

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
	.	Case No. 16-10386 (CSS)
PARAGON OFFSHORE, PLC,	.	
et al,	.	Courtroom No. 6
	.	824 Market Street
	.	Wilmington, Delaware 19801
Debtors.	.	
.	Tuesday, February 21, 2017

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	Mark D. Collins, Esq.
	Amanda R. Steele, Esq.
	RICHARDS, LAYTON & FINGER, PA
	One Rodney Square
	920 North King Street
	Wilmington, Delaware 19801
	Gary T. Holtzer, Esq.
	Jessica Liou, Esq.
	Alfredo R. Perez, Esq.
	WEIL, GOTSHAL & MANGES, LLP
	767 Fifth Avenue
	New York, New York 10153

(Appearances Continued)

Audio Operator:	Electronically Recorded by Leslie Murin, ECRO
Transcription Company:	Reliable 1007 N. Orange Street Wilmington, Delaware 19801 (302) 654-8080 Email: gmatthews@reliable-co.com

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

APPEARANCES: (Continued)

For the U.S. Trustee: Benjamin Hackman, Esq.
OFFICE OF THE U.S. TRUSTEE
844 North King Street, Unit 35
Wilmington, Delaware 19801

For the Official Committee
of Unsecured Creditors: Pauline K. Morgan, Esq.
YOUNG, CONAWAY, STARGATT
& TAYLOR, LLP
Rodney Square
1000 North King Street
Wilmington, Delaware 19801

Brian S. Hermann, Esq.
Andrew N. Rosenberg, Esq.
Samuel E. Lovett, Esq.
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP
1285 Avenue of the Americas
New York, New York 10019

For Cortland Capital
Markets: Jeremy W. Ryan, Esq.
D. Ryan Slauch, Esq.
POTTER, ANDERSON & CORROON, LLP
Hercules Plaza
1313 North Market Street, 6th Floor
Wilmington, Delaware 19801

Scott D. Talmadge, Esq.
Benjamin Mintz, Esq.
Madlyn G. Primoff, Esq.
ARNOLD & PORTER KAYE SCHOLER, LLP
250 West 55th Street
New York, New York 10019

For Deutsche Bank: Crystal R. Axelrod, Esq.
MORGAN, LEWIS & BOCKIUS, LLP
1701 Market Street
Philadelphia, Pennsylvania 19103

(Appearances Continued)

APPEARANCES: (Continued)

For JP Morgan Chase:

Kimberly A. Brown, Esq.
LANDIS, RATH & COBB, LLP
919 Market Street, Suite 1800
Wilmington, Delaware 19801

Sandeep Qusba, Esq.
Katherine A. McLendon, Esq.
M. Shin, Esq.
SIMPSON, THACHER & BARTLETT, LLP
425 Lexington Avenue
New York, New York 10017

APPEARANCES VIA TELEPHONE:

Ryan Tarkington
PARAGON OFFSHORE, PLC

Thomas Osmun
ALIXPARTNERS, LLP

INDEX

	<u>Page</u>
<u>STATUS BY MR. HOLTZMAN</u>	4
<u>MOTION TO EXTEND EXCLUSIVITY</u>	8
<u>COMMITTEE'S MOTION TO MODIFY CASH COLLATERAL ORDER</u>	
<u>Argument by Mr. Hermann</u>	8
<u>Argument by Mr. Perez</u>	11
<u>Argument by Mr. Qusba</u>	12
<u>Argument by Mr. Talmadge</u>	24
<u>Further Argument</u>	26
<u>Court Decision</u>	30

1 (Proceedings commence at 10:33 a.m.)

2 (Call to order of the Court)

3 THE COURT: Please be seated.

4 Good morning.

5 MR. HOLTZER: Good morning.

6 THE COURT: Mr. Holtzer.

7 MR. HOLTZER: Good morning, Your Honor. Gary Holtzer,
8 Weil, Gotshal & Manges, for the debtors, Your Honor.

9 I wanted to use the opportunity today, Your Honor, to
10 update you on the status of the case.

11 THE COURT: Okay.

12 MR. HOLTZER: As you know from the pleadings that have
13 been filed since the last time we were before you, we now have
14 an Official Committee of Unsecured Creditors, represented by
15 the Paul Weiss firm, not surprisingly, since the three members
16 of the committee are bondholders.

17 Your Honor, we've been working with the committee and
18 the term and revolver lenders to resolve as many issues as we
19 can in the case. And I'm pleased to report now that we have
20 resolved a number of issues that are before Your Honor today.
21 As you know, there were two contested matters before Your
22 Honor, one relating to exclusivity, and a second one, the
23 committee's motion with respect to our cash collateral order.

24 With respect to the exclusivity motion, Your Honor,
25 the parties have reached an agreement, and the committee has

1 agreed to withdraw the objection to exclusivity, based upon our
2 discussions and agreement amongst the term and revolver lenders
3 regarding a mediation. And we would like to submit the plan
4 matters, Your Honor, to a mediation. And it's our request that
5 we would do that as quickly as possible, but in the month of
6 March. And if we need to go a little bit into April, we would.

