IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA (RICHMOND)

In re	)	Case No. 15-32919-KRH
	)	Richmond, Virginia
HEALTH DIAGNOSTIC LABORATORY, INC., et al.	)	June 21, 2016
	)	10:10 AM
Debtors.	)	
HEALTH DIAGNOSTIC LABORATORY, INC., et al.,	)	Adv. Proc. No.
Plaintiffs,	)	16-03011-KRH
-against-	)	
TRUE HEALTH DIAGNOSTICS, LLC, and JEFFREY P. "BOOMER" CORNELL,	)	
Defendants.	)	

TRANSCRIPT OF HEARING ON:
MOTION TO EXTEND INITIAL DEADLINE TO EXECUTE ASSIGNMENT AGREEMENTS [DOCKET ITEM NO. 1141]; MOTION FOR MODIFICATION OF CASE MANAGEMENT ORDER AND FOR APPROVAL OF POST-CONFIRMATION NOTICE, CASE MANAGEMENT, AND ADMINISTRATIVE PROCEDURES [DOCKET ITEM NO. 1146]; MOTION FOR ORDER APPROVING SETTLEMENT AGREEMENT BETWEEN THE LIQUIDATING TRUSTEE, CIGNA HEALTH AND LIFE INSURANCE COMPANY AND CONNECTICUT GENERAL LIFE INSURANCE COMPANY [DOCKET ITEM NO. 1148]; MOTION TO (A) ENFORCE THE AUTOMATIC STAY TO CERTAIN ACCOUNTS RECEIVABLE CONSTITUTING PROPERTY OF THE ESTATE, AND (B) EXTEND THE AUTOMATIC STAY TO COLLECTION ENTITIES ACTING AT THE AID AND DIRECTION OF THE LIQUIDATING TRUSTEE FOR PURPOSES OF COLLECTING SUCH PROPERTY FOR THE BENEFIT OF CREDITORS AND (C) GRANTING RELATED RELIEF UNDER 11 U.S.C. SECTION 105 [DOCKET ITEM NO. 1145]; OMNIBUS MEMORANDUM IN SUPPORT OF OBJECTIONS TO REQUESTS FOR PAYMENT OF INSURANCE PROCEEDS [DOCKET NO. 1183]; MOTION TO EXPEDITE HEARING ON MOTION TO MODIFY PROTOCOL ORDER IN REGARD TO PAYMENT OF PROCEEDS TO G. RUSSELL WARNICK [DOCKET NO. 1167]; EXPEDITED MOTION TO MODIFY PROTOCOL ORDER IN REGARD TO PAYMENT OF PROCEEDS TO G. RUSSELL WARNICK [DOCKET NO. 1166]; SUMMONS AND NOTICE IN ADVERSARY PROCEEDING [HEALTH DIAGNOSTIC LABORATORY, INC. V. TRUE HEALTH DIAGNOSTICS, LLC, AND JEFFREY P. "BOOMER" CORNELL, CASE NO. 16-03011 DOCKET ITEM NO. 09];
BEFORE THE HONORABLE KEVIN R. HUENNEKENS,
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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THE CLERK: Health Diagnostic Laboratory, Incorporated, items 1 through 10 on proposed agenda.

THE COURT: Good morning.

MS. SPECKHART: Good morning, Your Honor. Cullen Speckhart appearing on behalf of Mr. Arrowsmith, who is the liquidating trustee in this case.

As the amended agenda filed yesterday afternoon reflects, we do have ten items on for this morning, the majority of which are uncontested in nature. If it's acceptable to the Court, we thought it made sense to just proceed through the agenda in order, beginning with the uncontested motions.

THE COURT: That's fine with me.

MS. SPECKHART: I'm going to start it, Your Honor; Mr. Kanowitz will handle items 3 and 4; and I'll pick us back up at item 5 and carry us through the balance of the agenda for this morning.

Item number 1 is our motion to extend the initial deadline to execute assignment agreements. Pursuant to Article (a)(1)(ix) (ph.) of the plan, creditors who indicated on their ballots an intent to assign their causes of action to the liquidating trustee -- we would have sixty days to obtain an executed assignment agreement to give contractual effect to that intent. Counting from the effective date, the initial deadline would expire on July 11th. We have thirty-eight

creditors who are subject to the assignment mechanisms in the plan. We're diligently pursuing a complete set of executed agreements, but we acknowledge the possibility that that process might take a little longer than we'd like. In recognition of that, we've requested that the assignment deadline be extended by sixty days, through and including September 9th, 2016. We received no objection to this request and we'd ask that the motion be granted.

THE COURT: Any party wish to be heard in connection with the assignment motion?

That's motion's granted.

MS. SPECKHART: Item number 2 is our motion to modify the existing case-management order and for approval of post-confirmation case-management procedures. Your Honor, we reviewed docket item number 40, which was the original case-management order, and we believe that, to a large extent, it is appropriate to carry us through the rest of the case. We wanted to clean up the procedures just a little bit, though, in order to remove references to the debtor and the committee and replace that with references to the liquidating trustee. We also wanted to update the core parties upon whom notice of motions and objections would be served, remove old deadlines and dates that would apply to the pre-confirmation process. And most importantly, we wanted to specifically incorporate the other procedural orders that Your Honor has entered in

this case, with reference to the discovery order, the claims-procedure order and the adversary-proceeding order. I think that the proposed order that was appended to our motion to modify the case-management procedures lays all of that out appropriately. We did receive no objection to this request and we ask that the motion be granted.

THE COURT: Does any party wish to be heard in connection with the motion to modify the case-management order?

All right, I reviewed that order. I thought that that made perfectly good sense. That will be granted.

MS. SPECKHART: Thank you, Your Honor. I'm going to cede the podium to Mr. Kanowitz.

THE COURT: All right.

MR. KANOWITZ: May it please the Court. Richard Kanowitz on behalf of Richard Arrowsmith, liquidating trustee. Good morning, Your Honor.

THE COURT: Good morning.

MR. KANOWITZ: As to the Cigna settlement, the 9019 motion, I'm pleased to present it to you after many, many months of hard work and negotiations with Cigna. We've come to an agreement to settle any and all outstanding disputes, claims, concerning the pre-petition district-court litigation that was pending, as well -- and the various counterclaims and items in there, as well as any claim that Cigna has in the

bankruptcy case. As you saw from the settlement agreement, Cigna is going to be paying 4.25 million dollars to the estate upon the effective date of the settlement, with Your Honor's approval of it.

We are not going to collect any of the Cigna patient accounts receivable; it's approximately 42 million dollars of the universe of 667 million dollars of A/R that's owed to the estate. Basically, we're buying peace between Cigna and the estate. The fifty-nine-million-dollar claim that Cigna filed is going to be allowed, but it's going to be allowed as a Class 4 claim. So, essentially, if the unsecured creditors are paid in full, Cigna will then realize on its claim. Hopefully that will be the case; we do not know. Similar to what we did with Aetna. The difference between, really, Aetna and Cigna is Aetna paid in full all of the money to the estate and, therefore, you have the higher claim number in a less subordinated Class 4 claim, whereas Cigna stopped paying at a certain point in time; hence, the forty-two million dollars in receivable, among other things. And this just cleans everything up.

The lowest-threshold standard on a 9019 motion is clearly met here. I would say this is an unbelievable result, because there's no more litigation, there's no more attorney fees, there's no more burn, and there's money coming into the estate, and creditors benefit by the subordination of the

fifty-nine-million-dollar claim.

THE COURT: All right, thank you.

Does any party wish to be heard in connection with the motion to approve the settlement?

All right, that motion'll be approved. The Court finds that it is well within the range of reasonableness and exercises sounds business judgment of the liquidating trustee.

MR. KANOWITZ: The next motion, Your Honor, is something that I'm less pleased to present to Your Honor. I'm actually kind of dismayed that we come to this but, given the course history of this case, I'm not surprised. Essentially, we are extending the automatic stay to protect the receivables that Your Honor has recognized as property of the estate, and also ask for a 105 order to aid in collection. I'm going to give you, I guess, a big picture. One of the things that struck me during the course of our case, the Chapter 11 case, is that we sort of didn't give you enough information about certain things. At least that was my perspective of where we were going and what was happening behind the scenes. In this new stage of this case, you're going to get that information. I think, as a fiduciary -- Mr. Arrowsmith's on the phone -- we're going to be visible with Your Honor. We're not hiding the ball. We're not trying to pull anything. Okay. We're going to be out in front and we're going to ask Your Honor for a lot of guidance on certain issues, because there're a lot of

tricky issues in this case, as you're going to see.

So let's talk about the claim pool. Three billion was filed. Probably scrub it down to 400- or 600-million-dollar universe. No matter what we do, it's going to be a large claim pool. The DOJ has a claim of ninety-four million dollars, give or take; UnitedHealthcare Company, ninety-six million dollars; Aetna, claim of seventy-eight million dollars; Cigna, as you just heard, fifty-nine million dollars.

The common fact about all of these claims is they allege HDL committed fraud or is a scheme. I mean, there's no way around it; each one of those claims somehow touches upon a scheme. And in any type of scheme situation, there are going to be innocent victims. And Mr. Arrowsmith and the professionals he hired -- our job in a specific platform is to try to figure out who were the innocent victims. And that's why we come here today saying to you we're only collecting or trying to college paid-to-patient receivables; those are checks that were sent from an insurance provider to the patient, that should have been sent to HDL. Whether it was by mistake, by checking the wrong box, it doesn't matter. Those monies, no matter what the policy was from HDL's tortured history -- because I could go through it with you where it was in 2010 to where it was ultimately in 2014, which you saw by Exhibit J to the supplement. Throughout that history, okay, paid-to-patient payments were to be returned over to HDL,

because it's not the patient's money; it was HDL's money. And that's what we're trying to collect today.

Now, could we collect patient responsibility? Sure. But as I was just discussing with the U.S. Trustee among many of my committee members, the question is twofold: Do we have a legal right to collect? Absolutely. Should we collect? It's a different story. I'm not here today to ask you one way or another what we should do on those. I'm just saying, paid-to-patient, we have a legal obligation and we have an absolute right. There was no misleading any patient, whatsoever, that paid-to-patient should be returned. And that's what we're seeking.

So the next issue becomes, well, how do you go about doing it. Right? What's the most efficient way? Well, as you could see how much money was spent when Ms. Speckhart argues with the Ds and Os, these books and records are a mess. There was no thought given by the debtors-in-possession -- and I blame this right on the Ds and Os -- to put the books and records for this large receivable base in an order that can be collected in such a manner that makes economic sense. And they didn't do it, for whatever reason, most of which was because they were looking to avoid any potential liability from the estate to them that they know is coming down the line.

So they left the business with books and records in

complete disarray. So what does that leave us to do? Well, we have a whole bunch of information. As you know, you granted 2004 motions as to Blue Cross Blue Shield, because we believe Blue Cross and Blue Shield were the primary insurance company who sent out paid-to-patient. And in fact, just yesterday we found additional information.

So from Blue Cross Blue Shield, Horizon Health Care, from 12/9/10 to 9/23/15, there was 4.4 million dollars on 6.8, or sixty-five percent, to 10,000 members, sent on paid-to-patient. If you extrapolate those percentages -- and again, I'm not suggesting it's exact one for one -- the 175 million dollars Blue Cross Blue Shield paid-to-patient may realize about 113.5 million dollars for the estate. That's the magnitude of paid-to-patient we're talking about. Okay? So on a 600-million-dollar, give or take, claim pool, 113 million dollars is at stake. Happy not to collect it if Your Honor directs. I'm not sure you're not going to direct me to collect it.

The question then becomes, so, what are we -- what are we doing? Well, we hired -- or Mr. Arrowsmith hired collection agencies, and collection agencies do what they do. But as Your Honor knows from the True Health preliminary-injunction order, what we're seeking is somebody who gets a notice, to communicate with us, send us an EOB, show us that you did not receive paid-to-patient. Then you go back into

the second bucket: is it patient responsibility, is it something else. We could communicate. That's what we're looking for.

Now, are the collection agencies perfect? No. Are there mistakes being made? Absolutely. Would I ever say otherwise? No. But are they correctable? Yes. But if people don't communicate, if they don't engage with us, we really have no better process, unfortunately so, for the reasons that I just laid out before.

Happy to go another way. We could hire tons and tons of people to match up patients and records, et cetera, at cost of millions of dollars. There's no more HDL employees, which goes back to my earlier point. All of this when the sale happened to True Health in September, October. Months went by; not a thing was done by any of the Ds and Os. I wonder why.

So we're here today. So, why are we here today? We're here today because class-action lawyers and other lawyers decided -- instead of picking up the phone and talking and doing a good job for their client by talking to us so that we could understand where they're coming from, decided let's go sue people, as in the case of Kirk (ph.) Miller in Washington over a 5,000-dollar debt, or, in the case of Mr. Lemberg and the Women's Health Network, decided to put on a Web site a way to get a class action together. And instead

of protecting their individual clients by engaging with us, that's not what their goal is, because they've already accomplished that; they've already interfered with collection.

What's on the Web site now, the Women's Health Network has approximately 1.5 million dollars of receivables. 552 of 5,077.2 (ph.), which are sent to Monterey for collection, are the Women's Health Network. So, essentially, of approximately 20 million dollars of collection that those accounts represent on Blue Cross Blue Shield California, Oregon, Washington, Women's Health Network is interfering with 1.5 million dollars, putting aside all the process and handling fees that we might go after them for. So there's a concerted effort to interfere.

Now, if they didn't agree that the patients owed anything, then come and talk to us or, alternatively, start an action in this court, challenge the concept that Your Honor didn't grant an order for us to sell air to True Health. We actually sold something, right? Wasn't air. It was our accounts receivable, 0 to 180. No different than the 180-plus to us that we're keeping as excluded receivables.

Your Honor's sale order, the APA, Your Honor's TRO, Your Honor's preliminary-injunction order, all of which are public record, all of which we tried to give to the attorneys. And you saw the e-mail exchange between Ms. Speckhart and Mr. Miller. Despicable. Completely despicable. And you saw

my e-mail exchange with Mr. Lemberg. Less despicable, but still in the same concept. Okay? I'm forcing them to come here and defend their actions.

And all I'm seeking today, Your Honor, is a straightforward let's protect the collection agencies. If they want to come here and challenge the estate on paid-to-patient, on patient responsibility, on whether there was a debt, they have a mechanism to do that. But to have collection agencies, who are trying to do the best they can under very difficult circumstances, be threatened, to have Web sites out there to alert patients not to pay, they're violating the stay. They're interfering with the receivable, whether or not you want the collection agency to do anything. They're interfering with property of the estate. It's a fundamental process.

Now you could argue -- and we went a little further than we needed to go for today, just so Your Honor understands we've thought this through. What happens if somehow there was a policy by HDL that somehow said, we assume the risk? And what happens if you actually ever came to the tortured conclusion that that meant we wouldn't collect anything from you? Well, we challenge that as a fraudulent conveyance; it's that simple. But we're not there yet. We don't have to. Okay? Your Honor's prior rulings make clear what the case law is at this state (sic). Someone wants to challenge it,

there's a vehicle to do that. Suing agents of the estate is not appropriate.

So, a couple of more items for you to consider. The paid-to-patient amounts, like I said, could be up to upwards of 113 million dollars. We know conservatively they're going to be at least 25 million. The patient responsibility, again, deductibles and co-pay, we have a 667-million-dollar face amount; there's a subset that that's going to be patient responsibility. We know, on co-pay alone, twenty dollars times seven-million-dollar accessions -- seven million -- sorry, not million dollars, but seven million accessions, is four million dollars right there. The denials, again, where they say basically, we're not paying for it, that's a subset of the 667 million dollars. Then of course you have process and handling fees paid to the doctors; that's forty-one million dollars.

So you're talking about really big numbers here that will have a meaningful impact on creditor distributions. The collections to date -- something else to give you: Accelerated Receivables Management, collections to date, 1.8 million dollars; paid in full by patients, 1,476; they've received six batches from us at 35 million dollars there. Monterey Collections, to date: 267,000 dollars; paid in full, 92; two batches; 18.5 million. Remix (ph.), collections to date, 90,000; paid in full, 48; two batches; 12.6 million

dollars. And all of that is consistent with Exhibit J, what the billing policies were. It's night and day. If you look at Exhibit J, they say when you will receive a bill. Now, of course, HDL might not have sent them out in the past. We're going to send them out now. And what we're looking for is communication back to us.

I'm not really sure if I really need to hit the reply that we filed. I think Your Honor understood where we were going. But there's no basis to lift the stay. You should apply the stay. Collection agencies deserve protection. If people want to battle it out, battle it out there on this record where Your Honor has made rulings about whether or not there is a debt -- and that's the fundamental mistake that the collection lawyers on the other side -- not the collection agency -- class-action lawyers -- the customers maybe -- they assume and go right to the conclusion that there is no debt and, therefore, they get to sue. They're wrong.

And lastly, Your Honor, and I'll leave this to see how Mr. Lemberg wants to handle it, using confidential information or unauthentic information is really inappropriate. If he's going to come up before Your Honor, I'm going to challenge certain things on documentation, on authenticity, on hearsay and, more importantly, on relevance. Whether or not there's a cash-pay price and there's an insurance price is not relevant to whether there's a debt. At

best -- at best -- it goes to how much we should be collecting from people. Like I said, it's going to be a while before we get to who's the innocent victim and who's not.

Unless you have any further questions, Your Honor, I just ask that I be able to respond to any objections.

THE COURT: Thank you very much, Mr. Kanowitz.

Mr. Page?

MR. PAGE: Good morning, Your Honor. Ronald Page appearing as co-counsel to Sergei Lemberg, the Lemberg Law firm, and the consumers as defined in the reply and in the motion for admission of Sergei Lemberg pro hac vice. Your Honor, the motion to admit Mr. Lemberg has been filed. I ask that you grant that motion today and allow Mr. Lemberg to respond to Mr. Kanowitz's comments.

THE COURT: Have you submitted an order on that?

MR. PAGE: The order has been submitted to Your Honor.

THE COURT: It'll be entered and it is formally admitted.

MR. PAGE: Thank you, Your Honor.

THE COURT: Mr. Lemberg?

MR. LEMBERG: Good morning, Judge.

THE COURT: Welcome to the court.

MR. LEMBERG: Thank you very much. I take real pleasure being in bankruptcy court, because I started my

career as a bankruptcy lawyer and practiced for three years. I do some of it -- I've done group claims in the bankruptcy context. So it's always a pleasure to be back.

THE COURT: Well, good.

MR. LEMBERG: Let me address some gating issues first. The suggestion that my firm is working with these corrupt doctors to manufacture claims --

THE COURT: I didn't hear the word "corrupt".

MR. LEMBERG: A similar word was used in the pleadings. Well, let's remove the adjective for now --

THE COURT: All right.

MR. LEMBERG: -- as baseless.

We were contacted by the Washington physician, who told us that all of her patients whose test lab (sic) she has submitted to HDL are being inundated by phone calls and letters, dunning letters, from collection agencies seeking not 100, not 200, but thousands and thousands of dollars, where the debtor had told them that it would not be their responsibility. Okay? My response was, this is what I do.

Now, Mr. Kanowitz characterizes my firm as a class-action firm; it's part of what we do. It's a small part of what we do. We do fair-debt-collection class actions; they are not a large part of our practice, because the damages in those cases are limited to one percent of the net worth of the defendant. So if you have a large collector who has, say, 50

million dollars in assets and 35 in liabilities, they are, at worst, on the hook for 150 grand, plus legal fees at the end of the day. We do these cases when we think they are important, when there's something to be -- some result that bears bringing that claim forth. And we have cited some of the cases: Butter (ph.) v. Collecto; there were collection fees tacked onto debts. And I've done this kind of work for ten years, Your Honor. I have never seen in my life anything remotely close to what these debt collectors are doing to these consumers. I've never seen it.

The cases that we have brought are on the margins. Does a collector for AT&T have a right to collect a collection fee at the time they're dunning the consumer, if under their agreement with the creditor the fee is not owed until the end? It's marginal stuff that's at the end. I've never seen folks being dunned for thousands more than they owe.

Now, Mr. Kanowitz said at the outset, look, we are only collecting paid-to-patient receivables. I told him flat out, twice, we have no problem whatsoever with your collection of paid-to-patient receivables.

THE COURT: That's great; we're making progress. I like that.

MR. LEMBERG: That's why --

THE COURT: All right.

