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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:) Case No. 14-11550 (CSS)
) Chapter 11
MACKEYSER HOLDINGS, LLC,)
et al.,)
Debtors.) Courtroom No. 6
) 824 Market Street
) Wilmington, Delaware 19801
)
) August 7, 2014
) 1:00 P.M.

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

APPEARANCES:

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<u>DEBTOR:</u>				

Thomas Barry	8	10		
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1 THE CLERK: All rise.

2 THE COURT: Please be seated.

3 MS. QUIRK: Good afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MS. QUIRK: Marion Quirk, Cole Schotz, on behalf of
6 the MacKeyser Debtors. With me today is Tom Allison the
7 Debtors CEO, Tom Barry who's a principal from H2C, the
8 Debtors' proposed investment banker and my colleague David
9 Hurst as well in here. Your Honor, we filed an amended
10 agenda yesterday. I just wanted to make sure that you had a
11 copy of that.

12 THE COURT: I do.

13 MS. QUIRK: And then there were pleadings filed this
14 morning that we delivered over to Chambers.

15 THE COURT: I think I got everything, including
16 Essilor's response and proof of claim.

17 MS. QUIRK: Great.

18 THE COURT: And I have reviewed everything.

19 MS. QUIRK: All right. Your Honor, items number 1
20 through 4 on the agenda are all resolved or orders have been
21 entered. So, the first matter going forward is interim comp.
22 Your Honor, this is a standard interim comp procedures that
23 the Debtors' filed for approval of. We received informal
24 comments from the U.S. Trustee. We have incorporated those
25 into a new form of order. So, I can quickly run through

1 those. We added the Committee as a notice party, not a big
2 substantive change. And then we also added that the Debtors
3 will include their payments to professionals, and committee
4 members and any monthly operating reports they file. Those
5 are the two changes to the proposed order.

6 THE COURT: All right.

7 MS. QUIRK: May I approach, Your Honor?

8 THE COURT: Yes. Thank you.

9 MS. QUIRK: And that's paragraph 2A, Your Honor, and
10 paragraph 6; that's the new language.

11 THE COURT: All right, does anyone wish to be heard?
12 Okay, I'll sign the order as revised.

13 MS. QUIRK: Thank you, Your Honor. The next item,
14 Your Honor, is item number 5; this is the Debtors' amended
15 application to retain Hammond Hanlon Camp, otherwise known as
16 H2C, as the Debtors' exclusive investment banker. Your
17 Honor, just by way of background, we initially filed an
18 application that was amended as of mid-July and the terms of
19 the compensation are more favorable to the Debtor. It
20 provides for a \$50,000.00 fee in July and then a \$250,000.00
21 fee payable in September.

22 Your Honor, H2C is running the sale process for the
23 Debtors' sale of their physician practice assets. They spent
24 a significant amount of time to date, Your Honor, negotiating
25 with potential purchasers, communicating with the Debtors.

1 So, they have certainly invested a lot of time to date.

2 We are seeking to retain them *nunc pro tunc* to the
3 petition date. The U.S. Trustee originally filed an
4 objection mid-July to the initial application and we have
5 worked through all of the issues, Your Honor, but one at this
6 point. One issue that we have just resolved prior to the
7 hearing, Your Honor, relates to the maintaining time records.
8 And as we indicated in the pleadings H2C doesn't maintain
9 time records, but what they can do is provide a summary of
10 time spent and as estimate of the number of hours spent by
11 person that they will file with their final fee app. We sent
12 a sample to Mr. Hackman this morning. It's acceptable to
13 him. So, with respect to that issue we are resolved with the
14 U.S. Trustee.

15 So that leaves us with one issue and that's the
16 fiduciary language. There is a provision in H2C's retention
17 that says that H2C is an independent contractor and won't act
18 as a fiduciary in this case. I am prepared to put on a short
19 proffer of Mr. Barry to address the issue and then we can
20 have argument, if that's okay with Your Honor.

21 THE COURT: Any objection to the proffer?

22 MR. HACKMAN: No, Your Honor.

23 THE COURT: All right, you may proceed.

24 MS. QUIRK: Your Honor, Mr. Tom Barry is in the
25 Courtroom today. He is available for cross-examination. If

1 called as a witness he would testify as follows: he is a
2 principal of H2C Capital Advisors, LLC. H2C is a strategic
3 advisory and investment banking firm with a particular
4 emphasis on the healthcare sector. Mr. Barry has more than
5 40 years of experience, either working in the healthcare
6 organization arena or as an investment banker providing
7 service to healthcare organizations. H2C was formed in 2011.

8 Your Honor, with respect to the issue of the
9 provision in the engagement letter, its paragraph 13, that
10 specifically provides that H2C shall act as an independent
11 contractor under this agreement and not in any other capacity
12 including any fiduciary capacity. Mr. Barry would testify
13 this is standard language in H2C's engagement letters that
14 this provision has been approved, both in and outside of
15 Bankruptcy cases, it was negotiated with the Debtors at arm's
16 length and H2C has fully disclosed to the Debtors that it
17 will be acting as an advisor and not as a fiduciary. That's
18 all for my proffer, Your Honor.

19 THE COURT: Mr. Hackman, any questions?

20 MR. HACKMAN: Just briefly, Your Honor.

21 THE COURT: Okay. Take the stand, please, sir.

22 THOMAS BARRY, SWORN

23 THE CLERK: State and spell your name for the
24 record.

25 MR. BARRY: Thomas M. Barry, B-a-r-r-y.

1 THE CLERK: Thank you.

2 CROSS-EXAMINATION

3 BY MR. HACKMAN:

4 Q. Good afternoon, Mr. Barry.

5 A. Good afternoon.

6 Q. My name is Benjamin Hackman, I am an attorney for the
7 U.S. Trustee. I had just a few quick questions for you about
8 your proffer. Correct me if I misstate or make a mistake in
9 accounting for what I understood your proffer to be. I
10 believe your proffer indicated that the provision that we've
11 been talking about, the provision and the engagement
12 agreement, between the Debtors and H2C that H2C is an
13 independent contractor and is not a fiduciary is a common
14 provision in your engagement agreements, is that correct?

15 A. Yes.

16 Q. How many engagement agreements has H2C entered into with
17 companies that have this provision in it since 2011, which I
18 think is when you indicated that H2C was formed?

19 A. It would be fair to say at least 30 a year.

20 Q. And how many counter parties to those agreements filed
21 for Bankruptcy?

22 A. Three.

23 Q. Were any of them in Delaware?

24 A. No.

25 Q. And in those three cases where H2C was engaged, pursuant

1 to an agreement that had that language in it and the counter
2 party filed for Bankruptcy, was the issue of the fiduciary
3 duty language in the engagement agreement brought to H2C's or
4 the Debtors' attention in those cases?

5 A. Could you repeat, be a little more specific.

6 Q. So, in the three cases in which there was an engagement
7 agreement, between H2C and a company that had this language
8 in it about the fiduciary duties, and the company ended up
9 filing for Bankruptcy, in any of those cases, that you can
10 remember where H2C was sought to be retained by the Debtor,
11 was the issue of the fiduciary duty language brought to your
12 attention or the Debtors' attention in those cases?

13 A. No.

14 MR. HACKMAN: No other questions, Your Honor. Thank
15 you, Mr. Barry.

16 THE COURT: You indicated in your direct that this
17 issue was negotiated at arm's length with the Debtor, was
18 this specific issue ever subject to negotiation?

19 THE WITNESS: The entire letter was actually
20 provided to us by the Debtors' counsel. We dropped our
21 normal letter and used theirs.