7 And that, Your Honor, we would submit the plan issues
8 would include, among other issues, adequate protection; the
9 Noble settlement, which, of course, is a part of our plan, and
10 other issues that are embodied in the plan that the parties can
11 identify and define for the mediator. And when we have a
12 mediator, we can agree on a deadline for a submission of
13 mediation statements in that process, Your Honor. The parties
14 would agree it would occur in Delaware, and of course, would be
15 with principals. And so we would respectfully request, Your
16 Honor, any assistance the Court can give us to arrange for
17 that.

18 THE COURT: Well, as we discussed in our pretrial
19 meeting, I am attempting to locate a colleague who has the time
20 and interest in mediating the dispute on the time frame you
21 indicated. So I'm not going to have an answer for you during
22 our hearing; hopefully, I'll have an answer in the next day or
23 two, and I'll be able to find somebody for you.

24 MR. HOLTZER: We appreciate that, Your Honor.

25 Part of the -- part of our set of agreements with the

1 various constituents includes an agreement on discovery for the
2 plan that's on file. And we would propose circulating a form
3 of discovery order amongst the parties and to Your Honor, so
4 that we can lock down the discovery process, and all the
5 parties can do the necessary planning with respect to that. So
6 we will be circulating that among the parties, and then we will
7 submit it to Your Honor.

8 We've also agreed that confirmation on the plan that's
9 on file would begin on June 5th, and we wanted to confirm trial
10 dates with Your Honor, so that we can also plan for that.

11 THE COURT: Yes, I checked my calendar, and I can give
12 you the week of June 5th, five days, all day, each day.

13 MR. HOLTZER: Thank you, Your Honor. Then we count
14 have that included as a part of our process, so all the parties
15 can plan for it.

16 THE COURT: Right.

17 MR. HOLTZER: I'm looking around at everybody, to see
18 whether there's anything else, at least on the preliminary
19 aspects of this, we need to focus on. I'll let others talk
20 about the resolutions that have been reached in connection with
21 the committee's motion on cash collateral because I believe
22 some of the issues have been resolved, but there are still some
23 that will be before Your Honor today.

24 THE COURT: Okay.

25 MR. HOLTZER: And so --

1 THE COURT: Thank you, Mr. Holtzer.

2 MR. HOLTZER: Yeah. Your Honor, if I can be excused,
3 I'll leave this in the capable hands of Mr. Perez.

4 THE COURT: Very good.

5 MR. HOLTZER: Thank you.

6 THE COURT: Thank you.

7 MR. PEREZ: So, Your Honor, Alfredo Perez on behalf of
8 the debtors.

9 The first order of business is the exclusivity order.

10 THE COURT: Yes. Please approach. Thank you.

11 (Pause in proceedings)

12 THE COURT: I've signed the order.

13 MR. PEREZ: Thank you, Your Honor.

14 Your Honor, the only remaining matter on the docket is
15 the motion of the Official Committee of Unsecured Creditors to
16 modify the final cash collateral order, Docket Number 1078.
17 I'll turn it over to Mr. Hermann.

18 THE COURT: Okay. Thank you.

19 Mr. Hermann, good morning.

20 MR. HERMANN: Good morning, Your Honor. For the
21 record, Brian Hermann from Paul, Weiss, Rifkind, Wharton &
22 Garrison, on behalf of the official committee.

23 Your Honor, I think the arguments are pretty well laid
24 out in the papers. I would just make a couple of points.

25 First, obviously, now that we're an official

1 committee, we took a fresh look at the cash collateral order,
2 to see what, if anything, needed to be changed in light of
3 that. I think we pointed out the things that mattered to us,
4 which are certain reporting that's going to the lenders, that
5 no provision was made for it to go the official committee. I
6 understand that the parties agree that we'll get whatever
7 reports the lenders are getting under the cash collateral
8 order.

9 We also noted that there were fees that are being paid
10 under the cash collateral order to the secured lenders. Those
11 fee statements go to the U.S. Trustee and the debtors, on
12 notice, to review them before they get paid. So we ask for the
13 same notice. I understand there's no issue with that, either.

14 As far as the carveout, there was no provision made
15 for a carveout for an official creditors' committee. And I
16 understand that the parties agree that we will share in the
17 carveout that exists today with the debtors, which is fine with
18 us.

19 And so that leaves this last issue, the investigation
20 period. Under the typical, for a cash collateral order, the
21 stipulations the debtors have made in that order are binding on
22 all parties. There is no provision made for an official
23 creditors' committee to do an investigation. Now that we are
24 an official committee, we think that that is one of our
25 statutory roles, is to do an investigation. We think we can do

1 it quickly, and for not that much money. But we do think some
2 amount of time needs to be provided to allow us to do that.

3 This is a committee, as Mr. Holtzer noted, of three
4 bondholders, but at least one of the bondholders was not
5 involved in this case until very recently. So whatever
6 happened in the past, there's certainly -- I don't think under
7 the case law, but certainly in the case of that one member at
8 least, cannot -- that member's hands cannot be tied, in terms
9 of fulfilling his fiduciary obligations.

10 And I think that things in this case have changed
11 dramatically. Your Honor is well aware of that; I don't need
12 to tell you, although I'm new. There's now a plan that is
13 premised, in large part, on a massive adequate protection
14 claim. We cannot fully defend and represent creditors'
15 interests in this case with respect to that adequate protection
16 claim without looking at the underlying liens because,
17 obviously, it's the liens that drive the adequate protection.
18 Without the validity of the liens, their adequate protection
19 may or may not exist, at least in the amounts that they've set
20 forth.

