

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

LYDIA CLADEK, INC.,

CASE NO: 10-02805-3G1

Debtor.

TRANSCRIPT OF PROCEEDINGS

Hearings re: Motions and Application before the Honorable Paul M. Glenn, Chief U.S. Bankruptcy Judge, commencing at 11:00 a.m., on November 10, 2010, at the United States Courthouse, Room 4A, 300 North Hogan Street, Jacksonville, Florida, as reported by Elizabeth M. Masters, RPR, and a Notary Public in and for the State of Florida at Large.

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Attorney for Sanibel Captiva Community Bank

MARK HILDRETH, ESQUIRE (by conference telephone)

Attorney for SunTrust Bank

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P R O C E E D I N G S

November 10, 2010

11:00 a.m.

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THE COURT: Court continues in session for November 10. And on the calendar at this time this morning is the case of Lydia Cladek, a Chapter 11 case, set on several matters: Motion for Approval of Notice Procedures, Application to Employ Buttner Hammock & Company as accountants for the Creditors Committee, a couple of stay relief motions, and the Creditors Committee's Motion to Combine Disclosure Statement and Plan for Confirmation Hearing.

The Court will take appearances. There are appearances in the courtroom and by conference telephone. The Court will first take appearances of those in the courtroom.

MR. BROWN: Thank you, Your Honor. May it please the Court, Jay Brown appearing on behalf of the Chapter 11 trustee, Mr. Michael Phelan.

THE COURT: Mr. Brown.

MR. KANE: Good morning, Your Honor.

THE COURT: Other appearances?

MR. KANE: Jon Kane on behalf of The Official Committee of Unsecured Creditors.

THE COURT: Mr. Kane, good morning.

1 Other appearances in the courtroom?

2 MS. ESCAMILLA: Good morning, Your Honor,
3 Elena Escamilla on behalf of the United States
4 Trustee.

5 THE COURT: Ms. Escamilla.

6 MR. BROWN: Your Honor, I neglected to present
7 Steve Wirth with my firm, Akerman Senterfitt, who
8 is also present, as well as Mr. Rob Wilcox, who
9 serves as conflict counsel on the case.

10 THE COURT: Very good. Mr. Wirth, Mr. Wilcox,
11 good morning.

12 MR. WIRTH: Good morning, Your Honor.

13 MR. KANE: And if I may, Your Honor, I also
14 have Mr. Edward Buttner here. He may be required
15 to testify if Your Honor would entertain testimony
16 with respect to the need to have an expedited
17 hearing on confirmation.

18 THE COURT: All right. Very good. Mr.
19 Buttner, good morning.

20 MR. BUTTNER: Good morning.

21 THE COURT: Now, appearances by conference
22 telephone.

23 MR. MARKHAM: Good morning, Your Honor,
24 Michael Markham for Sanibel Captiva Community Bank.

25 THE COURT: Mr. Markham, good morning.

1 Other appearances by conference telephone?

2 Mr. Hildreth?

3 MR. HILDRETH: Good morning, Your Honor, Mark
4 Hildreth on behalf of SunTrust Bank.

5 THE COURT: And Mr. Hildreth, good morning.
6 Mr. Brown.

7 MR. BROWN: Your Honor, I think everything
8 except for the motion for the combined hearing is
9 either something that should be set for a final
10 hearing or approved. And I'll just start in order
11 from the Court's calendar.

12 The first item, which is the Committee's
13 Motion for Approval of the Notice Procedures, I
14 believe everybody is okay with the form of order
15 that had been circulated and previously submitted
16 to the Court by Mr. Kane. I won't speak for the
17 United States trustee, but certainly from the
18 Chapter 11 trustee.

19 We worked with Mr. Kane on that and believe
20 that the form of order that he represented that he
21 was submitting was acceptable to us.

22 THE COURT: All right. Mr. Kane.

23 MR. KANE: Your Honor, I do have a proposed
24 form of order on the notice procedures.

25 THE COURT: Very good. Ms. Escamilla.

1 MS. ESCAMILLA: Your Honor, if it's the same
2 one that we looked at before he submitted the
3 order, we have no objection. We've worked out any
4 issues that we had.

5 THE COURT: Okay. And, Mr. Kane, if you would
6 bring forward your form of order.

7 MR. KANE: Thank you, Your Honor.

8 THE COURT: I will tell you that a form of
9 order made it to me with the representation that it
10 was agreed by all the interested parties. It made
11 it to me on November 2nd, on Tuesday, November 2nd.

12 It had in the notice to all creditors the
13 information that the bar date was November 1st, so
14 I didn't think it was appropriate to enter it at
15 that time. And that is really the reason that I
16 held it up.

17 MR. KANE: And this proposed order has the
18 same language in it. We can simply strike through
19 that paragraph, or I can resubmit, deleting the
20 paragraph with respect to the claims bar date.

21 THE COURT: Right. And had this order gone
22 out a month ago, it would have been good to have
23 the bar date in it. But I didn't feel comfortable,
24 on November 2nd, signing an order that informed of
25 a bar date of November 1st.

1 MR. KANE: I would be happy to form it and
2 resubmit it.

3 THE COURT: Okay, if you would do that. Then
4 we'll enter it right away.

5 MR. BROWN: Your Honor, the second matter
6 before the Court is the application to employ
7 Buttner Hammock for the committee. The committee
8 had filed yesterday an amended application that
9 addressed concerns that the Chapter 11 trustee had
10 had. And at this point, the Chapter 11 trustee
11 doesn't oppose that matter. I'm not sure about the
12 U.S. trustee.

