

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

**Clerk's Minutes**

Before the Honorable James Starzynski

James Burke, Law Clerk  
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters  
(505) 242-2809

Page Rasmussen - 1/30/02

Kim Middlebrooks - 1/31/02

Sara Edmonds - 2/21/02

**Date:**  
Wednesday, January 30, 2002

**In re:**  
FURRS  
No. 7-01-10779 SA

FH on First and Second Application for Allowance and Payment of Compensation  
for Services Rendered Feb. 14, 2001 to June 30, 2001 by Pepper, Hamilton

FH on Motion for Order Authorizing Reimbursement of Expenses of Members of UCC

FH on Application of Deloitte and Touche

Attorney for Pepper, Hamilton: William Cohen  
Attorney for UST: Ron Andazola  
Attorney for Heller: William Keleher  
Attorney for MetLife: Jennie Behles  
Attorney for Deloitte and Touche and Deloitte Consulting: Michael Li  
Trustee: Yvette Gonzales

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**Summary of Proceedings:**

Exhibits   X  

Testimony   X  

**MATTER TAKEN UNDER ADVISEMENT**

C: Like to start w/expense reimbursement. Helpful that Mr. Salvadori talk about committee deliberations and I would testify in supp. of Pepper, Hamilton applic.

L: I agree. Can prob. combine.

K: I jumped up bec. I thought we were parsing out UCC exp. But, should listen to all.

A: Sounds reasonable.

Ct: Fine. Go forward on that basis.

K: Would invoke the rule.

Ct: Mr. Salvadori as chairman of committee constitutes an interested party and Mr. Forkham is interested party. Mr. Barnett is.

L: Mr. B. is as well.

#### OPENING STATEMENTS

C: I struggled trying to decide how to show you the best way how the UST, the sec. lenders and how the prof. prov. benefits for the estate besides the disappointing results for all of us. I poured thru my filed and the meetings and sub-committee meetings. Six face to face mtgs and 20 confer. calls. Reviewed the min. and compens. arrangement of Golleher and Mays. All were sensitive and troublesome hrgs in this case. The dynamics taken by UCC were partic. relevant. I kept asking myself that there is something I am missing. Very rare for a prof. to face obj. by all constituencies in a case. The activities we engaged in that supp. obj. from all fronts.

K: This is argum. and or testimony. Like Mr. C. to propose what they will show.

Ct: Verging a little bit on argument. Not cited cases so far. Don't have a problem - I'm sure he will talk at some point what the argument will be. Was helpful when he talked about the 3 things he examined. Golleher and Mays and Skadden and m/for appt. of trustee.

C: I realized all of our mtgs and agendas was the obvious. 90% of work is not a matter of records and files in this case. Will i.d. for you thru testimony why we did what we did and why we thought it was important and to max. the benefit. Those things and the reasons behind it is not presented to court. Not pres. to ct in this case. In my exper. I realized it is rarely pres. to ct as to why partic. actions were taken. 90% of info. that is not of public

record of what actions were taken. UCC was nipping at heels of dtr at every action it took. We didn't bel. that and the evid. will show why we didn't bel. that. Some will see it was an obstacle to case. Evid. will show it as the opposite. We are gatekeepers. Try to max. value and explore alternative. Bel. me we are fully aware of our fiduc. resp. When evid. is in you will agree. Evid. will show why we did it and our rationale. Hard to do in a case like this when the actions and legal activities were placed on hold a # of times or some of the actions appear to be rejected out of hand. Evid. will show obj. taken by comm. were based on negot. Behind scenes we accompl. signif. savings. Diverse creds. comm. Had local entrepreneurs who sat on comm. Two sophis. bankr. attys. Partic. in decis. making process. Our actions were not careless and not quickly made and not superficial. You may disagree w/decis., but we were not misguided. I know you know UCC is not a guarantor of success in a case. We never promise our actions will produce distrib. to unsec. Why they took the actions they did. We worked diligently. Best business judg. at the time. Intent to max. value. Not billing file to build fees.

Ct: No evid. of that.

C: Described way comm. member should incur expenses. For 10 mos. we were in this ch. 11 had out of pocket exp. of \$37k. Partic. in live mtgs. Will show you why we had live mtgs. Locations was not chosen hap hazardly. Two mtgs in Denver. First at req. of R. Levin. He was out of town w/family. Only way he could reach it was to fly into Denver. Unfortunately he was snowbound. New York mtg was held in NY bec. dtr wanted a back to back mtg w/unsec. lenders. We selected those locations at success. of dtr. Met in Dallas two other times. Most econom. place to meet. Have members who are from Omaha, Nebraska, Cincinnati, Ohio and Colorado Springs, NC, etc.

Ct: I went over those again yesterday and I had following thought. Want to lay out what my thinking is. Look at overall fees. \$4.5mil. I will concede Heller and MetLife may not quite look at it that way. Other thing is putting aside one tech. expense is trip of Sandra Charmain trip to Albuq. before comm. was put together. Think these folks put in travel to work on this. Already companies that will unlikely get anything out of this. If I were to rule against reimb. all of these expenses is I will discourage future repres. Inclined to grant it. Think argum. made by Mr. Fish for Heller is the comm. breached a fiduc. oblig. by not restraining it's attys. Argum. goes too far. By punishing goes too far. I'm saying except for that one line item from Ms. Charmain you should put on test. Burden on objectors why those expenses should not be granted. Just let you know my thoughts.

C: Will hear evid. that the lawyers and financial advisors made recommend. to UCC. Unusual, but doing it w/permission. Recommend. we made were not always followed by client. 3 separ. times we made recommend. Not here to apologize, but important for you to know the req. we are making. Min. reflect that. Those are our exh. that identif. the life of our committee. Finally the repres. of Salvadori, Forkham and Barnett supp. why we did what we did to benef. the estate. What we did behind the scenes and the thought processes we went thru. Services were reasonable. Fee req. are very subst., but rendered in performing services.

L: Easy if big dividend. As Tolstoy is all unhappy families are alike.

Temptation is only natural to engage in hindsight. Unfortunate the hindsight is focused to avoid result. Worked very hard, but took highest degree of professionalism. Obj. parties raised ques. The evid. will show that is a sign the committee is doing it's job. Here to addr. concerns and answer our critics. We will reconstruct the case for the court. Will put court where it was not at the time. Will let court sit in on committee meetings and share hopes and aspirations. Provide counterbalance to prof. Will defend our integrity as profess.

A: Evid. will show that the prof. approached this proceed. as a large natl. case, but was a poor, regional ch. ll. We do not allege the case was deliberately overworked. We contend and evid. will show the case was overworked. Result of the mind set of approaching this matter. As to Deloitte they failed to file emp. applic. until Mar. 14. \$154k of fees were incurred during that time. Reas. for late filing was one Deloitte's conflict screen. UCC sugg. they work immed. and detracted from their filing emp. applic.

Ct: From UST you are prepared to relitig. that iss. Requested by Deloitte.

A: Yes.

K: Heller thought that was decided.

L: Court did rule on Dec. 6 that they denied Deloitte's req. Have an order to pass up. May ask for reconsideration. I don't know that it is an iss. for today. Take that iss. off table.

Ct: Gave court warning. I'm on ntc. that it is not completely dead.

K: Evid. that might come in today is numerical calculation.

A: Yes.

L: We could prob. agree to that. Will verify the #.

Ct: Makes sense and run it by Ms. B. and Mr. K.

L: Will addr. ct at an approp. time.

Ct: Fine.

A: Evid. will show at comm. mtg held April 18 Deloitte made present. that the dtr was not making it's oper. expenses. The UCC knew at that point that the dtr was in dire straits. Ltd returns for any unsec. cred. Despite this report by Deloitte the evid. will show Deloitte incurred large fees. \$423k in fees between April 31 and Aug. 31. Evid. will show Pepper, Hamilton was in much the same situation. PH proc. to incur over \$400k in fees from April 31, and Oct. 26. PH did large amts of work that was unecess. UCC did little to review and control prof. fees incurred. We contend the evid. will supp. the compens. for these prof. is due, but at a steep reduction.

Ct: Isn't there a chart that shows a signif. decrease in expenses to estate beginning in July.

C: I have a chart w/me that tracks.

Ct: Thinking of a single line box.