21 And in our view, that is -- that kind of a change,
22 where we've gone from a reinstate plan to now a massive
23 adequate protection plan, is the very sort of circumstance
24 where things have changed so dramatically that we think we
25 should be given some limited relief to look at the validity of

1 their liens and claims.

2 Your Honor, we don't think *res judicata* applies. We
3 were not a party to the prior cash collateral order, we didn't
4 exist, so I don't see how that applies; nor do I think that the
5 use of cash collateral will terminate if we are given a period
6 of time to look at their liens and claims.

7 First, the order itself expressly provides for a party
8 to make a motion and, upon court order, to have that period
9 extended. And I also don't think that, if we are given a
10 limited period to look at liens and claims, notwithstanding
11 what was in the pleadings, that the secured lenders are going
12 to terminate use of cash collateral.

13 So we think that, given our role as a fiduciary for
14 unsecured creditors, there is justification for giving us a
15 limited window to review the liens and claims of the secured
16 lenders. Thank you, Your Honor.

17 MR. PEREZ: Your Honor, Alfredo Perez. I'll be very
18 brief, as well, because I think most of the arguments are in
19 the papers.

20 Your Honor, I would just focus on the order. The
21 order was entered in March of last year, almost a year ago.
22 And the provision that was cited by counsel says:

23 "-- or as ordered by the Court, on motion, a party-in-
24 interest seeking to extend such time period."

25 I don't think that order can be reasonably read to say

1 that, two years after the fact, you can rely on that. I think
2 that was intended. And I think in the general parlance that
3 would mean that, within the seventy-five-day period, if you
4 can't get agreement, you would file a motion to extend that
5 period. I don't think this resuscitates a period that has long
6 expired.

7 And unfortunately, Your Honor, none of the other facts
8 in this case -- you know, unfortunately, a plan wasn't
9 confirmed. Obviously, when you come to court, you -- a plan is
10 either confirmed or not confirmed, so you can't say that that
11 is unforeseeable. So, you know 60(b)(6) or 105 are just not
12 applicable. So, Your Honor, we would request that the Court
13 not modify the order to allow them to do that.

14 MR. QUSBA: Good morning, Your Honor. Sandeep Qusba,
15 Simpson, Thacher & Bartlett, counsel for the revolver lenders.

16 Your Honor, the committee's motion is really an
17 equitable motion, and they rely purely on equity. 60(b)(6),
18 itself, says -- provides relief for a party, for any other
19 reason for -- that justifies relief. And we know 105 is
20 certainly grounded on equitable principles. Unfortunately for
21 them, in this particular circumstance, neither equity, nor the
22 law supports their position.

23 In particular, Your Honor, as Mr. Perez just said, I
24 think -- and we'll go through this in detail, or I'm happy to --
25 - the final cash collateral order is clear on its terms and on

1 its face. And then we'll also maybe look through a black-line
2 and compare the modifications that were made from the interim
3 order to the final order, to confirm and make sure that the
4 Court appreciates that many of these issues that are being
5 raised now were actually -- you know, people were making
6 judgments with respect to them and choosing particular paths.

7 And that's important because the Third Circuit says,
8 you know, you can only rely on 60(b)(6) for unexpected
9 hardships, and you don't get rewarded for making deliberate
10 choices by using 60(b)(6) to undercut and back-door an order
11 that's been final for almost a year. And they were very
12 deliberate choices that were being made here, Your Honor.

13 And I think Mr. Hermann, as counsel for the committee,
14 acknowledged that one of their members is a recent participant
15 in the case. They -- so they had a full knowledge of the
16 docket, or should have, when they bought into the transaction.
17 So it's not like, you know, this was a baby doe that just came
18 to this fight. They had full and complete knowledge of the
19 history of this case.

20 The two other members, Your Honor, of the unsecured
21 creditors' committee are bondholders, and they have been
22 involved even before the bankruptcy. Okay? They were involved
23 long before the bankruptcy filing, and that's evidenced by a
24 support agreement that we'll go through in a minute, they were
25 parties to that support agreement, which was executed pre-

1 bankruptcy. There were 2019 statements filed by Paul Weiss
2 which reference these two institutions as part of their ad hoc
3 group post-bankruptcy.

4 So they've been involved, they know exactly what's
5 been going on and what's led to this; not only involved, but I
6 would say they've been -- you know, I don't know about those
7 particular individuals, but the ad hoc committee itself has
8 been really leading these negotiations. And if you go back
9 even to the trial testimony from this past summer, Your Honor,
10 you would -- if you recall, David Kurtz, the company's lead
11 investment banker, got up and said they had a handshake deal
12 with the bondholders, with the ad hoc group, which was
13 represented by Paul Weiss and Dusair (phonetic) sometime in --
14 you know, call it the Winter of 2015.

15 And following that negotiation and that handshake
16 deal, it was ultimately culminated in, and was evidenced in a
17 plan support agreement, which the bondholders were a party to,
18 the revolver lenders were a party to, and the debtors were a
19 party to. And it's where -- and we attached the support
20 agreement, Your Honor, which is -- has been terminated. But at
21 the time, it was certainly effective, and we attached it as
22 Exhibit A to the revolver agent's response.