13 THE COURT: All right.

14 MR. KANE: Your Honor, in going back to the
15 prior order, if I may. It's the notice that has
16 the language regarding the claims bar date. So if
17 Your Honor could simply -- it's under the proofs of
18 claim paragraph.

19 THE COURT: Yes.

20 MR. KANE: If we can just simply line that
21 out, the order, I believe, can be entered and then
22 we can modify Exhibit A so that we don't have to
23 resubmit.

24 THE COURT: I'm sorry, which paragraph in the
25 order?

1 MR. KANE: It's actually in Exhibit A to the
2 order.

3 THE COURT: Right, it's in Exhibit A.

4 MR. KANE: And so it's actually on the third
5 page of Exhibit A.

6 THE COURT: I see it on Exhibit A, I see it on
7 Exhibit A.

8 MR. KANE: And if we simply lined out the
9 paragraph that referenced proofs of claim.

10 THE COURT: Okay. Then you'll modify that
11 before you send the order.

12 MR. KANE: Yes, Your Honor.

13 THE COURT: You won't send the order around
14 with an X over the paragraph.

15 MR. KANE: Correct.

16 THE COURT: Okay. All right. The order is
17 signed.

18 MR. KANE: Thank you, Your Honor.

19 The second item on the agenda was the
20 application, or the amended application, to employ
21 Buttner Hammock & Company as accountants for the
22 committee. And I believe everybody has agreed to
23 the proposed form of order.

24 THE COURT: Mr. Brown?

25 MR. BROWN: Correct, Your Honor.

1 THE COURT: Ms. Escamilla?

2 MS. ESCAMILLA: Yes, Your Honor.

3 THE COURT: All right. Would anyone else like
4 to be heard?

5 If you would bring that forward, please.

6 Mr. Brown, you're satisfied with this?

7 MR. BROWN: Yes, Your Honor.

8 THE COURT: All right. The order is signed.

9 MR. KANE: Your Honor, the third item on our
10 agenda is the motion by the committee to have a
11 combined disclosure statement and confirmation
12 hearing.

13 THE COURT: Let me interrupt. Let's deal with
14 the stay relief matters first because of the
15 telephone appearances. I would expect those would
16 go fairly quickly. We can then deal with those and
17 then move to the combined disclosure statement and
18 confirmation hearing.

19 Mr. Brown, is that satisfactory?

20 MR. BROWN: Yes, Your Honor, I believe that's
21 appropriate. Mr. Wilcox is going to handle the
22 preliminary hearing on the SunTrust motion for
23 relief from stay.

24 THE COURT: All right. But first is the
25 SunTrust stay relief motion. Mr. Hildreth, that's

1 your motion?

2 MR. HILDRETH: That is correct, Judge.

3 THE COURT: All right.

4 MR. HILDRETH: Your Honor, here's the
5 situation. My client has a first mortgage on two
6 vacant parcels of real estate down on Captiva
7 Island. They are titled in the name of Captiva
8 Island Vacation Properties, LLC, which is one of
9 the entities that's covered by the Court's
10 injunction that was entered back on, I think,
11 September 7th.

12 We've asked for relief from stay and/or
13 modification of the Court's injunction. I think
14 that there's a case that could be made here that
15 the scope of the injunctive orders and so forth
16 basically effectuate something akin to a
17 substantive consolidation and that the standards
18 applicable for 362(d) stay relief should be applied
19 here.

20 And in this case, Judge, those standards show
21 that there's no equity in this property. It's two
22 vacant pieces of property, not income producing.

23 At the time we filed the motion, we only had
24 an appraisal on one of the two parcels. What we
25 call the Captiva Drive property, we had an

1 appraisal from March of this year at \$752,500. I
2 got a more recent appraisal -- or another appraisal
3 -- I'm sorry -- on the Murmond Drive property at
4 \$590,000.

5 I got those appraisals to Mr. Wilcox at the
6 beginning of the week. I heard back from him, not
7 any different than the written response filed by
8 the trustee, that they just need more time.

9 I'm, frankly, not sure what they need more
10 time to do. They want to have this set for a final
11 evidentiary hearing. I'm not sure what factual
12 issues need to be tried.

13 I don't personally have a problem with them
14 having a couple of more weeks to look at the
15 appraisals and make sure they're comfortable that
16 they're adequate and objective and that sort of
17 thing.

18 But our debt was \$1,606,000 on the petition
19 date. These appraised values combined out at
20 \$1,342,500. So there's not really, I don't think,
21 any argument there's equity. And, of course, I
22 don't know how often the Court is being asked to
23 almost take judicial notice of property values in
24 Southwest Florida, but I don't think that there's
25 much of a case that these are going to be found to

1 be in excess of the debt to my client.

2 So our view is that there's no compelling
3 circumstances to push this out 60 days or more.
4 I'm not sure what the final evidentiary hearing is
5 going to be about. So we would ask the Court to,
6 at the most, give them a couple of more weeks to
7 make a decision and/or, in the alternative, grant
8 partial stay relief so that we can go ahead and get
9 started with our foreclosure action. And if they
10 need a little extra time to sort through what's up
11 here, then maybe that's another option.

12 THE COURT: All right. Thank you, Mr.
13 Hildreth.

14 Mr. Wilcox.

15 MR. WILCOX: Thank you, Your Honor.

16 There are a couple of -- there's a little more
17 to these properties than meets the eye as,
18 obviously, Captiva Island Vacation Properties, LLC
19 is one of the entities that the Court has already
20 determined is an alter ego entity.