MR. LEMBERG: -- I felt it was a gating issue.

THE COURT: All right.

MR. LEMBERG: Once an underlying form so that it could not be missed -- in other words, we have told our clients -- we screen the clients. We have told them specifically, if you have any money that belongs to the estate, in your pocket, turn it over, number one; number two, we are not representing you, because we think there's a conflict between those folks and folks that are being dunned on debts they don't owe.

So I don't know what the big to-do is about, but we told the trustee's counsel flat out, twice, no problem with that.

Number two, what we do have a problem with and what is illegal under the Fourth Circuit decision in Russell and under the Fair Debt Collection Act, which has been in place since 1978, is the collection of any amount that is not owed; any amount that is not owed. 1692e. It's --

THE COURT: I'm familiar with --

MR. LEMBERG: 1692e(2). I'm sure you're familiar with f(1).

THE COURT: I'm familiar with the statute. We get --

MR. LEMBERG: Okay.

THE COURT: -- plenty of those in here.

MR. LEMBERG: I assumed that you would.

Now, I don't need to go very far, Judge. You saw the

cash-price list. That was the cash-price list for noninsured folks. Okay? You have one bill that was attached to a supplement.

THE COURT: Excuse me just a minute.

You have an objection, Mr. Kanowitz?

MR. KANOWITZ: Yes, Your Honor. I move to strike the record. There's no foundation whatsoever on that document. It's also confidential. The top of the document says "Internal Use Only", among other things. It's based in 2013, at the bottom of it. There's no authentication, there's no record, there's nothing for counsel to lodge into facts. Cleary if Your Honor wants to consider it for whatever other purpose, I have no objection. But I don't think it comes in as evidence of truth of the matter asserted. Thank you.

THE COURT: Are you going to authenticate the document and plan to introduce it through some sort of a --

MR. LEMBERG: Your Honor, I don't believe this was --

THE COURT: -- witness?

MR. LEMBERG: -- noticed as an evidentiary hearing, number one; number two, the motion that was brought that seeks injunctive relief, that relief is only available, under 7001, through an adversary proceeding, which would have evidentiary rules applied that are not at issue here today. My point with the cash-price list is to illustrate what the claim is. I don't want it, for today, to be conclusive as to what the cash

price was. I want to --

THE COURT: Okay, well, then --

MR. LEMBERG: -- illustrate to you --

THE COURT: -- I won't consider it; I mean, if you want to introduce it I will, but otherwise I think that the objection is well founded.

MR. LEMBERG: Okay. May I make a point about this without asking you to deem it to be admitted or to ask for it to be admitted for the truth of what it says?

THE COURT: You can make whatever points you would like to --

MR. LEMBERG: Okay.

THE COURT: -- try to make.

MR. LEMBERG: The cash price for the first test that this lady was billed for, 82172, she's being billed for $50.49. How do I know this? She did something that Mr. Kanowitz said the consumers ought to do: she picked up the phone and she said to Monterey folks, I'm not responsible for this, send me a bill, I'm not -- this is not -- this can't be right, you told me it was free. So, Monterey said to her, sure, lady, we'll send you a bill, here's your bill for 2,034 dollars. And as part of that bill, there's a test; $50.49 for code number 82172. The equivalent -- reasonable equivalent value of that, even if there is a claim, is eight bucks.

Let me give you something else.

THE COURT: Okay, well, how much did she receive from the insurance company?

MR. LEMBERG: So far as we know, she herself received nothing. Our clients, Judge, got nothing. And if they --

THE COURT: Okay, well, then Mr. Kanowitz said he's not pursuing that claim.

MR. LEMBERG: This is not that. That's the point I'm trying to make to you is that these are not paid-to-patient receivables.

THE COURT: Okay, so what we need to figure out is how to figure out who's in which bucket?

MR. LEMBERG: Yes --

THE COURT: Okay.

MR. LEMBERG: -- but our clients --

THE COURT: Are you able to --

MR. LEMBERG: -- are not in that bucket.

THE COURT: -- assist with that?

MR. LEMBERG: Our clients are not in that bucket.

THE COURT: Okay, are you able to assist in that process?

MR. LEMBERG: Your Honor, here's my suggestion by way of cutting through: as an FDCPA lawyer, okay, number one, to suggest that these folks don't have a right to counsel contravenes federal law. 1692 --

THE COURT: No one's saying they don't have a right

to counsel. The question is can we figure out who's in which bucket? If we know that somebody received a payment from an insurance company, then that's one thing; if they did not, then Mr. Kanowitz said he's not pursuing that collection.

MR. LEMBERG: But that's not so, Judge, because --

THE COURT: Well, can we figure out how to figure that -- how to do that so that we don't inconvenience these folk?

MR. LEMBERG: Let me --

THE COURT: Are you able to assist in that process?

MR. LEMBERG: Judge, it's not on me.

THE COURT: I know it's on you.

MR. LEMBERG: There's a Fourth Circuit --

THE COURT: I just asked whether you were able to.

MR. LEMBERG: I can assist to some extent, but Fourth Circuit case law says, you, Debt Collector, may not send a bill out for more money than owed. The question is why -- the question in Robbins -- I'm sorry -- in Russell, was, well, but they never disputed. And the Fourth Circuit said it's not on the recipient of the bill to dispute, it's on the debt collector to transmit a true and correct bill.

I can assist with this, Judge, and here's how: I think there is clear liability not on the trustee -- not on the trustee -- not on the trustee's counsel, but on the debt collectors which are breaking federal law and other creditor

law, not the Bankruptcy Code. They're collecting the money. There's no question they have a right to collect the money -- some money; they've been authorized by you. But in doing that, they have -- they must, like all of us, comply with the law, and they're breaking that law.

It was on them, it was on the debt collectors, when they accepted these receivables, to ask the trustee what are these, are you sure, do we have a right to collect them and, if we don't, we can't do it, Trustee, we can't do it, because there is a strict-liability federal statute that prohibits us from collecting any money -- any money -- other than what's owed under the agreement or the law. And we can't send out a bill for 5,000 in the hope we collect 50. We got to know that that 5,000 is owed. That's not what happened.

THE COURT: So if the debtors' books and records say the 5,000 is owed and they turn that over to a debt collector and then the patient doesn't dispute it -- I mean, I'm trying to figure out what happens. Is that just no longer a receivable just because --

MR. LEMBERG: There're two answers to that. First of all, Mr. Kanowitz -- you heard him tell you that it's not known what is owed, that they haven't gotten to the patient-responsibility portion of the collection and that the information is coming in. Number one. So, maybe in that situation a bank can transmit maybe under some circumstances,

although Citibank and Chase and Capital One have gotten severely penalized by regulatory authorities for doing just what you suggested, where they didn't have the backup. So a creditor can in certain circumstances transmit a bill to a collector for collection, and the collector must only collect what is owed.

In this circumstance --

THE COURT: Well, here we're saying --

THE COURT: What Mr. Kanowitz is saying, because I think we're talking past each other. What he's saying, if I heard him correctly, and I'm going to give him a chance to stand back up and tell me if I'm wrong, but he's not trying to collect all of that, even though he says he has the legal right to collect it. All he's trying to do is collect to pay the patient receivables.

MR. LEMBERG: Judge, that's not what's happening.

THE COURT: Okay, so we need to figure out a way to make sure that that's what happens.

MR. LEMBERG: Absolutely.

THE COURT: Okay.

MR. LEMBERG: Absolutely.

THE COURT: Okay, so you agree with that.

MR. LEMBERG: Absolutely.

THE COURT: Okay.

MR. LEMBERG: Okay, so my suggestion to the --

THE COURT: Oka.

MR. LEMBERG: -- I had a --

THE COURT: I'm writing this down; what's your suggestion?

MR. LEMBERG: My suggestion, okay. The FDCPA is a prophylactic statute, and I don't believe Your Honor has the power to say that these folks don't have a right to bring the claims against debt collectors in their respective courts. Now, we haven't figured out whether it's an individual claim, a class claim; whatever it is, but to enjoin them --

THE COURT: This is not sounding much like a suggestion. I was getting ready to write down --

MR. LEMBERG: I'm getting to the suggestion, so sorry.

THE COURT: -- your suggestion.

MR. LEMBERG: I think that what ought to happen here is: Number one, the trustee ought to immediately stop collecting any money from consumers, other than patient responsibility money.

THE COURT: All right, so far --

MR. LEMBERG: The trustee --

THE COURT: -- that sounds like an easy one, okay, good.

MR. LEMBERG: Number two, they should immediately, as of today, remedy credit reporting on all consumers affected

because these folks are getting hit. I spoke with somebody who cannot get a mortgage because there's a 7,000 or 8,000 bill on her credit report. They should immediately remove all credit reporting for all affected folks, unless and until they know every penny that is owed exactly, okay, by whoever it is owed.

THE COURT: All right.

MR. LEMBERG: Okay. And this is affecting thousands of people, this is something that is -- the FCRA, unlike the FDCPA, has more --

THE COURT: I wrote that down, I've got it right here, okay.

MR. LEMBERG: Number two -- that's number two. They should stipulate on the record, or you should hold that the debtors' failure to dispute these bills within thirty days under the letters that have been transmitted to them, do not make these bills valid. Part of the problem with transmitting bogus bills to folks is that they have the notice required by 1692g, the g says, if you don't dispute within thirty days, it's valid, we will assume it's valid.

Well, it's not valid to begin with. These debts that the -- other than the paid-to-patient, which they're not -- which we have no issue with, the 3-, 4-, 5-, 10,000 dollar debts are not valid to begin with. So they should stipulate that the failure to dispute an invalid debt --

THE COURT: Well, this comes to the very first question I asked, and this is important, is if we've got this notice in this letter, and it says, look at, if you dispute this, please let us know, and they don't dispute it. How is the collector supposed to know that it's, as you say, an invalid debt? I mean.

MR. LEMBERG: I'll give you the Fourth Circuit's answer, it's better than mine. The Fourth Circuit's answer is, the law requires you to know, and the consumer is not required to dispute it. That's the Robins case, and I may be missing it -- Russell (ph.) case.

THE COURT: The Russell case.

MR. LEMBERG: Now, if they, number one, halt the collection of anything other than paid-to-patient, number two, fix the credit report, and number three, stipulate that sending to the thirty day issue, we will work with them. I will work with them. I have done class claims in bankruptcy before. It is not our intention to thwart the trustee's efforts, except to the extent that they're breaking the Fair Debt Collection Practices Act.

And so my suggestion is to get Mr. Kanowitz, not on the other side of the table, but at the same table with us, together with the three debt collection agencies, their counsel, and their carriers. They're all insured, they all have insurance cover -- well, most of the reputable ones have

coverage -- and work out a resolution of these claims for all consumers that are affected by this. Because I'm sure you, Judge, don't mean to look the other way while the trustee's collection agencies are trampling the rights of these thousands of consumers, and in the -- and then making a bad situation, and I've read enough to know that HDL is a bad situation.

Well, I don't think anybody wants to make it worse by disabling folks from being able to buy houses, rent cars, pay college tuitions. This is crippling for people. I mean, I got an e-mail yesterday, wish I had my phone with me, I'd read it to you, it's crippling. There's a man who lives on Social Security, he gets a bill for 5,000 dollars, he doesn't know what to do with it.

THE COURT: Okay.

MR. LEMBERG: So that's my suggestion is to get --

THE COURT: Those three things.

MR. LEMBERG: -- trustee's counsel -- so we will hold off on filing our cases; we haven't filed anything. My intention was to seek -- to file a motion, and I told Mr. Kanowitz, my intention was to file a motion for relief from stay; these guys beat me to the punch, whatever. The idea is to get them at the table, get the debt collectors at the table, and work out a resolution of class claims. Whether it will be submitted to your -- for your approval or a district

judge's approval in Washington, is -- or in California where one of these debt collection agencies is, is a different story. But that's my proposal.

Now, obviously, there's got to be an exchange of information, as in any mediation. Consumers, I think there's got to be a notification procedure because, you know, these consumers have to know what the story is. And maybe, maybe, I don't know that you have the power to enjoin consumers from filing suits, but what I might suggest to you is what you might have the power to do is enter an order, some sort of order, or we could stipulate to an order, staying the filing of these potential cases temporarily so that the parties can engage in mediation.

In any class action there will be other additional suits being filed, there may be opt-outs, there may be this, there may be that; that's all dealable with. But the large problem they have is that they have me protecting the folks who are receiving these bills. The large problem I have is that the bills that these folks are getting are vastly higher than the paid-to-patient representation that was made today.

So how do you solve it? I gave you a solution.

THE COURT: All right, thank you.

MR. LEMBERG: Pleasure.

THE COURT: All right, Mr. Kanowitz?

MR. KANOWITZ: Thank you, Your Honor. A couple of

points, going to be quick.

We need EOBs, explanation of benefits, not his word; it's really simple. That's what the collection agencies are actually asking for. Explanation of benefits, it demonstrates from the insurance carrier what went on. A lot of patients are refusing to ask their doctors or the insurance carrier to provide that.

So the idea that some people are paying fast and loose and just ignoring these things; it's happening. And are the collection agencies, you know, doing what the collection agencies do after that? Yes.

It's in your true health order, we want EOBs; not worked, EOBs. It's really simple. Had Mr. Lemberg, like I asked him in several e-mails, provided me for his twenty-one clients the EOBs, the legal work and the fighting wouldn't have happened; we would've been talking, which is what the point is.

Second, any amount not owed. The amounts are owed. Let's be clear, all of the A/R is owed. The question we have is, should we collect the nonpaid-to-patient because of the marketing materials, or because a fraudulent doctor told their patient you won't have any responsibility. Not HDL, but some doctor who got (indiscernible) in handling, hence the Women's Health Network.

Okay, go on their Web site, they're going after True

Health, by the way. Same thing, we're changing their billing policies. There's a multi-paragraph thing about who she spoke to in True Health's billing department and how they changed their policy and how unfair it is. So the idea that this doesn't go on in this industry, I think is a little naive.

So every dollar is owed; the question becomes, is there a defense to that: i.e., waiver, estoppel, et cetera. Which gets us back into can the trustee do something if HDL, in fact, pre-petitioned, waived, argued, assumed the risk, made people to believe certain things. I believe we do. So the idea that there's an immediate violation of the Fair Debt Collection Practice Act is just fundamentally, legally wrong.

He would like you to have that as a holding so that he could go off and file his lawsuits. But the act of filing lawsuits is premature because Your Honor has already ruled. There's a debt, and that's the fundamental problem. All of the A/R is owed. Whether we choose not to collect all of the A/R, i.e. patient responsibilities denials; that's what we're talking about.

Can we get clarity? As you said, put it in this bucket, that bucket. That's what we're striving for. Is it perfect? No. Are we asking for excuses? No.

There's a debt. Without him getting his way that there's no debt, he doesn't have a case. He represents twenty-one clients; happy to work with them. Happy to make

sure that his clients, to the extent after I see an EOB or other verified forms, there is a credit problem, happy to try to fix that, absolutely.

It's really that simple. We're talking past each other, Judge. You hit it right on the head.

THE COURT: Well, that's what I'm concerned about is that we're talking past each other, and because what I was hearing you say is that you were only trying to collect the paid patient receivables. I understand exactly what you're saying, you need the explanation of benefits because that tells you exactly what's been paid and what's not been paid and then you know, you know, what the answer is. That makes perfectly good sense to me.

And it makes perfectly good sense to me that you send out the letter because that's what the accounts receivable is, and they've got the opportunity to say I don't owe this because. And then at that point the collection stops?

MR. KANOWITZ: At that point, if they're -- yes.

THE COURT: Okay.

MR. KANOWITZ: We've instructed the collection agencies they must follow the law. We're not going to make excuses for them if they go further. The -- what happens a lot is you get aggressive collection agencies and patients at odds, or you get a patient that doesn't do anything, and doesn't provide the EOB. It's just, that's the reality of the

collection world.

And so will collection agencies say, fine, they didn't respond, there's a complete A/R where there's no EOB; yes, you owe me the money. There's absolutely that's going to go on.

Are we trying to make sure that there's some sort of communication? Of course, but once the notices go out, it's incumbent upon the patient to respond. And if they respond correctly, we're not going after them at this point in time. And if we are, they need to tell me, they need to tell somebody, and I'll be more than happy to try to rectify it because it's impossible to otherwise figure out. We're going to spend millions of dollars to figure out the buckets. It's just -- you might as well just tell me, don't collect the A/R.

THE COURT: Well, I think that you're entitled to get the EOBs. And I think you're certainly entitled, without getting into anything for the paid-to-patient receivables.

MR. KANOWITZ: Right.

THE COURT: I mean, that, under many, many different theories, you know, would be due. And I, as you say, have held that this is property of the estate, and there's no doubt about that. The question is, as you say, should you collect it; should the trustee collect it. And there may be reasons why the trustee should not collect it, and I'm not going to get into that, although I understand it. And I think that you

probably identified the right category to go after, and I'll leave it at that.

But I think we need to identify the buckets and try to figure out how to do that. To the extent that counsel can assist with that, that is fine.

And anything further?

MR. KANOWITZ: Yes, Your Honor. Mary Schmergel is here, she's made an appearance for -- on behalf of HHS.

THE COURT: I saw her sitting there. I was wondering, you know.

MR. KANOWITZ: Well, you know, it was nice finally after many months of speaking and e-mailing that we finally got to meet each other. The good news is that she's not here to argue on the DOJ stay issue because we kicked that off, we're trying to work that out; having my healthcare regulatory lawyers deal with the lawyers from the South Carolina action. So hopefully, we don't even have to come back on June 21st.

But she is here to ask for yet another carveout from whatever order you do. And I'll let her explain it.

My response to that is, of course, of course. We've done it all the time, why don't we just do it again. But I would just say with that, it's similar to what you've just heard. The law is before the Court, we're trying to make sure the collection agencies follow the law. Are there going to be mistakes? Absolutely. There just are, unfortunately, there

are. And I'm not using that as an excuse, it's just a documented reality in this case and we're trying to do our best in challenging situations. Thank you.

THE COURT: Okay, well, you know, whatever ruling that I make, I just -- and I'll let you respond to this now before --

MR. KANOWITZ: Okay.

THE COURT: -- we get to the next carveout. Is that there's got to be a remedy for when mistakes are made. And I'm not going to foreclose to any of these consumers the opportunity to have some sort of remedy. It may very well be that the action needs to be filed in this Court because it is property of the estate, and the concerns that with -- I'm not making a ruling there, I'm just saying that I'm not going to foreclose any remedy that the plan --

MR. KANOWITZ: Absolutely. I don't think our motion seeks that, it just seeks to have the stay.

THE COURT: I know it doesn't, but I just wanted to be sure the record will be clear on that.

MR. KANOWITZ: I'm happy to defend at that appropriate time because I'm sure before any action is ever filed we will do our best to remedy as best we can. People are trying to take advantage of the situation. That's what we don't --

THE COURT: I'm not going to allow that.

MR. KANOWITZ: Thank you.

THE COURT: All right. No, I would like to hear from the Justice Department first.

Welcome, again.

MS. SCHMERGEL: Thank you, Your Honor. Good morning. Mary Schmergel on behalf of the United States. I have to say, we have worked out a carveout, and so you know, I hate to dip my toes into this situation but I think it was important enough for me to come down here, and important enough for HHS to come down here and to let you know why we have asked for this carveout and what the carveout means.

Like the issues that have been raised by the Lemberg Law Firm, HHS is concerned that the trustee is sending collection notices to Medicare beneficiaries for amounts that were regulated and paid by CMS to HDL directly. We are aware of, or HHS has made me aware of, three cases where we have had Medicare beneficiaries who have received these paid-to-patient notices from one of the trustee's collectors.

Under the Social Security Act and Medicare program, though, the way it's supposed to work, is that a patient would never receive money directly from CMS. The way the statute is set up, is that there's a list of, this is how much you're going to be paid, this is what you'll be paid from CMS; it goes directly to the provider, in this case HDL. It would've never have gone to the actual Medicare beneficiaries. And

under the Social Security Act, and that's basically what the carveout that we've asked for, it just says that any order that you enter in this matter would not enjoin or waive any of our rights under the Social Security Act.

But under the Act, there are violations for sending out these type of notices to Medicare beneficiaries. And it's my understanding from HHS, is it's not just those collectors that sent the actual notice, but it's any entity that causes the collection. So in this case, it could be the trustee and his collectors that send these notices to the Medicare beneficiaries improperly.