23 And in particular, Your Honor, I want to point you to
24 a couple of different provisions of the support agreement
25 because I think they're valuable. One is Section 10 -- it's

1 Docket 1128, Your Honor; Exhibit A to Docket 1128.

2 So one provision, Your Honor, is Section 10 of the
3 support agreement, which is entitled "Creditors' Committee."
4 And here, the ad hoc group of lenders -- those are the people
5 and individuals who executed that, including two out of the
6 three members of the now creditors' committee, there's a clear
7 and distinct statement in there that says "all parties agree;"
8 it's the last sentence of Section 10:

9 "All parties agree they shall not oppose the
10 participation of any consenting creditors or the
11 trustee" -- indenture trustee, that is -- "under the
12 indenture on any Official Committee of Unsecured
13 Creditors formed in the Paragon cases. They reserve
14 the right in this support agreement to participate in
15 the creditors' committee."

16 Okay? And they also reserved their right, if you look
17 at the definition of "adequate protection order" in the support
18 agreement, and "adequate protection order," Your Honor, is
19 defined to mean the cash collateral order, which has to be, in
20 form and substance, satisfactory to the requisite creditors.
21 Excuse me. The requisite creditors, in turn, includes the
22 requisite noteholders. So they had the power to consent or not
23 on cash collateral orders. They reserved for themselves the
24 right to participate on the creditors' committee. And in fact,
25 here we are, they're on the creditors' committee.

1 But then, what they didn't do, as we walked through
2 the cash collateral orders, is reserve particular rights for
3 the creditors' committee to reopen matters, stipulations,
4 agreements that have long since seasoned. So they were very
5 clear in the reservation of rights with respect to -- both on
6 the order and the ancillary documents, to effectuate the
7 transaction that was contemplated by that support agreement.
8 And they were very clear that they may even end up serving on
9 the creditors' committee. Fine. So then, they, in fact, did
10 exercise those rights, and they exercised them very
11 deliberately and purposefully. They negotiated the interim
12 order, they negotiated the final cash collateral order.

13 And Your Honor, with respect to that, the orders were
14 very clear. If we begin with the interim -- and Your Honor, do
15 you have a copy of the black-line that compares the interim to
16 the final?

17 THE COURT: No, I don't have the -- I apologize, I
18 don't have my hearing notebook with me; I left it at home over
19 the weekend.

20 MR. PEREZ: Okay.

21 THE COURT: So I don't have any papers in front of me.

22 MR. PEREZ: Can I approach with a --

23 THE COURT: Yes.

24 MR. PEREZ: -- black-line?

25 THE COURT: Yes.

1 (Participants confer)

2 THE COURT: Thank you.

3 (Participants confer)

4 THE COURT: They got you going -- what is this? Oh,
5 okay. Thank you.

6 MR. QUSBA: So, Your Honor, that black-line is on the
7 docket, as well.

8 So, in particular, what I want to focus in on is
9 Paragraph 21, to begin with, in the black-line. It's Page 27
10 of what I just handed to -- handed up, Your Honor.

11 THE COURT: Uh-huh.

12 MR. QUSBA: And there, towards the bottom of page --
13 Paragraph 21, Page 27, towards the bottom, you can see the
14 stripe-through. And what -- and this is, again, the stripe-
15 through shows changes from the interim to the final, right?
16 And there, what we had done, as is, you know, pretty customary
17 and typical here in Delaware and other -- and elsewhere, is we
18 had reserved the right at the beginning of the case for the
19 challenge period to be either 75 days from the petition date or
20 60 days after the formation of a committee.

21 And that's typical and it's customary. And why?
22 Because it's an interim order. We understand, we appreciate
23 those are the local rules with respect to what you can get and
24 grab and ask for at the beginning of the case. You've got to
25 give people and opportunity to get grounded, et cetera.

1 Okay. One we went from the interim order to the
2 final, we very deliberately, with the input of Paul Weiss, of
3 the ad hoc bondholders, with their input, consent, and
4 agreement, eliminated references to the "committee." They made
5 a deliberate choice. They thought they had -- and we did -- a
6 plan support agreement, binding the revolvers, binding the
7 company, binding themselves. They had a path forward on a
8 Chapter 11 plan. There was one party on the outside that was
9 objecting and litigating. And they made the bet that, you know
10 what, we're going to get through this, and we don't need to
11 reserve rights, as we did in the interim order, on a going-
12 forward basis for the final order. They made that judgment,
13 they made that determination.

14 Now the fact that that plan was never approved and
15 confirmed, that's a risk they were willing to bear at the time.
16 That allocation of risk shouldn't shift now to the secured
17 lender because that plan wasn't confirmed, and they want a do-
18 over with respect to all these stipulations, agreements, and
19 arrangements that they had, otherwise; said, it's no moment to
20 us because we think we have a plan and path forward. That
21 allocation of risk shouldn't shift to us at this point.

22 Going on, Your Honor, so we very deliberately went
23 from, you know, affording a committee a sixty-day period, from
24 its formation, to challenge this. And what typically happens
25 when requests for extensions are given, oftentimes, not always,

1 but oftentimes, extensions are granted. And sometimes, people
2 have to come to Your Honor before the expiration of the
3 challenge period and ask Your Honor for some judicial
4 intervention to extend that period, notwithstanding the fact
5 that the agents or the secured lenders haven't consented.