K: Evid. will show that the fee applic. from Deloitte and Touche is over \$1mil. PH for all that money didn't contribute much value. Heard 90% of work nobody knows about. All work is reflected in fee applic. Don't see evid. of anything being done for value of estate. PH the time entries are inflated and will put on evid. That is signif. In the case of both PH and Deloitte work was done that didn't benef. the unsec. Looks like work was done that was a waste of time. Was a mtg w/analysis and present. and more mtgs and repes. and review of pldgs, reporting to one another. Decis. was made let's make sure this dtr is dying. Did more analysis and review. On and on. Applic. for employ. show these people are exper. Mr. Cohen knows what a ch. 11 looks like. Mr. Li is exper. Know how to run the #'s. Report April 18. DT reported. Extremely detailed presentation. Evid. is also - reason time chgs like that are justified if have a jr. worker will take 3 hrs to figure something out. Senior can figure it out. Have exper. Evid. will show nobody did that. If they did, nobody paid attn. to it. Part of blame is on UCC itself. UCC wanted to be paid. When apparent on April 18 that there wasn't going to be a distrib. they knew the liquid. was project. between \$67mil. Evid. will show they had a debt matrix that showed the debt value was losing money. Would be out of money by June 1. Also knew the dtr made proposals on how they were going to survive. Used as bench mark. In Feb. of 2001 the dtr was missing matching it's weekly sales volume by 45%. Dtr recog. that. Showed they would miss it by less and less. Borrowed DIP financing. Dtr was going to buy inventory and get people back in store and survived. What happened is those sales weren't recovering. That was clear as of April 18. April 18 DT is a break even analysis. Not break even unless they increase their sales a lot. DT pointed out they are running out of money. Stop buying inventory. In same pickle that caused dtr to file. Infusion did not help. Nobody accepted that. Egregious that chairman of comm. spoke to Mr. Golleher. Said this enterprise has val. of \$150mil. Don't accept DT and Golleher repres. Looking at it realistically. What UCC refused to do. No alternative pursued. Make decis. quickly. Pay a lot of money on hourly basis. Kept going and going and going. Evid. will not show the UCC or it's prof. were willing to realistically assessing the info. they had. Kept looking for more. Didn't do any good. Info. that had as of April 18 was did dtr have enough to turn it around. No, it was clear. DIP financing had deadline of Aug. 1. Losing money hand over fist. Overdrawn. Nothing there. Not going to turn around. If sold, how much would be realized. Had DT saying \$160mil. Nothing left for unsec., no.

Ct: Harvest the organs?

K: Was my thought, but thought too graphic. None of that helped to get dtr sold or help stem flow of losses. None of it helped keep dtr operating. May have detracted from it. No value. Relied heavily on DT report. Didn't like it and didn't pay attention to it. Didn't take long to confirm dtr was terminal. Kept ordering tests. Doing CAT scans to make sure dtr was dead, but didn't help.

B: May be more simplistic than this. The night we were negot. the DIP financing order was little obj. to entry of that order. Entered w/their

consent. Mr. Davis was here wanting to be UCC lawyer. Shortly after that we knew two things. Knew the dtr was req. to have a sales agent in place by July then moved to Aug. Had to have a sale in place by a very specif. time. DIP financing prov. that. We knew going in and said to my client are you sure you want to make this loan. Reality is you have to rely on sale to come out here. Will be a liquid. prof. in place and a liquid. or sale has to take place by a specif. time. All knew that is what would happen in this case. What was going on was an idea this wasn't going to happen. Skadden was filing motions to employ Solomon. I might add when DIP financing got approved there was very little obj. from UCC. Few lang. changes that lead to this liquid. that was built in from get go. Obj. had nothing to do w/that. What bothered me was we all knew what would happen. Would have liquid. Knew there was one big looker when this case started and that was Fleming. See if you could do a better job of a bidder. Work of comm. was not aimed at that. Not facing agreed upon and court ordered inevid. in this case. True of all prof. to some extent. Even if white knight had saved you would have to seek relief. Lose from inevid. of liquid. agent. Nobody did. We knew where we were going. Why doing all of this other stuff has been beyond me. Why so much objection. Was in print and court ordered.

Ct: Sugg. I look at DIP financing order.

B: Yes.

C: Call first witness?

TESTIMONY OF JAMES SALVADORI (sworn)

RECESS

TEST. CONT'D

A: Obj. to leading form of ques.

Ct: Yes, it is.

A: Obj. again.

Ct: Wait, let him get it out.

A: Obj. again.

Ct: Overruled.

TEST. CONT'D

K: Calls for hearsay. Going too far to tell us what he learned from people he interviewed.

Ct: Ques. is why is it being offered? For estab. what comm. did rather than for merits of what that stmt was?

C: Yes.

Ct: Admissible on that basis, but not for truth of matter.

TEST. CONT'D

C: Have KK?

K: Did you serve me w/Pepper, Hamilton?

C: Bel. I did.

Ct: Nothing from Pepper, Hamilton? Have two volumes.

C: One w/expenses. Prov. 3 copies to court. Make one of them available to Mr. Keleher?

Ct: Talking about KK and...

C: Another is not an exhibit. My notes.

K: Heller obj. to cross examine based on exh. that has been produced that wasn't introduced. Not rec'd exh.

C: Totally unaware of that. Have list of people who got it. If Heller didn't rec. it, totally unaware of it.

K: Apprec. you didn't do it intentionally. But, Heller is being prejudiced. No one from firm is on the list.

Ct: How many more exhibits?

C: Just this one, but intend to offer book of exhibits.

Ct: Haven't been offered yet. Not sure what the prejudice is. Will allow you to examine witness w/respect to this exhibit?

C: Delivered by deadline.

L: Bel. it is Jan. 19.

K: This memo is dated Jan. 11.

C: This memo is to various attys. Some I don't know who they are. Happy to do anything to enable Mr. K. to examine the minutes. Had two depositions over the weekend.

K: Didn't ques. anyone on minutes.

C: I testified.

Ct: I will let you examine this witness w/respect to Pepper, Hamilton exh. KK. Will think about prejudice and if there is a way to fix this.

L: Is also in Deloitte and Touche's exh. S.

K: That fixes it.

TEST. CONT'D

K: Obj. to form of ques.

Ct: Will overrule.

TEST. CONT'D

C: Like to introduce exh. NN.

Ct: You mean KK?

C: Yes.

Ct: Let's not get into that. Introduce DT exh. S.

C: Okay. S.

TEST. CONT'D

K: Obj. Whole book that Heller did not receive.

C: Can identify it, then admissible.

Ct: Is this the witness thru whom you are intending to get these thru?

C: Yes.

K: If I may...

Ct: Before we do this I want to look at the order that was entered in connection w/this. So I have that background.

K: It's 1474. Order resulting from Prelim. Hrg.

C: I don't see who is supp. to be served. I acknowl. he is an obj. party and entitled to rec. exh. Pointed out this morning a memo and I don't know who all the lawyers are in the memo. Is there something I have missed that says who should rec. exhibits?

Ct: Parag. 4. (read)

C: All I'm saying it is a tech. point. It doesn't say, but he should have been served. If there is any way I can accommodate Heller. Unless he figured he would be able to raise this at the hrg. Surprised me. Should have called and said Mr. C. I haven't rec'd your exh. Knew Mr. A. had them.

K: I knew Mr. A. had D & T exh. There was no ques. as far as I understood - depos. were by telephone. I didn't bel. there was any ques. of Mr. C. or Mr. Salvadori regarding exh. produced by PH. I didn't have everything in front of me. Would be unlikely for PH to ques. it's own witness about exh. it was going to use. I am a little embarrassed. I have exh. from D& T. Thought

this is what we were going on. Had their testimony. Not prejudiced by not putting them in.

C: I disagree.

Ct: Not sure about prejudice iss. Not had a chance to cross index and figure out how many other exh. if any from PH proposed exh. are in fact already desig. as D& T exh.?

C: No.

L: Bel. there are two or three. Seems these exh. are not partic. controversial. True and accurate correct copies. Like an oppor. to review them. Not a long read or a hard read. Can proceed. We also did not send them to Mr. Fish. Mr. Keleher called and asked where are the exh. Were mistakes, but not a lot of followup.

K: Like an oppor. to look at them. Don't want them to be offered w/o me having a chance to look at them.

Ct: Planning on ques. witness.

C: Get them in thru witness.

Ct: Need to verify they weren't served. Confirm w/your office. I understand the list doesn't have name of any Modrall lawyer on there. Mr. Keleher you ought to check w/your office and make sure they didn't make their way to your office.

K: Seems unlikely, but I will check.

Ct: Once that is done I will be in a better position to rule. What needs to happen is a set is to be delivered to Mr. Keleher. If needs court's set, should do that. Figure out what exh.

C: Will do that.

Ct: Putting those exh. into evid. or are you going to testify about them.

C: I am.

Ct: Think about looking at those exh. and figure out what the prejudice is. Let's do it that way. Won't bother w/identif. now. Go forward w/cross examination. Break early to let Mr. K. check w/his office and let you check w/your office.

C: Good.

Ct: Not just exh. w/respect to PH, but committee reimburs. as well.

K: Didn't know about those as well. Saw an applic.

Ct: This is not the applic. Appears the billing for one person for a NY hotel. NY sales tax and NY occupancy tax. Said NY City occupancy.

C: Taxes combined are more than a hotel room in Albuq.

Ct: Need to look at those as well and same ruling applies.

C: Concludes direct exam.

Ct: Want to break and come back at 1:30.

L: Have time constraints w/Mr. Barnett needing to be at a hrg in Austin tomorrow.

Ct: Can take Mr. Barnett out of place.

A: I have a witness here who also has travel plan constraints.

Ct: Is she a fact witness?

A: Testify about monthly oper. rpts?

Ct: Should she be sequestered?

K: Fact witness.

A: Has a flight sched. for 5:30.

Barnett: Have a 5:00 flight.

C: Mr. Salvadori also has a 5:00 flight.

K: I can read fast. Just need to look at these things.

Ct: Go ahead and in meantime check w/your people and let's go forward. Will be in recess til 1:15.

RECESS

K: The order says serve it on people that showed up at prelim. hrg which is odd bec. we did not show up at prelim. hrg.

C: Was an oversight at our office. I called our office and confirmed we did not serve them. We looked at the min. of the prelim. hrg and they were not there. Would not rely on that.

K: Looked at exh. and have no obj.

Ct: All that agonizing I did over lunch I will put aside. Next issue is who is going to testify next. Are you done?