And we're not here today to say that, yes, we have evidence that it is. You know, as I've mentioned, we've gotten three notices, we are looking into that. And we've been in touch with Mr. Kanowitz, we've informed him of that. But we've also informed him, and we want to inform the Court, that the violations are very clear, that if HHS does do an investigation and makes a determination that the Medicare beneficiary received an improper collection notice, there will be sanctions. And the sanctions are 10,000 dollars per service. So it's not just a collection, if they improperly, you know, by mistake, if Mr. Kanowitz has admitted has -- you know, has happened. If there's a mistake a notice goes out, and there's services, it's 10,000 for each service. So if there were seven services on that notice, it's a 70,000 dollar

sanction under the Social Security Act.

So anyway, we were in touch with Mr. Kanowitz, he's agreed to allow us to have the carveout. And I understand the practical difficulties that he is in. You know, as he said, they've got the files, they've got the information, and as he alleged, it wasn't complete and so he has difficulties identifying patients. And my understanding, and he'll correct me if I'm wrong, identifying the Medicare beneficiaries.

We're sympathetic to that, however, the burden is on the trustee to make sure before he sends out those notices, he is not sending them to the Medicare beneficiaries who should not be receiving them. Otherwise, you know, HHS is reserving its rights under the Social Security Act, and will fine sanctions. You know, I know we've talked a lot about stay. Well, the letters say if you dispute this you can go ahead and call and take steps. But in general, Medicare beneficiaries are older, they may get these notices --

THE COURT: I mean, it's a separate act, too.

MS. SCHMERGEL: Yeah. Yeah.

THE COURT: It's a --

MS. SCHMERGEL: They may not think I can just call on my own and dispute this. They may just go ahead and pay it, they may not understand. And that's part of what the Social Security Act and Medicare is designed. That's why HHS gets to enforce its regulation to say you can't send these kind of

collection notices to Medicare beneficiaries.

THE COURT: We all have parents; we know.

MS. SCHMERGEL: Yeah, right.

THE COURT: Okay.

MS. SCHMERGEL: So that's why, you know, again, it's a separate issue but they're -- it gets back to the practical realities of the due diligence part on the trustee to make sure that when he sends these notices out, that you know, he's sending them out properly, that the fees are debts that are actually owed to the estate. I mean, the United States is a creditor, so we understand what he's doing, and he's doing it on behalf of the creditors, but as a regulator, you know, our job is also to protect those Medicare beneficiaries.

THE COURT: Right. All right, thank you.

Mr. Kanowitz?

MR. KANOWITZ: Just to close the loop on that HHS matter, we've had discussions with the Government. I made it clear it would be very helpful for them to give me a whole list of their patients so that I understand who they're concerned about. Now, of course, they say, well, make a -- you know, it's HIPAA violation, this and that. So we've got a document issue here that we're going to work through.

The second point, it's not just CMS sending out. They use Blue Cross/Blue Shield. And when they use Blue Cross/Blue Shield, Blue Cross/Blue Shield may have made

mistakes and send monies out. That's why we're sending notices, and that's why as between the twenty-one Lemberg clients or all the thousands that are being collected from Monterey, Remex, et cetera, we are only talking about three.

I'm hopeful that I could get some visibility from the Government so that we don't send these things out. If we do, we'll come back before Your Honor if they want to go for a sanctions hearing, and we'll see what happens.

I know we're doing our best and we're going to continue, but don't -- it's not like there isn't a Blue Cross/Blue Shield problem imbedded in the HHS situation. And if we work together we'll be able to figure that one out. But if we stand behind HIPAA and other types of things, it's going to be slower than quicker in figuring this out. Thank you.

THE COURT: All right, thank you very much.

As far as the -- I understand that there's a stipulated language that you're going to put into the --

MR. KANOWITZ: Yes.

THE COURT: Okay, thank you.

Mr. Williams, do you have a dog in this fight?

MR. WILLIAMS: I do, Your Honor. We represent --

THE COURT: Mr. Louis.

MR. WILLIAMS: Women's Health.

THE COURT: I'm sorry, I couldn't help myself.

MR. WILLIAMS: Excellent, Your Honor, thank you.

No, Your Honor, we represent Women's Health Connection, PS, which Mr. Kanowitz has referred to on occasion as Women's Health Network. They are a healthcare provider based in Washington. They have 8- to 10,000 patients. They regularly use the services of HDL. They are frequently referred to in the pleadings, so obviously, this issue is very important to them. Our firm was just retained last night. Women's Health has reached out to counsel to bring up some of their concerns with the order that's proposed in connection with this motion. I've reached out to Ms. Speckhart last night and spoke with Mr. Kanowitz this morning.

Although we have lots of responses to many of the things that have been said, for the immediate purposes of today, our only concern is to make sure that we're assisting the process of narrowing down who the patients really are that need to be collected from; these paid-to-patients clients, and to that extent --

THE COURT: Your client doesn't have any problem with that.

MR. WILLIAMS: No, Your Honor, certainly not. And in fact, she has -- they have advised their patients that if they receive checks to turn them over immediately. Their concern is these thousands of other patients that aren't pay-to-patients that are getting these collection notices. And all we're looking for, and I think Mr. Kanowitz is in agreement,

he can let me know if he disagrees, is we just want to make sure that given the language in the order, if Women's Health Connection advises their patients that they should seek counsel or that they should submit EOBs in an effort to narrow down the bucket of who's really liable here that they're not going to be facing, you know, some liability or exposure for violating the automatic stay.

As the order is written, it's a little broad, and so we just want to get some clarity that upon inquiry, Women's Health Connection, PS, is authorized to advise their clients. And the language we were looking for was something similar to notwithstanding the foregoing, nothing contained herein shall preclude Women's Health Connection and its affiliates, subsidiaries, and agents from advising current and former patients upon request regarding the excluded receivables and collectors. I think this is probably protected by the First Amendment, and I don't think it could be interpreted as being a violation of 362, but we were just hoping to get some clarity on the record about that.

THE COURT: All right, thank you.

MR. WILLIAMS: And Your Honor, and to the extent Mr. Kanowitz is not in agreement with that, we would just reserve our right to address some other issues with respect to the motion.

THE COURT: All right. Thank you.

MR. WILLIAMS: But that should resolve us.

THE COURT: All right. Now, you want to be heard, also.

MR. LEMBERG: Yes, very briefly.

On the issue of what's owed, Judge, I just want to be clear. No problem with the paid-to-patient stuff.

On the other stuff, they have a receivable on the books, okay. The first issue is that that receivable on the books has an offset in the reserve. Otherwise, the books would make no sense, otherwise, you'd have these receivables that you know you'd never collect. The accounting system of the debtor have to, if they had --

THE COURT: Had to what?

MR. LEMBERG: They had to offset in the accounting system the receivables by -- with a reserve that would show the bookkeepers, the accountants, how much the receivable actually was. So number one, the receivable isn't really the receivable, unless you account for the offset that the debtor had in his books to reserve for the receivables that they knew they were never going to collect. They send the bill to the insurance company --

THE COURT: Well, because some of them would be uncollectible?

MR. LEMBERG: Well, I mean, look, this is what happens in their field. 2,000 dollar bill to the insurance

company; they know the insurance company is only going to pay 300 bucks, right. So if on their books they show a 2,000 dollar receivable, their books are meaningless to anyone; they've got to have a reserve. They've got to offset that receivable by a reserve so that anybody looking at these books would say, well, this is the true potential receivable we have. That wasn't accounted for. True. Number one.

Number --

THE COURT: But I don't have any evidence of that one way or the other.

MR. LEMBERG: Well, you have the bill, you have the medical bill to our lady, to -- and the supplement, which shows that she's being billed for 2,000 dollars.

THE COURT: That was an attachment to a motion.

MR. LEMBERG: It was an attachment to a motion.

THE COURT: Okay.

MR. LEMBERG: That's number one.

Number two: I understand they're trying to do a good job.

THE COURT: Good.

MR. LEMBERG: I get it. The problem is the statute doesn't allow for it. The FDCPA says your intent at the end of the day counts under 1692k in determination of damages because the statute is a strict liability statute.

Number three, Judge: This may be viewed as

opportunistic on the part of my firm. We do consumer work; that's what we do. The Ninth Circuit, where most of these folks are, said in the case Ivan (ph.) v. Michael (ph.) that the statute was intended to be prosecuted by private attorney generals, including my firm. So there is nothing inappropriate what we're doing, it is in fact, what this law was intended to do.

Now, the debt collectors don't like it because we hold them accountable for what they're doing. But that's the system we have.

That's all I have.

Oh, last issue, Judge. On the issue of the matter of the debt going back, sending a bill and asking the consumer for an EOB is not the law in the Fourth Circuit, or anywhere else. They have to know exactly what is owed if they want it. It's potentially some amount --

THE COURT: But Mr. Kanowitz says he knows what he wants, he wants the account receivable. And he's saying that he will, you know, use the EOB to adjust it down for the amount that that patient actually got paid. Now, what's wrong with that?

MR. LEMBERG: What's wrong with that, there is an -- that hypothetical is a violation of the FDCPA because it includes in the bill an amount not owed.

THE COURT: What amount?

MR. LEMBERG: The difference between what was paid in the EOB and the bill. The different is the violation. You can't do it. It's the Russell case, it's the Third Circuit case. In the Third Circuit case, it was a little bit like -- the case is called, I think, it's PHS, I don't remember the plaintiff's name, it's in the brief. And the issue there was this debt collector, a firm in Philadelphia, they included attorney's fees when they filed foreclosure complaints, they added an amount for attorney's fees. The debtor sued saying, look, these fees haven't been approved. Why are you billing me for that? The Third Circuit said -- the debt collector said, well, we were just estimating. This wasn't our estimate, the Third Circuit said number one, debtor, you're absolutely right, the fee wasn't approved. Number two, it didn't say estimated in the letter, it said owed.

So what they're doing may seem like an expedient business practice, but it doesn't work under the FDCPA, number one. And number two, it has devastating impact on thousands of people. And I call on you to stop it.

THE COURT: All right, thank you.

MR. LEMBERG: Thank you, Judge.

THE COURT: All right.

Anything further, Mr. Kanowitz?

MR. KANOWITZ: Just to clarify the record, the A/R is fully owed. Whether we give credit or deductions or otherwise

for the benefit of the patients, not because we're not legally entitled to collect the full amount, but because in the search for innocent victims maybe the marketing materials had some equitable benefit to them, based on what we say, and, more importantly, what you say.

It's not that the A/R isn't owed. And that's the fundamental mistake Mr. Lemberg keeps going back to. It's not a violation in the first instance.

THE COURT: Actually, I get that part. The part I wanted you to address was Mr. Williams. Did you have any problem with the language that he was proposing?

MR. KANOWITZ: The answer is of course I do, but I'll let it go.

THE COURT: But you --

MR. KANOWITZ: I mean --

THE COURT: I think under the First Amendment he probably does get that.

MR. KANOWITZ: I'm happy for his client to speak to the patients. I wasn't going to try to stop that. What he's concerned about is that it would be a violation of the stay.

I think, as an officer of this court, I'd have a harder time making such a claim than his need for that language in the order.

THE COURT: Okay.

MR. KANOWITZ: And that's my bigger concern, because

when you put the language in the order, they do something else.

THE COURT: Well, we're not going to let that happen.

MR. KANOWITZ: Thank you.

THE COURT: All right. Anything further? All right.

So the Court's going to grant the motion of the trustee. The Court is going to extend the automatic stay. I don't think I need to extend it, because they're agents of the estate collecting property of the estate, but to the extent there's any doubt it extends to the collection agencies.

As I said, that's not to foreclose any remedy. I'm not going to do that. There isn't going to be any remedy. If there's a violation of the Fair Collection Practices Act then file a motion for relief from the automatic stay. I can hear that. Or you can file the complaint in this court, which is probably the more likely avenue that we would go, because, as you know from the trustee, you have to see it -- well, anyway, there's a long line of cases that suggest you have to get relief from this court in order to start suing estate professionals.

In any event, the stay will apply. Please include Mr. Williams' suggested language and the language for the benefit of HHS.

And I would strongly encourage counsel to get together to try to figure out where the buckets are properly.

It's just a matter of having the proper information. I don't think that Mr. Kanowitz is trying to do a gotcha here. He's trying to get to what everybody has stood up here and said is the legitimate receivable, which is the pay to patient receivables. Okay? If we go beyond that I want to hear about it, because I might have some concerns. I'm not saying I do. I'm just saying bring it before you do it. Okay?

All right. Any questions about the Court's ruling?

All right.

UNIDENTIFIED SPEAKER: Thank you, Judge.

THE COURT: Thank you, all. Thank you.

You want to be excused?

MS. SCHMERGEL: I do, Your Honor.

THE COURT: You are.

MS. SCHMERGEL: Thank you, Your Honor.

THE COURT: Thank you for coming down.

UNIDENTIFIED SPEAKER: Mr. Lemberg would also like to be excused.

THE COURT: Oh, no. He has to stay here for the whole -- yes, you may be excused.

MS. SPECKHART: Can I be excused?

THE COURT: No.

MS. SPECKHART: Your Honor, item 5 on the docket includes all of the matters pertaining to the various requests for insurance proceeds as advanced on behalf of Russell

Warnick, LaTonya Mallory, Dennis Ryan, and Joseph McConnell. A similar request was made on behalf of Satya Rangarajan, but due to the date of its service that matter is not for hearing at this time.

Your Honor, as you can see from the chart appearing in paragraph 17 of the trustee's omnibus memorandum, the total amount requested to date is approximately 1.85 million, which represents about 20 percent of the policy limit.

I won't belabor the procedural history underlying these requests. I know Your Honor is well familiar with them. But I do want to point out a couple of things about this process before I take up the merits of our response to these requests and talk about our suggestions for how they can be resolved based on our experience thus far.

First, Your Honor, I just want to be upfront and acknowledge some discomfort in this whole process. We are professionals, and we take no pleasure in reviewing and challenging the bills of other professionals, especially when they're our colleagues and we respect them. They practice in this court with us every day.

We did object to all of these requests, and it's not because we're trying to cast undue aspersions or be unreasonable. It is simply because we are an estate fiduciary, and this is an asset in which the estate has a vested interest which can be significant. So we're trying our

best to protect it, and we're trying to put together a structure whereby Your Honor can incorporate a number of very limited rulings in the relief from stay order to allow for the policy to be implemented by the insurer in an appropriate fashion.

Second, I'm going to touch on something that was addressed when Mr. Harbour was at this podium on December 10th. The Court well recognized on that day when it entered the protocol order that this is not a perfect process. The access procedures that are in the order provide a mechanism for request and response that would involve the estate as a necessary and interested party, and the reason that the procedures allow for this type of discourse is because the estate does have claims under side B. So those claims are going to be subject to the same strictures and limitations that appear within the policies themselves, and we're not trying to rewrite the policies.

What I understand from my study of the transcript from December 10th is that the Court intended to adopt a protocol that would recognize the pre-petition contract rights, taking into due consideration the post-petition bankruptcy dynamics that are now acting upon them in a way that would cause the least disruption to the process.

And so when I think about the perfect implementation of the access procedures, I don't think about cross-examining

witnesses. I don't think about leading the court through a line-by-line analysis of all these bills for an individual ruling on each one of them. I think that that would cause more disruption than what was reasonably intended, and so we put together the structure that you'll see in the omnibus memorandum, where we suggest the resolution that I'm going to talk about.

To protect the proceeds, which are property in which the estate has an interest, we are asking that the Court make six discrete and specific rulings, which I think conceptually should be noncontroversial and subject to the implementation of the insured, in consultation with the requesting D&Os.

In essence, we're asking for the bankruptcy order on the automatic stay that provides enough deference to the insurer and that will also act as a safeguard against any risk the policy might be interpreted in a way that would prejudice the substantive rights of the estate.

So we're asking the Court to decline to modify the stay to allow for expenditure of policy proceeds for work related to this bankruptcy case, because it's not considered a loss under the policy, and it doesn't give rise to a claim as to the way that that term is defined in the policy.

We're also asking the Court disallow payment for duplicated work, for work that is not properly documented, and for work without any clear benefit to the insureds or any

other party-in-interest.

We're asking the Court to protect the estate from overreaching and from having to pay for work that was not necessary and reasonable in its circumstances and fees for work that would otherwise fall outside the scope of coverage.

Ms. Mallory's lawyer makes the point that the insurer in the language of the policies will take care of all of this anyway, but they overlook the fact that we still have an automatic stay, and we still have an estate with interest in these proceeds. And it may very well be that our request for these categorized rulings, as reflected in the memorandum, bring the Court's order into perfect alignment with what the policies say and what the insurer would do. But I would submit to Your Honor that that would not necessarily be a bad result.

The reality is that when the requests are made to the insurer we can't control what the insurer might do in the absence of an order. And it's an incumbent thing upon the liquidating trustee to do what he can do to safeguard the policy proceeds through the order on the automatic stay.

So what we're asking for is for the Court to decline to modify the stay for fees requested that fall into any one of the six categories I described as a safeguard, subject to the implementation of the insurer and with respect to D&Os.

THE COURT: So what you're saying is, for instance,

is that with regard to the documentation issue, you don't want me to make a ruling that the documentation is sufficient or insufficient, but just to say that the insurer should make sure that for its policy purposes the documentation is sufficient.

MS. SPECKHART: That's correct, Your Honor, for two reasons. I think on the documentation point, the insurer has been provided with invoices that are not as redacted as the ones that we've received, for obvious reasons regarding privilege and work products and all the rest of it, and I think that that really makes the point that they're in the best position, subject to your ruling, to implement that ruling in a way that's fair to all of the parties, including the estate.

THE COURT: All right. Thank you very much.

MS. SPECKHART: Thank you, Your Honor.

THE COURT: All right. Who wants to go first?

Mr. Hastings?

MR. HASTINGS: Good morning, Your Honor. For the record, I am Michael Hastings, Whiteford Taylor & Preston. We represent Tonya Mallory.

Your Honor, I have with me today, my law partner, Ed Buxbaum, from our office in Baltimore and there's an application to admit him pro hac vice that's pending and there's an order tendered to the Court and I would ask that he

be able to argue on behalf of Ms. Mallory today.

THE COURT: All right. That will be fine.

MR. HASTINGS: Thank you.

THE COURT: Welcome to the Court.

MR. BUXBAUM: Thank you very much, Your Honor. I appreciate the opportunity to be heard on this.

THE COURT: Your name again, [Buzz-bomb], is that it?

MR. BUXBAUM: Buxbaum, B-U-X --

THE COURT: Buxbaum.

MR. BUXBAUM: -- B-A-U-M.

THE COURT: Thank you very much.

MR. BUXBAUM: Thank you, Your Honor.

THE COURT: All right.

MR. BUXBAUM: At the outset, let me note that it strikes me as rather ironic that the very party that has asserted that my law firm and the other firms working for my client, Ms. Mallory, as well as every lawyer sitting to my left, has been engaged in efforts that were wasteful, were unnecessary and provided no apparent benefit to our client, when the very process that brings us here today has been the result of an incredible waste of time and effort which we detail for you in the reply which we filed which I hope the Court had an opportunity to read. And I am not going to --

THE COURT: You would be surprised to know that I do read your stuff.

MR. BUXBAUM: I know that you do. And I am not going to walk through all of the rather incredible wasted effort of getting -- of forcing the trustee to finally provide us with something to explain why it is they were objecting to literally almost every entry. We got charts that made no sense with blanket labels that were virtually meaningless and on the very even of this hearing, we finally get from the trustee a filing which says, you know, the things that you said back in December when we argued that it made more sense to let the entity that does this for a living, the AIG Insurance Company, take the first crack at these bills, you know, in retrospect, that was probably the right way to go. So all of that effort was completely meaningless and a waste.

But notwithstanding that, they added some caveats in there. They essentially say Judge, we need you to, in essence, tell AIG how to go through the effort of reviewing their bills, notwithstanding the fact that that's again what the carrier does every day. It looks at policies and makes determinations. Is there sufficient documentation to support it? Did the work represent a duplicative effort? Was it necessary? Does it comply with what's at stake in the lawsuit and comport with what the policy provides.

And what they want you to do is cut some order to essentially provide an advisory opinion to AIG As to how it should go about that task. And I suppose I asked a rhetorical

at this point, why? What basis is there in the record that was provided by the trustee that says to date, AIG can't do its job. AIG needs you to provide it with some guidance as to how to go through these bills. And the answer, of course, is there is no such evidence in this record.