6 None of that occurred. This challenge period expired
7 ages ago. None of that occurred. There was no reservation of
8 rights. And they know how to reserve rights; we saw it in the
9 support agreement with respect to committee-formation and their
10 ability to participate on that committee. There was no
11 extension of the reservation of rights to challenge
12 stipulations or the like, you know, sometime down in the
13 future, if a committee is ever formed. That was a deliberate
14 decision.

15 Your Honor, I also want to point out to you a number
16 of provisions in the final order itself that should put an end
17 to this, we hope. In particular, for example, again, staying
18 in Paragraph 21, Your Honor -- one, two, three, four, five --
19 six lines down, again, off the black-line. It says, very
20 succinctly, clearly:

21 "The stipulations and admissions contained in this
22 final order, including, without limitation, in
23 Paragraph 4 of this final order shall be binding upon
24 all parties-in-interest."

25 The committee is a parties-in-interest. This is --

1 THE COURT: Wait, wait. I don't --

2 MR. QUSBA: Yeah, I'm sorry.

3 THE COURT: It says:

4 "The debtor, and any successor thereto, in all
5 circumstances."

6 MR. QUSBA: Are you in Paragraph 21, Your Honor?

7 THE COURT: Yeah.

8 MR. QUSBA: Yeah, I was -- one, two, three, four, five
9 -- six lines down. It begins "the stipulations and
10 admissions."

11 THE COURT: Yeah, "The stipulations and admissions" --

12 MR. HERMANN: Right.

13 THE COURT: "-- contained in this final order,
14 including, without limitation, in Paragraph 4 of this
15 final order, shall be binding" --

16 Oh, it says it twice then because it -- I see. I'm
17 sorry. The previous sentence -- the previous sentence -- I'm
18 sorry. The previous sentence binds the debtors --

19 MR. QUSBA: Right.

20 THE COURT: -- and this sentence --

21 MR. QUSBA: All other parties-in-interest.

22 THE COURT: -- has all -- I see. Okay.

23 MR. QUSBA: Exactly. That's exactly right, Your
24 Honor. I apologize. I should have been clearer.

25 THE COURT: No, no. My --

1 MR. QUSBA: And then on Page 28, staying in this,
2 unfortunately, lengthy Paragraph 28 -- 21 -- excuse me -- but
3 Page 28, I'd say three-quarters of the way down, there's a
4 clause -- well, halfway down the page, there's a Clause Z, as
5 in "zebra." The obligations, the liens:

6 "-- shall not be subject to any other or further
7 challenge by" -- again "-- any party-in-interest. And
8 any such party-in-interest shall be enjoined from
9 seeking to exercise the rights to the debtors'
10 estates, including, without any limitation, any
11 successor thereto" --

12 And another including, without limitation:

13 "-- any estate representative or a trustee."

14 We were very deliberate about these words, obviously,
15 because they mean something to secured lenders. They may not
16 mean anything to unsecured bondholders until they feel like
17 challenging it, but certainly, they mean something to us from
18 the get-go.

19 And then, finally, Your Honor, Paragraph 24, Page 30
20 of the black-line. Once again, the provisions of the orders,
21 I'm at the beginning:

22 "-- including all findings, shall be binding on all
23 parties-in-interest, including, without limitation,
24 the agents, the secured parties, the debtors, their
25 respective successors or assigneds" --

1 It goes on to talk about trustees, examiners appointed
2 under 1104, or any other fiduciary appointed as a legal
3 representative. This order has contemplated this circumstance.

4 And certainly, the fact that the plan that they had
5 originally -- "they," meaning the ad hoc group, had originally
6 agreed to wasn't confirmed. There was a litigation. There was
7 no promise made that it would be confirmed. It was as
8 deliberate choice made not to reserve any further or additional
9 rights for the committee or themselves under that final order.

10 And that's what 60(b)(6) is supposed to protect. It's
11 supposed to protect the finality of orders. And only under
12 exceptional, unexpected hardships, where there were not
13 deliberate choices made, can you use 60(b)(6). Nothing
14 untoward happened here, to unwind an order that's been settled
15 and in place for almost a year, and particularly an order that
16 is very precise with respect to its intent and its words.

17 And so, lastly, Your Honor, I think the committee now
18 says, well, there's a sentence in the order that says, you
19 know, Your Honor is allowed to extend the challenge period --
20 extend the challenge period on a motion by a party-in-interest.
21 But "extension," as used in the order -- and we can go back to
22 the order and look at the words again -- but extension is not
23 resuscitation, it's not revival. That motion, that language,
24 when you look at it in the context of where it is and how it's
25 drafted -- and even the common law -- or common understanding

1 or definition of "extend" means to lengthen; it doesn't mean to
2 resuscitate or revive.

3 But the point being that that language was only meant
4 to deal with motions that are made before the challenge period
5 expires, so that the challenge period can be extended. It's
6 not an *ex post facto* provision that allows the revival or
7 resuscitation of a challenge period that's long been since
8 dead.

9 Your Honor, the committee also makes a number of
10 points with respect to, well, you know, we were just formed,
11 you know, you can't look at the participants in the ad hoc
12 group, we have fiduciary obligations. But there's no fiduciary
13 statutory right under the Bankruptcy Code to look at liens.