C: I am. Like to finish w/Mr. Salvadori and call Mr. Barnett.

A: Ms. Lashell will book a later flight.

Ct: Still under oath Mr. Salvadori. A couple of ques. I intended to ask under direct. Will ask them now. Mr. Salvadori when the UCC was insisting that

certain things be pursued despite sugg. of comm. prof. did the UCC give any thought who was going to pay for all that work?

S: Not in line of \$ and cents. Bel. strongly and took an opposing view from our prof., but did not ques. who would pay.

Ct: Not come out of pockets of members of UCC?

S: All the activity related to looking at lease interest didn't know \$ amt. Often times didn't know benef. until we got to answer. Benef. would outweigh the cost.

Ct: Made same calculation if ConAgra was going to pay the bill?

S: I understood my fiduc. role plus recovery for ConAgra. Thought we made subst. contrib. to the estate.

Ct: Understand thrust of my ques. If spending somebody else's money, easier to tell someone to go full speed ahead.

S: Time we spent was not reimbursed. Spent time and money.

Ct: Those are my ques. Want to ask followup ques.?

C: No.

K: Going to identify those exh. and get them entered?

C: Yes.

TEST. CONT'D

C: Offer exh. AA - TT.

Ct: Objections?

K: No.

Ct: Admitted.

CROSS EXAMINATION BY R. ANDAZOLA

CROSS EXAMINATION BY W. KELEHER

K: I move to admiss. of D & T exh. M.

L: No obj.

Ct: Admitted.

CROSS CONT'D

Ct: How does the second lien work. IF have a lien on everything including the

inventory, does it prime the senior lien?

S: Generally tied where perpet. debt is offset by extension of credit. On same terms we did perpet.

Ct: If not enough money to pay off unsec., does that mean ConAgra are forced to fall back on admin. clms?

S: Yes.

CROSS CONT'D

K: Obj. to hearsay.

C: Resp. to ques. whet. the patient is dead. Mr. S. is about to explain whet. the dtr is dead.

Ct: Obj. is overruled. Didn't mean to interrupt you. He can testify to that.

CROSS CONT'D

CROSS EXAMINATION BY J. BEHLES

C: Obj. This entire line of ques. calls for a legal conclusion. Mr. Salvadori is not a lawyer. Tried to be patient.

Ct: Thought he was testifying as to what was reported to him by Mr. Davis.

C: If that is the limit to the ques., I will w/draw the question.

CROSS CONT'D

CROSS EXAMINATION BY M. LI

K: Obj. Can't bring exper. of other cases into this. Not having oppor. to know about other cases is inapprop.

Ct: Could antic. given his background could bring up. Say this is what we did in these other cases. Seems to me if it will prov. relevant evid. so at this stage I cannot say it is not applic. or irrelevant. Go ahead.

CROSS CONT'D

K: Need foundation these are similar cases.

Ct: Will let him go ahead and testify. If can't link up, will disregard it.

CROSS CONT'D

REDIRECT

A: Obj., leading.

Ct: Let him get the ques. out.

K: Like to add a relevancy objection. Stated no rational basis that a sec. cred. would accept a trade lien. Doesn't matter what happens in other ques.

C: Ask it a differ. way.

REDIRECT CONT'D

A: Calls for speculation.

Ct: I thought ques. was what did Mr. Mays actually tell him?

C: Was my ques.

Ct: Can go ahead and answer it.

REDIRECT CONT'D

K: Very leading.

C: Redirect. Allowed to ask leading ques.

Ct: Absolutely not.

REDIRECT CONT'D

Ct: Who is next.

L: Call Mr. Barnett.

C: May Mr. Salvadori be excused?

All: No.

TESTIMONY OF BENJAMIN BARNETT (sworn)

A: Willing to agree Mr. Barnett is an expert.

TEST. CONT'D

B: I may be able to short circuit this further. I'm told nobody challenges that. Maybe that will help Mr. Li. No ques. D & T did the work or did it professionally.

L: Nearly done. Just going over ques. raised by Mr. Keleher.

K: That is adverse to sec. lenders. Carve out not addr. at this hrg. Not paid out of carve out anyway. Heller doesn't have much to say about this.

Ct: Obj. was that D & T overworked the case. Does that obj. apply to this?

K: Overworked to extent it wasn't needed, but...

Ct: Cont. w/examination. Will overrule the tender.

B: To extent to prove they did it professionally, no one doubts that.

Ct: Moved beyond that.

L: We have.

TEST. CONT'D

L: Move for admiss. of DT's exh. A.

All: No obj.

Ct: Admitted.

TEST. CONT'D

Ct: Are you going to cross examine this witness?

C: I am not.

Ct: Would like to have you at Li and Cohen table go one right after the other.

CROSS EXAMINATION BY R. ANDAZOLA

CROSS EXAMINATION BY W. KELEHER

CROSS EXAMINATION BY J. BEHLES

L: No redirect. May Mr. Barnett be excused.

Ct: Any reason?

All: No.

A: Ms. Lashell has a flight out of here tonight.

Ct: Take her out of order.

L: Did not know she was going to be an expert.

A: Testify to mo. oper. rpts. Qualify her as an expert for that purpose.  
Will be her analysis on 3 of the mo. analysis filed in this case. I did send  
a copy of her memorandum.

Ct: When?

A: Bel. on Jan. 18.

B: Like to take a short break.

RECESS

TESTIMONY OF JEAN LASHELL (sworn)

A: Offer Ms. Lashell as an expert witness.

VOIR DIRE BY MICHAEL LI

L: Obj. to her qualification. Not sure she would look at things that people would partic. look at.

Ct: I understand. I believe she should be allowed to testify.

TEST. CONT'D

A: Move for admiss. of UST exh. D7.

L: No obj.

Ct: Admitted.

TEST. CONT'D

K: No ques.

B: No ques.

CROSS EXAMINATION BY M. LI

K: Obj. Not in evid. A whole lot of financing that went on.

Ct: Will sustain obj. If tying it in to cc or ask how long the dtr cont'd to run.

CROSS CONT'D

C: No ques.

Ct: Redirect?

A: No.

Ct: This witness is free to step down and is excused. That was taken out of order. Is ten after 5:00. Come back at 9:00 tomorrow.

RECESS

**January 31, 2002**

L: Will take Mr. Cohen first.

TESTIMONY OF WILLIAM COHEN (sworn)

K: Objection. Vague.

Ct: Overrule obj.

TEST. CONT'D

K: Wondering what he is referring to?

C: Memo from my office.

Ct: And you want to look at it?

K: Absolutely.

Ct: Make sense for him to finish w/it and then pause so you can look at it.

TEST. CONT'D

RECESS

TEST. CONT'D

K: Objection. Says he doesn't have any idea, but he cont. to testify.

Ct: Think he should be able to go ahead.

TEST. CONT'D

L: Move for admission of exh. by Pepper, Hamilton UU and VV.

A: Deadline has past and I don't think third applic. is on for today.

Ct: I thought it was on. Let's focus on this partic. obj. to the exh. Taken into acct there may be time to further obj. to third applic. Is a lot smaller than other two. Prob. w/admitting these otherwise?

A: No obj.

Ct: Will be admitted.

L: No other ques.

Ct: Had a ques. I wanted to ask. Ever had a situation where the UCC disregarded your advice and wanted you to do something or told you something not to do in a case other than Furrs. How did you deal w/that?

C: Bel. I have a same situation in PharMor. Deter. whet. their decis. had legal supp. and was ethical. Once I deter. it had legal supp. and was ehtical I followed their decis. In this case I cont'd to urge them not to do what they wanted to do. Felt very strongly about that. Instructed me to the contrary.

Ct: Based on fact was on decis. you had made.

C: Decis. I think is a terrible thing for the client to do and so misguided I might say to client you have a right to do it, but I won't repres. you in this situation. Didn't do that in this situation.

Ct: How should court deal w/this in respect to compensation. Who should pay?

C: I don't think committee decis. contrary to concept is in best interest of estate. If you accept their view, based on view they were fulfilling their fiduc. oblig. Were other lawyers that felt it should be done. Is approp. to pay for that. If action taken is predicated on motives that aren't consistent w/that constituency. For instance, obj. to Golleher and Mays bec. we don't like these guys I would have trouble saying it was in best interest of the estate. I lost all three. The Skadden matter, the m/to appt trustee and...was very significant. R. Levin and I had lengthy discuss. about that. Best interest of estate to put it on hold. Approp. to compens. for those services.

Ct: Thank you. Mr. Li.

L: Nothing in way of redirect.

CROSS EXAMINATION BY R. ANDAZOLA

L: Mine is not labeled.

C: Perhaps extra copies are marked.

L: Maybe I can look at that.

C: Here it is. No.

Ct: Can use this set.

L: Thank you.

CROSS CONT'D

K: Did you give up your set?

Ct: I did.

K: Let me give Mr. Li my set.

Ct: Admitted w/o objection.

CROSS CONT'D

Ct: Is Pepper, Hamilton's exh. K the subj. to all these entries?

C: Yes, I have them.

Ct: Those are the one's referred to here?

C: Yes.

CROSS CONT'D

Ct: Where are we w/the rest of the time of Mr. Cohen. Still have Mr. Forkham?

A: Yes.

Ct: Make sense to take a lunch break and come back here. Wondering whet. we will get done by 5:00. Come back at 1:30.