They suggest in their six categories, if you will, one of them is that you should issue an order that only tasks associated with the 2004 request should be payable by AIG, which is completely at adds with what the policy defines as a defense cost.

And so the very first category is completely limiting and at odds with what the policy provides and what it covers. They suggest that you need to provide an order that says nothing duplicative should be paid. Again, I suggest AIG knows how to do that.

In the example in the filing they submitted with respect to my firm, the argument was wait a minute you did some work in conjunction with the DOJ action down in South Carolina. Why should we pay for that twice? Had they bothered to pick up the phone and call and ask questions as was contemplated, I believe, under the order in December, they would have learned that Whiteford Taylor had information that the lawyers involved in the DOJ case didn't have and when DOJ made a request of those lawyers it made more sense, was efficient, and effective and in fact we had contacted and

spoken with the carrier who agreed with it, that it made more sense for Whiteford Taylor to respond and provide that information, rather than lawyers who didn't know what that information was, start from scratch.

Again, AIG knows how to do that. If there are questions about why was this work done and why was it necessary and why did your firm do it versus another firm, then again AIG does it for a living.

Again with these other categories, one of the things that they say is well, AIG ought not provide payment for anything that wasn't "properly documented." Again, we got into this issue and dispute about we sent them redacted bills as we were -- as we indicated we would do because you've got attorney work product privilege, you've got attorney-client privilege. AIG doesn't get redacted bills at the risk of stating the obvious here.

If they feel like they don't have a sufficient basis to determine whether something should or should not have been paid, believe me they're going to pick up the phone and contact us and the law firms are obviously well-motivated if they want to get paid, to provide that information.

Again, the rhetorical question I ask is, what's the purpose to be served? And at the end of the day, the only thing that we could come up with is it appears that they're suggesting that this Court tell AIG preemptively how to do its

job and there's no evidence in the file, in this record, that suggests that AIG doesn't know how to do this.

I will end with this point. The Court may recall back in December with respect to my client that she was a defendant and is a defendant in not one but two cases, as well as the 600 million dollar claim that's been asserted against her. That's why our cap was 800,000 dollars, the initial cap, as opposed to some of the others which were half in amount. The amount sought by Ms. Mallory doesn't come close to that total.

The total between the three or -- let's see, there's a firm representing Ms. Mallory in the South Carolina action, as well as local counsel, a firm representing Ms. Mallory in the Eastern District Aetna case, as well as Whiteford Taylor and the total for two sets of submissions that have been provided to this Court which we designate as Mallory-1 and 2, is $487,900.47.

So we haven't come close to getting to our cap. And again, for all of these reasons, I think these guidelines just simply are not necessary. At the end of the day, my anticipation is that AIG, again with its expertise, is going to do whatever AIG normally does in accordance with its protocols and billing guidelines. It will advise the law firms how much it's going to pay. And if there's a problem, I suppose someone is going to come back here and we may well be

back in front of you arguing these things but to draft some preemptive order at this point when there's no evidence that it's necessary simply does not make sense.

So for those reasons, I would ask that you deny the relief sought by the trustee in its memorandum. Thank you, Your Honor.

THE COURT: Thank you, Mr. Buxbaum.

MR. BASS: Good morning, Your Honor.

THE COURT: Good morning.

MR. BASS: My name is Tim Bass from the law firm of Greenberg Traurig. I represent Dennis Ryan. I've been in the courtroom for several of these hearings but haven't had the pleasure of arguing before you.

I echo many of the things that my colleague just said. I want to bring a couple of other points to the Court's attention. First of all, procedurally, I don't think that this is a proper motion. The order that you entered in December contemplated that the parties could, if necessary, move to modify the order. This is essentially a motion to modify the order that's being filed in the form of an objection.

I personally was out all of last week and I didn't even have a chance to get this until yesterday. I think procedurally what should have happened is if they wanted to modify the insurance proceeds order, they should have filed a

motion, allowed all the parties an appropriate time to file opposition and then have a hearing on that. So, I object to the six categories on a procedural ground.

Secondly, Your Honor, I feel that these six categories -- the imposition of the six categories is an improper modification of the parties' contractual rights. The insurance policy is a private party contract and we --

THE COURT: Don't we modify contractual rights all the time in bankruptcy?

MR. BASS: I don't think it's appropriate in the context of what they're trying to do today.

THE COURT: The policy is property of the estate. I mean I think that's probably the weakest of your arguments.

MR. BASS: Right. And I actually disagree that the policy is a property of the estate. I have the transcript from the December hearing where Your Honor actually explicitly said he's not making that ruling today and I haven't seen that but --

THE COURT: I did say that. I do recall that but --

MR. BASS: But I agree, Your Honor.

THE COURT: But I guess, you know --

MR. BASS: There are other points that are stronger and I'll move on from that one.

Your Honor, the other problem I have with the six categories is it improperly restricts what we as defense

counsel are able to do because when you read the six categories in toto what it is essentially saying is that the only things that we should be paid for is responding to the 2004 request. But respectfully, Your Honor, I was the one who painstakingly went through everyone's bills and said listen, everyone has multiple attorneys that are doing things. Everyone has duplication of effort. That's part of what we do.

I did the same thing with regard to Mr. Kanowitz's bills, with regard to investigation of legal claims, legal liabilities and they are replete for the past six months, as well they should be, with work by his firm analyzing potential D&O claims, analyzing defenses. We should be allowed to do that same thing.

I would actually be doing a disservice to my client right now if I didn't use these intervening three, six months to research his potential liability and his potential damages. So to sit there and say the six categories, the only thing you should be paid for is your responding to the 2004 investigation. Well, frankly, I don't think that's true and I think I would be committing an ethical violation if I just sat on my hands and didn't do what my client has hired me to do.

Along the same token, with all the bankruptcy proceedings, a lot of the stuff that's gone on with this plan and the disclosure statement affects my client's rights. It

affects potential claims that can be brought against him. Again, as a lawyer, I am ethically bound to read the papers that are filed and come in here to say, okay, Dennis, let me sit down with you and explain what's going on, how this could potentially affect you down the road. If I don't do that, I get sued for malpractice.

So This all comes with an ambit of defense costs and loss, as Mr. Buxbaum explained and what this really -- what these six categories are is really it's a backdoor attempt to say you can only bill for responding to the 2004 costs, which I think is improper.

Fourth, Your Honor, another procedural point I want to make, we've already had an application that was filed on behalf of debtors' counsel, Ropes & Gray and LeClairRyan for reimbursement under the D&O policy. These six factors were not used when the Court granted that application and I believe it was granted for something in excess of 500,000 dollars.

If these same six categories were applied to the Ropes & Gray bill and the LeClairRyan bill that's already been approved, I would submit to the Court that the vast majority of those would be disallowed under these six categories. So it's kind of a goose and gander argument here. I don't think that the Court should now apply, all of the sudden, because it's defense counsel, six categories that were never applied to debtors' own counsel. I just -- I don't feel that that's

fundamentally fair.

And the last point I want to make has to do with Mr. Ryan specifically, Your Honor. I think each fee request needs to be evaluated on its own merits and with regard to Dennis Ryan, we had the representation that the total fee request between all defense counsel is somewhere around 1.78 million. Dennis Ryan's 120,000. I have taken painstaking efforts to keep legal defense costs down as much as possible. I have myself, who is a D&O attorney, I have one bankruptcy attorney and I have one paralegal. That's it. And I feel like I've done an admirable job, keeping costs as low as possible.

And so to sit here and lump this all together and act like this is some outrage sum, well with regard to Dennis Ryan, I think I'm saving the estate money, not that I should be lauded, not that I am looking for kudos or slaps on the back, but each fee request needs to be looked at separately and to sit there and uniformly say you guys are all wasting away policy, is well -- personally, I just don't think that applies with regard to Dennis Ryan.

THE COURT: All right. Thank you.

MR. BASS: Thank you, Your Honor.

THE COURT: Mr. Hayes?

MR. HAYES: Good morning, Your Honor. Dion Hayes with McGuireWoods for Dr. Russell Warnick.

Just first as a matter of housekeeping, we filed a

motion for an expedited hearing on our motion to increase the interim soft cap applicable to Dr. Warnick in the Court's protocol order. And our motion for expedited hearing to my knowledge, has not been contested. I would like to --

THE COURT: Well, those are the next two items, are they not?

MR. HAYES: They are, Your Honor. I thought it might be efficient to argue these points together. If the Court would prefer to deal with those after we --

THE COURT: I would like to deal with those two separately because I see that as a different issue than this. So why don't we do this and then we'll go to that, if that's okay.

MR. HAYES: Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. HAYES: I want to follow-up on a question the Court asked just now and a question that the Court asked at the protocol hearing but none of us were nimble enough to have the correct answer at the time at the protocol hearing. But the Court has said twice, contracts get modified all the time in bankruptcy. That is not correct with insurance contracts.

Your Honor, the McCarran-Ferguson Act is a federal statute that causes state insurance law to reverse preempt contrary federal law, including federal bankruptcy law.

In a case that I would refer the Court to has been

cited in the papers MF Global, 469 BR 177 which is a Southern District of New York, it's a Judge Glenn decision from 2012, in which he stated that "The filing of a bankruptcy petition does not alter the scope or terms of a debtors' insurance policy and preserves such proceeds for those covered by the policy."

And the Court went on to say that, "Notwithstanding in many noninsurance context, the Bankruptcy Code and Bankruptcy Courts may alter contract rights, insurance matters are fundamentally different because the McCarran-Ferguson Act creates an exemption to normal preemption rules for federal statutes not directly related to insurance."

Judge Glenn went onto state, and this is in footnote 17 of his decision and I have copies for the Court and the Court's law clerk that "Pursuant to the McCarran-Ferguson Act, federal law including the Bankruptcy Code, will be reversed preempted by state insurance law if the federal statute does not specifically relate to insurance and the automatic stay and the Bankruptcy Code on its face does not specifically relate to insurance. Secondly, the state law at issue was enacted to regulate the business of insurance and number three, the federal statute at issue would invalidate, impair or supersede the state law."

The MF Global court held that all three requirements for application of McCarran-Ferguson were met with regard to a

New York State statute that reads very similarly to a Virginia statute that I will get to in a second. The New York State statute provided that the insolvency or bankruptcy of the person insured or the insolvency of the insureds estate should not release the insurer from the payment of damages for injuries sustained or loss occasioned during the life of and within the coverage of such policy or contract.

The comparable Virginia statute is Section 38.2-220 which provides that, "No policy or contract insuring or indemnifying against liability for injury to or the death of any person, liability for injury to or destruction of property or liability for injury to the economic interest of any person shall be issued or delivered in the commonwealth unless it contains in substance, the following provisions or other provisions that are at least equally favorable to the insured."

"Subsection 1: that the insolvency or bankruptcy of the insured or the insolvency of the insured's estate shall not relieve the insurer of any of its obligations under the policy or contract."

And in accordance with this mandatory Virginia statute, the insurance policies in this case at Section 15, Have that language.

Your Honor, as in MF Global, this Court cannot consistent with McCarran-Ferguson, abridge insured's rights to

cover defense costs under the policy. And the Court cannot decide which costs are covered defense costs itself and certainly not in this procedural posture where AIG is not present and has not filed a proof of claim in the bankruptcy.

Your Honor, I noted a comment that Ms. Speckhart made to the effect that the guidelines may not even change the policy. If that is the case, then the policy is adequate but in all events, this Court is not permitted to modify the policy.

Another relevant Virginia statute that would reverse preempt any determination by this Court under the McCarran-Ferguson Act is 38.2-311 which requires that any condition or provision in or endorsed on a policy -- on an insurance policy, must be in the policy itself. The six guidelines that the trustee would like the Court to legislate in violation of the McCarran-Ferguson Act are not in the policy. If they don't add to the policy as Ms. Speckhart suggested they may not, then they're superfluous and unnecessary. To the extent that they change the policy in any respect, which we think they do, we agree with Mr. Bass' argument on that point. They would violate the McCarran-Ferguson Act and would be reverse preempted.

So, Your Honor, the Court needs to decline the invitation to self-legislate an addenda to the policy as invited by the liquidating trustee which would violate the

McCarran-Ferguson Act and violate the Virginia statute. And what the liquidating trustee is asking the Court to do is inconsistent with what the debtors' counsel represented to the Court would be the process at the hearing on the protocol last year.

Debtors' counsel stated that, "Mr. Hastings asked for some language indicating that the insurance carrier is going to make coverage determinations. There's no need for that language because it's just a fact. The carrier is going to make coverage determinations." That was a statement of Mr. Harbour at the protocol hearing and, in fact, we all proceeded under the protocol. The debtors submitted a side B request and a side D request, which was denied. And none of these guidelines were in play. So it's perplexing that Ms. Speckhart says that the debtors' side B claims should be subject to the same strictures as they're proposing for the individual insurers. Well that water has passed under the bridge. This is a bait and switch. They're seeking to legislate additional and greater requirements for coverage under the policy after they've already gotten their side fee reimbursement approved.

So, Your Honor, for these reasons, and the reasons that were argued by my colleagues that also represent directors and officers, we would oppose the six categories. And I have specific issues with the six categories, but I

think they were covered adequately by counsel for the other defendants. But we don't think the Court can legally, consistent with McCarran-Ferguson, do what the liquidating trustee is asking it to do.

Thank you.

THE COURT: Thank you very much, Mr. Hayes.

MR. BROSCIOUS: Good morning, Judge.

THE COURT: Good morning, Mr. Broscious.

MR. BROSCIOUS: For the record, I'm Bill Broscious. I'm counsel to Joseph P. McConnell. Mr. McConnell was a former officer and director of HDL. He served as chairman of the board of directors through the plan confirmation, and it was his privilege to do so.

Tonya Mallory's objection and reply and today's proceedings are well stated, so is Dr. Warnick's position. And we welcome Mr. Ryan's suggestion as well, that perhaps the Court might consider on an individual basis some of these requests that have been submitted and are before the Court today.

I won't add anything to the positions taken by those two gentlemen that preceded me, but I do appreciate the opportunity to present Mr. Mc -- Dr. McConnell's specific concerns with respect to this request and the objections thereto; really the lack of any specifics in terms of the objections to Dr. McConnell's request. Dr. McConnell

submitted a request for reimbursement of legal fees and costs incurred by him that directly related to the investigation and defense of claims that were made against him by the creditors' committee in this case.

The notice submitted by Dr. McConnell to this Court is exactly what was submitted to AIG. There were no further redactions, additions, supplements; any changes whatsoever. So what the -- what AIG has is exactly what has been filed with this Court. The reimbursement request submitted by Dr. McConnell is for 43,311 dollars. It's actually under 43,000 dollars, but for about 300 and some dollars of expenses for which he is seeking reimbursement.

THE COURT: $392.02.

MR. BROSCIOUS: Thank you. That's one-tenth of the 400,000-dollar cap provided in the protocol order entered by this Court.

The notice and the request was prepared in a very reasonable way. It was prepared in a way that we hoped that would defy any possible objection to it. I personally examined each one of the invoices that were attached to the request. I eliminated any duplicate billings, except for those instances where two attorney time entries were completely warranted and justifiable. I redacted very few billings in terms of the descriptions that were included in the fee request for the 43,000 dollars.

Finally, there are no billing entries whatsoever for work relating to the bankruptcy case, generally, to the filing of the proofs of claim. Even with respect to Dr. McConnell's valuable service as a director through the plan confirmation, we use six separate billing categories in our invoices purposefully. None of those categories, except for the ones directly related to the investigation and the defense of the claims, were asserted in this request. The Court can see that because there's a huge number of blanks where that would have been time entries. Those are for other items outside of the defense and investigation of the claims.

I might add, with respect to his director service, Dr. McConnell incurred over 65,000 dollars of legal expense; not a penny of that is included in this request.

Frankly, it seems like any sort of request, whether it was for 10 dollars or 43,000 dollars, there's going to be an objection to it. We submit, respectfully, that the objection, on its face, is unreasonable. In fact, we would submit it's absurd. Again, I remind the Court that the request here by Dr. McConnell is for about one-tenth of the 400,000 dollars permitted under the protocol.

For further contrast, I would add that it is one-third to one-twentieth of the amounts submitted by other D&Os in this case that are before the Court today. I would submit that his reimbursement request is plain; it's straightforward;

it's patently reasonable. I would submit that the same cannot be said of the liquidating trustee's objection to his request.

The liquidating trust's objections are not adequately set forth. There's no explanation, as has been alluded to by other counsel. You're given a chart, but there's no explanation for what is objectionable to the highlighted entries. The objection includes several categories and then attaches a spreadsheet. And the spreadsheet is just highlighted in some instances. There's no effort to explain what the basis of those objections are.

I won't do this, but I would be welcome to in response by any questions by the Court, to provide a sampling of the purportedly objectionable time entries. And I would submit again that each one of those that were objected to would demonstrate the absurdity of the objection. These entries and the others like them that I'm alluding to by sample all relate directly to the investigation and defense of claims made against Dr. McConnell by the creditors' committee.

Now, there's one thing especially unique as to Dr. McConnell in the objection by the liquidating trustee. The liquidating trustee has mused that Dr. McConnell may not be entitled as a matter of contract to reimbursement because he's not engaged panel counsel. That's true. My law firm is not approved panel counsel. Dr. McConnell, very early on in this case, made the decision to try to get competent counsel and to

do so as inexpensively as possible. He's done that. The fee -- or the request demonstrates that. That was now -- that was then, and I am afraid that we are now turning to the time when he is going to need to engage panel counsel for the coming litigation.

But again, that's a defense, if any, that the insurance company, not the liquidating trustee, is entitled to make. I would also add that this was an opportunity -- this entire process -- for other D&Os to object to this fee app -- this reimbursement or request that Dr. McConnell has made. There's been no other objections today. Only the liquidating trust has made that objection. And as to the basis of us not being -- or my firm not being panel counsel, I would suggest to Your Honor that that's a matter that the insurance company is quite able to deal with.

There's nothing at all reasonable, we would submit, about the liquidating trust's objections. I will be pleased to go through, if the Court would so entertain it, a line-by-line defense. I don't think that'll be necessary. Again, Dr. McConnell requests a 43,000-dollar reimbursement from AIG. It's been submitted in the exact same form that's before the Court. We believe that it is patently reasonable, and we would ask the Court to allow the insurance company to evaluate it and, we would submit, pay it.

Thank you, Your Honor.

THE COURT: Thank you very much, Mr. Broscious.

Any other of the officers and directors' counsel?

All right, Ms. Speckhart, you wish to reply?

MS. SPECKHART: Yes, Your Honor. Taking a step back, I just -- I would just like to remind the Court and everyone here that we are not asking for an order designating what work can be done. We are only asking for an order designating how the estate could pay for that work. The estate owns the policy. The estate paid for the policy. The estate paid the premiums under the policy, and we have a vested interest in its proceeds.

So on one hand, if work needs to be done, this is not a malpractice question. We're not trying to restrain anybody's ability to zealously advocate for their client. This is a --

THE COURT: I understand that, and -- but why -- I mean, in the protocol order that I entered previously, I had specific caps. And when I went back and reviewed the transcript, I noted Mr. Harbour's comments that -- I believe it was Mr. Hayes -- reminded me of today. but when I was looking at that, in preparing for this hearing, why isn't the caps that I have imposed in the case for allowing the exception to the automatic stay for parties to proceed, why isn't that sufficient protection to the trust going forward; why do I need to micromanage this to this extent? And why

isn't it up to the insured -- insurer to make these determinations?

MS. SPECKHART: I think, as an ultimate matter, it will be, Your Honor. But the caps that are imposed pursuant to the access procedures are subject to objections by other parties, including the estate.

THE COURT: I know it is, but I'm asking why should I entertain that, because I don't think you're asking me to amend the order or anything else.

MS. SPECKHART: No, we're not asking you to amend --

THE COURT: I understand --

MS. SPECKHART: -- the order.

THE COURT: -- what you're asking to do.

MS. SPECKHART: And we're also -- and to Mr. Hayes' point about McCarran-Ferguson, we're not asking for the Court to modify the policy whatsoever. Remember, this is a policy that has been assumed already through the plan. We are simply asking for an order that protects the estate's interest in the policy so that there isn't overreaching and abuse on behalf of the Ds&Os who are also entitled to proceeds under the policy, which will then delude everyone else's interests.

THE COURT: And I understand that. It's the collective action problem --

MS. SPECKHART: That's correct, Your Honor.