22 THE COURT: So, the language was?

23 THE WITNESS: It was to facilitate the process.

24 THE COURT: The language we were discussing was in
25 the Debtors' proposal?

1 THE WITNESS: Yes.

2 THE COURT: Okay, redirect?

3 REDIRECT EXAMINATION

4 BY MS. QUIRK:

5 Q. Just to clarify, Mr. Barry, this is a provision that is
6 from your standard engagement letter, is that correct?

7 A. Yes.

8 MS. QUIRK: I don't have any other questions, Your
9 Honor.

10 THE COURT: Thank you. You may step down.

11 MR. BARRY: Thank you.

12 MS. QUIRK: Your Honor, just by way of background,
13 we did take a look at some other retentions of investment
14 bankers in Delaware, specifically, to see if this language is
15 in engagements that have been approved and there are a few
16 cases, Your Honor, just in case you're interested. One is
17 the Ritz Camera case, SSG was retained in that case and there
18 was similar language that they were an independent contractor
19 and not a fiduciary; that was ultimately, the order was
20 entered approving their retention as the investment banker in
21 the Ritz case, as well as in the IGPS case, Your Honor.
22 Houlihan Lokey's engagement letter, essentially, provided
23 that, you know, there is no fiduciary relationship, it's just
24 they'll serve as an independent contractor. And that was
25 also something that got approved in that case; that was a

1 Gross case in 2013.

2 THE COURT: Well, in either of those instances was
3 it subject to dispute or was it just in the form of agreement
4 that wasn't subject to an objection and was approved by the
5 Court?

6 MS. QUIRK: Your Honor, I don't believe there was a
7 filed objection by the U.S. Trustee, but I don't know if
8 there were informal comments. Mr. Hackman has told me, you
9 know, it's an issue that he is focused on, but I personally
10 haven't experienced this being an --

11 THE COURT: And it's a limited utility, isn't it, to
12 say that it's been previously approved on a non-contested
13 basis?

14 MS. QUIRK: Well, I was just pointing it out, Your
15 Honor because H2C hasn't been retained in Delaware,
16 specifically. I was just for your information, not as
17 binding authority, for the record noting that this type of
18 language has been approved before and I believe it is
19 something that is in engagement letters of investment
20 bankers. From the Debtors' perspective it's not an issue
21 that they're going to be an independent contractor. Their
22 certainly very important here to be the Debtors' investment
23 banker. They have put a lot of work in and it's an important
24 provision, as we understand from H2C's perspective, to keep
25 in the standard language in their retentions.

1 THE COURT: All right, let me hear the objection.

2 MR. HACKMAN: Good afternoon, Your Honor, may I
3 please the Court, Benjamin Hackman for the U.S. Trustee. As
4 counsel has pointed out already there is a provision in H2C's
5 engagement agreement that provides, "H2C shall act an
6 independent contractor under this agreement and not in any
7 other capacity, including any fiduciary capacity."

8 When I reviewed the original retention application I
9 gave counsel comments about it. One of the comments I made
10 was if the Debtor is seeking to retain a professional under
11 327, the professional is going to be an estate fiduciary. I
12 asked them to include a provision in the order indicating
13 that language in the engagement agreement, indicating that
14 H2C was not a fiduciary, would be deemed of no force or
15 effect. I was advised that H2C was not agreeable to that
16 change. The Debtors then filed an amended retention
17 application for H2C, which included a revised engagement
18 agreement, and again, the language about fiduciary duties
19 remained in that agreement.

20 The problem, Your Honor, is that if the Debtor is
21 retaining professionals, those professionals are fiduciaries.
22 Case Law supports that. Their status as estate fiduciaries
23 is what entitles them to seek exculpation in a plan. And
24 what we have here, apparently, is a professional who wants to
25 be retained by a Debtor, but not serve as a fiduciary in

1 these cases. I would respectfully submit, Your Honor that
2 that is not acceptable. If a professional is not willing to
3 serve as a fiduciary, I don't think they are eligible to be
4 retained.

5 A professional should not be able to reserve,
6 somehow for itself, the right later during the engagement to
7 be adverse to the Debtors. I was reading a Judge Walsh
8 opinion letter from a 1999 case *in re Dailey International*.
9 The site is 1999 Bankruptcy Lexis 2065 and that case involved
10 an Ernst & Young retention where there were provisions in the
11 engagement agreement about limitation of liability. One of
12 the comments that Judge Walsh made in that opinion letter is
13 that, "it is patently clear from Sections 327 and 328 that
14 sophisticated parties are not entitled to dictate the terms
15 and conditions of the engagement of professionals. Those
16 terms and conditions are subject to the approval of the
17 Bankruptcy Court in making reasoned determinations as to what
18 is in the best interest of the estate." I have copies of
19 that opinion letter if Your Honor would like to review it.

20 THE COURT: No thank you.

21 MR. HACKMAN: I have not been able to review the
22 IGPS or Ritz cases.

23 THE COURT: You don't need to address that.

24 MR. HACKMAN: Thank you, Your Honor. In trying to
25 figure out a way to resolve this, Your Honor, an option would

1 perhaps be to include language in the order approving H2C's
2 retention indicating that, notwithstanding anything to the
3 contrary in their engagement letter, they are deemed to be
4 estate fiduciaries to the maximum extent permitted by law.
5 I'm not sure H2C is agreeable to that change, but absent it,
6 Your Honor, I think there is a very serious problem if a
7 professional that a Debtor seeks to retain is not willing to
8 serve in a case as a fiduciary. Unless Your Honor has any
9 questions that's all I have.

10 THE COURT: I don't have any questions. Any reply?

11 MS. QUIRK: Your Honor, just a few points. I think
12 that Mr. Hackman's comments are overly broad with respect to
13 all estate professionals. I don't think there is any
14 requirement in the Bankruptcy Code that an investment banker
15 that's retained under 327(a)(d) be a fiduciary. I would
16 submit that Debtors' counsel, for example, I think, they are
17 fiduciaries. Committee counsel has fiduciary duties, but I
18 don't believe there is a requirement, as part of the
19 retention, to have the fiduciary language be a component.

20 I would submit just in response to the case
21 citations that Mr. Hackman submitted that the United Artist
22 Theatre case, which I think everybody is familiar with,
23 that's a Third Circuit case, specifically says that officers
24 and directors are fiduciaries, but financial advisors like
25 Houlihan Lokey, in this case it was Houlihan Lokey that was

1 at issue, are not fiduciaries. So, there is some law on the
2 point. I don't think we have any concern here that H2C is
3 somehow going to be adverse to the Debtors. From the
4 Debtors' perspective, you know, they're doing everything that
5 we asked them to do and we believe their services are very
6 important on a go forward basis.

7 In terms of exculpation, you know, I would submit
8 that H2C would agree that they are not going to seek
9 exculpation in this case, if it were to come to that being an
10 issue under a plan or otherwise.

11 THE COURT: Well, the chances of a plan in this case
12 are not good. So, that's an empty promise. I'll cut right
13 to it. I don't see any reason to treat this professional any
14 different from any other professional. I don't think the
15 order needs to specifically state that the professional is a
16 fiduciary. I think the law, including subject to its
17 limitations, deals with how professional persons retained by
18 Debtors are to operate and under what standard they're
19 actions will be governed.

20 I have a real problem with the carve-out. I am not
21 going to approve them and pay them under 327 or 328 as an
22 independent contractor; I'm just not going to do it. So, you
23 need to strike the language. I don't think you need to
24 specifically enumerate that they are or not a fiduciary; it's
25 the carve-out in and of itself which is, I believe,

1 problematic. So, if they are not agreeable to acting without
2 the carve-out, then they're not going to be retained and the
3 Debtor will have to find another investment banker; if they
4 are, I'll approve the application.