L: Quicker is better.

RECESS

L: If we could take up some sched. iss. Mr. Forkham has to be in Dallas for meetings tomorrow. Rather complete this tonight. Needs to be in Dallas.

Ct: Mean go past 5:00?

L: If we need to.

Courtreporter: I have a problem. Am on a plane tonight.

Ct: How much time?

L: Hour and a half.

Ct: Take about the same time.

L: Time allotted for this side.

Ct: See where we are by 2:30 or so. Assume we will be done w/Mr. Cohen by then.

A: Hopefully not much more than 15 - 20 min.

Ct: Good stuff.

CROSS CONT'D

K: Have a stipulation w/Deloitte. Fees prior to March 14, 2001. Signif. #. \$154k

L: Deloitte will agree that that is the #.

Ct: Okay.

CROSS EXAMINATION BY W. KELEHER

Ct: Even if Mr. Hertzberg - two iss. person who is resp. for client would go thru the bill to see if reasonable. Across board for any client.

C: It is.

Ct: When put together fee applic. wouldn't expect Mr. H. to check indiv. entries. For instance, C. Coston put in differ. entries. My point of view. If have differ. thought, ask differ. ques.

K: Will ask differ. ques. Make sense to client and is approp. If it has been done by a person resp., then when fee applic. is put together say I've looked at it over time and signing off. Accurately reflect work done. Evid. that

has already come in says it wasn't done. Records aren't accurate. Will proceed w/ques. on that.

CROSS CONT'D

Ct: Sugg. that it's not the case he used standard lang. for every reclamation?

C: I don't know. I wasn't actively involved in reclamation analysis. Never had reclamation procedure in this case. I recommended that we not work to come up w/a procedure. Don't know if this is what he looked at down here. Understand your question. I just don't know.

CROSS CONT'D

Ct: Don't harass the witness.

K: I didn't mean to harass the witness.

CROSS CONT'D

K: That's the questioning I have to support my motion to strike fee applic. Testimony today is that they are inaccurate.

Ct: Goes both way. Struck me either during course of examination by Mr. Andazola. I'm not going to strike fee applic. Need to think about it a little bit or see if other ways to deal w/it. Might be to say all time billed by Mr. Coston is stricken, but I don't know right now.

K: Given the oblig. of the applicant to only bring forward applic. that they think are inaccurate. Consider not what work was done, but misrepres. to court and whet. if sanctions are approp.

Ct: Procedurally I don't have a prob. if want to addr. in closing argument.

K: Good place to do it.

CROSS CONT'D

K: Move admiss. of this exh. and Heller #1.

L: None.

C: None.

Ct: Admitted w/o obj.

CROSS EXAMINATION BY JENNIE BEHLES

A: Referring to something that is not an exhibit.

C: Notes and is not an exhibit.

Ct: Will take a break and can make it available to everyone. Will addr. test. of Mr. Forkham.

B: Very close to concluding my examination. Might have 15 min.

C: I'm not sure what time I have to leave to make that plane.

Ct: What time is your flight?

C: 5:20.

Ct: Addr. this iss. now. I'm thinking what we ought to do is get him done so he can get out of here. Length of examination is not inapprop. Get started w/Mr. F. direct examination. Want to have him on stand for awhile so I can judge his demeanor. Cont. that exam. and cross exam. by telephone somewhere down the road instead of having him come back and you come back Mr. Li. My thought about getting this done w/respect to time. Also done closing argument by phone before.

L: Let me think about this a little bit. Unusual procedure. No prob. w/telephonic oral argument. Thinking about logistics of exh. or whet. better to push on.

Ct: Good point. Think about it.

CROSS CONT'D

RECESS

CROSS CONT'D

L: No redirect.

C: May I be excused?

Ct: Sure.

C: Apologize for racing out.

Ct: Not offended.

L: Discuss the scheduling. Figure out what works best. Do oral argument by telephone. W/respect to the testimony I'm not convinced it will be most benef. to court by telephone.

Ct: I was doing that thinking that you and Mr. Forkham might prefer that. If druthers are to come back here to complete it, then that will be fine.

L: My druthers would be to push on as long tonight. Don't know court availability.

K: I'm available.

A: I'm available.

Gonzales: I'm available.

Behles: I'm available.

Ct: Then we will push on.

A: Ms. Lombard and Ms. McCowan were going to testify. Won't be able to stay past 5:00.

L: Prefer to get as much as Mr. Forkham today.

Ct: My thought.

TESTIMONY OF ANTHONY FORKHAM (sworn)

L: Move for admiss. of Deloitte and Touche exh. B.

A: No obj.

K: Testif. he is not sure.

Ct: Is close enough. Want to voir dire him about it?

K: No.

Ct: Will be admitted.

TEST. CONT'D

**February 21, 2002 - Continuation of trial**

C: At conclusion of last hrg we talked about sched. Will be going out of town tomorrow. In antic. of hrg lasting one day I have plane reserv. leaving tomorrow at 9:10. To get me out of Albuq. I have a plane reserv. at 11:30 tomorrow. Other parties do not obj. to me taking the stand first. You would consider allowing closing arguments by telephone. If can be accomod., would apprec. it.

Ct: Sure. I was thinking we would get all test. done today and start on closing today or tomorrow. Possib. no reason to go home this afternoon. Go thru as quickly as possible.

L: Have Mr. C. go first, then Mr. Davis and Ms. Lombard. Mr. F. has an important confer. call today at 1:00.

A: Mr. D. is on stand by at his office. When his turn comes up can call him and get him here in 10 min.

Ct: Go forward w/Mr. C. test. Get done in plenty of time for Mr. F. to do his phone call.

A: Like to move admiss. of UST exh. D1 and D3 - D14. UST exh. PH1 - PH12.

C: No obj.

L: No obj.

Ct: Are admitted w/o obj.

C: PH subm. time records of Mr. C. for every day. And affidavit by me is attached to that. After sworn would like to addr. that. Also explan. for Oct. time. Time in the description accurately reflects tha t.

Ct: Have an exh. A attached to it which is biography of Mr. C. Listing of all of the collect. of time sheets. That is what you are talking about?

C: Yes. Like to offer it now. Offer as PH exh. WW.

K: Have a ques. of Mr. C. hand writes it. Written backup.

C: He dictates them as I do.

Ct: Is PH WW. This is orig.

K: Do you have a copy of that?

Ct: I do. Going to examine the witness?

L: No. Affidavit would come in.

K: Hope to have ques. and answer today. Now he wants to explain the affidavit. Proper to cross examine.

Ct: Can make a few opening remarks about affidavit. Continuation of previous hrg. Still under oath.

C: I understand.

TESTIMONY OF WILLIAM COHEN

Ct: In course of your explan. I thought you said at time he was doing certain work was preparing for fee applic. Also doing pldg summaries.

TEST. CONT'D

K: Obj. This is hearsay coming in. Mr. Coston's explan. Not avail. to be cross examined.

Ct: I want to know what is going on.

K: I'd like to know too. Objectors are entitled to cross exam. Mr. Coston.

Ct: Will allow it. I'm not sure that at the end of this test. what is being introd. is the test. of Mr. C. about time written off. Will let it in.

TEST. CONT'D

Ct: Saying it is PH position that w/review of pldg the time spent in preparing a summary of pldg is not supp. to be charged.

TEST. CONT'D

Ct: So he did bill even though it was position of PH to not bill. In order to make the stmt of PH policy more accurate you are taking a rough cut and subtracting \$12k from applic. Repres. roughly the time spent in preparing the pldg summaries.

TEST. CONT'D

Ct: But, that is what you are attempting to do.

TEST. CONT'D

CROSS EXAMINATION BY R. ANDAZOLA

CROSS EXAMINATION BY W. KELEHER

Ct: Doesn't necess. take 11 min. May take 6 min. Before we go down that road.

CROSS CONT'D

RECESS

CROSS CONT'D

CROSS EXAMINATION BY MICHAEL LI

CROSS EXAMINATION OF ANTHONY FORKHAM BY R. ANDAZOLA

Ct: Is there some way you can ask a single question instead of breaking it up that way?

A: Yes sir.

CROSS CONT'D

Ct: Does Ms. Scott bill in increments of 1 - 2 hrs.?

F: Not to my knowledge.

Ct: Haven't heard anything but whole numbers.

F: Is a paralegal. Her respons. are more administrations. Her direction is to record time in the same way as the other prof.

CROSS CONT'D

L: I don't mean to cut Mr. A. off. All he is asking is what is in the billings. Mr. F. has call at 1:00 and committments in Dallas tomorrow.

Ct: Anyone else going to ask ques. of Mr. F.?

K: I am.

Ct: How long?

K: 45 min. to 1 hr.

Ct: How long is phone call?

F: 45 min.

Ct: Say 1 hr. What time are you leaving?

F: Have reservations for 5:00 and 8:30.

L: Wondering if...

Ct: I'm wondering about that too. This is long fairly and a expensive way to get these into the record unless you want to call them to my attention.

A: Trying to establish pattern of fees.

Ct: Get done as much as we can. Need to take a break and let Mr. F. deal w/his phone call and get a bite to eat.

CROSS CONT'D

A: Will move on w/the type of questioning.

Ct: Well, how long do you think you will go.

A: ½ hr to 45 min.

Ct: Do the same type of stuff.

A: Yes, but not quite the same.

Ct: Finish in ½ an hour.