THE COURT: -- where we have every D&O is potentially

in conflict with each other as well. I understand that. I appreciate it. But why isn't managing it through some sort of a cap type of protocol and then allowing the insurance company to do its job the better way to proceed?

MS. SPECKHART: Because as an estate matter, we have no control over what the insurance company's going to do.

THE COURT: I understand.

MS. SPECKHART: And there are specific bankruptcy issues that are playing on top of this policy. For instance -- and Mr. Broscious very eloquently made this point for me. I think Mr. Broscious and Mr. Bass indicated that their bills do not reflect any bankruptcy work in the bankruptcy case that was not related to or responding to the committee's 2004 exam requests. There are people in this room who have a different interpretation of what a claim is and what a loss is.

Our reading of the policy says this bankruptcy case, as a matter of itself, is a voluntary petition supported by a corporate resolution and is not underlying of a claim. So from the estate's perspective, there are issues such as these that need to be addressed prior to the instance when the insurer gets a hold of it, because, as a matter of estate property, the estate is at risk to its interest under Side B.

THE COURT: Okay. Thank you.

MS. SPECKHART: Thank you, Your Honor.

THE COURT: All right. All right. The Court has --

MR. HAYES: Your Honor, we have evidence in support of our fee request.

THE COURT: All right, you're not going to need that. You can -- okay?

MR. HAYES: We're not permitted to put on evidence?

THE COURT: I will let you put on evidence to the extent that evidence is needed, but I was going to rule in your favor here if you just --

MR. HAYES: Okay, all right. Well, the evidence relates to the motion that is set for expedited hearing as well. So we'll --

THE COURT: But we haven't gotten to that yet.

MR. HAYES: I understand.

THE COURT: Remember, I put that to the side?

MR. HAYES: Thank you, Judge.

THE COURT: Okay. I -- believe me, I'm not going to cut you off, Mr. Hayes, I problem. Okay?

So anybody else wish to be heard before I rule?

All right. The Court is going to deny the trustee's -- or overrule the trustee's objection with regard to the matters up to the amount of the caps the Court had previously approved. I think it's up to the insurance company to make determinations about whether or not it's a covered loss. The insurance company can make determinations under its

protocols as far as duplication of efforts. The last thing I think is appropriate is to tie defense counsel's hands as far as what they -- this Court telling them what they can and can't do with regard to preparing a defense for their clients within their ethical obligations.

And so I'm not going to do that. I'm not going to through and say you can do this, but you can't do that. I'm going to allow the insurance company to be the insurance company and make those determinations.

Now, as I've said previously -- and I said it at the protocol order -- I said -- hearing and again now, we do have a collective action problem. Everybody -- we have one policy. It's a diminishing resource. We have many parties that have an interest in the policy, and how I propose to regulate this is with the cap mechanism that we've already addressed and to do as -- what Mr. Harbour said, let the insurance company make the coverage determinations as far as that's concerned.

So that's my ruling with the -- in that regard. Are there any questions regarding the Court's ruling in that regard?

All right. I don't know who I ask to draft this order now, but the -- I guess Mr. Hastings, I'll let you take the first shot at this. And if you can put together an order and submit for the Court's determination. I would like you to share the order, obviously, with Mr. Kanowitz and Ms.

Speckhart before submitting it.

MR. HASTINGS: I will, Your Honor. Thank you.

THE COURT: Thank you very much.

All right. All right. Now, that said, let's get on to the next one. Your motion to expedite is granted. We have everybody here at the party, so we might as well go forward. And I will hear your underlying motion.

MR. HAYES: Your Honor, we're prepared to skip argument and go straight to evidence in support of our motion.

THE COURT: All right. Ms. Speckhart or Mr. Kanowitz, who's going to handle this one?

MS. SPECKHART: I will, Your Honor.

THE COURT: Okay, very good.

Do you wish to make an opening before we hear evidence?

MS. SPECKHART: Your Honor, I think that you just -- I think that you just made a ruling in connection with the prior motion that our objections to the insurance request would be overruled subject to the limits that you just imposed. So it's my perspective, based on your most recent argument, that Mr. Hayes' motion is moot.

THE COURT: Well, as I understand -- and maybe I've got this wrong -- Mr. Hayes, maybe it'd be better if you could answer a couple of questions for me before we hear the evidence.

But as I understood it, what is the cap that I previously had as far as Mr. Warnick was concerned?

MR. HAYES: The -- in the Court's protocol, there is a per capita soft cap of 400,000 dollars with respect to individual Ds&Os unless and until they are the subject of a lawsuit. There was a separate cap for Ms. Mallory. And then --

THE COURT: And that cap was 800-?

MR. HAYES: 800-, correct, Your Honor.

THE COURT: Right.

MR. HAYES: And --

THE COURT: Because she was involved in multiple litigation, if I recall correctly.

MR. HAYES: Correct, Your Honor.

THE COURT: Okay.

MR. HAYES: And the -- and then, the protocol goes on to say that in the event that a director and officer becomes the subject of a lawsuit, then the per capita cap would increase to 800-. Our fee request that has been submitted is approximately 754,000 dollars, and we have filed a motion to increase the cap with respect to Mr. Warnick to one and a half million dollars.

And in response to that motion, the trustee filed a pleading that had a number of attacks on Mr. Warnick and the legal work that's been done for Mr. Warnick in the bankruptcy

case. And the evidence we would like to put forward relates to that, Your Honor.

THE COURT: So you think that you have -- your cap now is at 800,000 is what you're saying?

MR. HAYES: Our cap currently is at 400-, because we have --

THE COURT: 400-?

MR. HAYES: -- we have not been sued by anybody.

THE COURT: Okay, so your cap is at 4-, and you have a bill that you want to submit of almost 800,000 dollars?

MR. HAYES: Correct, Your Honor, 754-, that was submitted to the carrier on May 26th.

THE COURT: And your motion today is to increase that -- the cap to 1.5 million --

MR. HAYES: Correct, Your Honor.

THE COURT: -- rather than just up to the 800,000 dollars?

MR. HAYES: Well, Your Honor, I think we're going to coming back to get these caps increased. It's my judgment, that for any particular individual director or officer, it's going to cost 2 or 3 million dollars to defend a 600 million-dollar suit.

THE COURT: All right, and that's the evidence you're going to put on today?

MR. HAYES: That, among other evidence, Your Honor.

THE COURT: Okay, very good. Thank you.

All right, you may proceed.

MR. HAYES: Ms. Sieg of my firm is going to present the evidence, Your Honor.

THE COURT: All right.

MS. SIEG: Your Honor, Dr. Warnick calls Dion Hayes to the stand.

THE COURT: All right. Mr. Hayes, please come forward and be sworn.

(Witness sworn)

MS. SIEG: Your Honor, if there's a factual presentation, we're willing to stipulate this is totally unnecessary.

THE COURT: Is there a fact -- you have some facts that you would --

MS. SIEG: Your Honor --

THE COURT: -- like to stipulate or no?

MS. SIEG: Well, if we could stipulate that all of the facts alleged in the liquidating trustee's objection are false, then that might eliminate the need for this testimony. But I don't think --

THE COURT: Proceed with your testimony.

MS. SIEG: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. SIEG:

Q. Please state your full name for the record.
A. Dion William Hayes.
Q. Could you please describe for the Court your education since high school?
A. Received a bachelor's degree in history in 1989 from the University of Virginia and received a law degree in 1992 from William & Mary School of Law.
Q. And could you please describe your work history since you graduated law school from William & Mary?
A. Since 1992, I've been an attorney with McGuireWoods in their restructuring and insolvency department based in Richmond and made partner at the law firm in 2000.
Q. And have you played any role in this particular bankruptcy case?
A. Since late September 2015, I've been the lead bankruptcy counsel for Mr. -- for Dr. Warnick.
Q. And in that capacity as counsel to Dr. Warnick, have you had an opportunity to, among other things, review drafts of plans and other plan related documents before they were filed?
A. Yes, Dr. Warnick, since our engagement, was an active member of the board. And we reviewed and commented on every draft of the plan, disclosure statement, and related documents that were provided to the board by the debtors' counsel.
MS. SIEG: Your Honor, I have several exhibits that I'd like to use with this witness. If you would give me a

moment to pass them out to Your Honor and counsel.

THE COURT: All right. You may.

MS. SIEG: Your Honor, I have three copies for the Court and one for the witness.

THE COURT: All right.

MR. KANOWITZ: Do we get a copy?

MS. SIEG: Of course you do.

THE COURT: Thank you.

Q. Mr. Hayes, if you could please turn to tab numbers 10 and 11 in the binder you've just been handed?

A. Okay, I'm at tab 10.

Q. Do you recognize that document?

A. This appears to be the Bankruptcy Court's May 12th, 2016 order confirming the Chapter 11 plan in this case.

Q. And do you recognize the document that's at tab number 11?

A. This appears to be the modified second amended plan of liquidation proposed by the debtors, which, to my understanding, was the version of the plan that the Court confirmed.

MS. SIEG: Your Honor, at this time, I'll move for admission of tab numbers 10 and 11 in the exhibit book?

THE COURT: Any party wish to object?

All right, it's admitted.

(Original and second amended plan of liquidation was hereby

received into evidence as Dr. Warnick's Exhibit 10-11, as of this date.)

Q. Mr. Hayes, please flip to tab number 9.

A. I'm there.

Q. Do you recognize this document?

A. This appears to be docket number 999, which is the debtors' notice of filing of amended exhibit to plan supplement.

Q. And do you recognize the attachments to that notice?

A. Yes, the first attachment appears to be a liquidating trust agreement, and the second exhibit appears to be a blackline of the liquidating trust agreement.

Q. And is this the final trust agreement that was filed before plan confirmation?

A. Yes. To my understanding, this represents the final version of the liquidating trust agreement.

MS. SIEG: Your Honor, I'd move tab number 9 into evidence.

THE COURT: Does any party object?

All right, it's admitted.

(Notice and attachments of liquidating trust agreement was hereby received into evidence as Dr. Warnick's Exhibit 9, as of this date.)

Q. Mr. Hayes, please turn to tab number 1 in the exhibit book. Do you recognize that document?

A. Yes, this appears to be the 2012-13 director and officer insurance policy for the debtors that was issued by Chartis/AIG/National Union.

MS. SIEG: Your Honor, I move for admission for tab number 1 in the exhibit book.

THE COURT: Any objection from any party?

All right, that's admitted.

(2012-13 director and officer insurance policy for debtors was hereby received into evidence as Dr. Warnick's Exhibit 1, as of this date.)

Q. Now, Mr. Hayes, has McGuireWoods been approved by the insurer to act as counsel to Dr. Warnick in this bankruptcy case?

A. Yes, we're approved panel counsel for Dr. Warnick effective as of, I think, approximately September 29, which was the date of the 2004 motion filed by the committee.

Q. Mr. Hayes, please turn to tab number 2.

A. I'm there.

Q. Do you recognize this document?

A. This appears to be the October 26, 2015 demand letter that was sent to several directors and officers, including Dr. Warnick, by counsel for the creditors' committee making a 400 million-dollar demand.

MS. SIEG: Your Honor, I move this document into evidence.

THE COURT: Any objection by any party?

All right, it's in evidence.

(10/26/15 creditors' committee demand letter was hereby received into evidence as Dr. Warnick's Exhibit 2, as of this date.)

Q. Please turn to tab number 3.

A. Tab number 3 appears to be an April 19, 2016 supplemental demand on certain directors and officers, including Dr. Warnick from counsel for the creditors' committee asserting a 600 million-dollar demand.

MS. SIEG: Your Honor, I move this document into evidence.

THE COURT: Any party wish to object to the admission of this document?

All right, it's in.

(4/19/16 creditors' committee supplemental demand letter was hereby received into evidence as Dr. Warnick's Exhibit 3, as of this date.)

Q. Mr. Hayes, please turn to tab number 4 and let the Court know if you recognize this document.

A. Tab number 4 is the request for payment of insurance proceeds that our firm submitted on behalf of Dr. Warnick in the approximate amount of 754,000 dollars on May 26, 2016.

MS. SIEG: Your Honor, I move this document into evidence.

THE COURT: Any party wish to be heard -- I mean object to this document?

All right.

(5/26/16 request for payment of insurance proceeds on behalf of Dr. Warnick was hereby received into evidence as Dr. Warnick's Exhibit 4, as of this date.)

Q. Mr. Hayes, after McGuireWoods submitted this notice on May 26th, did the liquidating trustee request additional documentation beyond what was contained in this notice?

A. Yes, the next day, on May 27, which I believe was the Friday before the holiday weekend, you had a communication with Ms. Speckhart where she requested additional information.

Q. And what was McGuireWoods' response to that request?

A. The next business day, which was, I think, Tuesday, May 31, my understanding is that you responded to Ms. Speckhart and informed her that we would provide additional information, specifically redacted invoices upon execution of an appropriate protective order.

Q. And did the liquidating trustee's counsel ever respond to that offer?

A. No.

Q. What did McGuireWoods do after not receiving a response from the liquidating trustee's counsel?

A. In light of no response, ultimately, we filed, unilaterally, a motion for entry of a protective order, which

the Court entered.
Q. And did McGuireWoods then provide redacted invoices subject to that protective order?
A. We did.
Q. Please turn to tab number 5. Are these the redacted invoices that were provided to the counsel for the liquidating trustee?
A. Yes.
MS. SIEG: Your Honor, at this time, I would move tab number 5 into evidence, but I would ask that the protections Your Honor granted under the protective order, specifically under Rule 502(d) of the Federal Rules of Evidence, be applicable to the use of this document in this proceeding as well.
THE COURT: Is there any objection?
All right, that will be admitted and subject to those protections.
(Redacted invoices was hereby received into evidence as Dr. Warnick's Exhibit 5, as of this date.
MS. SIEG: Thank you, Your Honor.
Q. Now, Mr. Hayes, are you authorized to waive any privileges for Dr. Warnick?
A. No.
Q. Mr. Hayes, all of the fees that are reflected in these invoices, are they all reasonable and necessary fees incurred

in defense of claims asserted against Dr. Warnick?

MR. KANOWITZ: Objection, Your Honor.

THE COURT: What is the basis of the objection?

MR. KANOWITZ: He's not here as an expert to say what's reasonable. I think it's your job. He can say what he did.

MS. SIEG: Your Honor, this is lead counsel for Dr. Warnick, who submitted a fee request to the insurer subject to an insurance policy provision that requires they all be reasonable and necessary and, in his capacity as lead counsel for Dr. Warnick, has made decisions regarding what work would be done and what work was necessary to defend the claims. And I'm asking this witness for his understanding whether all of these fees are reasonable and necessary defense costs under the insurance policy.

MR. KANOWITZ: It doesn't get to ask him whether it's reasonable. Ask him what he did.

THE COURT: Okay. I -- isn't the -- hasn't the Supreme Court said that if -- for purposes of -- you have to have an expert witness to testify as to the reasonableness of fees and such and that it has to be an independent person that have to put it into issue?

MS. SIEG: Your Honor, I don't believe that the Supreme Court has held that in regard to director and officer defense costs under an insurance policy. And I don't think

any such ruling would foreclose this witness from providing his understanding whether he directed the work to be done consistent with the insurance policy.

THE COURT: Well, you can ask him that question.

BY MS. SIEG:

Q. Mr. Hayes, for all of the work that is reflected in these invoices, is it your understanding as lead counsel for Dr. Warnick that that work was undertaken as necessary to defend claims that had been asserted against Dr. Warnick?

A. Yes, I did. And when we submitted our invoices to the carrier, as panel counsel always does, we certified that the work was reasonable and necessary.

Q. Now, Mr. Hayes, you're aware that the committee and the liquidating trustee have contended that your work for Dr. Warnick in this case has been designed solely to obstruct progress toward confirmation; do you agree with that contention?

A. No, I do not.

Q. If you would please describe your understanding, generally, of the plan drafting process on the debtors' side?

A. On the debtors' side, the primary drafters of the plan were McGuireWoods and Hunton & Williams. The board wanted to receive a draft plan from the debtors' counsel promptly, really immediately after the closing of the sale of assets to True Health at the end of September. Regrettably, the board

did not receive from debtors' counsel a draft of the Chapter 11 plan in this case until November 6, which was over a month after the True Health sale closing.

Q. And did McGuireWoods provide comments on the draft plans as they were finally circulated by debtors' counsel?

A. We did. We had probably ten or twenty or more calls with debtors' counsel about the draft plan. We submitted comments in writing, and we reviewed and commented on every draft that was provided to the board.

Q. Did the other directors that were sitting on the board have separate counsel?

A. They had separate counsel, but they were really litigation counsel. We were the only firm that were bankruptcy specialists and that provided careful bankruptcy review of the debtors' plan drafts. And as a matter of course, when the board would receive a draft plan document from debtors' counsel, McGuireWoods would review it, discuss it with counsel for the other represented directors, obtain consent, generally around comments, and then send those comments to debtors' counsel on behalf of the represented directors.

MR. KANOWITZ: And Your Honor, I just waited until the witness completed his answer. I move to strike. If you're not going to strike it, at least admonish the witness to answer the question and not just continue a rather self-

serving commentary.

THE COURT: All right. Please answer the question, Mr. Hayes. You know how to do that.

MR. HAYES: Thank you, Judge.

THE COURT: All right.

Q. Mr. Hayes, who took the lead among director counsel in regard to reviewing the draft plan?

A. McGuireWoods.

Q. And McGuireWoods represented only Dr. Warnick; is that right?

A. Correct.

Q. Mr. Hayes, please turn to tab number 6. Have you seen this document before?

A. Yes. The e-mail at the top is a recent forward for printing purposes, but the substantive e-mail is the second e-mail from the top, which is a November 11, 2015 e-mail from my colleague, Shawn Fox, to a number of people, including debtors' counsel, the then CRO, and counsel for the other represented directors.

MS. SIEG: Your Honor, I move tab number 6 into evidence.

THE COURT: Any objection to tab number 6 coming into evidence?

All right, there's no objection, it's admitted.

(11/11/16 e-mail was hereby received into evidence as Dr.

Warnick's Exhibit 6, as of this date.)
Q. Mr. Hayes, who is Shawn Fox?
A. Shawn Fox is an experienced bankruptcy attorney in our New York office that has particular expertise on drafting plan and related documents, with whom I've worked with quite a lot and who assisted in the review of the draft plan and related documents in this case.
Q. And you testified a few minutes ago that you had maybe ten to twenty phone conversations with debtors' counsel regarding the plan. Was Mr. Fox on those calls?
A. Generally, yes.
Q. And did Mr. Arrowsmith participate on those calls?
A. Typically, no.
Q. Did Mr. Kanowitz or anyone else at Cooley generally participate on those calls?
A. Never.
Q. Do you have an understanding about why no one from Cooley generally participated on those calls?
A. Our understanding from debtors' counsel was that they believed that Mr. Kanowitz's participation on these calls would not be constructive.
Q. And during these calls, when McGuireWoods began commenting on the initial draft plan, what was one of the earliest and biggest concerns that you expressed to the debtors about the plan?

A. Well, a recurring theme which I discussed early and often was that the plan needed to have the concept of enjoined actions and tolling agreements. Specifically, in order to maximize and marshal the debtors' D&O insurance proceeds in the direction of the estate as opposed to third parties -- actions by third parties that might invade the D&O's policy coverage should be enjoined, similar to what has happened in many other cases, including a case called Land America, where we were on the debtor's side.

And tolling agreements would be appropriate to be approved as part of the plan so that in exchange for third party actions against directors and officers being enjoined under the plan, those directors and officers would execute tolling agreements that would toll the statute of limitations or those third party actions. And that mechanic worked successfully in Land America.

Ultimately, after some resistance from the debtors and the committee, made into this plan, and that was at our suggestion.

Q. Now, this document that's been admitted at tab number 6, does this reflect comments that McGuireWoods gave to debtors' counsel on November 11th of 2015?

A. Yes.

Q. What was your first impression of this initial draft provided by debtors' counsel?

A. It had numerous major deficiencies and was not a good draft.

Q. Now, let's go through some of the specific comments that were provided in this November 11 communication, starting with the e-mail itself. You'll see a comment from Shawn Fox towards the bottom of the page that references some tax treatment. Do you see that portion of the e-mail?

A. Correct. The initial draft did not have the language required to have the liquidating trust treated and taxed as a grantor trust. If a trust is a taxable entity, it pays taxes on income that the trust enjoins through interest and other recoveries, and the trust itself, as a new taxpayer, does not have tax losses that can be used to offset those gains.