21 The trustee is in the process of evaluating a
22 number of properties with Captiva Island and is
23 scheduled to take depositions of the principals, or
24 the principal, of that entity on November 29th, so
25 it certainly is appropriate to allow the trustee to

1 do that.

2 There are also federal forfeiture issues and
3 questions of preferential transfers and other
4 potentially avoidable transfers in association with
5 that property. It may be that the trustee decides
6 that there's nothing here for the estate. But I
7 think he has to have the opportunity, and should
8 have the opportunity, like any party would to have
9 his own appraisal done of the property and
10 determine if the federal government has any
11 interest here, so that's why we're asking for some
12 period of time.

13 Realistically, I think it is likely to be
14 60 days, but it at least has to be after
15 November 29th, and then give the trustee the
16 opportunity to adjust that information and make a
17 response.

18 And we've pledged to SunTrust that as soon as
19 the trustee -- or if the trustee makes the
20 determination that there's nothing of value for the
21 estate, then he will abandon his interest.

22 The other thing is that there's a pending plan
23 of reorganization. How that treats these
24 properties is a little unclear to me at the moment.
25 But there are two prongs to the stay relief. One

1 is that there's no equity; secondly, that it's not
2 necessary to a plan of reorganization. I don't
3 think we know that today.

4 THE COURT: Okay.

5 MR. HILDRETH: Your Honor, it's all well and
6 good, I suppose, that the trustee needs some time.
7 And I understand needing to take the principal's
8 deposition. But these are mortgages, or a
9 mortgage, that goes back to 2003. Now, I realize
10 the allegations that the -- are that the debtor's
11 principal started this scheme, if you will, back in
12 the late '90s. But this particular mortgage goes
13 back to 2003, and I don't see that you've got
14 preferential or fraudulent transfer issues for
15 something that's that old.

16 I don't know what the federal forfeiture
17 issues might be, but I don't see that that's going
18 to impact how this plays out.

19 And so that the dynamics here, the only issue
20 that would seem to be in play is going to be the
21 valuation issue. And that is -- I mean, this is
22 vacant real estate. It's not that hard to get
23 valued. It could be done in a couple of weeks.

24 And whether or not the Captiva Island Vacation
25 Properties principals engaged in some funny

1 business or not doesn't really affect these
2 mortgages given the -- just nothing else besides
3 the age of the mortgages. And this was
4 arm's-length transactions with the bank and the
5 principals.

6 And I understand what Mr. Wilcox is saying
7 from a broad perspective, but I don't see anything
8 specific other than that we just need a lot more
9 time because we think we may have this or we think
10 we may have that. But I think it's all belied by
11 the age of the mortgage, Judge.

12 THE COURT: Okay. Well, let me think out
13 loud. I welcome the suggestions or the comments of
14 both of you.

15 What if we modify the automatic stay to allow
16 the creditor to begin its foreclosure and set an
17 evidentiary hearing on -- but not proceed to sale
18 if you're not going to even proceed to a
19 foreclosure hearing.

20 We'll set an evidentiary hearing on the motion
21 in 45 to 60 days. That will give you time to look
22 at it, it will let Mr. Hildreth get started on his
23 foreclosure. Then if it turns out that the
24 property is appropriate for the administration of
25 the estate, we can do that; otherwise, he can

1 complete his foreclosure.

2 MR. WILCOX: Well, I think, Your Honor -- and
3 let me make one comment. There's no evidence
4 before the Court today.

5 THE COURT: Right.

6 MR. WILCOX: And I think my client is entitled
7 to have evidence presented at some point.

8 THE COURT: Okay. And Mr. Hildreth is
9 entitled to have a stay relief motion acted on in
10 30 days.

11 Okay, go ahead.

12 MR. WILCOX: Thank you, Your Honor. At least,
13 on a preliminary basis, I would agree.

14 And, Your Honor, under the Court's comments,
15 they would be able to file the foreclosure action
16 but not proceed to judgment?

17 THE COURT: Correct.

18 MR. WILCOX: Since there are a number of
19 properties, may I consult briefly with my client's
20 representatives?

21 THE COURT: Yes.

22 MR. WILCOX: They nodded their heads yes, Your
23 Honor.

24 THE COURT: It makes sense, it makes sense.
25 So if it turns out to have value and it turns

1 out to --

2 MR. WILCOX: Well, we're certainly not
3 interested in delaying SunTrust or any other
4 creditor.

5 THE COURT: Right.

6 MR. WILCOX: We've seen the appraisals. We're
7 aware, generally, of the situation. But my client
8 does have duties he needs to fulfill. This will
9 give him the opportunity to do that.

10 THE COURT: Okay. It makes sense to you, Mr.
11 Hildreth?

12 MR. HILDRETH: Your Honor, I think so. My
13 only question of clarification, I've done a number
14 of these, as you have seen, over the years and
15 usually the protocol that I've seen has been that
16 we're allowed to go through the point of getting
17 the final judgment. But the final judgment cannot,
18 in fact, set a sale date. And so I like that one
19 personally because it gives you a defined point to
20 which you can get.

21 Now, I know I will not get to that point
22 within 60 days. But as far as an order along the
23 lines of what you were mentioning, I don't know how
24 far I can go. And so that's my only question about
25 the process here is, you know, how far can I go

1 before we get to an FEH?

2 And certainly it's good to be able to get the
3 case filed, get process served, et cetera, et
4 cetera. But I just want to know what the Court's
5 thoughts are on how far I could go.