5 MS. QUIRK: Okay, Your Honor, we will discuss it
6 with H2C, and then see if we can work out language with the
7 U.S. Trustee and submit something under certification of
8 counsel.

9 THE COURT: All right, but no carve-out.

10 MS. QUIRK: Understood. Your Honor, the next
11 several items on the agenda Mr. Hurst is going to handle.
12 So, I will turn it over to him.

13 THE COURT: Okay.

14 MR. HURST: Good afternoon, Your Honor, David Hurst
15 for MacKeyser Debtors. Your Honor, we have two items that
16 I'll be covering; it's a sale motion and a motion by Sight's
17 My Line asserting a lien on certain sale proceeds.

18 Starting with agenda item number 7, the sale motion.
19 Your Honor, back on July 17th the Debtors filed a motion to
20 sell a variety of their practice assets and was at docket
21 number 166. On the 31st the Debtors' filed a notice amending
22 the list of practices that are subject to the motion; so,
23 some were taken off because they had been sold pursuant to a
24 miscellaneous asset sale procedure and some were added, in
25 fact, at least 10 were added. I've given you that background

1 because that drives some of the things that are going on
2 today and some of the pleadings that you have seen. The 10
3 stores that were added were, there were 8, The Eye Gallery
4 stores, they're basically optometrists and a lot of retail
5 eyeglasses and two, The Artful Eye stores.

6 We received formal or informal objections from five
7 parties and have resolved a large majority of issues raised
8 by the objecting parties by amending the order. We still
9 have open issues with two parties, Your Honor. The First
10 with Joseph Kurstin, MD and his affiliate Jokur Acquisitions.
11 Dr. Kurstin is one of the doctors from whom we bought a
12 practice and Jokur Acquisitions is a landlord for the
13 physical practice location. Dr. Kurstin owns Jokur. You'll
14 see that, basically, this is coming up in the context of a
15 sale of that location where Dr. Kurstin is a bidder and also,
16 effectively, a landlord and that drives some of the
17 complications and some of the reasons we have not been able
18 to resolve issues.

19 The second open issue, Your Honor, is with Essilor
20 of America regarding Essilor's ability to credit bid and
21 that's where you saw the flurry of filings today. I
22 apologize for all the late filings. I think we have
23 generally worked things through and I'll get to that in just
24 a couple of minutes. Yesterday, Your Honor, in an attempt to
25 simplify things today, we filed a notice of the amended order

1 so that Your Honor could get a preview of all the changes
2 that had been made. What I was going to suggest is that I
3 hand a copy to you and we just walk through the more material
4 changes if that pleases the Court.

5 THE COURT: Sure.

6 MR. HURST: May I approach?

7 THE COURT: Yeah. Is this the blackline?

8 MR. HURST: Your Honor, I actually handed you two
9 documents. One was a UCC-1 filing for Essilor. I am going
10 to get to that a little later in my presentation, but it will
11 save me a trip. By the way, for everyone's benefit, the
12 blackline I just handed to the Court came from the pleading
13 we filed yesterday.

14 Now, Your Honor, when you look at the blackline you
15 can see a lot of changes. A good bit of that is because we
16 moved some paragraphs around so that they would be logically
17 grouped together. So, I apologize if it's confusing. When
18 you actually boil it down we just did a couple fundamental
19 things.

20 If you begin at the bottom of page 3, Your Honor,
21 you'll see that we've added language to create a cure notice
22 procedure. When we filed the motion, we planned to file
23 summaries of all the assets that were being sold, you know,
24 summaries by practice location. Included in the summaries
25 were the list of real property leases, and then also

1 equipment lease and we listed cure amounts. The idea was,
2 you know, the respective lessors would look at that and then
3 if they didn't agree with the cure amounts they would file
4 objections to the sale. While I guess that would
5 theoretically work, after talking to some landlords and
6 thinking it through, we recognize it's probably going to lead
7 to confusion and we weren't sure everyone would get adequate
8 notice.

9 So, we have added the more traditional process where
10 the Debtors send out a notice and it would explicitly list
11 the objection deadline. So, you will see there are a number
12 of paragraphs that implement that procedure and then we've
13 added a proposed form of cure notice at Exhibit 3 to the
14 order. And if everything is approved today, Your Honor, the
15 plan would be to send out cure notices tomorrow and the
16 objection deadline for those would be the 22nd.

17 The second group of changes you'll see, Your Honor,
18 beginning at the bottom of page 5, and really interspersed
19 through the order, are changes to the sale timeline. Again,
20 this was in response to concerns by parties in interest. The
21 bid deadline, Your Honor, remains at August 21st.

22 THE COURT: Just back up a bit. August 22nd is going
23 to be too tight. You can't give people 14 days' notice in
24 the middle of August of a cure amount, especially when you
25 don't have a sale hearing till September 3rd. We can talk

1 about that later, but I wanted to flag the issue.

2 MR. HURST: Your Honor, what we could do is simply
3 combine that objection with the sale objection deadline which
4 is August 29th if that would work better.

5 THE COURT: That's fine.

6 MR. HURST: Okay, we'll make that change in the
7 final version of the order. The auction, Your Honor, is
8 scheduled to begin on August 26th. To the extent it runs over
9 we'll into the 27th, but hopefully, we will take care of it in
10 one day. Sale objections are due on the 29th and cure
11 objections as well, and then adequate assurance objections
12 September 1st and the hearing on the 3rd.

13 THE COURT: You know the 1st is Labor Day, right?

14 MR. HURST: Yes, I do know.

15 THE COURT: Okay.

16 MR. HURST: The next group of changes, Your Honor,
17 it's on page 10 and this has to do with the sale of hearing
18 related assets. I think I talked about this before, we have
19 three locations right now that have both optical and hearing
20 assets; this is in Flint, Saginaw and Pontiac, Michigan. So,
21 two of those are operating locations of Flint and Saginaw,
22 Pontiac is closed, but in each of those locations you have
23 the optical practice and then maybe on the other side of the
24 room you have the hearing practice.

25 It turns out, Your Honor, that the Meyers Family

1 Trust, who sold these assets to the Debtors, asserts a lien.
2 It's not real straight forward because the assets had been
3 transferred from one entity to another since they sold them.
4 So, they don't have a UCC-1 on file with respect to the
5 entity that holds those assets, but they assert, through a
6 constructive trust or equitable lien theory, that they have a
7 lien on those assets.

8 So, what we have done so that that doesn't interfere
9 with the sale is we are going to go forward with the sale.
10 To the extent they are not the winning bidders, we will
11 segregate the proceeds of the hearing assets and then we will
12 have to probably come back to Your Honor if we can't reach an
13 agreement about how those proceeds should be distributed.
14 So, we've put off the difficult work of, you know, really
15 nailing down those arguments and figuring out who's right
16 about it because Meyers Family Trust is going to bid,
17 actually the Trust or one of its affiliates will bid, compare
18 the winners, it doesn't matter. So, hopefully, we have
19 avoided that issue.

20 On page 11, at what appears as paragraph 16 in the
21 blackline, which is actually paragraph 18 due to some kind of
22 error in the blacklining software, we make it clear that the
23 transfer of patient health information in connection with the
24 sales will comply with HIPPA, applicable State Law and then
25 the Debtors' own privacy policy for the protection of health

1 information. If we jump to page 3 of the bidding procedures,
2 which are attached to the order as Exhibit 1 --

3 THE COURT: That's a little informal. Why don't we
4 say applicable Federal Law, applicable State Law and the
5 privacy act, is that problematic?

