee.
8 And we believe that there are serious issues of both fact and
9 substance on the fairness of the mechanisms concerning
10 guarantee claims that are inherent in the bar date procedures
11 that the debtor has proposed.

12 So if we are going to have an evidentiary hearing, as
13 the gentleman who proceeded me made clear, we would like the
14 opportunity to present testimony on that score and to develop
15 that aspect of the infirmities of the bar date as well. Thank
16 you, Your Honor.

17 THE COURT: Okay.

18 MR. BROZMAN: Good afternoon. Andrew Brozman,
19 Clifford Chance for Calyon, Your Honor. I am going to just
20 raise one additional point. I don't think the Court got an
21 answer to its question of what's the rush. I heard a lot of
22 explanations of what they've been doing and a lot of excuses
23 for giving people enough time to have discussions. But
24 unfortunately, those discussions didn't bear fruit.

25 And I suggest that if we are going to provide the

1 Court with a record upon which it should rule, and I agree that
2 it should be an appropriate record, I don't understand why we
3 are going forward on June 29th. I think that there is no
4 apparent rush to this process. If anybody wants to rush, it
5 should be the people who are awaiting their funds. I don't
6 believe that we would be dilatory or do anything other than
7 proceed with alacrity here.

8 But if we are going to observe the minimum
9 requirements of due process, and given the fact that there is
10 no apparent need for a date today, tomorrow or the next day, I
11 suggest that if we're going to do this: number 1, we pick a
12 reasonable date to provide opportunity both to have further
13 discussions based upon the new revised order; number 2, to
14 understand what it is; and number 3, if there is going to be
15 some deviation from the normal contested matter process, in
16 terms of limiting or restricting discovery, I think at least we
17 should be entitled to a new and full-blown witness statement,
18 so we have some concept of what it is that the witness is going
19 to base his testimony upon. Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. HANDELSMAN: Good afternoon, Your Honor.
22 Lawrence Handelsman, Stroock & Stroock & Lavan. I'll be very
23 brief. I rise only because I'm not sure whether this is a list
24 of those who are reserving their rights to put in evidence. I
25 --

1 THE COURT: I don't think --

2 MR. HANDELSMAN: -- an exclusive list. That was my
3 concern.

4 THE COURT: -- it's neither exclusive nor a list.

5 MR. HANDELSMAN: Well, just briefly. I also
6 represent a record holder of the Euro medium-term notes that
7 Mr. Shimshak referred to. I do not intend to put on evidence -
8 - a witness, I should say, since my client's in Japan. I
9 would, and I hope we can work something out with the debtor
10 where we can put in a sample document upon consent. And that's
11 all we would have to put into the record in order to make the
12 arguments we think you ought to hear.

13 THE COURT: Okay.

14 MR. SZYFER: Your Honor, Claude Szyfer, also from
15 Stroock & Stroock & Lavan, but I represent twenty-three
16 derivative claimants. And I simply rise to echo what Mr.
17 Brozman said, simply because I have clients in Finland, in
18 Germany, in Japan, and I don't see the rush and see why we need
19 to proceed on the 29th. And I'm not saying that I would be
20 able to get clients if I wanted to put them on from such far
21 flung places as Finland and Japan.

22 THE COURT: Looks like those wishing to be on the
23 list have finished their comments. There probably is no reason
24 for the 29th as opposed to any other day, except there is
25 something to be said for convenience and the fact that it's

1 another Lehman day. It's a day that was set aside for purposes
2 of dealing with an emergency motion to fund Aurora Bank, and I
3 believe that a hearing is set for 2:00 in the afternoon on the
4 29th. 2:00 seems too late to start proceedings with respect to
5 the derivative and guarantee claim issues, and I would propose
6 that we hold the date on the 29th; start at 10 a.m. that day.
7 Consistent with Mr. Brozman's remarks, however, it isn't
8 necessarily so that every witness who may need to show up will
9 be available that day. It isn't necessarily so that we will
10 complete the record that day.

11 Oh. I have another case on at 10 a.m. on Monday. I
12 can't do it at 10 a.m. on Monday. It's another Weil Gotshal
13 case.

14 MR. WAISMAN: We'll adjourn it.

15 THE COURT: No, it's extended stay. We can't do it
16 at 10; it has to be at 2. I have a confirmation hearing on the
17 30th. Regrettably, this is just a busy time. And consistent
18 with Mr. Brozman's request for additional time, if I look later
19 in the month of July, it doesn't get much better. So I think
20 that we should stay at 2:00 on the 29th, recognizing that we
21 might go late. But that's not an invitation to go late.

22 As far as the process, however. In the best of all
23 worlds, we would not be involved in a contest over something
24 that should be transactionally easy to understand. There
25 should be no issue of fact in dispute as to what's involved in

1 proving up a derivative claim. It may be that it varies from
2 derivative to derivative, a swaption may be different from a
3 foreign exchange contract. But I suspect there's some
4 overlapping Wall Street approach to this sort of process. So I
5 doubt that if a witness from Morgan Stanley gets on the stand
6 and talks about the process, that somebody from some other
7 securities firm is going to say well, that's not how we do it,
8 we do it differently; or if it's done differently, it's not
9 going to be materially differently.