If you set up the trust as a grantor trust, where the claimants, in exchange for their claims, receive a share of the trust and then as a legal fiction are deemed to transfer their share of the trust assets into the trust so that they are the grantors, then the trust does not pay tax, and the creditors themselves pay tax on their recoveries. But the aggregate dilution of creditor distributions is less because each individual creditor has tax attributes that the trust doesn't have that he or it brings to that transaction, typically operating losses potentially relating to the bankruptcy itself so that the aggregate tax paid on the distributions is less.

And this is a commonly accepted mechanic to set these up as grantor trusts to maximize recoveries for creditors and to reduce the aggregate tax paid. And that was a change that we recommended to debtors' counsel, which was ultimately made.
Q. Now -- so that change is reflected in the final confirmed plan?
A. Yes, it is.
Q. If we could flip now to the blackline -- or the redline that McGuireWoods provided and starting with Section 1.39. When you get there, please describe the change that McGuireWoods made to this section.
A. My tab 6 is missing pages. I think I need to get another binder. Actually, I -- they're just out of order. I can fix it. Thank you.

MR. KANOWITZ: Your Honor, to try to streamline it, we'll stipulate that there were certain requests and changes made by McGuireWoods that ultimately may or may not have been put into the plan. It's really unnecessary for the purposes to go through it line-by-line. It's a complete waste of time.

MS. SIEG: No, Your Honor, I think it is important for the Court to hear all of the changes that Dr. Warnick proposed and the role that he played in this bankruptcy case, that his conduct has been called into question by pleadings filed by the trustee. And this evidence is intended to refute those allegations. So we think it's important. There's no

reason to limit Dr. Warnick's right to present this testimony just to save time.

MR. KANOWITZ: No, it's a stipulation that he provided comments, and some of them made it into the plan. The argument from that fact, she could justify his conduct.

MS. SIEG: Your Honor, I think it -- I think Mr. Kanowitz's effort to propose a stipulation that Dr. Warnick provided some comments and they were accepted is intended to --

THE COURT: Okay. Why don't we just skip through it as fast as we can, so --

MS. SIEG: Thank you.

THE COURT: -- why don't you ask the questions?

Q. Do you see the change reflected at Section 1.39?

A. I did. And if others have the same problem with their binder, it's just that the pages are out of order, but it's easily fixed. So we're at 1.39?

Q. 1.39.

A. Yes, the definition of "effective date".

Q. And what was the significance of this change?

A. This was one of the significant drafting issues with the draft plan. This language that we requested or suggested for effective date is the language that is in the finally confirmed plan. And among the reasons that we made that suggestion is the wording of (a) and including it in a

nonwaivable definition of "effective date" would have caused there to be essentially an automatic stay with respect to the confirmation order until it becomes a final order.

And the -- that would have meant that the debtor, when it confirmed its plan, would not have been able to have gone effective on that plan within the first fourteen days after entry of the confirmation order. And it was important to Dr. Warnick and important to the board who were all at that time working very hard to get to a plan that had general consensus, that whatever plan the Court confirmed could be effectuated promptly by the debtors because we thought that was in the best interest of creditors. And the debtor took this change.

Q. And is that change consistent or inconsistent with the allegation that Dr. Warnick's sole concern has been to delay this case?

A. Wholly inconsistent.

Q. Now, please describe the change that is reflected at Section 1.64.

A. Yes, this is the definition of the "liquidating trust oversight committee" or what was called in the case the LTOC. The way the language was drafted originally, a holder of a claim that chose to pursue and had pending their own claim against a director and officer, thereby competing with the estate's claims for D&O coverage, could continue to serve on the liquidating trust's oversight committee which was intended

to oversee the liquidating trust's prosecution of claims that might recover from D&O coverage.

And it was our view that that was an untenable conflict that a creditor that chose to pursue claims against an individual director and officer and to maintain those claims post-confirmation simply couldn't serve in that position. And that was a change that, after initial opposition by the debtors and the committee, was accepted by the debtors and the committee by Dr. Warnick's suggestion.

Q. Please describe for the Court the change that was made at Section 4.1.

A. 4.1 -- and I'm -- we're really addressing the second change there, where it says "thirty calendar days". This was very perplexing because the debtor, and subsequently the committee, appeared not to be in favor of a requirement under the plan that administrative claims be paid no later than thirty days after allowance.

It was important to the board and Dr. Warnick that all administrative claims, including, for example, fee claims with estate professionals, be paid promptly after allowance and that there be a deadline.

And ultimately, despite the initial resistance, which was inexplicable to Dr. Warnick, this change was accepted and is in the final plan.

Q. And please flip to Section 6.2(b) and describe that

change for the Court.

THE COURT: I'm sorry, which number are you on?

MS. SIEG: 6.2(b).

THE COURT: Got it. Thank you.

A. 6.2(b) was a question that we posed to the draft that resulted in a change in the provision. The debtors' plan would have required that the debtors be dissolved as a matter of corporate law on the effective date. Our experience in Land America and a number of other cases is that there are frequently intangible assets that a debtor has, like, for example, LLC interests or other investments that can be lost on dissolution. And therefore, it is preferable that the liquidating trustee have the discretion to delay the dissolution of the debtors in a liquidating Chapter 11.

And that change was accepted by the debtors, and that change was important to the board and Dr. Warnick to maximize recoveries for creditors.

Q. And there's another change in 6 -- Section 6.2(b) pertaining to the allowed fees for professionals employed by the estate as well. Was that an important change for Dr. Warnick?

A. Yeah, the third paragraph that begins with "The professionals", what was attempted to be done here, really by debtors' counsel, was to address the ASARCO issue. the Court is well familiar with the Supreme Court's ASARCO decision,

whereby it was determined that the Bankruptcy Code itself does not permit estate professionals to recover fees on fees or fees incurred defending objections to their fee applications and prosecuting fee applications.

The language that was submitted here by debtors' counsel was an attempt, which I presume was supported by the committee, but it was an attempt by the estate professionals to cause the estate and the liquidating trust to bear the cost of their prosecution of their final fee applications, which was not a provision permitted by their retention orders. It is not a provision that is consistent with the Supreme Court's ASARCO decision. And it was a provision that the board thought would be obnoxious to the Court and the U.S. Trustee.

So the board thought this was an overreach by estate professionals, pushed back on the provision very hard, and this provision was not -- well, our language change was included in the plan. And the plan does not permit estate professionals to recover fees on fees incurred in prosecuting their final fee applications as a result of Dr. Warnick's efforts.

Q. Now, if you would please flip to Section 6.4(j) and describe the changes Dr. Warnick made to 6.4(j)?

A. The change in 6.4(j) related to estimation of reserves, and the language that I'm focusing on specifically is the deletion that starts at the bottom of page 24 in the blackline

and goes over to the next page. But in substance, the debtors' draft and subsequent drafts from the committee wanted the liquidating trustee, who was expected to be someone who had never had that position before -- so it was a rookie liquidating trustee -- to have unfettered discretion to estimate reserves for disputed claims that might be the -- lower than the face amount of the claim.

That could result in an underreserve and an overdistribution position in the event that the liquidating trustee's unfettered estimate was too low. It was important to the board and to Dr. Warnick that the liquidating trust not find itself in an underreserve/overdistribution position and that there be some limitation on the liquidating trustee's ability to unilaterally estimate reserves at lower than the asserted amount of the claim.

And the ultimate resolution of this was a compromise, which Dr. Warnick was supportive of, which provides in the final plan that the liquidating trustee can estimate reserves only where the asserted face amount of the claim -- can estimate reserves without a court order, endorsing the estimate only where the asserted face amount of the claim is less than a million dollars.

And we thought that was an appropriate compromise and would be in the interest of all creditors. And the debtors and the committee agreed.

Q. If you could please turn to Section 8.1 of this document?
A. Right, 8.1 deals with rejection of executory contracts and leases and, in particular, the deletion and the new language we made -- we inserted related to insurance policies. The debtors had a -- the debtors' counsel were proposing a blanket statement that the insurance agreements were not executory contracts, and therefore not subject to assumption or rejection. That's not a uniform view among courts.

As Ms. Speckhart pointed out earlier, the way the plan was ultimately resolved, it states in the last sentence in this section that, "To the extent an insurance policy or agreement is determined to be an executory contract, it is hereby assumed and assigned to and shall vest with the liquidating trustee." And the preceding sentence, which was our addition, which the committee and debtors accepted and is also in the final plan, provides that, "All insurance policies that were not assigned in connection with the sale are unaffected by the plan and remain enforceable according to their terms."

It was important to the board and Dr. Warnick that this plan not inadvertently do something that would adversely impact the right of the liquidating trust and other insureds under the debtors' insurance policies.
Q. Now, all of the comments that we've just gone over that Dr. Warnick made to this draft of the plan, were those

comments aimed at delaying the case or designed solely to benefit Dr. Warnick?
A. Of course not. These were designed to maximize recoveries for all creditors and to expedite those recoveries.
Q. And these weren't all the comments that Dr. Warnick ever provided on any draft of a plan, were they?
A. We commented on every draft, and we gave a lot of comments, I'm sure, at times was annoying to debtors' counsel, maybe even committee counsel. But our comments were targeted at benefitting creditors, generally, which would, in addition, benefit Dr. Warnick as a creditor and as a potential litigation defendant.
Q. And did you also comment on the trust agreement?
A. We did.
Q. Please turn to tab number 7. Do you recognize this document?
A. Yes, the first e-mail is a forward for printing purposes. The second e-mail is an e-mail from Mr. Fox to counsel for the debtor and counsel for the other represented directors, dated December 8, 2015, enclosing McGuireWoods' comments on the debtors' draft liquidating trust agreement and draft tolling agreement.
MS. SIEG: Your Honor, I move the document that's at tab number 7 into evidence.
THE COURT: Any objection?

All right, it's in.

(12/8/15 e-mail was hereby received into evidence as Dr. Warnick's Exhibit 7, as of this date.)

Q. Now, you noted some of the parties copied on this e-mail were other counsel for the directors. Did you generally preview your comments on agreements of this nature with counsel for the other directors before submitting them to debtors' counsel?

A. We did. We had many calls of just the directors' counsel without debtors' counsel present to talk about the plan. At this point in time, in December, the campaign by Mr. Arrowsmith to become the committee counsel's choice for liquidating trustee was in full bloom. And Mr. Arrowsmith's bias as relayed to me by debtor's counsel was to just simply accept all the comments that the committee provided.

The board, however, took its fiduciary duties very seriously and wanted the plan to work, be internally consistent, and to expedite and maximize recoveries for creditors. And we reviewed everything that was provided to the board very carefully and provided comments to debtors' counsel, which -- many of which ultimately made it into the plan.

Q. Well, let's --

MR. KANOWITZ: Objection, Your Honor. I move to strike self-serving, scandalous testimony. We're not -- I'm

not going to allow this record and his testimony, because I'm not going to waste time cross-examining on every point. It's moot, and I'm going to have a blanket objection that everything he says is going to be challenged at a later date so that we don't have another hearing where this transcript gets trotted out, because we all know that's been done in the past with this client and this counsel.

So I move to strike every unresponsive answer and every self-serving answer. Thank you.

MS. SIEG: Your Honor, the answer directly addressed my question, and I don't think I fully understand the evidentiary basis for the objection.

THE COURT: Well, the evidentiary basis for the objection is that it was -- contained editorial comments that perhaps went beyond the direct question that was asked.

I'm going to sustain the objection. I'm going to allow you to reask the question, and let's see if we can get a better answer. How is that?

Q. Mr. Hayes, what is your understanding of debtors' counsel's reaction to some of the comments and positions taken by the committee in this case?

MR. KANOWITZ: Objection. Hearsay, Your Honor.

MS. SIEG: Your Honor, I asked this witness for his understanding. There's no statement at issue. There's no out of court, no person --

THE COURT: Well, let me ask this question. Why is his understanding of what Mr. Harbour thought make any difference at all?

MS. SIEG: It makes a difference to the necessity of the comments on the plan. It also goes to whether Dr. Warnick was doing nothing but trying to delay this case. This testimony is directly relevant to refute those issues.

MR. KANOWITZ: Your Honor, nothing is going to rehabilitate Dr. Warnick's past conduct. Your Honor's rulings are Your Honor's rulings. This transcript will do nothing to that. If -- the plan was a compromise. There were comments made; there were comments accepted; there were comments rejected. This is a continued waste of time. They're trying to rehabilitate the past. We object.

THE COURT: Okay. I don't think that his understanding of Mr. Harbour's reactions makes any difference, so I'm going to sustain the objection. Let's move on and get into more of the facts.

Q. Let's discuss some of the specific changes that were made to this trust agreement by Dr. Warnick, starting with Section 2.38.

A. Correct. 2.3, which starts on page 4, enumerates the matters that require the approval of the LTOC, i.e. that the liquidating trustee could not do unilaterally. And Dr. Warnick and the board thought that it was important in the new

(h) that the liquidating trust oversight committee would have approval rights with respect to fees and expenses of the liquidating trustee professionals. And that was a suggestion that we made in the interest of creditors, which made it in the final trust agreement.

Q. And please turn to Section 5.8(b) and describe that change.

A. 5.8(b) is the liquidating trustee's indemnity. It was important to the board and Dr. Warnick that the liquidating trustee not be indemnified for bad faith, willful misconduct, reckless disregard of duty, criminal conduct, fraud or self-dealing. And those exclusions to the liquidating trustee's indemnification are in the final trust agreement.

Q. And please describe the change that was made to Section 9.2.

A. Similarly, Section 9.2 describes the circumstances under which the liquidating trustee can be removed. It was important to the board and Dr. Warnick that the liquidating trustee could be removed in the event of theft, bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence or self-dealing. That would be the case regardless of who the liquidating trust was, and that comment is -- that change was -- is reflected in the final trust agreement.

Q. And how about the change at Section 12.11?

A. With respect to 12.11, our change was to state that the liquidating trust agreement would be subordinate to the Court's confirmation order in the event of any conflict. We thought it was disrespectful for the Court and not good practice for the trust agreement to trump an order of the Court.

Q. Now, all of these changes that we've just discussed to the trust agreement, those all made it in into the final trust agreement?

A. Yes.

Q. And did you later receive from the debtors the committee's markup of the draft plan?

A. Yes.

Q. And what was your general impression of the committee's changes to the plan, as a whole?

A. The plan had gotten worse. The comments were internally inconsistent, and there was a lot of work to be done.

Q. And did you continue to work with committee counsel and debtors' counsel on revisions to the committee's markup?

A. We worked through debtors' counsel.

Q. Please turn to tab number 8. Do you recognize this document?

A. Yes, the first e-mail is a forward for printing purposes. But the second e-mail is an e-mail from Mr. Harbour dated December 16, 2015, and he was forwarding to the represented

board directors and all the board members a markup of the debtors' draft plan that reflected comments from counsel for the creditors' committee.

Q. I'd like to discuss some of the specific changes that Dr. Warnick made, starting with Section 1.4 -- 1.- -- yeah, let me see. Do I have the right one?

A. 1.8?

THE COURT: 1.4 is allowed claims.

MS. SIEG: It's the enjoined action --

THE WITNESS: We were okay with that one. It's 1.8.

Q. It's the -- it's deleted 1.4 on page 7 of the redline.

A. Oh, on page 7 of the redline, the definition --

THE COURT: 1.40?

THE WITNESS: 1.40.

A. The definition of "enjoined action" was deleted by the committee for reasons that were hard to understand. The committee initially did not want to do something comparable to what was done in Land America and which was ultimately done under this plan, which was to enjoin third party actions that might invade the D&O coverage.

Q. And did this change make it -- or if you could compare, please, this section with the final plan at Section 7.4(b)?

A. Remind me what tab is the final plan.

Q. The final plan is at tab 11. And my question about Section 7.4(b) in the final plan is, does it -- did it contain

the concept of and enjoined action, notwithstanding the committee's attempt to delete that in its redline?
A. Yes, the concept of enjoined action and tolling agreements, which were also deleted by the committee, which had members that had pending claims against directors and officers and therefore could potentially be subject to the enjoined -- the operation of the enjoined action provision.
Ultimately, the suggestion that we made on behalf of Dr. Warnick and the board was in the final plan, which, to the committee's credit, they ultimately supported. But initially, the members of the committee apparently did not want to have third party actions that might invade director and officer coverage to be expressly enjoined under the plan.
Q. If you could turn back to tab 8 and pick up with the change that was made to Section 1.48? It's on page 8 of the redline.
A. 1.48 was a change we resisted, which was ultimately changed in the final plan. But what the committee had done, the committee had come up with a concept of an assigning creditor, whereby a creditor that had a claim against third parties like Ds&Os could assign that claim to the trust. And what the definition of "face amounts" in later provisions in the committee markup attempted to accomplish was to have sort of an arbitrary and noncorrelative increase in the face amount of a claim of a creditor that happened to assign the cause of

action to the trust, irregardless of whether there was ever any recovery of the trust on account of that claim that was assigned to the trust.

The board and Dr. Warnick, through us, objected mightily to this because we thought this would potentially render the plan unconfirmable, could provide a windfall to a creditor that assigned a claim to the trust that had no value but yet received a noncorrelative fifty percent increase in the face amount of their claim.

And the plan ultimately ended up, I believe, with a provision that permits the Court to increase a creditor's claim based on the actual recover that the trust has on account of the cause of action that that creditor assigned to the trust. So now, we have a prospect of a correlative increase in the amount of a creditor's claim, but not a total windfall.

Q. Now, Mr. Hayes, please flip to Section 1.103. It's a deleted 1.103 on --

A. Okay.

Q. -- page 17.

A. On page 17, 1.103 contained the definition of "tolling agreement", which was the quid pro quo for the enjoined action that a subject of the enjoined action, specifically a director and officer, similar to what the Court approved in Land America and has been done in other cases, would have to

execute a tolling agreement that would toll the statutes of limitations on those third party claims, but yet let the trust pursue its D&O claims in the interim so that third parties would not savage the proceeds of the D&O policies before the trust could have its turn.

For whatever reason, the committee did not want to use that mechanic and deleted this provision. But ultimately, the tolling agreement provision is in the final plan. And we think that's an important facet of this plan that was important to the board and Dr. Warnick to maximize and expedite recoveries for creditors.

Q. Now, Mr. Hayes, please flip to Section 5.1 and 5.2 regarding interest on Class 3 and Class 4 and describe that change to the Court -- or describe the committee's proposed change and what the significance of it is.

A. This -- the treatment of interest in Classes 3 and 4 and the introduction of a class of subordinated claims was a change that the committee proposed that rendered the plan noncompliant with 1129(a)(7) and Section 726 with respect to the treatment of interest. Specifically, the language that the committee drafted provided that the Class 3 general unsecured claims, or GUCs, would receive their -- up to their principal and then would receive interest. And then, Class 4 would receive principal and then could receive post-petition interest.

We pointed out to debtors' counsel that this needed to be changed, that under the Solvent Debtor Doctrine in 1129(a)(7) and 726, no unsecured creditor can receive post-petition interest until all unsecured creditors have been paid in full. So the way the plan ended up is not the way the committee drafted it. Class 3 gets principal. Class 4 gets principal. Class 3 gets post-petition interest, and then Class 4 gets post-petition interest.

And we spent a lot of time on the phone with debtors' counsel explaining this issue to them. Presumably, they spent a lot of time on the phone with committee counsel explaining the issue to committee counsel. And this was a change that, had it not been made, I think could have been a serious problem for confirmation of the plan.

And there is a subsequent provision in this plan -- I think it's in Article 9, perhaps 9.6 -- that talks about interest on claims, where the committee had also stated the Class 3 should get interest before Class 4 gets principal. And that was unworkable, and that was changed at the suggestion of Dr. Warnick and the board.

Q. So back in tab 8, please describe for the Court the committee's proposed changes in Section 6.4(c) and the significance of that change. 6.4(c) is -- it's a deleted -- I think it's the --

THE COURT: The trust execution section?

MS. SIEG: No, it's actually on -- it's on page 30. It's new Section 6.4, but the deleted (c).

A. Oh, yeah. Well, page 30, new 6.4(c), it's entitled "Trust Distributions". Without getting into the minutiae of the language, it was important to the board and Dr. Warnick that the plan obligate the liquidating trustee to make distributions at least annually. You see in many plans and trust agreements that distributions have to be made quarterly. Inexplicably to us, there was pushback from the creditors' committee on a requirement that the liquidating trustee make distributions at least annually.