6 MR. HURST: I don't think its problematic, Your
7 Honor, but the only law that we're aware of that potentially
8 is applicable is --

9 THE COURT: You have a defined HIPPA, this is a
10 legal document. It includes statutory and regulatory
11 provisions. I'm not trying to be difficult.

12 MR. HURST: No, no that's fine.

13 THE COURT: You either need to define it properly or
14 use broader language.

15 MR. HURST: All right, we'll fix that, Your Honor.
16 If you jump to page 3 of the bidding procedures, which are
17 attached to the order as Exhibit 1, we've added a provision
18 that potential bidders must disclose their connections to the
19 Debtors or its insiders. The only other big area, Your
20 Honor, was actually back in the order. I jumped over it, but
21 I wanted to save it for last because it's the biggest point
22 of contention. It's the credit bidding language for Essilor
23 and that is on page 10 of what appears as paragraph 14 in the
24 blackline.

25 Your Honor, when we filed this yesterday. We

1 tentatively agreed with Essilor on this language. After we
2 filed it, I was advised by the Committee, the Committee
3 identified a potential issue with certain of the liens of
4 Essilor. So, as I talked about in the beginning, we have
5 these 10 stores that they have liens on all the assets in
6 those 10 stores, eight of them are The Eye Gallery, the other
7 ones are branded The Artful Eye. The Committee raised an
8 issue and said listen, when you look at the description of
9 the collateral in the UCC-1 and in the security agreement,
10 and that's why I handed that to you and highlighted the
11 language. It talks about all the assets in the business
12 operated as The Eye Gallery.

13 So, the issue is, it's possible that because of the
14 way the collateral is described that the security interest
15 didn't attach to the assets at The Artful Eye stores; that's
16 one potential. The other issue could be that even if it
17 attached, it's not properly perfected.

18 THE COURT: Are The Artful Eye properties listed in
19 the list of real properties that follow?

20 MR. HURST: They are, Your Honor. The addresses of
21 all the properties are there.

22 THE COURT: All right.

23 MR. HURST: But through the preliminary analysis
24 conducted by the Committee and also the DIP lender, they
25 believe it is potentially an issue. So, in the world of UCC-

1 1's, Your Honor, sometimes small details are important. And,
2 you know, if you're thinking about if something is
3 potentially misleading, and you have a vendor look at that
4 and they deal with The Artful Eye, they aren't going to know.
5 I mean, potentially, maybe they don't; that's a question
6 that, ultimately, may be before Your Honor, but it's
7 something that does need to be run down because it
8 potentially has a significant impact. You have two out of
9 ten stores and these are valuable assets.

10 So, Your Honor, that's the issue. When Mr. Bowden
11 speaks to you after I leave the podium he's going to talk
12 about potential resolution. The first part of the resolution
13 I can tell you about is we have agreed, everyone has agreed
14 that Essilor should have the right to credit bid on the eight
15 stores so long as, you know, their credit bidding on their
16 collateral as described in the security agreement. What Mr.
17 Bowden will talk about is what do we do about these other two
18 stores; keeping in mind that we're headed toward an auction
19 and we'd really like to take care of this now, but I'll leave
20 that for Mr. Bowden.

21 Your Honor, I think that sums up the Essilor issue.
22 If you don't have any questions for me, I'll turn it over to
23 Mr. Bowden, and then I know that counsel for Dr. Kurstin is
24 also in the Courtroom and would like to present his
25 objections and then I can respond if that makes sense.

1 THE COURT: Okay. Mr. Bowden.

2 MR. BOWDEN: Your Honor, good afternoon, for the
3 record Bill Bowden of Ashby & Geddes for Essilor. With me is
4 my colleague Stacy Newman. Your Honor, joined on the phone
5 by Holly O'Neill of the Gardere Wynne Sewell Firm, our co-
6 counsel here. Your Honor, before I speak it might be best if
7 we hear from the DIP Lenders or the Committee on this issue
8 if they have anything to add and that way I won't need to be
9 jumping up and down and we can do this in a more sufficient
10 fashion.

11 THE COURT: That's fine with me. Mr. Beck.

12 MR. BECK: Good afternoon, Your Honor, Richard Beck,
13 Klehr Harrison Harvey Branzburg on behalf of the Committee.
14 I think Mr. Hurst's recitation of what of the events are,
15 everything is generally accurate. We also filed a reply
16 today that sort of outlined the issue in, somewhat, greater
17 detail. As we indicated, this was an issue that sort of
18 percolated up yesterday when the amended bid procedures order
19 was filed. We certainly believe there is a potential issue
20 concerning the perfection and/or extent of the liens as they
21 relate to the two stores.

22 The one thing that I think is clear and is, I
23 believe is undisputed is that this security interest and the
24 related UCC-1 filing do not extend to all assets of this
25 Debtor; that's clear, it's a limited lien. As a limited lien

1 in a credit bid situation, it obviously raises a number of
2 questions. The bookends of that are what is, the extent of
3 the conveyance of the lien, and the perfection, thereof, and
4 what are the assets that are being acquired?

5 So, we certainly have an issue as to the frontend of
6 that, but we also need to know what assets are being acquired
7 because the lien does not extend to all assets of this
8 Debtor. I don't know if the schedules and statements of
9 financial affairs have not been filed. I don't know whether
10 this Debtor possesses or owns any other assets. So, there
11 are a number of questions there.

12 As to the frontend, I think Mr. Hurst's recitation
13 is generally accurate. The parties chose, in this language,
14 to define the collateral as relating to assets used by the
15 business, which is defined as The Eye Gallery. This is not a
16 situation, as Essilor raised in its reply, that you didn't
17 use a trade name or you filed against a corporate entity, but
18 you didn't include the trade name in the UCC-1. Those cases
19 don't apply to this at all because the parties chose to use
20 the trade name; that's the language that they deployed in the
21 security agreement and in the UCC-1.

22 So, where we are at this point is it's a complicated
23 issue. For the reasons we stated, we don't believe that a
24 credit bid can be allowed today. We have discussed language
25 to, I believe, get us through today and allow this process to

1 proceed. We will tee this up in whatever way is decided in
2 Court today. But that's sort of a synopsis of where the
3 Committee believes things stand at the moment.

4 THE COURT: Okay. Thank you.

5 MS. PIERCE: Good afternoon, Your Honor, Sarah
6 Pierce of Skadden Arps on behalf of the DIP Lenders. I would
7 echo what Committee counsel said and thank them for bringing
8 this issue, actually, to our attention and apologize to Your
9 Honor for the late notice. If it wasn't their eagle eye we
10 probably would not be here on this matter today. Nothing
11 different to add to what Mr. Beck or what Mr. Hurst noted,
12 simply that the collateral is described how it is. More than
13 a potential there is a dispute over what that language means,
14 whether a security interest attached in these two stores,
15 Your Honor.

16 I understand that Essilor filed their proof of
17 claim, I think 30 minutes before the hearing. I have not yet
18 had time to review that. So, it is on file now, Your Honor,
19 but, you know, very quickly before the hearing. I would just
20 additionally note credit bidding under 363(k), it's not an
21 unlimited right, it's not an absolute right, its only if
22 there is a valid secured claim and the liens are not in *bona*
23 *fide* dispute; that's the language of this District and this
24 Circuit. We would submit that as a *bona fide* dispute exists
25 and Mr. Bowden will discuss how we can further get through

1 that dispute and put our positions on the record in less than
2 the 24 hours that has happened before the hearing, those
3 liens cannot be credit bid. We submit that they should not.