10 So, in the interest of efficiency, let's not create a
11 structure that's completely unnecessary. One of the procedural
12 problems that we have here is that there are lots and lots of
13 objectors, and they tend to cluster around certain common
14 themes. One theme is the theme raised by Ms. Granfield on
15 behalf of her client, which is not only is this burdensome,
16 it's simply inappropriate to shift the burden on us.

17 The debtors' theme is, this is unprecedented. And
18 it's simply going to be impossible for this claim process to be
19 anything other than my worst nightmare, unless we have
20 procedures in place applicable to all parties who have claims
21 of this type; which procedures are not necessarily typical, but
22 which are nonetheless appropriate under the circumstances.

23 All I'm trying to get the parties to do is to agree
24 that some set of procedures does make sense here, and to see if
25 you can develop a consensus approach to what those procedures

1 are. To the extent you can't, obviously, I'll decide. Ms.
2 Granfield mentioned something which resonated with me, because
3 it's on my personal wish list. My wish list would be that an
4 ad hoc committee of counterparty representatives were to form
5 without portfolio, because no one's going to authorize you to
6 do anything. But to the extent that you've been active and you
7 represent a major counterparty, you should have an interest for
8 your client to protect, and that you could be, in effect, an
9 information source for the debtor.

10 The debtor could sit with this self-anointed group --
11 because I'm not going to appoint you. And you can spend some
12 time in somebody's conference room talking about the issues the
13 way an unbiased committee might talk about the issues. I'm not
14 talking about litigation, I'm talking about designing a
15 solution, recognizing that the solution you design doesn't bind
16 anybody, but might be a recommendation to be made to the Court
17 on Monday. I'm not directing that, but I'm suggesting that.
18 And I think that you might find that you don't have as many
19 disagreements as you think you do.

20 To the extent that there are major problems that
21 don't go away, I'll see you at 2 o'clock, and the first witness
22 will be the debtors'. And we'll probably take the afternoon
23 with that witness, but that's without prejudice to anybody
24 else's witness. Additionally, in terms of streamlining the
25 process, to the extent that there are aspects of the

1 derivatives and guarantee claim process from the perspective of
2 counterparties that are of common concern, it might be useful
3 if you could coalesce around a particular authority: someone
4 from a trade association, someone from a particular
5 organization that would be an acceptable witness for all. So
6 that instead of having a dozen witnesses saying the same thing,
7 maybe we could have one witness saying what a dozen other
8 people would say.

9 My goal is to get to a good result, not to create a
10 monstrosity. That should be everybody's goal. Is there
11 anything more before we break for our late lunch?

12 MR. WAISMAN: Your Honor, just a point of
13 clarification on the proposed procedures. Given that the
14 debtors' witness is known and has submitted a declaration
15 which -- to clarify the procedures, Your Honor, the debtors'
16 witness is known, has submitted a declaration. Everyone has
17 it. We may need to supplement it to meet some of the concerns
18 or questions Your Honor has --

19 THE COURT: Right.

20 MR. WAISMAN: -- but we would expect that any witness
21 that a party is going to present at the hearing on Monday, that
22 the debtors' be advised of the identity of the witness and be
23 presented with a declaration as to that witness' testimony so
24 that it is an equal playing field and that it be done in a time
25 frame that enables the debtors to analyze the submission to the

1 same extent that parties have the declaration and have had an
2 opportunity to review the debtors' declaration.

3 THE COURT: It's a reasonable request, although I
4 suspect, given the hour of the day and the number of parties
5 involved and the need for people to figure out who their
6 witnesses may be, that all I can suggest is that you receive
7 the best notice that parties can give you; recognizing that you
8 may not know until Friday afternoon or maybe even by e-mail
9 over the weekend, when somebody is available to testify.

10 We don't have a lot of time to dedicate to this. I'd
11 like to be really clear on something. I don't think this is a
12 situation in which we are dealing with disputed issues of fact.
13 I think this is a situation in which the parties should be able
14 to, to a very large extent, stipulate as to what the facts are.
15 And part of what I'm looking for is evidence as to the
16 appropriateness of the procedures that have been cobbled
17 together here, and as to the burden on counterparties
18 associated with compliance with these procedures.

19 Some burden is to be expected. The question is
20 whether or not it's unreasonable under the circumstances. And
21 the ultimate standard, I think, is what happens in the market.

22 MR. WAISMAN: Just one final clarification. And I
23 appreciate that parties will provide notice of the identity of
24 their witnesses as soon as possible, hopefully on Friday, and
25 if later because of circumstances determine, obviously as soon

1 as possible, including any declaration; and that neither the
2 debtors' witness nor any other party's witness is subject to
3 deposition over the next few days. We will all be heard by
4 Your Honor on Monday.

5 THE COURT: We'll see you at 2:00 on Monday.

6 MR. WAISMAN: Thank you, Your Honor.

7 (Whereupon these proceedings were concluded at 1:26 p.m.)
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I N D E X

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a true and accurate record of the proceedings.

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