CROSS CONT'D

Ct: How much more time do you need?

A: 10 - 15 min. or so.

F: I'm fine w/that.

CROSS CONT'D

RECESS

CROSS EXAMINATION BY W. KELEHER

L: Obj.

Ct: Will overrule.

CROSS CONT'D

CROSS EXAMINATION BY JENNIE BEHLES

CROSS EXAMINATION BY Y. GONZALES

RECESS

REDIRECT

A: Obj. Basis is hearsay.

L: Testify as to the industry standard.

Ct: Not heard anything that sugg. otherwise that D & T bills differently.

L: Not sure I covered it.

Ct: I think it is covered.

REDIRECT CONT'D

K: Outside scope of cross.

L: Mr. A. asked about investment fees.

Ct: Yes, he did. Go ahead.

REDIRECT CONT'D

Ct: Have 15 min. Can't run past 5 today. How long will it take you to do your examination?

A: 15 min.

Ct: Cross examination of Mr. D.

L: I will have 5 or 10 min. of cross.

Ct: Do we get started tomorrow morning? Well, go ahead and need to be done by 5:00.

TESTIMONY OF WILLIAM DAVIS (sworn)

CROSS EXAMINATION BY MICHAEL LI

Ct: Redirect?

A: No.

Ct: You may step down.

RECESS

Ct: Tomorrow morning at 9:00. 10:00 your time.

**February 22, 2002**

TESTIMONY OF BEN BARNETT (already sworn)

Ct: Mr. B. tell me why it makes a differ. w/respect to assuming and assign. a lease and selling to somebody else whet. it is a capital lease what someone will pay for that to take over lease.

Burke: I'm not sure.

G: What was the result.

Ct: Asked to take ntc of dtrs stmts and sched. Whet. they say a value or trans. took place on a certain date or not.

G: My purp. to point out what the applic. says.

L: Fine.

Ct: Not argue what he actually said took place.

G: Yes.

Ct: Fine. I will take judic. ntc of that.

L: Ready for closing.

RECESS

Ct: Need to be done by noon. 1 hr. by applicants and 1 hr. for opponents. Staff atty takes notes and I take notes. Already have 38 pgs of single spaced notes. If you go thru and make refer. to what it is you want me to look at need to do that. Don't need anybody reading anything into the record.

L: I started off in my opening saying this is a case where no one wanted to end up where we ended up. Is a story the court hasn't necess. heard before. What happens happens outside the court. At end of day is like watching sausage being made. Tried to show you the anguish and dashed hopes. I hope your honor has come away that this isn't the same case. We came to tell you the story of a dtr who was disorganized from the outset. Lost millions. Heard about unreliability of data. Inconsistent stories. My constituencies have lost millions of \$. Wish result could have been differ. System did what it was supp. to do and it worked. Start w/the law. Blurred by obj. parties. It is not a ques. of \$ or tang. money. Congress made clear in inacting code and amend. in 1994. 523 (a) (4). Talks whet. serv. were perf. at time they were performed. Does req. your honor to put yourself in shoes of committee and professionals. Hindsight analysis. 226BR284. BAP reversed and remanded. Re: Ames, 76F3rd56. Skadden asked to be paid and court said no success, no payment. Court is not chg'd w/deter. what is right or wrong. Not asking who has better side. Ques. is is the decis. we made w/in the range of reasonableness. Akin to a bus. judg. type. Ethical balance. Broad spectrum of legit. bus. choices. Risk profile is differ. May disagree w/you on facts. Happens all the time. In a case in Delaware I won I looked at facts and law and thought we ought to settle this. Core of what it means to be a prof. Important we play by rules if system is to work.

Ct: I will tell you my conclus. right now and subj. to being argued is fundamentally the committee didn't care what expens. were run out. Not coming out of their pocket. Sense I got from Mr. Salvadori's test. Am I willing as a client to pay for these serv. here. Skews the whole thing?

L: Does and doesn't. Reason we have committ. is unsec. would prob. not be at

table. Make that analysis. Lost that money. Committee members wouldn't pay for most of the things it does. In terms of constraints, normally your client is the biggest constraint. Usually pretty effective. I do think there are other factors. Have to ask whet. it is in scope of legit. bus. judg. If isn't, perhaps it evokes the constraints. Can take riskier positions than I would perhaps take. Under this system we aren't guarantors of the result. Had convers. yesterday during recess how fee applic. is a clunky system. May be better to have a contingency system. Point 2 is it isn't whet. somebody could have done it for less or an Albuq. profess. or Phoenix prof. could do it for less. Underlying frame. Wasn't a big national case, just a big local case. High priced professionals. Before enactment of code in 1978 that system didn't work well, bec. it didn't bring right people into the system. Compens. system was adjusted. Creating a rehab. system as opposed to a liquid. system. No doubt in my mind there are some that did as Skadden did. 986F2nd207. Not about whet. committee members would have paid for this if paid out of their own nickel. Look at policies that underline ch. 11 cases. Designed to encourage rehab. Have to have people that are repres. everyone else. Our system is an adversarial process. Have parties there who repres. themselves and look out for their own interests. Have to have adeq. repres. Is a self regulating process. Have to have transparency. Seen sec. creds who came in and said this was going to be a liquid. Cred committees have obj. to that. Cred comm. fosters all of these goals. Check for management who often times don't care. Eq. holders. Management is looking for new jobs. Going to push when negot. w/potential employer. When I repres. sec. creds some turn out to be legit. some are less so. That is just human life. Ques. for court is a reas. review for the time. Could have predicted everything w/certainty. W/respect to dtrs reorg. Mr. F. testif. about prob. he saw. Reason for why they were in bankr. Was a free for all bankr. Not planned mos. in advance. Dtrs position was regardless would not have taken a differ. position. Mr. F. outlined things. Dtr had a plan. Doesn't mean they can't be persuaded nicely. This is a red herring. During summer it became increasingly clear the stores were going to be sold. Leasehold valuation. Deloitte has brought val. to this case. Testif. the dtrs worked hard. DIP financing. Proposed a key retention plan. Prov. committee w/necess. reports. Attempting to verify info. from dtrs. Encouraged mgmt to use a trade lien. Heard how why the committee should have called it a day from day one. May have been what they believed or wanted, but end up in a differ. place. Are two that are relevant. Control the process to a high degree before. Completely differ. game bec. you have a creds committee. Important decis. in case. Large extent to how the case plays out. Have an 11 member committee in this case. Is large. 4 - 6, maybe 7. Changes the dynamics. Diffic. getting consensus or leadership. Talk a little bit about valuation. Asked about val. at Dec. 6 hrg. Tried to point out there are two tasks involved. One is high level valuation. Leasehold val. Mr. D. would have liked to get a quicker answer. Asked Mr. B. to testify about that. Regardless he also wanted other appraisal. Testimony is clear. Will hear argum. about why we had to visit the stores. You can make a call whet. we should have visited stores. Mr. D. didn't regard this as a problem. He testif. he thought it was super fantastic. If look at min., clear this was discussed repeatedly w/committee. Important to note we could not jump right in. Leasehold was discussed as early as last year.

Ct: Already used ½ the time. Don't want to cut folks off. Those of you who are opponents can you do it in 1 hr.

K: Mine may take ½ hr or 45 min.

L: Getting toward the end. Mr. A. will talk about stage doors. Clear from test. is economy of stores. Will hear about why we didn't do a cost benef. analysis. Committee knew what we were doing. Realize it is hard to do a cost benef. analysis. How much will it cost to do a m/relief from stay or file a proof of claim. If this were post facto litig., it would be easy. Not sure fruitful on a # of points. Diffic. to know the conclus. in advance. Easy to say in hindsight. In Enron one of the m/before court is to estab. proced. to settle the swap agmt. Good reasons why dtr would want to do that. Do bus. w/in the future or a # of legit. reasons. Feel that the people who are settling up are going to be out of a job soon. Who knows what is right in that context. Hear arguments when we gave the committee a Lexus when a Corolla would have been fine. Had to do a lot more work than we thought. Acctg prob. Booking as oper. leases. Mr. F. spoke to that at great length. Mr. C. did and Mr. B. also did. I will let Mr. C. speak more about that. Not sure to get up to speed we could have done less. Flash reports were important. Had to figure out where co. was. We had to partic. in the process. Idea we overworked this case - saw as cash cow. This judge will give us whatever we want. Is ridiculous. Also a red herring. Look at fee applic. their work drops off signif. Could you have used fewer people. Unless see clear abuse respect integrity. Reasonable for Mr. F. to do work and spend time debriefing everyone to keep them up to speed. 70% of work done by people below senior manager. Did not overspend this case. Ques. is whet. we were reasonable for believing what we did at the time. Like patient w/a serious disease and whet. that disease is too serious. Like a secretary in our firm.

K: Obj. to this outside of scope.

Ct: Keep it w/in.

L: Did you we do anything unethical. Answer if no then the fees ought to be allowed.