4 If Essilor is given an unfettered right to credit
5 bid with respect to all 10 of these stores, two of which are
6 in dispute with respect to their collateral, that dispute is
7 thereby resolved without actually being adjudicated, Your
8 Honor. To do so would cause damage to the estate, to the
9 Creditors and to the DIP Lender. We would submit that's not
10 appropriate at this point. I would turn the podium to Mr.
11 Bowden to discuss a potential way we can deal with that in
12 advance of the auction that could serve everyone's interest,
13 that could allow an auction for the eight stores that are not
14 subject to *bona fide* dispute to go forward and, potentially,
15 with respect to the two that remain should the issue become
16 resolved or adjudicated.

17 THE COURT: All right.

18 MS. PIERCE: Thank you, Your Honor.

19 MR. BOWDEN: Good afternoon again, Your Honor, for
20 the record may I please the Court, Bill Bowden of Ashby &
21 Geddes for Essilor. Your Honor, this is the first time that
22 I have appeared before Your Honor in this case and it's
23 important, I think that I give Your Honor a little bit of
24 background about who Essilor is.

25 Your Honor, Essilor is not an enterprise that is in

1 the business of acquiring distressed debt for the purpose of
2 credit bidding on an asset that they see has upside. Essilor
3 is an eye glass business. It has been the exclusive supplier
4 of lens wear for these estates, these Debtors, for some
5 period of time; that was through all of their locations,
6 including the locations that they closed shortly before they
7 filed, pursuant to a trade services agreement. Essilor was
8 out about \$2 million dollars when the case was filed under
9 that agreement.

10 Your Honor, when the Debtors desired to expand their
11 operations into these 10 locations, which Your Honor is
12 hearing about, Essilor was the lender, is the lender that
13 funded their acquisition of those 10 stores. I very much
14 appreciate Your Honor taking the time to look at the proof of
15 claim and the papers that came into Your Honor over the last
16 14 hours since this issue came to light in the middle of the
17 day yesterday. I am not going to repeat the sequencing.

18 Suffice to say, Your Honor, I would not be
19 effectively representing my client if I did not advise Your
20 Honor that my client feels frustrated. I use that word by
21 where it finds itself today. It feels as if it has tried to
22 engage and been proactive with these estates since before
23 they filed, only to find themselves having to deal with
24 various hurdles that they continue to have to jump through.
25 Enough said on that issue, Your Honor. I appreciate you

1 hearing me on that.

2 Your Honor, shortly before the hearing Mr. Hurst
3 circulated a further revised bid procedures order and bid
4 procedures, which we think, for which I understand, the
5 parties are in agreement on with respect to the eight Eye
6 Gallery stores. So, those are resolved.

7 What the Debtors, the Lenders and the Committee had
8 proposed with respect to two Artful Eye locations, which are
9 now in dispute, was that we, either resolve consensually the
10 issue or they be removed from the auction process. In my
11 view that puts us in a bit of a box because it implicitly
12 eliminates what we believe to be a right to credit bid on
13 those locations.

14 So, what I proposed to counsel, to the Debtors, to
15 the Lenders and the Committee, which I understand they are in
16 agreement with, is that we file very limited briefs on this
17 issue. I know since Your Honor has reviewed these pleadings
18 before taking the bench this morning, Your Honor is aware of
19 what the issue is. We did file a proof of claim earlier this
20 morning. What I would propose is that everyone on this side
21 of the line who's disputing the extent, validity and priority
22 of the lien on this file letter briefs by Friday, we'll file
23 a reply the following Wednesday and impose upon Your Honor,
24 if we might, to decide the issue before the auction.

25 THE COURT: When's the auction?

1 MR. BOWDEN: The 26th.

2 THE COURT: I really don't think I need to do that.
3 I'm prepared to rule unless anybody has got a problem with
4 that.

5 MR. BOWDEN: We're happy to have Your Honor rule.

6 THE COURT: I don't see an issue at all. I think
7 the UCC clearly governs and covers the business located at
8 these premises, even though it's called The Artful Eye and
9 not The Eye Gallery. I don't think there is a *bona fide*
10 dispute as to the priority or extent of the lien and I'll
11 allow the credit bid in the full amount to the full 10
12 properties.

13 MR. BOWDEN: Thank you, Your Honor, I will work with
14 Mr. Hurst post the hearing to include that.

15 THE COURT: Well, I don't know. Given that ruling,
16 is the language you previously agreed to with the Debtors
17 adequate?

18 MR. BOWDEN: The language --

19 THE COURT: You may not have actually previously
20 agreed to this language. I apologize.

21 MR. BOWDEN: No, we previously agreed to language on
22 eight of the 10 stores and Your Honor's ruling now gives us,
23 essentially, the same right to the other two stores. So, I
24 think that that language is fine. It had been revised to
25 address the possibility of Your Honor ruling on this after

1 today's hearing, but since Your Honor has ruled, I think we
2 need to reconvene.

3 THE COURT: Okay, submit something under COC.

4 MR. BOWDEN: Thank you, Your Honor.

5 MS. PIERCE: Your Honor, very briefly if I might.

6 THE COURT: Yes.

7 MS. PIERCE: Sarah Pierce of Skadden Arps on behalf
8 of the DIP Lender. Given the rapid nature in which this
9 arose, the DIP Lender and the Committee submitted a short
10 reply that was not intended to be a full brief on the matter,
11 it was to bring the matter to Your Honor's attention. The
12 discussion today was more of a preview, which we had also
13 discussed with Essilor as to how we would deal with those two
14 stores.

15 THE COURT: Yeah, but A) he didn't agree to what you
16 had proposed in full and B) I don't think it's a problem.
17 So, I looked at what you had filed. I think it was adequate.
18 I think it's a valid lien, i.e. I don't think the fact that
19 Artful Eye is not included is a problem. I don't think it
20 effects the security interest and I don't see any cause
21 otherwise not to limit the credit bid. I know it's been done
22 fast, but you made your bed on this one a little bit by
23 adding them into the sale process at a late time. This case
24 needs to move forward. It doesn't have time and it can't
25 afford extensive briefing. I don't think there is a *bona*

1 *fide* dispute.

2 MS. PIERCE: Thank you, Your Honor.

3 MR. BECK: Your Honor, I understand the Court's
4 ruling. The only issue I would bring up, they filed the
5 proof of claim. The claim, 363(k) only pertains to allowed
6 claims. Until 30 minutes before the hearing they did not
7 have a claim that's allowed under the Code because no proof
8 of claim had been filed and no schedules have been filed.

9 So, we have not had an opportunity, I haven't even
10 read the claim to be honest with you because I was preparing
11 for the hearing. I don't know whether I have an issue as to
12 the claim or not, but I haven't seen it and I haven't
13 reviewed it. It was filed, literally, the last minute prior
14 to the hearing. They can't have an allowed claim on which to
15 credit bid. Now, they can have it, technically, I think it's
16 allowed --

17 THE COURT: It is allowed.

18 MR. BECK: It's allowed once the proof of claim is
19 filed, but, Your Honor that's unfair.

20 THE COURT: It's not fair that you added into your -
21 - you got to be kidding. You're going to come up here with
22 fair; you added this asset five days ago and now your jamming
23 him and it's unfair to you.

24 MR. BECK: No, the Committee didn't add it, Your
25 Honor, okay, the Debtor added it.

1 THE COURT: The Debtor added it and you're jumping
2 up and down in favor of it, I know that. I understand.

3 MR. BECK: I'm in favor of the stores proceeding.
4 It's not our sale, Your Honor, but we do have an obligation
5 to our clients to ensure that there is no facial objection to
6 the claim; we haven't had a chance to look at it.

7 THE COURT: Mr. Beck, overruled. Third time I've
8 ruled on this issue. Do I have to go to four or are we done?
9 Nothing else? Oh, we haven't had the Jokur issue. Somebody?