But again, it was important to the board and Dr. Warnick that creditors receive their distributions, as much as they could get, and that they receive them timely. And we prevailed on this point in the final plan.

Q. And please describe for the Court the significance of the committee's proposed change in Section 6.6(c)(21), which is on page 37 of the redline, regarding reporting to the U.S. Trustee.

A. 6.6(c)(21) addressed the quarterly reporting by the liquidating trustee. The committee did not want to file those reports with the Court or to have to provide them to the U.S. Trustee. The committee only wanted to provide those reports to the LTOC. This was the subject of discussion among the board, counsel, and it was important to the board and Dr.

Warnick that there be some transparency to what the liquidating trust was doing.

And with some dissatisfaction on the part of debtors' counsel, the board pushed hard on this point. And ultimately, the plan provides that the quarterly reports will be provided to the U.S. Trustee and filed with the Court publically so any creditor will have access and it's not going to be simply private reporting to the LTOC, as was proposed by the creditors' committee.

Q. And now, please describe for the Court the significance of the committee's revision to Section 6.6(d) on page 38 of the redline.

A. Right. The second change in 6.6(d) was a deletion by the committee of the requirement that the liquidating trust oversight committee give prior approval of fees and expenses relating to the liquidating trustee's professionals. At this point in time, there was a concept of other litigation claims. Again, this was an issue that was important to the board and Dr. Warnick, that the LTOC, whoever it was comprised of, would have to approve the liquidating trustee's and his professionals' fees and expenses. And we prevailed on that point.

Q. Now, all of the issues that we've discussed today with regard to the committee's changes that Dr. Warnick and the board resisted, all of the concepts that the committee had

proposed that were resisted, those -- the board's direction and Dr. Warnick's direction is what is reflected in the final plan. Is that right?

A. Correct.

MR. KANOWITZ: Objection, Your Honor.

THE COURT: What is the objection?

MR. KANOWITZ: Conclusory statement. Ask -- but the question is -- it's not all -- it's not true. It's conclusory.

THE COURT: And it was a leading question, okay? Why don't you rephrase the question and let Mr. Hayes say it in his own words? It would be much more beneficial to the Court.

Q. What, if any, of the changes we've discussed today that Dr. Warnick and the board resisted from the committee's draft, what, if any, of those changes are reflected in the final plan?

A. Based on my review, all of the changes that Warnick and the other directors wanted were in the final confirmed plan.

Q. And now, after having gone through all of Dr. Warnick's comments on various drafts of the plan and related documents, do you agree or disagree with the assertions that Dr. Warnick did nothing by try to delay this bankruptcy case?

MR. KANOWITZ: Objection, Your Honor. Self-serving testimony. It has no relevance whatsoever to the issue at -- I mean, I --

THE COURT: What are we trying to do here?

MS. SIEG: Your Honor, in the objection to both Dr. Warnick's notice of a fee request, which has already been resolved, but significantly, also in the objection to Dr. Warnick's motion to amend the fee cap, which is at issue with this testimony, they've alleged that increasing the fee cap is inappropriate because all Dr. Warnick did was try to delay the bankruptcy case. And this question is directly relevant to that issue that they have raised in their pleading.

MR. KANOWITZ: Your Honor, that is not true. They made a request for a fee. They can tell you what their services were. They can't rehabilitate themselves. All of this testimony I'm going to ask to be stricken. And if you consider it, consider it only with respect to whether or not the fee cap should be increased. This is a one-sided, ridiculous presentation.

I mean, the fact is, is what we pointed out was Your Honor's public findings of fact and conclusions of law. They want to challenge that, they can. The confirmation order is final, so this attempt at rehabilitation under a hard fought, fully negotiated plan that was presented to Your Honor on a full record is just a waste of everybody's time. And I object, and I ask Your Honor to either strike this entire testimony or make the record only be responsive to the request to go from 800,000 dollars with no litigation yet -- so it's

really 4- -- to 1.5.

MS. SIEG: Your Honor, this testimony does relate to the motion that Your Honor is considering. And you've admonished me before that testimony comes in and whatever consequence there is, it arises just from the fact of the testimony. And Your Honor, we do remind that the -- Mr. Kanowitz opened this hearing telling Your Honor that we're going to bring to you all of the details about what went on behind doors.

We want you -- a free and open process for Your Honor to hear about it, and I'm asking this witness whether he agrees with the assertions that have been made in the committee's objection to the motion that's at issue.

THE COURT: All right. I'm going to allow you to answer the -- Ms. Speckhart.

MS. SPECKHART: Excuse me, Your Honor. I just want to point out that pursuant to the ruling that you just made in connection with the other motion, it is not relevant at all what we think or what our position is as to whether these fees were incurred caused delay. That is now entirely within the purview of the insurer who's going to make the ultimate decision up to fee cap.

THE COURT: Right, which is 400,000, but they're asking that the fee cap go up. And so --

MS. SPECKHART: Right, and I would echo Mr.

Kanowitz --

THE COURT: It's only relevant to the extent that I'm going to consider raising the cap.

MS. SPECKHART: Yes, Your Honor.

THE COURT: So I'm going to allow him to answer the question.

Do you remember what the question was?

THE WITNESS: Your Honor --

MS. SIEG: Well --

THE WITNESS: -- it's interesting to be on this side. I do not remember the question.

THE COURT: Okay. So would you like to reask the question?

MS. SIEG: I will.

BY MS. SIEG:

Q. Do you agree or disagree with the assertions that Dr. Warnick did nothing but try to delay this bankruptcy case?

A. I absolutely disagree. That assertion is patently false.

THE COURT: Okay, and I would be shocked if you had said anything differently.

All right.

Q. Now, Mr. Hayes, in prior engagements, not for Dr. Warnick, you've had experience defending other claims made against directors and officers, have you not?

A. Yes, I have. Among the cases where we've defended

directors and officers is a case called Physiotherapy Associates, a case called BearingPoint, another matter in Texas where the suit is not yet filed. So our firm and myself, in particular, have significant experience defending directors and officers.

Q. And based on that experience, how much do you expect it would cost for an individual director to defend -- in terms of attorneys' fees, how much would it cost for an individual director to defend against D&O claims in the amount of 600 million dollars, as have been asserted here?

A. Based --

MR. KANOWITZ: Objection, Your Honor. There's no basis for him to opine. D&O claims is just amorphous. It could be anything.

THE COURT: Well --

MS. SIEG: I can --

THE COURT: -- I want a --

MS. SIEG: -- reask the question.

THE COURT: -- I want a better foundation raised than that. I want to know why the dollar amount of a D&O claim should have any bearing on what the fees should be to defend the claim. I mean, wouldn't the nature of the claim be more relevant to this?

MS. SIEG: Your Honor, I think it's just a fact that a 10,000 dollar case is --

THE COURT: No, I want you to --
MS. SIEG: -- defended --
THE COURT: That's my ruling.
MS. SIEG: Well --
THE COURT: I want you to lay the foundation, because, otherwise, I'm not going to allow the answer to that question, because it seemed to be that it had to do with why the amount of the claim had to do something -- something to do with the fees.
Q. So Mr. Hayes, in your experience as a lawyer, has it been -- has it been more expensive for a defendant to defend a claim in the amount of 600 million than it would be, for example, a claim in the amount of 1 million dollars?
A. I would expect the larger claim to result in more expensive litigation.
Q. And in this case, given that there has been a 600 million-dollar demand by the committee, how much do you think it would cost per director to defend that kind of cause of action?
A. In my experience, at a minimum, inclusive of legal fees and expert expenses, it would be no less than two and a half million dollars per director.
MS. SIEG: Thank you, Mr. Hayes. That's all I have for this witness, Your Honor.
THE COURT: Any cross-examination for this witness?

MR. KANOWITZ: Yes, Your Honor, but there are two requests. First, silence is not acquiescence. Ms. Speckhart was not here for the entire service of this case, and what Mr. Hayes testified to was before her time frame. It's not within -- it's not without my contract. I know fully how I could go on. We're probably days of cross-examining, but I'm not going to do that.

So I ask you just again in connection with the ruling as to whether it's relevant to the issue of the cap and go no further or be stricken entirely. And if you're not going to strike it entirely, if you're going to relate it just to the cap, so be it. But silence is not acquiescence, because I'm not going to waste this Court's time or anybody else's time going into past history.

THE COURT: Okay. Well, for purposes of today's hearing, it's for purposes of the cap. I'm not going to strike the testimony. I'll allow him to put on -- Mr. Warnick put on his evidence with regard to raising the cap. That's what it's for.

MR. KANOWITZ: And no other purpose?

THE COURT: That's exactly right.

MR. KANOWITZ: So when he comes --

THE COURT: Because otherwise, there's other parties --

MS. SIEG: You --

THE COURT: -- that haven't been --
MR. KANOWITZ: So when he comes and tries to make a substantial contribution motion -- I just want to be on the record --
MS. SIEG: No.
THE COURT: Oh, no, no, no, no. This has nothing to do with a substantial contribution motion. I'm not --
MR. KANOWITZ: Okay.
THE COURT: -- going to get sandbagged with that.
MR. KANOWITZ: Okay, that's --
THE COURT: You understand that, too, right?
MS. SIEG: I do understand, and I understand that ruling about evidentiary issues in a proceeding that's not before Your Honor today is perhaps not as far as we need to go. I think the testimony came in today for purposes of the motion that's at issue. The --
THE COURT: All right.
MS. SIEG: -- consequences of it can be determined later.
THE COURT: Yeah, well, I'm considering it only for purposes of the motion that's before me.
MS. SIEG: Thank you, Your Honor.
THE COURT: Okay.
MR. KANOWITZ: Then, I don't need to destroy the testimony that was self-serving. I'll let Ms. Speckhart deal

with the fees that are at issue to raise the cap.

THE COURT: Okay. And what we're going to do then, before we do the cross-examination, we're going to take just a five-minute recess. And then, we'll come back and we'll do that.

MR. KANOWITZ: Thank you.

THE COURT OFFICER: All rise.

(Recess from 1:01 p.m. until 1:09 p.m.)

THE COURT OFFICER: All rise. The Court is now in session.

Please be seated.

THE COURT: Ms. Speckhart.

MS. SPECKHART: May I proceed, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MS. SPECKHART:

Q. Good afternoon, Mr. Hayes.

A. Good afternoon.

Q. How many McGuireWoods lawyers are here today?

A. I'm sorry, you need to --

Q. How many McGuireWoods lawyers do you have here today with you?

A. With me, there's one.

Q. Is Mr. Hosmer on the phone?

A. It looks like he's listen only. I'm sure he's --

Q. How many --
A. -- I'm sure he's multitasking.
Q. How many paralegals do you have?
A. How many paralegals does the law firm have?
Q. With you here today?
A. One.
Q. What is the hourly rate that you're incurring by having one paralegal, two lawyers present, and one on the phone?
A. I don't know.
Q. Did you inform Mr. Warnick (sic) that you'd be bringing your entire staff with you today?
MS. SIEG: Objection, Your Honor. That calls for attorney-client privileged information. She asked what Mr. Hayes told Dr. Warnick in preparation for this hearing.
THE COURT: I'll sustain the objection.
Q. How much bankruptcy experience do you have, Mr. Hayes?
A. Since 1992, so twenty-four years.
Q. And you're lead counsel to Mr. Warnick in this matter?
A. Yes.
Q. And you believe that you're well equipped to handle Warnick's issues in this case?
A. I think I'm a qualified bankruptcy attorney.
Q. How many billers did you have on this file?
A. I don't know.
Q. Do your bills not reflect you had fourteen lawyers

billing on this file?
A. I don't know whether they do or not. If you want to show me a document, I can read it for you.
Q. Okay. You mentioned some work that was done by an attorney named Shawn Fox?
A. I did.
Q. Where is Shawn Fox located?
A. He is in our New York office.
Q. And what is his billing rate?
A. I don't know. Call him.
Q. Isn't it true that Shawn Fox bills at $697.50 an hour?
A. I --
MS. SIEG: Objection, Your Honor. The invoices that Dr. Warnick submitted speak for themselves. If she'd like to ask the witness what they reflect about Mr. Fox's hourly rate, she can do so.
THE COURT: Overruled. He can answer the question if he knows the answer. If he doesn't know the answer, then he's been perfectly capable of saying I don't know.
A. I don't know what Shawn's rate is, but I'm confident his rate is lower than many of the other attorneys that are submitting claims against the insurance policy.
Q. Does Mr. Fox's rate reflect a New York rate or a Richmond rate?
A. Well, seeing as how I don't know what his rate is, I

don't think I can answer the question.
Q. Did Mr. Fox make any discounts for this case in respect to the Richmond jurisdiction as opposed to the New York jurisdiction?
MS. SIEG: Objection, Your Honor. Whether Mr. Fox's rate was discounted for Dr. Warnick is a matter of attorney privilege. His rate is not at issue before the Court, and whatever kind of discount he got is privileged information.
THE COURT: Overruled. I think he can answer the question if he knows the answer. I don't think he's going to be able to answer it, but --
A. Well, the -- Ms. Speckhart, we're not submitting to the Court for approval of payment of fees from the bankruptcy estate or from the liquidating trust. We're not a court approved professional. The rate that Mr. Fox is charging is the rate that's been approved by AIG.
Q. But you're submitting request for payment for all of these rates pursuant to a policy that's property of the estate; is that correct?
A. No, the policy is not property of the estate. Some portion of the proceeds may be.
Q. You mentioned that you are approved panel counsel for AIG; is that right?
A. McGuireWoods is, yes.
Q. Okay. And have you submitted these invoices to AIG?

A. As you know, we submitted them to AIG on May 26th.
Q. And have they given you a response or approval of payment?
MS. SIEG: Objection, Your Honor. Communications between AIG and Dr. Warnick's counsel are privileged.
THE COURT: Between the insurer --
MS. SIEG: Between the insurer and McGuireWoods are privileged. That's why --
THE COURT: On matters of what they're going to pay on a bill?
MS. SIEG: Yes, Your Honor. Discussions between AIG and his attorneys --
THE COURT: I'm going to overrule that, because I'm going to want to know what's being paid on the bills.
MS. SIEG: Your Honor, there is a notice provision in the protocol order that requires the final amount approved and paid to be provided to the notice parties. The intervening discussions between AIG and Dr. Warnick's counsel are privileged.
THE COURT: The question was whether or not it'd been approved.
MS. SIEG: Well, excuse me, I must have misheard the question.
THE COURT: Okay.
MS. SIEG: But I do object to the extent it calls for

a content of any conversation between Mr. Hayes and AIG.

THE COURT: Okay. If that question gets answered, then you --

MS. SIEG: Thank you.

THE COURT: -- get up and --

BY MS. SPECKHART:

Q. Has AIG approved payment on these invoices?

A. Our May 26th fee submission to AIG is under review with AIG.

Q. Is it possible that they would deny some of it?

MS. SIEG: Objection, Your Honor. That calls for speculation.

THE COURT: Sus --

MS. SPECKHART: It goes directly to the cap.

THE COURT: Well, now, I -- it calls for speculation. It's -- anything is possible.

Q. Has AIG, in the past, denied some of McGuireWoods' bills?

MS. SIEG: Objection, Your Honor. Prior denials of these are not at issue today. All that's at issue is the motion to increase the cap. We've only made one request. The question is objectionable.

THE COURT: Well, if you've only made the one request, then maybe it's -- I don't understand the objection, to be perfectly honest.

MS. SIEG: It's irrelevant, Your Honor.

MS. SPECKHART: I'll move on, Your Honor.
THE COURT: Okay.
Q. So based on your previous testimony that this invoice is currently under review, you have no idea if the amount of the approved fees is going to exceed the 400,000 dollar cap, do you?
A. I think there's a high likelihood -- well, I know for certain, as I testified to earlier, that our fees in defending the case are going to be substantially in excess of the 400- and the 800,000 dollar cap. If you're asking me, do I think that AIG, in response to our submission for 754,000 dollars, is going to approve an amount less than 400,000, I think that is unlikely.
Q. Okay. What coverage is available under Side A of the policy?
MS. SIEG: Objection, Your Honor. That asks for a legal opinion.
THE COURT: I think that he's perfectly capable of answering the question. You put the policy into evidence.
MS. SPECKHART: In evidence.
A. Can I look at the policy?
Q. Yes, please, do.
THE COURT: It was Exhibit 1, if I recall correctly.
THE WITNESS: Thank you.
I don't suppose anyone has the ECF page number for

the coverage section of the D&O policy.

THE COURT: It's on page 1, coverage A, "Individual Insured", and it's the page 24 of 127.

THE WITNESS: Thank you.

THE COURT: Sometimes, I think I'm the only person who's read the policy.

A. Can you repeat the question?

Q. Yes. What coverage is available under Side A of the policy?

A. Coverage A says that the D&O says that, "The D&O coverage section shall pay the loss of an individual insured of the company arising from a claim made against such individual insured for any wrongful act of such individual insured, except when and to the extent the company has indemnified such individual insured."

Q. Okay. Has the company indemnified Mr. Warnick -- Dr. Warnick?

A. The company has not paid indemnification to Dr. Warnick on account of the May 26th fee submission, if that's what you're asking.

Q. Okay. And have you reviewed the definitions present in the policy?

A. I'm generally familiar with the policy.

Q. What is the definition of a "claim" under the policy?

A. Well, it's undisputed among the parties and with the

carrier that the Rule 2004 motion and the subsequent demand letters constituted a claim or claims. The definition of "claim" appears to have three subparts. Do you want me to read it into the record?

A. Actually, I would, if you wouldn't mind.

Q. Okay. "'Claim' means a written demand for monetary or nonmonetary relief, including any request to toll or waive any statute of limitations, a civil criminal administrative regulatory or arbitration proceeding for monetary or nonmonetary relief which is commenced by service of a complaint or similar pleading, return of an indictment, information, or similar document, in the case of a criminal proceeding, or receipt or filing of a notice of charges, or a civil, criminal, administrative, or regulatory investigation of an individual insured once such individual insured is identified in writing by such investigating authority as a person against whom a proceeding described in definition 2(b)(2) may be commenced, or in the case of an investigation by the SEC or a similar state or foreign government authority, after the service of a subpoena upon such individual insured, or the individual insured is identified in a written Wells or other notice from the SEC, or a similar state or foreign government authority that describes the actual or alleged violations of laws by such individual insured. The term 'claim' shall also include any securities claim and any

derivative demand."
Q. Okay. And I think that your prior comment indicated that the demand letter that Mr. Kanowitz transmitted in October of 2015, as well as the 2004 request, were agreed to constitute claims under the policy?
MS. SIEG: Objection. That misstates his prior testimony.
Q. I'm sorry; would you repeat that so I understand it?
A. It's my understanding that the 2004 motion and the two demand letters are conceded, by the carrier, to constitute a claim.
Q. Okay. Is that because they were written demands for payment?
A. Well, I would expect that that's one of the reasons that the two letters constitute claims.
Q. And when were you engaged by Dr. Warnick?
A. We were engaged by Dr. Warnick to assist him in the bankruptcy in late September.
Q. Okay. I'm going to direct your attention to the pink pages with your bills.
MR. HAYES: Tab 5?
MS. SPECKHART: Yes, Mr. Hayes.
Q. The first entry appears on September 30, 2015, does it not?
A. Sorry; I've got -- got to find page 1. There's an entry

on September 30.
Q. Okay. And what claim does this pertain to?
A. Well, I believe on September 29 the 2004 motion was filed, or on approximately September 29, and the 2004 motion constitutes either a claim or a notice of circumstance under the policy.
Q. Okay. And what does analysis of issues regarding closing of True Health sale have to do with the 2004 motion?
MS. SIEG: Objection, Your Honor. To the extent this question calls for attorney work product or if the answer would reveal the content of attorney-client communications, I would instruct the witness not to answer.
MS. SPECKHART: It's their invoices, Your Honor.
THE COURT: I really don't want to get into attorney-client or work product. I mean, the invoices speak for themselves, to a certain extent. I'm going to sustain the objection.
MS. SPECKHART: Thank you, Your Honor.
Q. Would you please turn to the following page, beginning with the third entry for October 2nd, 2015?
A. The entry by our -- our paralegal, Karen Cain?
Q. Yes, just the first part.
A. Well, it says, "research pleadings and articles impacting client, .3 hours, and prepare omnibus hearing binder, .4 hours".