C: The evid. throughout the hrg showed the prof. were aware of their role of duty to unsec. I agree w/Mr. L. in the way he described our function. Where we became unpopular where we exercised taking actions against dtr. What we bel. to maximize value. Mr. L. was right on target on point we all agree by saying we cannot succeed. 90% of what happened in case is not part of court files. Evid. clearly showed the amt of work we did to protect int. of unsec. is basis for ques. raised. Despite by how unpopular we worked were not max. Actions were highest caliber. Single minded in approach taken. Pursuing parallel paths all the time. Req. an active, aggressive creds comm. to create val. where the dtrs or unsec. didn't think val. for anybody. Apparent in their mind a quick sale. Ms. B. points to DIP agmt is inconsistent. She sugg. the exist. of invest. banker be hired was no oppor. for a reorg. In my exper. it is common the DIP agmts set certain deadlines and demands and req. an invest. banker. Immed. sale and liquid. was not something the creds comm. accepted or thought in best int. of unsec. The way in which the prof. were retained. Prof. who be able to do work necess., but stand up to prof. dtr had. Affidavit of Mr. M. that was attached to first day papers (read). Parag. 116 of pg 43 of depos. Not to say committee accepted his words. Committee didn't respect Mr. M. the way the co. did. At the first cred. comm.

mtg where he repeated the same stmts. Reas. to retain an invest. banker was for a stand alone plan. Set tone for case. Words throughout case is for parallel paths. No intent. to sell its assets. Is no ques. that was an alternative the committee was considering. Also absolutely certain the comm. attempted to turn the co. around. Even if a sale that would result in a distrib. to unsec. That was the direction the committee acted on. The actions we had to take were unpopular. One thing we did was try to get dtr to focus on what it needed to do to get inventory into the stores. Trade liens was something the dtr indicated early on. In fact, the company did nothing about.

Ct: Have a # of major vendors insisting and getting cash upfront before they put this stuff on the truck. Why chg it so you might not get paid at all. Get admin. claim. Why would any creds getting paid up front go for latter. Why think trade lien had a chance. Why not in bus. discretion.

C: Trans. of bus. w/dtr on cash in advance or COD is a terrible way to do bus.

Ct: Exactly. Why should they do this big favor for the dtr.

C: If dtr able to buy merch. on credit as protected as a lien and worked in many cases, result in a much freer flow. Enhance co. to generate cash. Comfortable they will get paid.

Ct: Ifi works out well, vendors are willing to take addit. risks to sell more stuff to dtr down the road?

C: Yes. Dtr didn't pursue it. Trade lien cont'd throughout the spring. Needed inventory and trade creditors. Prov. sample of trade liens. Had mtg sched. the sec. lenders cancelled. In early days of case to get co. to oper. in a more bus. like and stronger fashion created diffic. for this co. Were willing and able to help co. gener. more bus.

Ct: Say steam or theme.

C: Theme.

Ct: Listening to Mr. Salvador is here is a fella high up the ladder and it seemed they had an agenda and pretty unhappy dtr didn't have good sense to follow their advice.

C: Don't know if bel. differ. than smaller members.

Ct: No. Folks used to getting their way and not getting their way.

C: Were unhappy about it. Tried harder to get co. to look at process of running this bus. Felt co. wasn't doing that. That was frustrating. Co. felt the lead counsel would not be in position to devote it's attention in what was necess. for Furrs. Our view as prof. to committee that Skadden was an outstanding firm and be able to separ. and show loyalty. The challenge of their retention was not in best interest. Were instructed to do it and we did it. The court found the issues raised were difficult. Created contention between the parties. Was unavoidable based on val. of subcommittee. Not hiding behind decis. of committee. Created a prob. at early stages of case.

At credit of Mr. Levin he and I were able to communicate.

Ct: What does evid. show the obsess. obtained from Solomon?

C: Confronted early in case w/Mr. Dahlen's resignation from Furrs. Provided exit pkg. We obj. to exit pkg. The compens. to Dahlen made no sense and not in best interest of creds when contained as \$100k pension plan. Result of decis. taken by committee. W/respect to Solomon contract prov. for min. of \$500k per trans. If there were misc. sales of assets during case, they would be entitled to \$500k fee. Ultimate assets included included assets that should never have been included. Definition of Solomon agmt. I bel. the orig. trans. fee was a changing trans. fee and ultimately the trans. fee ranged from 1.5% to 2.8%. Solomon agreed to 1.5%. \$500k fee for intermed. trans. was eliminated. Orig. financing fee they asked for was not subj. to committee or court approval. Chg'd that financing fee was subj. to court approval. We were not able to make a chg in that orig. Definition of aggreg. consideration was changed to reduce amt. If sale consummated w/in 18 mos. after term. was chg'd to 12 mos. Agreed to share all info. w/committee. They orig. had lang. that totally ltd right to impose counter claims ag. them if they did things that were improper. Basically the chgs. All incorp. in agmt attached to order retaining them. W/respect to Golleher and Mays the iss. raised were diffic. iss. for committee. Clear to me they were competent in many ways. I got to know Mr. Mays better.

K: Seems to me what we are getting into is evid. that's not subj. to cross.

Ct: If on record...

K: Trouble sorting this out what was pres. in cross exam. and Mr. C. present recollect. of case.

Ct: Assuming Mr. C. is citing what is on the record. Not making a decis. on this today. If something said not of record, can be pointed out to me.

C: Biggest prob. w/the exec. was the compens. pkg they negot. Serv. duplicate of the serv. Solomon was doing. Committee respected many things they were doing. Their exper. was directed toward sale and not toward helping to reorg. co. to put in better position to be sold. Searched for exec. to help create value for unsec. Committee and time spent by prof. to speak w/alter. CEO candidates were designed to enhance val. for the estate. Not able to reduce success fees. Fees were ultimately challenged by us. Approved by court. Not in best int. of the estate. Work done by Deloitte and Touche was important for comm. and it's delib. Sec. 506 of code makes it clear an allowed sec. cred. is ltd to value of coll. securing that claim. Lenders don't admit is the fact they failed to perfect their liens. Evid. has shown the val. range between 24 and \$56mil depending on which approach you wanted to take. Bottoms up approach is a lower #. Separ. assets and leases including store fixtures oper. at a partic. location. Our view those had a val. close to \$57mil. Adv. proc. filed ag. sec. lenders could have created signif. value for the estate. Comm. instructed counsel to file an adv. and Mr. D. did that. I indicated why we asked them to find alter. exec. bec. not focusing on ways to enhance value. Also what persuaded them to file m/to appt trustee. Lost confid. w/G. and M. Clear the co. at some point was destined for sale. Sale was imminent. Mr. L. identif. the factors that caused the comm. to spend time

and energy bec. of size and differ. views of the committee. Not a reas. basis for saying the comm. should have stopped working. Assets ultimately sold were excluded. Prefer. recoveries. Late July and Aug. that Mr. F. urged comm. to make a settlement proposal for dismissing the adv. Had a justif. for bel. there was a possib. of a distrib. for unsec. Unwilling to make funds avail. for unsec. As late as July mtg Mr. Hertzberg reported he would work on a trust. G. Mays and Mr. Wallach talked about a pop plan and took place on June 27. Lawyers and in house counsel talked about parallel path they were pursuing. Wanted us to stop functioning as a committee. I bel. the evid. shows this co. viewed itself as a co. that would create val. for unsec. Did not come to pass. A lot of time was spent in cross exam. me as fraud. time records. I bel. the evid. shows Pepper dilig. pursued the direction of the creds comm. Did in way the comm. bel. would max. value. Were time entries in exh. that looked like they were in excess. of descript. of work done. I was convinced the reas. for those time entries was based on fact he was incorp. his description of summary. That was inconsistent w/description we took. Told counsel we would reduce our fees by \$12k. I also bel. the exhibit we filed showed the time Mr. Coston devoted to this case. Mr. Coston subj. to a # of entries reduced by an amt signif. less than \$12k. By any rational review the time spent on the matters were not reas. and approp., but justified. I accept the analysis of the legal standard that Mr. L. presented to the court. I urge the court to measure the work we did by the motives the comm. had in trying to max. value, but in the judg. taken at the time the challenge was taken. This comm. and our law firm was involved in many other iss. throughout this case. Spent on more mech. matters. The analysis and report to comm. on what it's fiduc. duty is. We analyzed reports from dtr at every mtg and telephone confer. We spent signif. time on trade lien. Handled reclam. clms. We analyzed the valid. of clms by other people and the loans to a from those officers. Estab. w/dtr a proced. for eval. lease reject. A lot of time was spent by Pepper and D and T on retention and bonus plans. Dtr took those plans off table at lease twice. We worked w/comm. on proposed bus. plan. We presented reports on signif. court actions taken. Legal analysis of Countrywide and Pinnacle. Got involved in mgmt realignment. Worked w/D and T. on status of doc. prod. Not getting docs. the comm. needed to complete analysis. We analyzed the stock ownership. Work was done by Mr. D. We helped the committee initiate the proced. for reviewing candidates for a CEO or crisis mgr. Made recommend. to comm. in that regard. We served as legal advisors to subcommittees.

Ct: Read fee applic. Continue to go ahead w/all the things you did?

C: No that pretty much covers it. Trying to show the work we did was more than described at trial.

Ct: I still have a prob. w/what Mr. Coston did. Shows a mindset to bill more than justified. Billed two hours for reviewing and dealing w/10 entries of appear. I understand what you said about lumping and maybe I just have practiced too long in this juris. Can't imagine he could not have put all those together and said I reviewed entries of appear. and put in single entry. No excuse for chging 2/10 of hr for that. Apparently your firm accepted that or didn't review the applic. before that and now the firm is defending it. In conseq. PH over billed the estate and no check on that from the client. Iss. is how do I deal w/that. Is a governance matter here. Inclined to take a step of striking all of Mr. C. time. I don't know if you want to comment on

that. It came up earlier and tell you what I am still thinking.