10 MR. GOLDBERGER: Good afternoon, Your Honor, Leonard
11 Goldberg P. Goldberger for Dr. Joseph Kurstin and Jokur
12 Acquisition. First of all, I'd like to thank Mr. Hurst who
13 has been very responsive in working with us to try and
14 resolve the differences, but other than one that made it into
15 the revised order, there are a number remaining.

16 If the Court would indulge me for a moment, I would
17 like to put the objections in some context. Dr. Kurstin
18 built this practice, sold it to American Optical Systems.
19 These are his former employees. These are some of his
20 patients. He feels very strongly about how the practice is
21 being run and how it's not being run. There are a number of
22 things he asked me to bring to the Court's attention about
23 what's happening to the practice today. He feels that it's
24 being neglected because the Debtors are not paying a number
25 of essential expenses to maintain the quality of the

1 practice.

2 For example, phone serve has been shut off, so
3 patients can't connect to the doctors. The doctors have had
4 to use their cell phones to connect to patients. There has
5 been no payment for Mitomycin, which is a drug used in the
6 LASIK procedure and that makes doing the procedure very
7 difficult. The cleaning service quit because they were
8 unpaid, and the office is not clean and that makes it much
9 more dangerous for infections. The website is down and radio
10 advertisements have been stopped, so that effects the flow of
11 patients and new patients are the lifeblood of the vitality
12 and economic vitality of the practice. Just by rough
13 calculations, the number of patients are down 50 to 60
14 percent and so is the revenue.

15 Against the disappointment and dissatisfaction of
16 how the practice is being run, Dr. Kurstin, he is looking at
17 the sale procedures with somewhat of a jaundice eye. He
18 wants to make sure that his interests, both as a potential
19 bidder and also as the landlord are adequately protected.

20 Now, if I could get to the substance of the
21 remaining objections to the sale procedure. What I have
22 tried to do is characterize them and propose actual text to
23 deal with them, if I might approach the Court.

24 THE COURT: Yes. Thank you.

25 MR. GOLDBERGER: The first objection is that

1 potential bidders must be financially qualified to adequately
2 restore damage to the lease premises if the fixtures or
3 equipment are removed. Now, of course there is a possibility
4 that any buyer for the location, and that is the Miami Laser
5 Eye Center at 1661 SW 37th Avenue in Miami, there is a
6 possibility that the buyer may just want the equipment and
7 not want to assume the lease and conduct the practice there
8 going forward, in which case they would remove the equipment.
9 Well, a lot of this equipment is permanently affixed and to
10 remove the equipment would leave holes in the wall or the
11 floor, their affixed and it would have to be repaired.

12 So, what we are asking is that as part of the
13 qualification of a bidder who indicates that they are not
14 going to assume the lease that they provide some type of
15 financial guarantee, a bond or some evidence that they have
16 the financial wherewithal to pay for the removal of the
17 equipment and the repair. Dr. Kurstin made a rough estimate
18 that it would be about \$50,000.00 in damage to the premises
19 and also that the required materials contain this in addition
20 to a time table and a work plan of removal and repair; that
21 would give Dr. Kurstin an ability to make a judgment as to
22 whether or not adequate assurance is being provided. So, as
23 you can see I provided proposed language to address that
24 which should be put into the bidding procedures.

25 The next objection is that the landlords must have

1 timely consultation rights to determine whether there is
2 adequate assurance, excuse me, whether the adequate assurance
3 package is sufficient for a potential bidder to be considered
4 as a qualified bidder. To the extent that the Debtor knows
5 who the potential bidders are and the adequate assurance
6 packages presented, Dr. Kurstin feels that landlords,
7 respectfully himself, should be provided with that
8 information.

9 I understand Mr. Hurst's point that Dr. Kurstin, as
10 a competing bidder, may have other interests. So, we limited
11 this to just the adequate assurance package so that he can
12 make a judgment then, rather than after the auction or at
13 some point in the truncated time between the auction and the
14 sale hearing. We simply ask that the Debtors consult with
15 the landlord requesting the adequacy of the potential
16 bidder's adequate assurance package.

17 The next objection goes to credit bidding and it is
18 in a very limited situation. The objection is the ability
19 for credit bidding must be extended to holders of landlords
20 liens if the lease is being rejected. Obviously, if the
21 lease is being assumed, there is not a problem. It's only
22 the instincts where a potential bidder decides not to conduct
23 business in that premises and the Debtor rejects the lease;
24 that would, of course, give rise to a lease rejection claim
25 which is governed and quantified under Section 365 of the

1 Code, but that claim is secured in this instance by Florida's
2 Landlord Lien Law. To the extent that rejection damage claim
3 can be calculated, Dr. Kurstin or his entity Jokur
4 Acquisitions ought to be able to credit bid that claim which
5 we'll know at or around the time of the auction. I've taken
6 the language to mirror the other language that was added to
7 the bidding procedures order, so, hopefully, there is nothing
8 controversial to the words themselves.

9 Lastly, the objection is that expedited discovery
10 must be available in connection with the preparation for the
11 sale hearing. If there is to be litigation between the time
12 of the auction sale on August 26th and the sale hearing on
13 September 3rd with the Labor Day weekend in the middle, we
14 ought to be able to have expedited discovery so that if there
15 is an objection that has to be litigated, we don't have to
16 come back to Your Honor and ask by way of motion for that
17 type of relief; that could easily be included in the bidding
18 procedures order and we've given language to that effect.

19 THE COURT: Okay.

20 MR. GOLDBERGER: Thank you.

21 THE COURT: Ms. Mersky.

22 MS. MERSKY: Your Honor, Rachel Mersky on behalf of
23 four landlords that were recently added to the list of assets
24 being sold. We have been working with Mr. Hurst since the
25 late filing of the locations and he has worked extensively

1 with us to assure that the only bids that are being proffered
2 are bids of optical/optician practices so that there would
3 not be a use or a need for a landlord to separately credit
4 bid its premises; therefore, the issue of whether a landlord
5 should have a right to a credit bid since the practice is
6 being sold as an optical practice with equipment as opposed
7 to a lease and separate equipment, would not be an issue for
8 this auction.

9 Mr. Hurst has also agreed to allow the landlords to
10 attend the auction to the extent that the landlord voices an
11 opinion at the auction regarding which potential bidders
12 would better be able to demonstrate adequate assurance; that
13 could, of course, be considered by the Committee and the
14 Debtors at the auction for determining the highest and best
15 bid. I just wanted to clarify and those issues have been
16 specifically and previously addressed to allow, in a very
17 condensed timeframe, the ability of the landlords to protect
18 their rights.

19 MR. HURST: Your Honor, again, David Hurst for the
20 Debtors. Your Honor, going to Dr. Kurstin's objections, as I
21 said early on in my presentation, I think a lot of issues
22 stem from the fact that Dr. Kurstin stands in two roles, both
23 a bidder and a landlord. And you can see that at some point
24 if you make it difficult enough for other potential bidders,
25 they just won't bid. The difference in consideration between

1 Dr. Kurstin and other bidders is significant. So, it's
2 important, I think that we don't chill bidding unnecessarily,
3 so that there are proceeds to benefit the estate.

4 I'll go through Dr. Kurstin's objections, Dr.
5 Kurstin and Jokur Acquisitions' objections. First of all,
6 with respect to adequately restoring the premises, it's
7 obviously a concern if equipment's ripped out, maybe it's
8 going to cause some damage. I don't know about \$50,000.00 in
9 damage. I mean typically this is an admin claim. I don't
10 think that the landlord is comfortable with an admin claim
11 and so he wants to sort of tack that on to force the
12 purchaser to pay.