14 Again, these are deliberate choices. And the finality
15 of orders has to be given some respect, and the finality of
16 this Court's orders have to be given some respect. It's not --
17 you know, the formation of a committee is not an invitation, it
18 cannot be possibly construed to be an invitation to open up all
19 the other orders that have occurred in this case before their
20 arrival. There's a difference between interim and final. I --
21 we get it, we appreciate it, on the context of an interim
22 order. But this isn't what this is anymore; it's a final
23 order.

24 Your Honor, if you have any questions, I'm happy to
25 respond.

1 THE COURT: I do not. I'm sorry. I do not.

2 Mr. Talmadge. I apologize. I think I'm getting my
3 son's cold.

4 MR. TALMADGE: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. TALMADGE: Scott Talmadge from Arnold & Porter
7 Kaye Scholer, on behalf of the term loan agent and the term
8 loan lenders.

9 Your Honor, fortunately, as Mr. Qusba was talking, I
10 just kept crossing out parts of my argument, so I'm not going
11 to repeat anything; I'm going to adopt all of Mr. Qusba's
12 arguments.

13 The one thing I'd like to point out is in terms of the
14 expiration, as in terms of extension, and looking at it in the
15 context of the order. The order is very clear about this. The
16 committee, in their reply, said, oh, but the Court can open up
17 the order on a motion of a party-in-interest.

18 The problem with their argument is the context of
19 where that occurs in the order because the very next sentence
20 in the order says, but once it's expired, it's expired. So I
21 think you have to look at this context, the context of being
22 able to file a motion within in the order.

23 THE COURT: Can you --

24 MR. TALMADGE: So if you're going -- if you're --

25 THE COURT: -- point me to that language?

1 MR. TALMADGE: Sure. If you go to -- and you're
2 looking at the black-line, Your Honor, so I can't point to it
3 exactly. If Mr. Qusba can hand me the black-line. It's in
4 Paragraph 21.

5 (Participants confer)

6 MR. TALMADGE: Okay. So, Your Honor, the -- it starts
7 out where you've got the challenge period.

8 THE COURT: Right.

9 MR. TALMADGE: Okay. So that --

10 THE COURT: And defined --

11 MR. TALMADGE: That period then, it says, if you don't
12 do it within that period of time, or such period as consented
13 to by the secured lenders or by order, then this is what
14 happens. And the very next sentence, it's at Page 28:

15 "If no such adversary proceeding or contested matter
16 is timely filed prior to the expiration of the
17 challenge period" --

18 And then you go on to all of the important points,
19 that the liens and the claims are good; and that no other
20 party, including a fiduciary or estate representative, may
21 challenge. So that was the one thing I wanted to point out to
22 Your Honor, is that, when you look at it within the context of
23 the order, it's quite clear. Once expiration has happened,
24 it's happened.

25 And Your Honor, it's our view that, you know, cash

1 collateral orders and DIP financing orders are heavily
2 negotiated. People rely upon those orders. It's all part of a
3 complex package of rights that are negotiated. And you just
4 can't start pulling out little pieces of an order a year after
5 the case has commenced.

6 And so, with that, Your Honor, I'm going to sit down
7 because I think everything that needed to be said was said.

8 THE COURT: Thank you, Mr. Talmadge.

9 Reply?

10 MR. HERMANN: Thank you, Your Honor. Again, Brian
11 Hermann from Paul Weiss for the official committee.

12 Let me start with the argument that the motion had to
13 be made within the original 75 days. If I go to the language
14 that Mr. Talmadge was just reading, I have two points: One is
15 he omitted the end of that sentence, which says that:

16 "-- if no such adversary proceeding or contested
17 matter is timely filed prior to the expiration of the
18 challenge period, without further order of this
19 Court."

20 So, once again, that is an indication to us that the
21 Court has the power to extend the challenge period.

22 Now the typical language you see in Paragraph 21 talks
23 about a motion to extend being made within the original
24 challenge period. That language doesn't exist here. And so
25 then the question becomes: What does "extend" mean? And I

1 think "extension" could have the meaning that Mr. Qusba gave
2 it, but it could also mean that you can resuscitate a challenge
3 period.

4 THE COURT: What language are we talking about?
5 Because I'm operating in English.

6 MR. HERMANN: This is -- well, if you go to --

7 THE COURT: I mean, "extension" doesn't -- I agree
8 with him. I mean, the plain meaning of "extension" doesn't
9 mean do-over, it doesn't mean resuscitation, it doesn't mean
10 revival. It means to make longer a period of time that still
11 is in existence.

12 MR. HERMANN: Well, I think it could mean that; I
13 don't think that it necessarily means that. And I think that's
14 why people usually are very clear about you need to make your
15 request within the seventy-five-day or the sixty-day period,
16 whatever it is.

17 And then I would go to the language that Mr. Qusba was
18 referring to on Page 28, which I think highlights this point.
19 When he talks about the stipulations being binding on any
20 party-in-interest, and he pointed out that it includes a
21 trustee that gets appointed, they went to the trouble to say:

22 "-- whether the trustee is appointed or elected prior
23 to or following the expiration of the challenge
24 period. It doesn't say that anywhere with respect to
25 whether somebody can bring a motion to extend the

1 challenge period, that that has to be within the
2 original sixty-day or seventy-five-day period."