C: This is not a person who bills 18, 19 hrs a day. Is a lawyer who works a full day. I hope a review of his time sheets won't show that. Hope you won't view this of a way of penalizing PH or an activity that was not intent. designed to pump up time to detriment of estate.

Ct: I don't think you or Mr. Hertzberg had that intent. Don't know about Mr. Coston. Signif. matter. Let me assure you I have no ques. you would not ever do such a thing.

C: I don't know what else to say. Prob. sounds like a generality. Wish you had an oppor. to talk to Mr. Coston. Perhaps my short mindedness to not bring him to court so you can talk to him. He is a man of integrity. To extent fee entries were not jusitif. I have no intent. of fighting about it w/you or anybody else. Asked he not be tainted or the firm be tainted. Not the case. I think as I said at beginning the activities of cred. comm. were unpopular. That value is not what you can measure in \$ alone. What we need to do and what we asked the court to do is stand in our shoes at the time the decis. were made. I don't bel. Mr. Salvadori's resp. should be discounted. He said already paid a tremendous amt of money for the position we are in. Not a quote. Is a concept. We spent countless hours talking about this case and the problems. As Mr. L. described the reas. the comm. members are not resp. for paying for their actions is justif. by facts of this case.

Ct: Committee has duty to look at bills that come in and do no more. Standard in bankr. My recollect. of Mr. S. test. where he said the sec. creds were paying the bill that was a real dereliction of duty.

C: Didn't have that same thought. Are arguing about what fees ought to be paid. Fees that have to be paid out of fund. Differ. hearing.

Ct: Totally irrelevant. Pay all adminis. costs. Decis. is on merits. Nothing to do w/adminis. insolvency. Sugg. case not as success. as everyone would have hoped.

C: Not a case where cred. comm. or Mr. S. was taking for granted that he was not writing cks himself. Not challenging the limits. I don't think his stmt is an irrelevant or inapprop. stmt.

A: Our position is this is a case where prof. repeatedly chose a Lexus. Best example is an answer from Mr. Barnett. Pg. 221 from trans. of hrg on Jan. 20. (Read) Very telling of the mind set of Deloitte and Pepper Hamilton. Set out to do the Lexus work w/o consider. whet. a lesser amt of serv. would do the job. The evid. is that the April 18, 2001 report proj. the dtr was running out of money. 4 - 6 weeks before hitting DIP limit. # of other intangibles that would make this case diffic. to proceed. Filing was unplanned. Lack of cooper. between UCC and dtr. DIP facil. was inadeq. Mr. F. said drastic action had to be taken. Until April 18 did not materialize. Mr. F. did testify that he had a convers. w/Mr. G. Mays. Told him he was cutting back w/serv. from PW and Skadden. Clear indic. the dtr was cutting back on prof. fees. Why weren't UCC prof. cutting back on their fees. Repres. about tapering off. UST exh. D5 shows Deloitte billed \$423k. PH UST exh. PH 3 billed \$407k after April 21. Still huge #'s for fees incurred in the case.

Amts spent in the cred. comm. category was \$220k. Fourth of total billings. UST exh. PH 6 deals w/entries listing agenda show that entries from May 6, 2001 was revision and review of agenda.

Ct: Have all that in the notes.

A: Entries add up to signif. amts. Similarly the UST exh. PH 8 deals w/entry of two paralegals has entries of signif. amt. Show catering of UCC that should not be borne by the estate. UCC spent \$17k as shown by UST exh. to appt. a ch. 11 trustee. M/filed June 1, 2001. Bringing m/would be problematic. Mr. C. testif. he had been contacted by Mr. L. in May prior to filing. PH went forward and filed the m/for trustee on June 1. Enough said about Coston entries. Unconvincing about time spent. W/regard to the PJ Solomon applic. and oppos. to it by UCC - PH auth. Deloitte to prepare a survey that was \$14k. D12. Still diffic. for me to understand why PH could not look at invest. banker applic. in it's own files. In the record is UST obj. to that same applic. Set forth many of the same grounds the UCC had also named. Not all the modif. were made to the orig. Solomon applic. Solely of UCC efforts. Is a market analysis really necess. to determine comparably chg'd. Under 328 court is allowed to grant employ. on such terms as are reasonable. Does that really req. a market analysis be conducted. Record amply states the obj. in connect. w/Skadden and PW were litig. on copies of other similar prof. who had submitted employ. applic. Showed whet. they were in reasonable terms. Golleher and Mays matter in which PH opposed the retent. of G and M. PH exh. AA which is min. of UCC mtg indic. Deloitte concluded their fees were w/in range of reasonableness. PH went ahead w/obj. Justif. was pymt to G and M. was duplic. of pymt made to PJ Solomon. Isn't that a legal argument. Estab. w/legal analysis. In effect the Lexus was being used when Corolla would be just as well. PH incurred \$23k. Deloitte subm. it's own applic. Was some certain time entries. Very few involving negot. That left PH w/prepar. of it's own applic. and Chanin. The orig. retent. was req. compens. for Chanin in \$100k a mo. Trans. fee from a percentage of any sale price. Negot. down and was ltd to \$300k. Mr. D. handled the hrg on Skadden obj. Pepper appeared by phone. Unclear why Pepper had to appear. Pepper did not appear at Deloitte hrg. Handled by Mr. Davis as well. The court min. for that day do not reflect Mr. C. or any PH atty was present. Pepper pursued employ. of Chanin w/regard to matters that would have fallen under this category. One the matters that is very troubling under serv. rendered by PH the evid. shows PH was aware indiv. members of UCC were targets of prefer. clms. Mr. Cohen testif. that the negot. for the release of prefer. actions is done in other cases - in successful reorg. cases. This is anything but. PH seemed to have no concerns about a settlement offer the UCC issued designed to release individ. members from liab. Breach of fiduc. duty. A legion of cases which decided in numer. juris. which the court's held is the results of the serv. rendered. The results were not successful. No distrib. to unsec. creds of serv. rendered. W/regard to fee applic. of PH. Submit a reduct. of \$400k is warranted of amt requested. W/regard to Deloitte applic. the clearest example is in connect. of leasehold val. Test. from Mr. D. is he req. and needed only a rough cut of leasehold value. Got full blown until he got a copy of fee applic. Performed accurate appraisal for \$100k per lease. While Mr. B. testif. that the site visitations were 6% of cost Mr. B. uses lack of justif. to state why val. came out to only \$1k. More than puzzling. Less than 80 leases valued for \$400k each. Why would 650 leases be done for \$650k when less than 80 leases cost \$357. Chg. for less than 1/6 is extremely

puzzling. On the iss. of site visits Mr. B. testif. (read). Mr. B. took it w/in his discret. to do more work. Mr. B. chose to have quality assur. reviews done that was inputted into their model. 2 hrs was devoted for ea. lease. Quality assur. review was accompl. \$630 per lease.

Ct: You can substitute the word Lexus for the whole phrase.

A: Okay. W/regard to mr. F. test. the comm. had been contacted for closure of several stores. The analysis prov. to him was not to level we bel. is approp. for making a deter. Mr. F. indic. he wanted the four wall analysis to do the type of analysis he felt was necess. to make an adeq. decis. At no point did he disagree w/the recommend. from Furrs to close the stores. Analysis had to be done to the nth degree. Evid. shows that Deloitte spent \$104k in preparing present. to UCC. UST exh. D13. Profess. were very costly. Mtgs cont'd after April 18 report. UST exh. D14 shows \$100k spent in preparing power point exh. Mr. F. stated that was routine use. Time consuming and costly. Clear the members of UCC were sophisticated bus. people. Did they have to be entertained w/graphs. Just see #'s.

Ct: Does anyone do a present. w/o Power Point? Nobody does anything w/o Power Point anymore.

A: I would note all the time entries pointed out it is questionable whet. the time spent was necess. and further w/regard to the bankr. court filings. Prof. used by Deloitte the hourly rates chg'd were above those chg'd by Davis and Pierce firm. Serious ques. whet. it would have been more effic. to contact Mr. Davis. Mind set is this is a large case and fees paid out of carve out. April 18 report indic. the dtr was in dire financial straits. Ironic that prof. should be compens. for all serv. performed by UCC. Bankr. will become a blank check for profess. If UCC directs something to be done then their fees and sacrosanct. Prof. are chg'd w/a fiduc. duty. Not contending prof. should be working on contingency fees. Re: Allied Computer Repairing. One ct held financial advisors are not shielded from req. of 330. That case is Thrifty Oil Co. This case boils down to spending other people's money and whet. you do so wisely. Would client outside of bankr. pay for services. Case law amply supports those serv. PH fee applic. should be reduced by \$400k. Deloitte applic. should be reduced by \$600k.

K: Wasn't guarding anything valuable. Not contributing much value to estate. The dog was barking but it wasn't accompl. anything. Evid. pres. to bank should be awarded. PH time entries were inflated. UCC did not properly supervise. Thought would be paid. Treated as an acct he could charge against. Entitled to get that back.

Ct: Reminds me of something. At the outset of this hrg I said my philosophy was it was important to honor their reimb. req. bec. otherwise people might be discouraged from serving on committee. Given me pause and caused me to think that unusually it would be approp. to cut in ½ reimb. to comm. members. Oversight on their part to watch out for costs as exemplified by test. of Mr. Salvadori.