6 THE COURT: Mr. Wilcox.

7 MR. WILCOX: Your Honor, I don't think they
8 should have a judgment entered prior to the final
9 evidentiary hearing. It seems to me that that
10 creates just a lot of problems. He can go ahead
11 and see if he can schedule it for the day after the
12 final evidentiary hearing.

13 THE COURT: All right. Right. I think that's
14 appropriate as well.

15 Mr. Hildreth, would you draft the order and
16 review it with Mr. Wilcox before sending it in?

17 MR. HILDRETH: I will do that, Judge.

18 THE COURT: Thank you very much.

19 MR. HILDRETH: And the Court will set the FEH
20 on this, then, within 45 to 60 days?

21 THE COURT: It will be 45 to 60 days.

22 MR. HILDRETH: Thank you, Judge.

23 THE COURT: Is that all right? I mean, that's
24 the time frame that you were looking at?

25 MR. WILCOX: I think that's right.

1 THE COURT: Okay. Good. Thank you, Mr.
2 Hildreth.

3 MR. HILDRETH: Thank you, Your Honor. I'll go
4 ahead and ring off now.

5 THE COURT: Thanks.

6 And now the stay relief motion, the other stay
7 relief motion, by Mr. Markham.

8 Mr. Markham.

9 MR. MARKHAM: Good morning, Judge. Thank you.

10 It's a somewhat similar situation.

11 Unfortunately, I've traded calls with counsel and
12 don't know their full position. I have tried to
13 lay out the simple facts in the motion. This is
14 two other residential lots that construction is
15 actually ongoing on that are owned by, at least
16 facially, Captiva Island Vacation Properties, LLC,
17 one of the entities that's subject to that
18 injunction.

19 As I've laid out, each loan at this point,
20 the bank is owed approximately \$2.2 million.
21 There's three years of real estate taxes, which are
22 about \$50,000 each.

23 The bank had no idea of this bankruptcy or the
24 connection and the -- and the injunction. It was
25 in the process of accepting a deed in lieu through

1 some principal of Captiva Island Vacation
2 Properties. And then I guess at that point,
3 through some title work, or whatever, discovered
4 the problem and then filed this motion.

5 So I guess the more complicated problem on
6 these is that the bank has essentially taken over
7 the construction, at least from a financial
8 perspective. And there's active construction going
9 on. I'm told that each one of these properties is
10 approximately 90 percent complete. There's no
11 certificate of occupancy.

12 So I don't know what the trustee's position
13 is. But if the bank thought they were out of the
14 woods and they were willing to waive this claim,
15 then they're prepared to waive any claim that they
16 might ever have against any of these bankruptcy
17 estates so they can move forward.

18 THE COURT: All right.

19 Mr. Brown.

20 MR. BROWN: Thank you, Your Honor.

21 Let me just back up on something on these real
22 properties. The entity, this Captiva Island
23 Vacation Properties, was an entity that Ms. Cladek
24 had some involvement with. We've tried to get to
25 depose Ms. Cladek, but we haven't been able to do

1 that. She didn't show up for her deposition in the
2 adversary.

3 We have another principal of that entity, Mr.
4 Prell, that has now agreed that he will appear for
5 a deposition, I believe, on November 29th.

6 So there's questions on funds that may have
7 been funds of the debtor that went through Ms.
8 Cladek that went to these entities to service debt
9 and whatnot and we just need some more time to
10 resolve those issues.

11 The other thing is, and a separate component
12 is, to the extent that there was money that came
13 from the debtor through Ms. Cladek and ultimately
14 serviced any of these particular debts, then we may
15 have a separate issue there that needs to be
16 addressed.

17 So those are kind of the big picture items
18 that we're working on that overlap with most of the
19 Captiva Island Vacation Properties. That said, you
20 know, at this point we have no reason to challenge
21 the mortgage. A similar order to what the Court
22 discussed at the last hearing should be acceptable.

23 We're trying to get to the bottom of all of
24 the issues related to the real estate. It's a lot
25 of real property, a lot of separate financial

1 institutions. And we haven't had the help of Ms.
2 Cladek, and so we're having to try to track down
3 information through other avenues just to get to
4 the bottom of things. And we don't want to see
5 something slide through --

6 THE COURT: Right.

7 MR. BROWN: -- and lose some value that this
8 estate may be entitled to.

9 THE COURT: Right, right. That makes sense.

10 Mr. Markham, does that make sense?

11 MR. MARKHAM: I guess that's fine, Judge. I
12 understand what they're dealing with. On the other
13 hand, I mean, you know, what's difficult from the
14 bank's perspective is, you know, they weren't a
15 party to the adversary proceeding.

16 THE COURT: Right.

17 MR. MARKHAM: You know, they could have been
18 made a party to the adversary proceeding. I'm not
19 suggesting that they would violate that injunction.
20 And I didn't think they were violating the
21 injunction. Somebody else might have been
22 violating it. But we didn't want to be looked at
23 as in a position of violating it.

24 If the trustee is taking the position that
25 these are property of the estate and there are

1 costs being accrued postpetition, then, you know,
2 the bank is going to look at those as
3 administrative expenses. And if there's damage
4 that's accruing to the bank as a result of the
5 delay or the lack of adequate protection, again the
6 bank is going to look at that as an administrative
7 expense claim. And I just -- you know, I want to
8 broach that with the Court and counsel so that we
9 don't end up in a situation where we make it worse.

10 I mean, if they're going to be able to talk to
11 Mr. Prell and get an answer, you know, by the end
12 of the month, you know, maybe that solves it.