3 The other thing I would point out about the black-
4 line, and then I'll leave this point, is that, while it's true
5 there was a provision in there regarding a creditors' committee
6 having a challenge right within 60 days of its formation that
7 was taken out in the final order, there are also provisions
8 throughout where it talks about binding on all parties-in-
9 interest, including trustees, et cetera, where there were
10 references to the committee, and that was taken out, too. So I
11 think the black-line cuts both ways.

12 In terms of the -- who is on the creditors' committee
13 and certain choices they made before today, to me, that's
14 legally irrelevant. Whether -- if the committee was completely
15 made up of new people, we'd be sitting here today having the
16 same argument. So the fact that people, in their individual
17 capacities, made certain choices prior to today should not tie
18 the hands of a statutory body like an official committee that
19 has fiduciary duties to all creditors. And so I think the
20 point about the RSA reservation of rights, and that the cash
21 collateral had to be, in form and substance, acceptable to
22 certain holders is legally irrelevant.

23 So, Your Honor, I think that -- and we're not making
24 an equitable argument. We're simply saying that we are now --
25 we are an official committee, we have a role to play. I think

1 we have a statutory obligation to do an investigation. This
2 order limits that, in my view, unless our motion is granted.
3 And I think, in light of the plan, which calls into question
4 and makes central the issue of the validity of their liens
5 because it's -- the whole plan is premised on an adequate
6 protection claim, we should have an ability under Rule 60(b)(6)
7 to have a look at their liens before we go down a path of
8 assuming that they're entitled to adequate protection. Thank
9 you, Your Honor.

10 THE COURT: You're welcome.

11 Anything further.

12 MR. QUSBA: Your Honor, Sandy Qusba, Simpson, Thacher
13 & Bartlett, counsel for the revolver agent.

14 Just a couple of clarifications. First, with respect
15 to the validity of our liens, a central part of, potentially, a
16 confirmation fight will be our assertion, which the debtors
17 don't agree with, and haven't agreed with, but is part of a
18 global settlement, as embodied in the Chapter 11 plan. But our
19 assertion of a lien on three hundred and forty, five million
20 dollars of cash that is sitting at PLC, that reservation of
21 rights, Your Honor, was very clearly out, both in the interim
22 order and in the final order, Paragraph 4(1), as in Larry,
23 where, you know, the debtors asserted that money is
24 unencumbered, and we've reserved rights with respect to that
25 allegation or position. And so, in the context of this plan,

1 there is a settlement of that litigation, potential litigation,
2 together with adequate protection and a number of other things.

3 So, you know, I think the committee and Mr. Hermann
4 have referenced, you know, we didn't know about this, or this
5 has never been really litigated or discussed, this lien, but it
6 was reserved, the right was reserved, that's not a surprise.
7 And it's a huge chunk of the company's balance sheet cash;
8 three hundred and forty, \$350 million.

9 In addition, Your Honor, I want to be very clear that,
10 absent this relief, I don't think this committee is prejudiced
11 one iota. They absolutely continue to have the right to object
12 to the plan. They have a -- they have a right to object to the
13 settlement, whether satisfied -- it satisfies the Third Circuit
14 law, with respect to the components of that settlement, what
15 was being settled, the adequate protection claims, the lien
16 litigation. All of that, it's up there for them to litigate
17 and fight in the context of where it's being brought and how
18 it's being brought by the debtors. So those were just two last
19 points I wanted to make, Your Honor.

20 THE COURT: Thank you.

21 All right. Well, first of all, I, of course, endorse
22 the resolution of the open issues that were agreed to, with
23 regard to sharing of information, sharing *pari passu* with the
24 debtors on the carveout, getting the fee review. And I'll
25 accept an order, an agreed order and a certification of

1 counsel, incorporating those agreements.

2 With regard to the open issue, which is whether the
3 challenge period should be reopened or resuscitated or extended
4 for an additional, say, 45 days, to allow the committee to
5 perform an investigation, and I guess the related issue that
6 there should be budgeted some amount of money to perform that
7 investigation, I'm going to deny that request.

8 Clearly, the Court has broad discretion to revisit its
9 orders; however, the Court should exercise that broad
10 discretion very carefully and very narrowly, in order to ensure
11 that parties who have relied upon agreements and rulings by the
12 Court in final orders can do so in -- they can rely fairly,
13 they can take actions based on that reliance, and the case can
14 move forward.

15 As a result, the law on revisiting these issues,
16 whether it be under Rule 60 or under general equitable
17 principles, is pretty narrow. And I personally was reversed on
18 a somewhat analogous issue by the Third Circuit, where there
19 were two parties to a dispute in Visteon about the formation of
20 a retiree committee. And I ruled that they could not -- that a
21 retiree committee need not be appointed. One of those parties;
22 the other didn't. I was reversed on the appointment of a
23 retiree committee, and instructed to create one, or said -- it
24 was said that it was required, in order to modify the benefits
25 that there be a retiree committee.

1 On remand, I said that was true, and the retire -- the
2 amendment to the retiree benefits was not applicable to both
3 parties, even the party that didn't appeal. It went back up to
4 the Third Circuit, got reversed again. It was a lucky case.