13 What I would suggest, Your Honor, is this is more of
14 a sale issue. Let's say, you know, we figure out who it's
15 going to sell to; that's going to be the subject of a Court
16 order. It will be filed and I think at that point that's
17 really when you consider is there an issue or is there not an
18 issue.

19 THE COURT: Yeah, I don't view this as an adequate
20 assurance issue. I agree with you, I think it's premature.
21 I'm not sure that at a final sale hearing I'm going to say
22 that any damage claim arising from a third party removing
23 equipment from a Jokur leasehold would only give rise to a
24 claim against the Debtor. I think whoever removes property
25 from that location, whether it be the Debtor or a buyer, is

1 going to have to do so in a commercially reasonable manner.
2 And if they create damages that are not commercially
3 reasonable in performing that task, I think they are going to
4 be held liable. Now, whether that's an admin claim or a
5 buyer claim, I don't think I need to decide today.

6 Having said all that, somebody who comes in and
7 removes property in a commercially reasonable manner from a
8 leasehold, is not an insurer of the landlords damages,
9 including damages relating to being able to relet the
10 premises or not. You can't come in, and I mean we all know
11 this, right, you can't come in and rip stuff out of the wall
12 and leave everything lying around and create a huge mess, nor
13 do you have to tip toe around and restore everything to a
14 pristine condition when you're finished.

15 I agree with you, I think this is not an adequate
16 assurance issue. I think it's a sale issue. I think we'll
17 have to deal with it, possibly, at a sale if people, indeed,
18 are just interested in what I assume is the LASIK eye surgery
19 equipment, which having had that procedure I know it's big or
20 at least it was when I had it done; it's probably a bread
21 basket now, but it certainly was big when I had it done and I
22 understand the concern. I think we can deal with it at the
23 sale hearing.

24 MR. HURST: Thank you, Your Honor. The next issue
25 raised was that the landlord liked to have consultation

1 rights. You know, as Ms. Mersky just said and I agreed with
2 her, she said well, can I come to the auction and then you
3 have multiple bidders, can I give my input because we may
4 prefer one over the other, there's adequate assurance issues.
5 I said sure, happy to listen to you because it avoids issues
6 later, but I feel a lot differently when you're sitting in
7 the room with a bidder looking at other bidders, getting
8 information about other bidders and wanting to consult. I
9 think it sends the wrong message.

10 THE COURT: No, you need to decide. I said this
11 recently, you need to decide, you are either a landlord
12 protecting your rights or you're a bidder. And if you're a
13 bidder you're going to be subject to limitations, including
14 limited information on what other bidders are doing. It is
15 not value maximizing for the estate, nor appropriate for a
16 bidder to have an inside look at what other bidders are
17 doing, simply by the fact that that bidder is a landlord.
18 So, no, I don't think that the Debtor need consult with the
19 landlord, at least not be required to consult with Jokur as
20 to what other bidders might be willing to provide in their
21 bid, including adequate assurance and future performance.

22 Once the Debtor makes a decision and picks a winning
23 bidder, obviously to the extent it's not Jokur that will open
24 up the question of whether adequate assurance of future
25 performance is being provided or not. I would focus then

1 again, I think on the Case Law which says again, not an
2 insurer of everything that might happen. Adequate assurance
3 means can you pay the rent over the next 12 months; that's
4 what adequate assurance of future performance is or
5 otherwise, that was a little narrow, or otherwise comply with
6 whatever lease obligations you have.

7 MR. HURST: I was getting my hopes up.

8 THE COURT: No, no, my point being again, I think an
9 over expansive argument about what adequate assurance has to
10 provide might be too much. At this point I'm speculating, I
11 don't know what the argument is going to be one way or the
12 other, but no, if its Jokur's bidding, it doesn't get to
13 consult on the other bids including the adequate assurance to
14 all its rights with regard to whether adequate assurance is
15 being provided will be fully preserved for the sale hearing
16 to the extent that they're not the winning. I will limit my
17 comments as *dicta* today and look at it with fresh eyes at a
18 sale hearing to the extent necessary as to what adequate
19 assurance might or might not require.

20 MR. HURST: Understood, Your Honor. Thank you. The
21 next issue is actually pretty interesting. Its credit
22 bidding, credit bidding and rejection damage claims. So,
23 Your Honor, two thoughts about this. First of all, at the
24 time of the credit bid the lease wouldn't be rejected, so
25 there would be no claim.

1 Second of all, if you were to require this
2 provision, basically anyone that wanted to just take the
3 equipment, perhaps because the lease is too expensive and
4 relocate it would be faced with a credit of, you know,
5 hundreds of thousands of dollars based on a rejection damage
6 claim which would make it impossible to pick the equipment.
7 It would effectively force any bidder to take that lease and,
8 frankly, the leases expenses.

9 THE COURT: I think this is a fundamentally
10 different issue then what we just dealt with in connection
11 with Mr. Bowden's client. There is no claim. There is no
12 lease rejection claim. And even if there's not a bidder at
13 the auction that takes assumption, or assignment or even
14 wants the equipment, that doesn't mean the lease will be
15 rejected.

16 MR. HURST: Right.

17 THE COURT: It may be the lease will be preserved to
18 possibly be assigned to a third party at a later date. I
19 don't know. We don't know what the Debtor will do in the
20 context of this business judgment. So and this goes to what
21 Mr. Beck was arguing, albeit again, in his favor here is we
22 don't have a claim here. We don't even have an action that
23 would give rise to a claim and I don't feel comfortable
24 having, even if there were a claim, putting in the order,
25 certainly a bid procedures order that there is a State Law

1 right to make that a secured claim.

2 Also, to a certain extent other than the situation
3 that you have posited, which is somebody wants the equipment
4 and not the lease, if its rejected its rejected; it's going
5 to end up back in the landlords hands anyway. What's the
6 point of a lease, secured lease claim and that secured lease
7 claim probably wouldn't attach as a security interest to
8 fixtures that are not affixed to the property. So, if the
9 equipment is saleable on a separate basis and can be removed
10 in a commercially reasonable manner, getting a secured
11 landlords lien based on rejection damages doesn't get you to
12 where you want to get anyway, I assume. You are stuck with
13 the land and you're going to get the land back anyway. So, I
14 want to add that language.

15 MR. HURST: All right, you've done a much better
16 analysis than me, Your Honor.

17 THE COURT: Not true.

18 MR. HURST: The final point is expedited discovery,
19 you know, I thought about this and we looked through a bunch
20 of different procedures and I haven't seen it. I think if
21 you really needed expedited discovery you would get it. I
22 would prefer not to put something like this into a bidding
23 procedure. I don't really want precedent out there and I
24 don't think it's necessary. I really do believe if Jokur
25 Acquisitions needed discovery based on adequate assurance

1 that the Debtors and the purchaser are going to work pretty
2 darn hard to get them information to get it done.

3 THE COURT: Yeah, I mean what's going to happen here
4 is first of all if they object you have a contested matter
5 and a right to discovery exist. Second, we're going to be
6 operating on an extremely short timeframe when you're getting
7 adequate assurance information on Labor Day for a hearing on
8 the 3rd. So, if there's going to be discovery about what
9 adequate assurance is, frankly, it probably isn't going to
10 happen before the 3rd and if there's an open issue, the
11 hearing on that issue will probably have to get kicked to
12 allow parties to figure out whether there's an adequate
13 assurance issue or not.

14 I agree with you. I don't want to blanket order
15 here that authorizes expedited discovery between the auction
16 and the sale hearing. I think to the extent somebody needs a
17 deposition in a hurry or some deal documents, I'll be here on
18 the 2nd and we can figure it out on the telephone and if not
19 we'll maybe have to kick that issue to a later date. I don't
20 know. It will depend on what happens at the hearing. It's
21 not at all unusual for landlords to get jammed on adequate
22 assurance at a sale hearing. Discovery rights will exist and
23 we'll deal with the timing of that if appropriate, if it
24 arises. I think I have overruled all the objections.