13 But these are active. There's a contractor
14 that's apparently out on these properties. And,
15 you know, if the trustee is going to take that --
16 and you've got to take the good with the bad, I
17 guess, is my point.

18 THE COURT: Right, right. And there appear to
19 be some complications in this that aren't in the
20 other Captiva Island Properties.

21 But it seems to me that a similar order, Mr.
22 Brown, would accommodate your needs and would let
23 Mr. Markham get moving on a foreclosure. And we'll
24 set it for an evidentiary hearing in 45 to 60 days.
25 And by that time, you will have been able to

1 evaluate the property and, hopefully, reach a
2 resolution with Mr. Markham.

3 MR. BROWN: We fully expect we will, Your
4 Honor. And that would be fine.

5 THE COURT: All right. Mr. Markham.

6 MR. MARKHAM: Judge, if I may, there was
7 another interesting twist to this. The bank, you
8 know, was in receipt of deeds in lieu of
9 foreclosure and was about to record them and
10 didn't.

11 THE COURT: I saw that in your motion. Right.

12 MR. MARKHAM: And so it may be that -- you
13 know, if the trustee is going to do its due
14 diligence and then abandon the properties, then I
15 don't need to spend the time and effort --

16 THE COURT: I've got you.

17 MR. MARKHAM: -- to do a foreclosure, because
18 I guess at that point I could just be authorized to
19 record the deeds.

20 THE COURT: Right.

21 MR. MARKHAM: So I don't know what their
22 position is vis-a-vis Mr. Prell's authority to do
23 that. And perhaps that would simplify things and
24 make the bank a little happier because they would
25 be able to move a lot quicker.

1 THE COURT: Right.

2 MR. MARKHAM: And I hate to kind of talk about
3 this in open Court, but I don't have a whole lot of
4 options.

5 THE COURT: Right. So I assume you'll find
6 out at the end of November.

7 MR. BROWN: And further, Judge, if I may just
8 be heard, if he wants to include in the order that
9 if we haven't filed a particular -- something in
10 furtherance of a response to the motion by maybe,
11 you know, December 10th, or some date in early
12 December, that he can proceed to record and
13 otherwise execute and the stay would be fully
14 lifted.

15 We don't want to hold them up, but, likewise,
16 we just want to make sure that we have an
17 opportunity to --

18 THE COURT: That's a fair proposal. That's a
19 very fair suggestion, I think.

20 So, Mr. Markham, is that satisfactory?

21 MR. MARKHAM: Yes, that's fine, Judge. I'll
22 put, I guess, a December 10 deadline in that order.

23 THE COURT: Right.

24 MR. MARKHAM: And then, I guess, try to talk
25 to Mr. Hildreth as well to make sure our forms of

1 order are somewhat similar.

2 THE COURT: Okay. And then review them with
3 Mr. Brown and send them in, all right?

4 MR. MARKHAM: All right.

5 THE COURT: Good. Thank you, Mr. Markham.

6 MR. MARKHAM: Very good, Judge. Thank you.

7 THE COURT: All right. And now that takes
8 care of everything except the motion to combine the
9 disclosure statement and confirmation hearing.
10 And, Mr. Kane, that's your motion.

11 MR. KANE: It is, Your Honor.

12 The committee -- and if Your Honor may recall,
13 back on August 12th, we had a hearing which lasted
14 about six-plus hours on the trustee's motion to
15 sell the performing assets of the debtor, which
16 included the ongoing subprime auto loan accounts
17 that were being paid. And at that time, Your Honor
18 had rendered a decision denying the motion and
19 essentially directing us all to try and work
20 together, which is what we've been trying to do.

21 We have spent the last two months, or more
22 than two months, trying to work with the Chapter 11
23 trustee in trying to put together a joint plan.
24 Which, obviously, the committee wants to include a
25 reorganized debtor, purchase of new notes, and

1 moving forward.

2 We had a meeting in early October, at my
3 suggestion, up in St. Augustine. It lasted about
4 four hours, four and a half hours. And we had
5 provided the Chapter 11 trustee with a draft of a
6 plan. And we basically had issues as to
7 methodology, just like we did two months earlier.
8 But unfortunately, they could not be resolved.

9 And so we have moved forward with the filing
10 of a disclosure statement and plan. We have
11 requested a combined plan and disclosure statement
12 hearing. The need for a combined disclosure
13 statement and plan hearing is necessitated by the
14 nature of the business.

15 The subprime automobile loan business, the
16 prime season is January and February. That's the
17 note-buying season. It has to do with tax refunds,
18 when they come in. And you're dealing with less
19 than stellar borrowers, and so the source of the
20 payments, down payments, for these vehicles comes
21 primarily from these tax refunds. And Mr. Buttner
22 will be available to testify as to these issues.

23 But we have been kind of pressed against a
24 wall due to the attempts that we have all made to
25 try and work together. And I know that it's

1 unfortunate that we have not been able to come up
2 with a joint plan. But the disclosure statement
3 itself addresses all of the necessary points. And
4 we would like to -- and the purpose is to have a
5 hearing by the end of the year.

6 The objection that was filed by the Chapter 11
7 trustee, if Your Honor has had an opportunity to
8 review that, basically raises one legal issue that
9 I saw. The legal issue is whether you can have a
10 combined plan and disclosure statement hearing when
11 it's not a small business debtor or prepackaged
12 plan.

13 I would submit to Your Honor that it's done
14 routinely here in the Middle District. Your Honor
15 did it in Amelia Island. I can cite to you other
16 cases, Hudson, Island One. I think it's actually
17 done more often than not. And this is a case that
18 warrants a combined plan and disclosure statement
19 hearing.