5 (Laughter)

6 THE COURT: And even though the Court found, in the
7 first opinion, that I had no power to take the action I took,
8 they said, because there was no appeal, that was a final order.
9 So something where I had no power, took action, was,
10 nonetheless, a final order.

11 And they made a very big point -- and it's a loose
12 analogy, but they made a very large point of saying, you know,
13 parties need to be able to rely on final orders, the Court
14 needs to be able to rely on final orders, and I think that's
15 very important here.

16 Look, you know, this -- whether a committee was going
17 to be formed, not formed a year ago, I wasn't privy to any of
18 that. No one ever asked me to direct the appointment of a
19 committee. I think, to a certain extent, the history here
20 really has to be put at the feet of the current committee and
21 its current membership.

22 Certainly, the committee is an independent fiduciary.
23 The members of that committee are fiduciaries to all unsecured
24 creditors. The committee acts as a separate entity, isn't
25 bound by previous plan support agreements. But we can't ignore

1 what happened here, we can't ignore the history. And the fact
2 that two of the three members of the committee were on board
3 with the strategy of this case from really not even day one,
4 prepetition, going forward, the plan support agreement, the
5 attempt to confirm the plan twice, and those denials by the
6 Court, those were strategic, tactical decisions made by fully
7 informed parties, who believed they had a deal that would be
8 approved by the Court. It turned out that was incorrect. It's
9 nothing bad anyone has done, I'm not being pejorative. It just
10 turned out that the -- that it went the other way.

11 And I had another analogous situation recently in
12 Energy Future Holdings, where the -- a deal was cut last
13 September that put the EFH unsecured creditors in a position
14 where they were looking at like about 50 cents on the dollar,
15 and they entered into an agreement to support the plan, and
16 they were headed -- we were headed forward to confirmation in
17 December with their support. And the Third Circuit reversed me
18 again, this time on the make-whole dispute in that case, which
19 required about a billion dollars or more value to come out of
20 the estate because it could work its way up to the EFH
21 unsecured creditors.

22 And they came in and said they wanted to change their
23 votes. They had all voted to confirm the plan, and they wanted
24 to change the votes because circumstances had changed. Well, I
25 didn't let them do that because circumstances hadn't changed;

1 in that, it was always a possibility that that was going to
2 occur. And it was specifically, actually, in the plan many
3 places that it might occur, that there might be a reversal.
4 And as a result, the plan sort of dealt with that, and said it
5 will be the waterfall, whatever it is.

6 And at the end of the day, I said, look, you know, you
7 made a decision, you knew the risks, you made the decision to
8 vote for the plan. Even though it was a risk, it would be --
9 although, you know, certainly you believed a very small risk, I
10 would be reversed, but there was that risk, and you're stuck.
11 And I think the committee here is stuck.

12 The members, but not even just the members, unsecured
13 creditors as a whole were supportive of the previous plan.
14 There was always a risk it wouldn't be confirmed. It wasn't
15 confirmed. That has subsequently led to further negotiations
16 that have led to a plan that the committee currently does not
17 support. And certainly, the treatment of unsecured creditors
18 is less advantageous than it was under the previous plan that
19 wasn't confirmed by the Court.

20 But that is a risk that existed from day one of this
21 case. And parties went in with full knowledge of that risk,
22 made their decision to not force the formation of a committee,
23 made their decision to not contest the cash collateral order,
24 made their decision to allow the period to expire. Things
25 subsequently happened that changed where people stand in the

1 waterfall at this point, changed where people stand in
2 connection with the negotiation strategy.

3 But this isn't out of left field. This was always a
4 possibility. And I think that's critical in deciding whether
5 or not to revisit the order, both under the case law, and just
6 as a matter of general equitable principles.

7 So I think the order here is critical, that it be
8 interpreted faithfully. I think that the history of this case
9 does not support changing the rules a year after the final
10 order was entered. I don't think "extension" means
11 resuscitation; I think it means extending before expiration of
12 the time. So, even if one were to look at the plain language
13 of the order, I don't think there's any argument to be made
14 that the Court sort of has the inherent power under the order
15 to extend because that period has already expired.

16 So, for those reasons, the Court will deny that
17 request. And I'll await an order under certification?

18 MR. PEREZ: Yes, Your Honor. We'll prepare an order
19 and circulate it to the parties and submit it under --

20 THE COURT: All right.

21 MR. PEREZ: -- certification of counsel.

22 THE COURT: Very good.

23 And I will be in contact, just for a point of contact,
24 through the debtors as to the status of being able to get you a
25 mediator, hopefully, a judicial mediator, in the time frame

1 that you need. I can't make any promises; my colleagues are
2 very, very busy. And it's always -- it's always a little
3 difficult to go, hat in hand, and ask for help. And they're
4 wonderful, wonderful people, and they're wonderful mediators,
5 but they have their own cases to deal with. So I'll do the
6 best I can, but I can't make any promises.

7 MR. PEREZ: Thank you, Your Honor. We appreciate
8 that.

9 THE COURT: All right. Very good. Anything else?
10 (No verbal response)

11 THE COURT: All right. Thank you. We're adjourned.

12 COUNSEL: Thank you, Your Honor. Thanks. Thank you,
13 Your Honor.

14 (Proceedings concluded at 11:16 a.m.)

15 *****

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

February 21, 2017

For Reliable