25 MR. HURST: Thank you, Your Honor. Those are all

1 the objections to the motion. Now, I understand Your Honor's
2 ruling. There's a couple things we have to adjust in the
3 order like changing the cure objection deadline and also to
4 applicable Federal Law instead of HIPPA. There are a couple
5 little changes to the order. I'll work with Mr. Bowden to
6 make sure we get the language just right about the Essilor
7 credit bid and we'll get the order over to Your Honor this
8 afternoon under certification of counsel.

9 THE COURT: As long as the order complies or
10 comports with the rulings I've made, based on the record I'm
11 happy to approve the DIP procedures as modified and I'll sign
12 the order when I get it.

13 MR. HURST: Okay. Thank you, Your Honor. Your
14 Honor, the last item on the agenda is interesting. It's the
15 motion by Sight's My Line.

16 THE COURT: The bid procedures wasn't interesting.

17 MR. HURST: We stepped it up with this one. The
18 motion by Sight's My Line asserting a lien on sale proceeds.
19 The Debtor's purchased a bunch of properties from Sight's My
20 Line; they got a note, they got a security interest. As
21 happened in a lot of the transactions with the Debtors, the
22 counterparties didn't file their UCC's exactly where they
23 were supposed to. In this case they filed in Texas, they
24 didn't file in Delaware and I don't think there is any
25 dispute about that; although, Mr. Hazeltine might, I think we

1 agree on that point, but he'll speak for himself.

2 Back when we filed the motion to sell the assets in
3 three of those locations that were sold to us in Texas,
4 Sight's My Line filed an objection and in order to resolve it
5 we included language in that order. The language basically
6 said that an affiliate of Sight's My Line, Age of Properties,
7 LLC was able to assert first priority liens on the proceeds
8 by filing a motion on shortened notice. So, we recognize at
9 the time they were kind of struggling with the legal theory,
10 I think.

11 I wanted the opportunity to come back to Your Honor
12 and say hey, Debtors sold all this stuff and our liens
13 attached to the proceeds. I didn't actually expect it would
14 happen, but that's what happened and they followed all of the
15 procedures and filed this motion on shortened notice. And
16 like I said, it's not disputed that they had a security
17 interest, it just happens to have been filed in Texas and not
18 in Delaware. Accordingly, it's not properly perfected, but
19 as the papers point out, Your Honor, there still is a lien or
20 a security interest, essentially, a security interest
21 attached, it's just not perfected. But because that's a
22 situation under 544, Code Section 544(a)(1) it can be
23 avoided. Unfortunately, it's not avoided, it can be avoided.
24 That is what our objection seeks. We seek to avoid that
25 lien.

1 Typically, this does require an adversary
2 proceeding. As set forth in our papers, however, we think
3 that Sight's My Line has consented to having this dealt with
4 in a contested matter. First of all, the language that we
5 worked into the sale order anticipated that they would file a
6 motion to deal with the lien; furthermore, they filed a
7 motion and responded with an objection. We think that you
8 can consent to having your lien dealt with in this sort of a
9 procedural context.

10 The second argument we put out there, Your Honor, in
11 case you weren't comfortable with that is that we could deem
12 the motion to be a complaint and deem our objection to be a
13 motion to dismiss. I didn't know what you would be more
14 comfortable with or if you would be comfortable with either,
15 but the bottom line is, Your Honor, I think everyone
16 understands what the outcome is going to be. I think Sight's
17 My Line understands what the outcome is going to be, but, you
18 know, they want to go through this process and so we have
19 been dragged along with it.

20 What we don't want to do is spend any more money on
21 this. I mean, you know, even filing the objection we did,
22 you know, at the end of the day it still takes a lot of time
23 to go through the UCC and try to make something presentable.
24 It takes time and we don't want to go another step and go
25 through the adversary proceeding process to avoid this lien,

1 which everyone knows can be avoided.

2 THE COURT: Maybe it's a question for Mr. Hazeltine.
3 Is it that your client wishes to have whatever lien you have
4 applied to the proceeds and/or is it that your client wishes
5 to credit bid at the auction?

6 MR. HAZELTINE: Your Honor, that auction is already
7 done. The transaction was with [indiscernible].

8 THE COURT: Yes.

9 MR. HAZELTINE: Excuse me, Your Honor, William
10 Hazeltine on behalf of Sight's My Line Inc. We filed the
11 motion to finally determine our status.

12 THE COURT: Right.

13 MR. HAZELTINE: Your Honor, I will say Sight's My
14 Line did file the UCC-1 in Texas. The property was located
15 in Texas. The Debtors have not presented any evidence
16 showing that AOS is a Delaware LLC. I have gone on the
17 Secretary of State's website; it is listed as a Delaware LLC,
18 domestic LLC. I checked the UCC-1 search and Sight's My Line
19 did not file a UCC-1 in Delaware, but unless an order is
20 entered, either granting the lien or avoiding the lien that
21 lien is in limbo. There are several reasons why my client
22 needs an order deciding that one way or the other and that's
23 why I filed the motion and presented it to Your Honor.

24 With respect to the adversary proceeding, I don't
25 think that there were really any evidentiary idioms in

1 dispute. I don't want to require the Debtors to file an
2 adversary proceeding. I don't think it's necessary in this
3 case.

4 THE COURT: Okay. Any further argument?

5 MR. HAZELTINE: No, Your Honor.

6 THE COURT: No further clarification. If the
7 parties are okay with the rather bizarre procedural posture,
8 I'm certainly not going to stand in the way of that. Would
9 you like me to rule?

10 MR. HURST: Yes, I would.

11 THE COURT: I couldn't tell if you were going to say
12 something else.

13 MR. HURST: No.

14 THE COURT: All right, well I go with the Debtors'
15 position here. Again, a different issue than the one we were
16 talking about where previously with Mr. Bowden's client where
17 the question was whether Artful Eye had to be specifically
18 enumerated. Here we have a failure of a fundamental
19 requirement which is the filing of Delaware because it's a
20 Delaware LLC. So, again, the security interest exists, it's
21 just a lack of perfection and we don't need to get into the
22 distinctions because the Code clearly allows the Debtor to
23 exercise its strong arm power through an adversary proceeding
24 to avoid and protect his lien based on the hypothetical
25 investor point.

1 So this, I think is a fundamental problem with the
2 security interest and as a result it is junior to, well, it's
3 avoided, the lien is avoided. You can send over an order and
4 I'll sign it.

5 MR. HURST: May I hand up an order?

6 THE COURT: Yeah. Why don't you submit an order
7 under COC?

8 MR. HAZELTINE: Yes.

9 MR. HURST: Why don't we do that so that the order
10 is right?

11 THE COURT: Yes.

12 MR. HAZELTINE: Thank you, Your Honor.

13 THE COURT: You're welcome.

14 MR. HURST: Your Honor, I believe that's it. It
15 sounds like two COC's will be coming your way this afternoon.

16 THE COURT: Okay.

17 MR. HURST: I don't believe there are any other
18 issues.

19 THE COURT: All right. Very good, we're adjourned.
20 Thank you.

21 (Court Adjourned).

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CERTIFICATE

1
2
3 I certify that the foregoing is a correct transcript from the
4 electronic sound recording of the proceedings in the above-
5 entitled matter.

6 /s/Mary Zajaczkowski
7 Mary Zajaczkowski, CET**D-531

August 14, 2014
Date

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