20 We're willing to push out the hearing until
21 the end of December. And if there are issues as to
22 confirmation, we can have discovery, we can go
23 there. And, you know, we're willing to go there.

24 The other issues that are raised in the
25 objection deal with feasibility and viability of

1 the plan and questioning the projections that we
2 have included in our disclosure statement.

3 I would submit to Your Honor that those are
4 not appropriate for a disclosure statement
5 objection. They're really plan objections. And
6 those can be addressed at a confirmation hearing.

7 We believe that the plan that we proposed is
8 fair, balanced, and equitable. It provides for a
9 payout of 50 percent of the creditor trust proceeds
10 directly to the creditors with reinvestment in
11 Newco of the other 50 percent.

12 So what it does -- and we struggled with this.
13 But what we tried to do is balance the need to have
14 capital to start this reorganized debtor. Because
15 every month that's proceeded since August, of
16 course, those accounts are getting paid down. And
17 so we're going to need to have start-up capital,
18 and also balancing that with trying to give the
19 creditors a form of cash payout through the
20 creditor trust. And that's how we arrived at the
21 plan that we did.

22 The other issue was, I believe, that the
23 Chapter 11 trustee thought that we should put in
24 our disclosure statement why we did not include an
25 opt out as a choice in the plan.

1 First of all, 1125(b) specifically says you
2 don't need to include alternative plans in your
3 disclosure statement. But more importantly than
4 that, Your Honor, we examined the need for an opt
5 out. And the committee determined that if there is
6 an opt out, then it may make the whole plan process
7 essentially a nullity.

8 The way to opt out of this -- of the plan is
9 simply to vote against it. If the plan that we
10 presented is not acceptable to the creditors, they
11 can vote against it. And the option is
12 liquidation. We have a Chapter 11 trustee in place
13 to take care of that.

14 So we feel like we've examined this
15 thoroughly. We've tried to work with the trustee.
16 And again, we just simply have a difference as to
17 methodology. And the trustee would have an
18 opportunity to present his own plan if he believes
19 that ours is not the best one.

20 THE COURT: All right. Thank you, Mr. Kane.

21 Mr. Brown.

22 MR. BROWN: Your Honor, one, this is a
23 preliminary hearing. There are evidentiary
24 hearings set on December 6th. And my first comment
25 is, I think it's appropriate that this matter be

1 set for evidentiary hearing.

2 Our response brings up some improprieties that
3 have been going on in this case related to the
4 committee, and we believe that there should be some
5 evidence considered in connection with that.

6 Getting back to just in general, in connection
7 with this particular motion, getting back to what
8 Mr. Kane is saying -- and, you know, again, this is
9 a non-evidentiary hearing and talking about all the
10 stuff about facts.

11 We had a hearing on the sale motion on
12 August 12th. And I stood here and said we've
13 already had discussions about a joint plan with an
14 option. It wasn't until early October that we
15 started really getting some momentum going. We
16 negotiated out a confidentiality agreement at the
17 end of September. It took some time to get that
18 done. The trustee has given a ton of information
19 to the committee.

20 And they turned around -- and, quite frankly,
21 it feels like being stabbed in the back -- and took
22 everything that we gave them. And we worked with
23 them in good faith. They never responded to
24 comments that we had to their proposed plan. And
25 then they go and say: Hey, we're going to file our

1 own plan, and there's no opt-out.

2 And to say that, well, the opt-out is just to
3 not vote for a plan, that's all good. But we think
4 the fair and equitable thing to do is to have a
5 plan with an opt-out.

6 So what we're trying to do -- and I've been
7 trying to have communications with Mr. Kane about
8 it -- is get to a place where we could advance
9 something that was a joint disclosure statement and
10 a joint plan and have this all dealt with at one
11 time.

12 And I think if that's what the situation was
13 and we were all in agreement here with how things
14 should unfold, then, in those circumstances, we
15 should have a combined hearing. And I think that's
16 what happens. All these cases where we talk about
17 there is a joint hearing on confirmation, those are
18 consensual matters.

19 That's not what's going on here. We have a
20 thousand people creditor body, we have a Ponzi
21 scheme case where a lot of the people in this case
22 are elderly people that were taken advantage of
23 that don't want to wait around for -- and I don't
24 know what time the plan would propose under the
25 committee's plan for distributions from this trust,

1 but I would guess to say it's going to be a long
2 time from confirmation before there will be a cash
3 distribution. They don't want to wait around for
4 shares of Newco to turn into whatever they're going
5 to turn into.

6 And so what the trustee is intending to do, if
7 we can't get something worked out very shortly as
8 far as an option plan, is to basically take their
9 plan, file our own plan, and put an opt-out in it
10 as well. And we'll ask the Court to track those
11 plans with the disclosure statement and
12 confirmation hearing at the same time.

13 And it's going to have to have to a formula.
14 The committee recognizes that they can't have a
15 reorganization if there's too much opt-out. And so
16 there's a floor there. And I've heard numbers that
17 vary. And that's going to be an evidentiary matter
18 at some point. But there's a floor there.

19 And it's not going to be feasible to start a
20 new company because there will be people. So
21 rather than wait for the committee's plan to fail
22 at a confirmation vote stage, we believe it should
23 be embodied in a plan. And if we can't get there
24 real quickly, by December 6th -- and we'll know
25 within a week or so whether we can get there or

1 not -- by December 6th, we'll have our own plan
2 filed and we can address this motion on whether
3 there should be a joint plan and disclosure
4 statement hearing at that point in time, address
5 improprieties that we believe have occurred with
6 the committee, and get on a fast track to confirm
7 whatever plan is out there. And we think that that
8 is fair.