K: That is the point I was making w/regard to UCC expenses. Did not supervise it's prof. responsibly. Bec. UCC did not fulfill it's role Deloitte and PH have claimed the UCC told us to do it. They didn't do their job either.

Useless and of no value to estate. Prof. cont'd to work on non-prof. reports long after the patient was terminal. Wasn't going to do anything to keep doing reports and power point present. To report the info. wasn't prov. Didn't help the estate. Leiderman case.

Ct: That's the standard?

K: Two prong test. Has to be necessary under Leiderman. To decide it is necess. need hope that it is successful. Therefore it is not compensable. Hope it is necess. it might be necess. Next ques. is was it necess. In the trustee motion not only is evid. was it going to succeed was detrimental to the estate. Not realize value. PH time entries. I don't mean to blame C. Coston for fee applic. His fee entries are incorrect and are the problem. Systemic prob. at the firm. Mr. Hertzberg signed that applic. Mr. Cohen came back to court and tried to argue they weren't inflated anymore. He said when we had a sched. confer. Mr. C. asked to file an affidavit. Thought he had some explaining to do. Found out more info. and submits affidavit. Said C. Coston is highly respected. On stand yesterday says he signed affidavit on Feb. 12 and talked to Mr. C. two nights ago. I was shocked at that test. Affidavits implies he knows something more. He doesn't. I don't buy it and I don't think this court needs to buy it. They did work, but how is the court to figure that out. Fee arrangement req. PH to bill only for time worked. We don't know how much time was worked. Don't know anything about voracity of time entries. Mr. H. signed doc., but he apparently didn't review it. Mr. H. did not know Mr. C. was billing 2/10 of an hr. Many people at PH billing to this case. Unpleasant thing to say, but given Mr. C. test. yesterday I don't know how much this court needs to bel. him. Subm. two reams of paper, but not much evid. On Deloitte they did work that was somewhat good when it did the analysis reflected in exh. M. A lot of info. in exh. M. That's about the only evid. of valuable work presented. Nobody willing to bel. it. Report showed the dtr was going to run out of money. Not meeting it's projections. No financing was avail. Results in low inventory and low sales. Death spiral. Ex. M showed it was a matter of weeks that the dtr would be out of money. The UCC now clms they were still praying for a miracle. Hoping for a stand alone plan. That isn't supp. by the evid. As of April 5 Mr. G. told the UCC repres. that he bel. the only value obtained was in range of \$100mil or \$150mil. Mr. H. agreed w/that assessment. Talk of stand alone plan was appeasement. Who knows whet. that was true. Didn't bel. needed to go to stand alone plan. Time to wake up and smell coffee. UCC did not want to do that bec. the debt matrix showed they weren't going to get paid. No distrib. for UCC. Tells client we aren't going to get paid out of this. UCC treated as they still had blank check. Teach those guys to listen to us and make Furrs do what we want. No value to that. Keep req. info. Get a trade lien and more money. UCC stated thru counsel and thru Mr. S. it understood it's fiduc. oblig. Goal to max. value of estate. Never did anything that would produce value to estate. Didn't assist to find buyers or oper. of dtr. Didn't help dtr in oper. Didn't try to stem the losses. Didn't do anything to help dtr w/that. Had meetings. Had prof. prepare reports on status of reports. Until yesterday I was thinking they relay those reports to dtr. Critical info. on situation of dtr that cost thous. of \$ the UCC didn't feel necess. to tell the dtr any specif. Just ignored report. UCC advice was to diagnose the patient. Said you are bleeding to death. If don't get more blood will die. Said stop bleeding. Tell us your blood pressure. Not a contribution of value. Info. req. didn't help. Took resources from reorg.

efforts. Fine line UCC is entitled to info. Repeated req. didn't help.

Ct: My recollect. of that time is the dtr for disorg. reas. wasn't prov. info. it should have prov. Not sure matter of not wanting to make it avail.

K: As of April 18 Deloitte had gotten info. and made diagnosis. Point out where you are bleeding. UCC kept it to themselves. Committee never once asked for a cost estimate. After April 18 the work of both Deloitte and Touche and PH was of no value. Ques. they asked were how dead is the patient. If patient were alive, how much did patient earn. Done as of April 18. Deloitte did some work after April 18 that wasn't necess. valueless. If saw something that could be done to help find a buyer, could have done it. No evid. they did anything to help buyer come to table. Didn't take hundreds of thous. of \$ to monitor that. Both Deloitte and PH put on evid. that they told UCC that certain actions they wanted them to take was not valuable. Under Leiderman that work is not compensable. UCC clms it was focused on creating value for the estate. Actions speak louder than words. Prefer. actions. Didn't hear any evid. they performed a prefer. screen. Conflict that every UCC will have. Let's not find out how much is worth. Get released right away. Further dereliction of duty. The comm. actions were irrational. Even Mr. C. admitted they were at times. Filing a m/to appt a trustee when m/to have an auction is going to be filed and know there is a matter of weeks of money. The court is faced w/task of having to decide what to do about PH applic. Natural reluctance to ques. somebody's motives. Do know PH hasn't met burden. PH has attempted to argue Heller and trustee pointed out ques. entries and everything else if fine. Not true at all. Those are the easy one's. May be more. Even if court wanted to award fees for PH to a large extent it will be a diffic. process. Can reduce by percentages. Did PH do anything of value to the estate. Considering governance issues and an improper fee applic. has been filed needs to be done strictly. Award what they did was of value. Is not much. PH doesn't understand that anything was done improper. On comm. expenses the comm. was derelict in their duties. Your honor has sugg. a 50% reduction. If not doing their job, shouldn't get paid at all. Deloitte filed employ. applic. Mar. 14, 2001. By April 18 they concluded there was not a likelihood of value. Ignored report and kept doing things. Should not be compensated. Hellers position on lease valuation doesn't take much of a position on that. Not paid out of carve out.

G: Tony Forkham said several times this is not a pretty picture. What I see is a retail grocery store has filed and no discuss. of what the cost will be. Continue Deloitte and Pepper to act as if a national case. Go about usual bus. Part of what they do is related to the carve out. I know your honor thinks it is not an iss. Shows mind set and lack of direction and lack of oversight of comm. and counsel. Forkham, Salvatori, Barnett testif. they thought it was \$600k a mo. That's how they governed their conduct. Knew dtr was not paying prof. fees. Echo Mr. A. and Mr. K. comments on specif. reductions. Have an example of Mr. Coston's billing. On dtrs m/for order to limit ntc of certain matters. Have copies. Docket entry is 29. On Feb. 22 Mr. C. billed .4 to review the m/. .4 to review the order. 4 pg motion and order is 3 pg. On Mar. 5 he billed an addit. .4 for further analysis of m/and .2 for reviewing the order. Order entered on Feb. 20. Mr. Cohen testif. after discuss. w/Mr. Coston he realized Mr. C. included summaries. If have a m/billed at .4 will be a lengthier motion. If PH stmt they shouldn't be billing for summaries then I think an approp. sanction would be to strike all

of Mr. Coston's time.

L: I start w/conclus. it would be nice if we had clear billings. Don't have that in this case. Understand what Mr. A. says he would have done w/his exper. Ques. Congress mandated were the comm. actions reasonable. Is it illegit. to say we staffed it the way we staffed it. Ensuring the process works. Not an idle concern. Push boundaries.

Ct: Mr. Forkham's test. gave me pause. Asked why weren't you sending your invoices to the dtr. Said we didn't have a retention order in place. Strikes me as disingenuous. Wasn't any thought I could see if order entered.

L: Not quite what his test. was. Deloitte filed applic. in Mar. and did not have hrg til June. Send it to dtr to say pay me. Needed retention order to know if going to get paid.

Ct: Send to dtr only for payment? Not for what prof. fees are.

L: In hindsight it is clear there are a lot of things that could have been done. Very rigorous adminis. orders. Might have been a valuable function. Not put in place in this case. Were oversight protections. Got to make sure you have the right committee. Squeaky wheel.

Ct: Understand. It struck me.

L: We did send them after your ruling. System is designed to be adversarial. Want to focus on this Lexus argument that Deloitte overworked this case. Mr. B. testif. there is a more extensive report that we did not do.

C: The stmts Mr. Coston's time entries should be used for extrapolating is a punitive remark and an effort to penalize prof. that did a lot of work in the case. Whet. measure fee applic. by results. No where were the time entries inflated or false. The second fee applic. is \$98k. Parties have a differ. of opin. the cc should have been working in case. Very dramatic drop off in work. We implemented that. Had confer. calls rather than meetings and are many more examples. Dtrs and lenders led us to bel. they were working in way to create value. We did not only what we thought was approp., but what law mandates. Create value or unsec. No guar. is unfair to penalize the prof. Important concept and I hope the court will keep that in mind of time spent. The analysis done by UST on cred. comm. tasks is indic. of analysis those exh. display. Are many components described in the item comm. mtgs. Exh. VV. Shows what was done. Have to take a look at that not just total #.

Ct: Will go thru this and go thru the notes. Get decis. to you as soon as possible. Lots of stuff.

L: Extremely long and diffic. process, but needed to tell the story. Apprec. the court's indulgence. Apprec. accomod. of the staff.

Ct: Staff is superb and include the court reporter. Court's are serving litigants. What you and your fellow taxpayers pay me to do.