Q. Okay. Can you then read Ms. Cain's entry for the 6th of October?
A. "Research pleadings and articles impacting client, .1".
Q. Would you also read her entry for the 7th of October?
A. It says the same thing, .1.
Q. Would you read her entry for the 8th of October?
A. Well, I think the document speaks for itself, but at our firm, in order to be efficient --
THE COURT: I think the question was whether you would read what it said on the 8th of October.
THE WITNESS: Yeah, I can read it.
A. And what we do in our firm, to be efficient, rather than have attorneys reading pleadings, as they come in, we have a paralegal, at a lower rate, review them and let the attorneys know of matters that may impact the client.
Q. Do you happen to know how many times this entry appears within these bills?
A. No idea.
Q. Were you aware that this entry appears 136 times in these bills?
A. I'm not aware of that.
Q. How frequently do you communicate with Dr. Warnick?
MS. SIEG: Objection, Your Honor. The frequency with which --
THE COURT: Overruled. That's not asking for any

attorney-client privilege.

MS. SIEG: Your Honor, but the answer to that question could reveal work product and could lead to the --

THE COURT: I said it was overruled.

MS. SIEG: Thank you, Your Honor.

A. The frequency of my communication with Dr. Warnick varies depending on what we're working on at the time. The frequency of my communication with Dr. Warnick during the plan review process, which commenced November 6th, when we first received a draft from debtors' counsel, was fairly regular because Dr. Warnick and his counsel were very focused on the plan being a document that would maximize and expedite recoveries for all creditors.

Q. How many times did you talk to Dr. Warnick in October of 2015?

MS. SIEG: Objection, Your Honor. That calls for attorney work product. To the extent it's not reflected in the invoices or to the extent it is reflected in the invoices, they speak for themselves. Beyond that, I think this question calls for attorney work product and they reveal the content of attorney-client communication.

THE COURT: Overruled again.

A. I don't remember.

Q. How about in November?

A. If you're asking me for a number, I don't remember.

Q. If I asked you the same question for all the other months, would you also not remember?
A. If you ask me how often I speak to my wife, I wouldn't remember; that's why we record these things in our bills.
Q. How frequently did you invoice Dr. Warnick?
A. Our invoices go to the carrier, subsequent to our approval as panel counsel, effective as of September 29th.
Q. You never sent your bills to Dr. Warnick, did you?
MS. SIEG: Objection, Your Honor. The bills are communication to the client. I would object to the extent that calls for attorney-client communications.
THE COURT: Overruled. The question is whether or not you've ever sent a bill to Dr. Warnick.
A. I would think that we have, at least once, sent a bill to Dr. Warnick.
Q. You mention in your pleadings that Dr. Warnick is not a wealthy man. Is that correct?
MS. SIEG: Objection, Your Honor. That goes beyond the scope of his direct.
THE COURT: I'm going to allow the question. We can get through this a lot fast, Ms. Sieg, if we could just let the examination go on. If you have real objections, though, I do want to hear them.
A. What's the question?
Q. What was my question? You mentioned in your pleadings

that Dr. Warnick is not a wealthy man, isn't that right?
A. I think that may be -- that may have been stated in pleadings relating to other matters, other than the matters before the Court today. And I think I've stated that previously from the podium.
Q. Does Dr. Warnick have the financial wherewithal to cover your bills in the event that the insurance claim is denied?
MS. SIEG: Objection, Your Honor, on a number of bases. That certainly calls for the content of attorney-client communications, and it's not relevant to the matter before the Court today.
THE COURT: How is it relevant?
MS. SPECKHART: Your Honor, it goes to bias. This policy is their only chance of recovering any of their fees, if their pleadings are to be believed about Dr. Warnick's financial circumstances.
THE COURT: I'm going to sustain the objection. I don't think that that's really relevant.
Q. Have you informed Dr. Warnick about what the total amount outstanding to your firm is on --
MS. SIEG: Objection, Your Honor. Again, that directly calls for an attorney-client communication regarding what Mr. Hayes informed Dr. Warnick.
MS. SPECKHART: I believe, Your Honor --
THE COURT: In order to be an attorney-client

communication, it has to be more than just communication between an attorney and a client. It also has to be a communication that was intended to be confidential and kept in confidence. I mean, how can that meet the --

MS. SIEG: To the --

THE COURT: -- second standard?

MS. SIEG: To the extent his answer would be required to reveal the content of an attorney-client privileged communication, then I object. If he can answer it without revealing the content of such a privileged communication, then he can answer it.

THE COURT: And you know, I am confident that Mr. Hayes could have told me that himself if he needed to. But I'm going to allow the question, and obviously I don't want you to reveal attorney-client communications.

A. Can you repeat the question?

Q. Does Dr. Warnick have any idea that 747,000 dollars has been incurred on his behalf in this case?

A. Well, that's a --

Q. Have you invoiced him for that amount?

A. One question at a time. Which question do you want me to answer?

Q. Have you invoiced Dr. Warnick for $747,448.70?

A. As I testified to earlier, subsequent to our approval as panel counsel, effective as of September 29, invoices have

gone to the carrier. Mr. -- Dr. Warnick is well aware that we've been active on his behalf. I don't know whether Dr. Warnick knows the precise amount of our balance as of today.

Q. Okay. Can you explain to me the reason why your firm would deploy fourteen billers on this file?

MS. SIEG: Objection, Your Honor. That calls for attorney work product and it could reveal attorney-client privileged communications.

THE COURT: Overruled.

MS. SIEG: The reasons why Mr. Hayes might staff it --

THE COURT: Still overruled.

A. Well, there -- there -- I don't know whether fourteen is the right number or not, but there have been periods --

Q. You're more than welcome to count; they're listed on page 1.

MS. SIEG: Your Honor, I would ask that counsel please allow the witness to answer the question.

THE COURT: I'm going to give him an opportunity to answer the question, I promise you.

Please continue, Mr. Hayes.

A. I'm going to answer a couple -- couple of ways. Number one, there have been periods where I have been unavailable or travelling or working on other matters, and colleagues like Doug Foley or Ms. Sieg or other people have filled in.

But the other point I would make, in terms of the volume of work, generally, is that, as I mentioned earlier, there were periods of time, on the debtors' side of the case, where, in my judgment, the board, and only the board, were resisting the changes to the plan suggested by the committee because we thought they were not in the interest of creditors. And because of the dynamic where a CRO was effectively chairman of the board because he could not be relieved by the board, but that CRO had concluded quickly where his bread would be buttered, and was no longer, sort of, participating in a plan development process independent of the committee, the board and their counsel was active in reviewing the plan and trying to improve the plan in the interest of creditors.

Q. I'm sorry; I thought the question that I asked was explain the reason why you needed fourteen billers on this file.

A. I was explaining the -- the work that we did.

Q. Okay.

MS. SPECKHART: You know, I had intended to take the witness through all of these invoices, to have him explain to me why each entry would relate to a claim as defined by the policy.

THE COURT: I don't think that would be particularly helpful.

MS. SPECKHART: No further questions.

THE COURT: All right.

MS. SPECKHART: Thank you, Mr. Hayes.

THE COURT: Does any other party wish to cross-examine this witness?

All right. May this witness step down?

MS. SIEG: No further questions for this witness, Your Honor.

THE COURT: All right. Mr. Hayes, thank you for your testimony, sir.

THE WITNESS: Thank you.

THE COURT: All right. Do you have any other evidence you wish to offer, Ms. Sieg?

MS. SIEG: No, Your Honor.

THE COURT: All right. Ms. Speckhart, do you wish to offer any evidence?

MS. SPECKHART: No, Your Honor.

THE COURT: Okay. I will hear your arguments.

MR. HAYES: Your Honor, Dion Hayes, McGuireWoods, for Dr. Warnick.

Our argument is very simple. For reasons that were discussed in the testimony, we were active, on behalf of Dr. Warnick, in the pre-confirmation period of this case. And it's our view that that work was in defense of the claim, and under the policy, we're permitted to be paid for investigation and defense of the claim. And it's undisputed that the 2004

motion, on September 29, was the first assertion of a claim, with the two demand letters to follow.

We are not, in our fee submission to the carrier, seeking any fees before the filing of that 2004 motion, even though there was work done for Dr. Warnick, which we think falls within corporate indemnification, that was done for him in his direct capacity. There's unrefuted evidence in the record that the cost of defending this 600-million-dollar demand will be no less than 2-and-a-half million dollars for legal and expert costs.

It's going to be an expert case with issues of solvency, reliance on legal advice is going to be a significant part of the case from the directors' and officers' perspective. And the fact that there is only twenty million in coverage, between the two policies, for the 2012/2013 year, is just an unhappy circumstance where the liquidating trustee apparently wants to sue ten or more former directors and officers.

But we think that Virginia law is clear that bankruptcy cannot nullify the rights that an individual insured has under a director and officer policy. And while a bankruptcy court can impose interim soft caps on the process, if the carrier agrees that a fee submission is within the scope of coverage under the policy, the individual insured is entitled to receive payment.

And we did a lot of work that was not recorded within that 754,000 dollars, worked on by myself, Ms. Cain, my partner, John Barr, on insurance issues. And we have tried to be economic in what we've submitted to the carrier. And unfortunately, because of the dynamic that existed pre-confirmation, between the debtor and the committee, we had to do work than you might otherwise do representing a director in a Chapter 11 case.

So the issue before the Court is whether to increase the soft interim cap for Dr. Warnick from four hundred to one-and-a-half million. There was a response filed by Mr. Ryan's counsel that just says "me too"; if you're going to increase it for Dr. Warnick, please do it for Mr. Ryan. We don't have any issue with Mr. Ryan's cap being increased, but if that happens today, I think Mr. Bass needs to buy me a beer after the hearing. But we think that the unrefuted evidence would support an increase in the cap for Dr. Warnick to one-and-a-half million. And I think there will ultimately have to further increases as this litigation proceeds. So Your Honor, that's the relief that we're seeking.

THE COURT: All right. I have two questions for you before you cede the podium. First is why are the fee submissions that you have, on behalf of Dr. Warnick, so much out of line with the fee submissions of all of the other directors' counsel?

MR. HAYES: Because -- and by directors' counsel I assume you're asking about the current directors' counsel. The former directors were not involved in the development of the plan and things like that. Because, as I testified to, among the counsel for the directors, McGuireWoods took the lead in reviewing the plan, the trust agreement, the disclosure statement, which we didn't discuss, and also in reviewing various pleadings that were submitted, and we did more work than those other law firms.

Now, it was exclusively as Dr. Warnick's attorney, but I think my colleagues -- some of them are here that represented other sitting directors -- would say that they benefitted -- the process benefitted from that work, and that they were on board with the various comments that we were submitting to debtors' counsel. So we just happened to be qualified and situated in a way that we ended up doing more work than they did.

THE COURT: All right. My second question is: why should I consider this request on a one-off basis? Why, if I was going to consider this, wouldn't I take up amending the protocol order, not only on behalf of your client but on behalf of all of the other directors as well, and the debtor, or now the liquidating trust, so that we have some balance as we go through the process? Because, as you point out, there's a finite resource, and otherwise we'd be encouraging, sort of,

a race to the courthouse kind of thing, although we don't have a courthouse here, but you understand what I'm saying. And that you have some people, such as just -- not to pick on him but Mr. Broscious, who's at the low end of all of the scale, talking about how he's tried to not do certain things, and others, so that we can maintain some sort of equity as we go through the process.

MR. HAYES: Your Honor, we don't have any opposition to the capping increase for all the directors and officers. My honest opinion on that is that what makes more sense is what Judge Glenn did in MF Global, initially, before he eliminated any soft cap on directors' and officers' claims, and that is to have an aggregate cap. If we know that the primary policy is ten million, put an initial aggregate cap for directors and officers of some number, five, seven, whatever the number is, and some directors and officers will incur more fees earlier than others, and the carrier is going to evaluate everyone's fee submission as the policy permits it to do.

So my -- you know, this may not be a uniform view among all of the directors and officers but my view is that there should be an aggregate interim soft cap subject to modification for the entire group.

Alternatively, if the Court would prefer to look at adjusting the per capita cap and retaining a per capita cap,

we don't have any opposition to that, in principle, but I would say that, to the extent it delays the increase in our cap and permits us to get paid more slowly, we're being penalized for having made what we think were substantial contributions to the process. And we were doing that because we knew we were going to be a defendant in subsequent litigation, we wanted creditors to get paid as much as they could and as quickly as they could from other sources because that, coincidentally, would benefit them but also would benefit Dr. Warnick. So our preference would be that we have an aggregate, that we do away with the per capita cap and have an aggregate soft cap for the directors and officers as a group.

THE COURT: All right. Thank you very much.

MR. HAYES: Thank you.

MS. SPECKHART: Your Honor, I think it's unfortunate that you just had to endure what we tried to save you from this morning. I also think it's unfortunate that you have to rule on this again when this request has been made to you now twice, once in Dr. Warnick's pleading, in advance of the December 10th hearing, and once at the hearing itself. Both times you denied Dr. Warnick's request to enlarge the cap to 1.5 million dollars, and nothing has changed since then.

You ruled two things in your protocol order. Number one, the cap is at 400,000 dollars, subject to a

self-executing enlargement to 800,000 dollars, in the event that a complaint is filed. Nothing has changed since them. There has been no complaint that would constitute an additional claim under the policy warranting an enlargement at all, let alone one of this size.

You heard Mr. Hayes testify that AIG has not made any decision as to whether to allow these bills; they are under the current review of the carrier. I would submit to you that unless and until AIG comes back with a decision telling Dr. Warnick that his fees are allowed up to the cap, this motion is absolutely premature and it threatens prejudice to all of the other D&Os, including the estate, based on the order of payments that's in the policy.

Mr. Hayes' request that we impose an aggregate cap on D&Os is equally without merit because there already is one in the policy and it's set at four million dollars, which sheds even more illumination on why this request, coming from Dr. Warnick, on a one-off basis, is so prejudicial. Why should Dr. Warnick be treated differently from all the other D&Os, with an extreme advantage, when it was his conduct that Your Honor found in this case to be vexatious to the process, his arguments specious in nature, and frivolous at that. We would submit that unless and until someone at the carrier comes back with a positive decision on all of these bills up to the existing cap, Your Honor's order denying all three requests

for enlargement should similarly be denied.

THE COURT: All right. Thank you. All right. The Court has then before it the motion of Dr. Warnick to expand the amount of the cap under the protocol order that the Court has previously entered. The Court is going to take that matter under advisement.

Now, I say that; here's what I want to have happen. I'm going to, Mr. Hayes, on a one-off basis, if I'm forced to do it, deny your motion. I'm not going to do that today. What I would like to do is have a proposal from everybody where everyone is included, that would come, including -- now, that is the liquidating trust, with a proposal as far as how we're going to go forward as soon as we're getting into the litigation phase of this. And when I say this, I'm also looking at the other side of the table saying I don't want people's hands artificially tied. It's not fair to be suing people without being given the latitude of people being able to defend themselves.

There's also, then, looking back at this side of the table, a lot of fluff in here. Now, you know what I've said about I'm going to let the insurance carrier pay it. If I was making the decision, it probably would be a lot different, but I'm not. I'm going to let the insurance carrier make the call. I've said that; I'm not going back on that ruling because I do believe that that's the way that this should

work.

But I do want there to be some sort of an update, if you will, to our protocol order, where everybody gets to play, everybody knows what the rules are going to be, everybody knows the parameters within which they have in order to be able to mount the defenses that are going to need to be mounted. So that's what I want everybody to carry away from this hearing we've just completed, almost.

Any questions?

UNIDENTIFIED SPEAKER: No, Your Honor, and we'll take the laboring oar to circulate a proposal and all the D&Os and their counsel could respond. It's probably the most efficient way of doing it.

THE COURT: Thank you very much.

MR. HAYES: I have one question. So the motion is under advisement. It's not denied. And --

THE COURT: I don't want you to force me to deny the motion. I would rather have you go and talk with everybody and come up with something because I would like to see the cap raised, okay, because it is going to be necessary, whether it's at the point where you testified, I don't know, but I do want to see something that makes sense for everybody. That's what I'm really concerned about. And when I say "everybody", I'm also talking about the liquidating trust.

MR. HAYES: I understand. Thank you, Your Honor.

That's helpful. And just for the record to be clear, because the carrier reads transcripts, even if its counsel doesn't come to hearing or file proofs of claim, but we have a 754-million-dollar -- I'm sorry; thousand dollar submission. Although I did --

THE COURT: I was going to say, we just --

MR. HAYES: I did note in one of the pleadings that someone had proposed a 400-million-dollar per capita cap which made me wonder why we were fighting, but -- and others have a pending fee request in excess of 400,000, so I'm sure they have the same question. While the carrier is reviewing fee requests that exceed the existing interim cap, the carrier should understand that the Court will consider increasing the cap, to the extent it becomes necessary, because the carrier happens to approve fees that are in excess of the existing cap.

THE COURT: Exactly.

MR. HAYES: Okay.

THE COURT: But I want to -- what I would like to do is to set a new level so that we don't have to worry about it, or we can do a new interim level, or whatever everybody collectively comes up with as being a solution that works for everybody.

MR. HAYES: So the carrier shouldn't -- okay, that's all, Your Honor. Thank you.

THE COURT: Okay? All right.

Now, I think -- we still have a couple of other matters we need to talk about.

MS. SPECKHART: Yes. I will move quickly, Your Honor. This takes us to item number 8 on our agenda; that is the continued pre-trial conference in the True Health adversary proceeding. We would like, with Your Honor's permission, to advance that to the July 21st omnibus hearing.

THE COURT: We can.

MS. SPECKHART: Thank you, Your Honor.

Also noting for the record, the motion for summary judgment that we argued last week has been also, similarly, advanced to July 21st at 10 a.m. We reflected that on the agenda for your benefit.

The third-party subpoena motion, as to the United States Department of Justice only, has been advanced to the July 21st, 2016 date. We're still working on some language with Ms. Schmergel, but we hope to wrap that up in advance of the hearing date.

The last matter, and it's a matter of housekeeping, I believe it's probably time to secure some new omnibus hearing dates. Would Your Honor like me to communicate directly with your deputy regarding that, or should we set them now?

THE COURT: No, I'd like you to communicate with my courtroom deputy on that, and she's perfectly capable of

handling that. That's probably above my pay grade.

Now, one thing, though, I want to point out, as far as housekeeping is concerned, with that July 21 omnibus hearing: I would like to change the time of that hearing to 9 o'clock instead of 10 o'clock because I need to have a hard stop at 11 o'clock. So we should be guided accordingly. If there's going to be a substantive motion, or whatever needs to come on, bring it on early and try to present it in an expeditious -- I know everybody tries to do that -- manner as we can. But we're not going to have all day to hear cases that day just because I've got some scheduling conflicts. So we'll start at 9, and I can definitely give you two hours that day.

MS. SPECKHART: Your Honor, we will amend the notice of hearing --

THE COURT: Thank you.

MS. SPECKHART: -- to reflect the time change.

It did occur to me, in respect of Your Honor's ruling with respect to the D&O insurance, we do have a pending outstanding request that I mentioned, on behalf of Satya, whose last name I have difficulty pronouncing. How would Your Honor like us to handle that? Our objection period is today. Does Your Honor's prior ruling apply, prospectively, to that request as well?

THE COURT: Yes, it's going to apply to that one as

well. I'm not going to have a different ruling for that director, and I don't know what the amount is, or do I know? Is it above or below the --

MS. SPECKHART: It's about 500,000; it's above the cap.

THE COURT: So it's above the cap. So I mean, it would be exactly the same. I would like that director to be included in the protocol, as well as any other directors that may not be presented here today, who are going to be targets of any litigation.

MS. SPECKHART: Okay, Your Honor. We'll note that for the record. We do appreciate your time today. Thank you very much.

THE COURT: Okay. Is there any other business we need to take up in HDL then?

All right. Thank you all.

MS. SPECKHART: Thank you.

THE COURT: All right.

THE CLERK: All rise. The court is now adjourned.

(Whereupon these proceedings were concluded at 1:50 PM)

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
For Dr. Warnick:					
Dion Hayes	86	129			

EXHIBITS:	DESCRIPTION	I.D.	EVID
Dr. Warnick:			
10-11	Original and second amended plan liquidation		87
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C E R T I F I C A T I O N

I, Aliza Chodoff, the court approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

June 23, 2016

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ALIZA CHODOFF DATE

AAERT Certified Electronic Transcriber CET**D-634

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