9 Judge, I could go into some other factual
10 background. But again, Mr. Phelan is not here.
11 This is a preliminary hearing. We've got December
12 6th, which is coming up rapidly, for evidentiary
13 hearings. And we believe it's appropriate to set
14 this matter for final evidentiary hearing. And
15 we'll do the best we can to make it as simple as
16 possible for the Court.

17 THE COURT: Very good.

18 MR. KANE: If I may, Your Honor. First of
19 all, with respect to alleged improprieties by the
20 committee, I would invite Your Honor to take a look
21 at what's alleged. Under Dow Corning -- and what
22 they're trying to say is that -- and unknown to me,
23 a committee member, the chairman of the committee,
24 sent out an e-mail saying -- to anybody she could
25 saying that the committee has filed a plan, please

1 take a look at it. She doesn't seek an acceptance
2 of the vote, she doesn't seek a rejection of
3 anybody else's plan.

4 And, Your Honor, I would cite to Dow Corning,
5 at 222 B.R. 111, where it's clear that solicitation
6 relates to the formal polling process through which
7 plan acceptance or rejection is sought. And
8 solicitation occurs only when a party in interest
9 makes "a specific request for an official vote
10 either accepting or rejecting a plan of
11 reorganization."

12 That's not what happened here. But, you know,
13 we've got people who are eager to get a plan
14 together. We tried to work with the trustee.
15 Unfortunately, it didn't work out.

16 With respect to turning over financial
17 information to the committee, we're supposed to be
18 working towards the same goal here, Judge. And
19 we've been trying to do that. But the concept that
20 the trustee would actually withhold financial
21 information from the committee is abhorrent to me,
22 regardless if -- and so we were trying to work
23 together.

24 But the trustee has perceived us as an
25 adversary. From the time we got involved in this

1 case, we have been the ones who have been reaching
2 out the olive branch, trying to get things done.
3 We prepared a draft plan and disclosure statement
4 and sent it to the trustee. We've been the one
5 who -- the ones who have been carrying the burden,
6 yet we're being accused of doing something
7 improper. Aside from the fact that it irks me,
8 it's all white noise.

9 Your Honor, what we're really looking at here,
10 the trustee says that he can file a plan. We don't
11 have a problem with that. If the trustee wants to
12 file a plan and it meets the requirements for
13 conditional approval, then the trustee can do that.
14 And we can set them both for confirmation at the
15 end of December.

16 My concern is that we're going to lose the
17 buying season. And the Chapter 11 trustee doesn't
18 seem to be concerned with that, because the Chapter
19 11 trustee is of the position that Newco isn't a
20 viable entity.

21 Well, we would like to have the opportunity to
22 have a confirmation hearing. And if Newco is a
23 viable entity and the creditors want to pursue it,
24 which we believe they do, then we'll actually have
25 the opportunity to do that and take advantage of

1 the buying season.

2 Your Honor, when you ruled on the 12th of
3 August, you said, "It appears that the unsecured
4 creditors should have the opportunity to evaluate
5 maximizing these assets. If selling is
6 appropriate, that's one thing; if a plan is
7 appropriate, that's another. If competing plans
8 are appropriate, that gives all the unsecured
9 creditors the opportunity to vote. But it is the
10 unsecured creditors that have their funds at risk."

11 And I think that's dead on. That's what we've
12 been trying to do. And I don't see anything in the
13 trustee's objection that would prohibit preliminary
14 approval of the disclosure statement with final
15 approval being set concurrent with the confirmation
16 hearing.

17 And it's in the best interest of the
18 creditors. Because if we're right, if the
19 creditors want to accept our plan, then we'll have
20 the opportunity to execute it. If we don't have a
21 confirmation hearing by the end of December, we run
22 a substantial risk of then once again being
23 obstructed from maximizing these assets. And it's
24 just going to put us at least a quarter, if not a
25 year, behind. And that's just not something we can

1 afford to do.

2 We spent two months trying to work this out.
3 And we diligently tried to do that. And we cannot
4 meet the trustee's demands.

5 THE COURT: Okay. Mr. Brown.

6 MR. BROWN: Judge, I wholeheartedly disagree
7 with Mr. Kane. I'm offended. But I'm going to
8 back off of that and just talk about the merits
9 here.

10 This is not a disclosure statement hearing,
11 this is a hearing to combine things. This is a
12 very extreme measure for this particular case.
13 There's not an agreement here. This is a matter
14 that I believe should be set for an evidentiary
15 hearing.

16 The trustee would like to present some
17 evidence on all this record that Mr. Kane is
18 professing. We don't agree with his
19 characterizations. And if it's not December 6th,
20 it can be earlier, certainly. But that time is
21 available.

22 I think we've got one of the matters that's on
23 for hearing that day resolved, so we should be able
24 to have sufficient time that day to deal with this
25 particular matter.

1 This isn't an evidentiary hearing. It wasn't
2 noticed as one. Mr. Phelan is not here. But to
3 start with, going back to what happened at that
4 sale hearing, quite frankly, there were a lot of
5 projections presented that day. And what the
6 evidence is going to ultimately show is none of
7 their projections, none of the committee's
8 projections, that are supporting their plan bore
9 out to be true, and the evidence is going to show
10 that everything that the trustee presented that day
11 did bear out to be true.

12 Additionally, this trustee has given them
13 every single bit of financial information that they
14 wanted. The reason that we want a confidentiality
15 agreement is because this case deals with a good
16 bit of litigation. There are things out there that
17 are potentially advantageous to parties that we'll
18 be going after that need to be subject to a
19 confidentiality agreement.

20 The day after the hearing, right after that,
21 we were willing -- the August 12th hearing, we were
22 willing to sit down and get to work on this. And
23 it didn't work out. Now, Mr. Kane's
24 characterizations on why it didn't work out and my
25 characterizations are going to be different. I

1 won't throw mud back and forth.

2 But we think that this matter should be set
3 for a final evidentiary hearing. We think the
4 trustee should have an opportunity to advance his
5 own plan on a simultaneous track as the committee
6 and that it be done -- quite frankly, I think that
7 it should be done under some sort of simultaneous
8 solicitation package rather than have dual
9 solicitation.

10 But those matters, I believe, Your Honor,
11 should be set for hearing for another day.

12 THE COURT: Okay.

13 MR. KANE: Your Honor, if I can close.

14 THE COURT: Okay.

15 MR. KANE: We're not trying to prohibit the
16 trustee from filing a plan. As Mr. Brown said, all
17 that they're seeking to do is to essentially defeat
18 the plan that we've already prepared.

19 Why can't they file that plan within the next
20 week or two, with conditional approval, and we'll
21 have a final hearing on confirmation of both plans
22 at the end of December so that we don't lose this
23 buying season?

24 Really, the buying season starts with November
25 and December, with the holidays. We've lost that.

1 The peak buying season is January and February.
2 And if we have a disclosure statement hearing
3 that's absolutely unnecessary on December 6th,
4 because there's been no factual issues raised with
5 respect to the disclosures themselves, we are going
6 to be -- we're going to be tied and we're going to
7 be prohibited from getting this business off the
8 ground in the fashion that it should be.

9 We're already two months behind. And the two
10 months that we lost was due to the attempts to try
11 to work this out.

12 You've heard from Mr. Brown, you've heard from
13 me. Obviously, we've got a long way to go until we
14 agree on something. If we can, hopefully we can do
15 it by the end of December and we can come in and
16 have a confirmation order that addresses all of
17 that.

18 But, you know, we didn't file this plan
19 precipitously, we did it after trying. And trying,
20 I think, very, very hard to work out something with
21 the trustee. The fact that we won't meet the
22 trustee's demands doesn't make our plan any less
23 viable.

24 You heard Mr. Brown just say he's going to
25 prove to Your Honor that the facts that they tried

1 to prove on August 12th are, in fact, true. We're
2 going back and relitigating this issue. We're not
3 going to arrive at an agreement, and it's not for
4 lack of effort.

5 So, Your Honor, I would submit that this is
6 done routinely in the Middle District, this is
7 regularly done, and we're going to lose that peak
8 buying season if we don't have a confirmation
9 hearing by the end of the year.

10 THE COURT: All right. Thank you both very
11 much. I appreciate your positions.

12 This is a preliminary hearing. Both the
13 unsecured creditors and the trustee have the same
14 interest, have the same interest, to maximize their
15 return and to get the best return for the unsecured
16 creditors.

17 It appears that there are different
18 possibilities for that return. It could be a new
19 company, it could be a sale of assets, it could be
20 both, it could be a new company with an opt-out for
21 immediate distributions.

22 I had hoped that there could be agreement.
23 And we stated that at the August hearing. I guess
24 I continue to hope that there can be agreement.
25 But I do think we have to set this for an

1 evidentiary hearing. And so at our next hearing
2 date -- that's December what? December 6th?

3 MR. BROWN: December 6th, at 3:00 p.m., Your
4 Honor.

5 THE COURT: On December 6th, at 3:00 p.m.,
6 we'll hear it and we'll make a decision.

7 I understand business. I understand business
8 very well, I think. I understand seasonal
9 businesses, I understand seasons. I also
10 understand the Bankruptcy Code. I understand the
11 need for fairness and consideration.

12 And the fact that you both have the same
13 goals, the same end result, indicates to me that I
14 should hear both positions. And so we'll have an
15 evidentiary hearing on December 6th and we'll make
16 a determination.

17 Thank you very much.

18 MR. KANE: Thank you, Your Honor.

19 MR. BROWN: Thank you, Your Honor.

20 THE COURT: All right. Is there anything else
21 we can accomplish today?

22 MR. BROWN: I think we've done enough.

23 THE COURT: And if you can reach an agreement
24 before then, please let me know.

25 MR. BROWN: We will certainly try, Your Honor.

1 MR. KANE: We'll try, Your Honor.

2 THE COURT: As you all know, I am certainly
3 willing to have hearings at joint request or
4 emergency hearings or on short notice and things
5 like that.

6 MR. BROWN: Thank you.

7 MR. KANE: Thank you.

8 (Whereupon, the hearing was concluded at 12:00
9 p.m.)

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STATE OF FLORIDA)

COUNTY OF DUVAL) .

I, Elizabeth M. Masters, Registered Professional Reporter and a Notary Public, State of Florida at Large, do hereby certify that the attached represents the proceedings before the United States Bankruptcy Court, Middle District of Florida, Jacksonville Division, before the Honorable Paul M. Glenn, Chief Bankruptcy Judge, in the matter of In Re: Lydia Cladek, Inc.; such transcript is an accurate recordation of the proceedings which took place. A transcript of this proceeding has been produced on November 17, 2010.

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