UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ALASKA

In Re: Case No. F08-00110-DMD	)	Chapter 11
	)	
CATHOLIC BISHOP OF NORTHERN ALASKA, an Alaska religious corporation sole,	)	Anchorage, Alaska
	)	Thursday, June 18, 2009
	)	9:05 o'clock a.m.
	)	
Debtor.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

HEARING ON UCC'S [REDACTED] MOTION FOR AUTHORITY TO COMMENCE, PROSECUTE, AND SETTLE LITIGATION ON BEHALF OF BANKRUPTCY ESTATE AGAINST THE HOLY SEE AND DIOCESE-RELATED ENTITIES (DOCKET 440) FILED 5/11/09

HEARING ON DEBTOR'S MOTION UNDER 11 U.S.C. § 105(a) AND L.R. 9013-1: (I) TO STRIKE THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' REPLIES (DOCKETS 431 AND 432) SUPPORTING THE COMMITTEE'S MOTION FOR AUTHORITY TO COMMENCE, PROSECUTE, AND SETTLE LITIGATION ON BEHALF OF BANKRUPTCY ESTATE AGAINST THE HOLY SEE AND DIOCESES-RELATED ENTITIES (DOCKET 345); AND, II, TO SUMMARILY DENY THE COMMITTEE'S DERIVATIVE STANDING MOTION FILED 5/6/09 (DOCKET 434)

HEARING ON DISCLOSURE STATEMENT

BEFORE THE HONORABLE DONALD MACDONALD IV
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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

ANCHORAGE, ALASKA - THURSDAY, JUNE 18, 2009

(Historic Courtroom)

(On record at 9:05:41 a.m.)

THE COURT: Good morning, everyone. This is case number F08-00110-DMD, *Catholic Bishop of Northern Alaska*. We'll start with the telephonic appearances today. Mr. Elsaesser, are you there?

MR. ELSAESSER: Yes, I'm here for the Catholic Church Communities of Northern Alaska, commonly referred to as the parishes, with my assistant, Donna LaRue.

THE COURT: Okay. John Martinek?

FATHER MARTINEK: Yes, I'm here (indiscernible - telephonics) Catholic Church Communities of Northern Alaska.

THE COURT: Okay. Father Robert Fafth?

FATHER FAFTH: I'm here on behalf of the Catholic Church Communities of Northern Alaska, along with Jim Hasselberger, who is on my finance council.

THE COURT: Okay. Eliza Jones?

MS. JONES: Yes.

THE COURT: Ms. Jones, are you there?

MS. JONES: Yes, I am.

THE COURT: Okay. And for whom are you appearing today?

MS. JONES: The Catholic Bishop of Northern Alaska.

THE COURT: Okay. And Ms. Susan Murphy?

MS. MURPHY: Yes. I'm Susan Murphy, and I'm representing the Catholic Church Communities of Northern Alaska.

THE COURT: David Paige?

MR. PAIGE: Your Honor, yes, David Paige on behalf of the debtor, Catholic Bishop of Northern Alaska.

THE COURT: Rebecca Rhoades?

MS. RHOADES: Yes, Your Honor, appearing on behalf of various tort claimants.

THE COURT: Dennis LaGory and David Spector?

MR. LAGORY: Yes, Your Honor, appearing on behalf of the Catholic Mutual defendants.

THE COURT: Michael Pompeo and William Corbett?

MR. POMPEO: Yes, Your Honor, Michael Pompeo of Drinker, Biddle & Reath on behalf of Travelers Casualty and Surety Company. Your Honor, Mr. Corbett is not admitted yet *pro hac vice*, but I would ask the Court's permission and indulgence to allow him to participate telephonically.

THE COURT: He can.

MR. POMPEO: Thank you, Your Honor.

THE COURT: Mr. Nash?

MR. NASH: Yes, Patrick Nash on behalf of Continental Insurance Company.

THE COURT: Mr. Dykstra?

MR. DYKSTRA: Present on behalf of Alaska National

Insurance Company.

THE COURT: Young Kim?

MR. KIM: Present.

THE COURT: Okay. Here in Anchorage, we'll start on my far left, and we'll have counsel state their appearances for the record.

MR. EKBERG: Charles Ekberg, Lane Powell, on behalf of the Continental Insurance Company.

MR. ORGEL: Good morning, Your Honor.

THE COURT: Good morning.

MR. ORGEL: Robert Orgel, Pachulski Stang --

THE COURT: Okay.

MR. ORGEL: Here for the official committee of unsecured creditors.

THE COURT: Okay.

MR. STANG: Good morning, Your Honor. Jim Stang for the committee.

THE COURT: All right. Mr. Bundy, you're going to be quiet today?

MR. BUNDY: I hope so, Your Honor.

THE COURT: Okay.

(Laughter)

MS. BOSWELL: Good morning, Your Honor. Susan Boswell, Quarles & Brady on behalf of the Catholic Bishop of Northern Alaska, and Bishop Kettler is present in the

courtroom.

MR. MILLS: Michael Mills of Dorsey & Whitney, also on behalf of Catholic Bishop of Northern Alaska.

THE COURT: Okay. Well, we've got a couple of different motions on for a hearing. I thought we'd start with the UCC's motion for authority to commence, prosecute, and settle litigation on behalf of the bankruptcy estate, and I think the debtor's motion to strike would obviously be included in that, and we'd deal with the motion for authority to prosecute, and then after that, get to the disclosure statement and argue that separately, if that's okay with you, Ms. Boswell, and you, Mr. Stang. I take --

MR. STANG: That's fine with me, Your Honor.

THE COURT: Okay. Then why don't you take the lead and we'll start with the UCC's motion for authority to commence litigation.

MR. STANG: Thank you, Your Honor. Your Honor, actually, I think I'll start off with the motion to strike.

THE COURT: Go right ahead.

MR. STANG: I know you usually have the moving party go first, but that's where I'd like to start.

Your Honor, you should deny the motion because the interests of this case and the interest of creditors require that there be a hearing on the merits of the standing motion. And the interests of survivors of sexual abuse should not --

and, frankly, all creditors, because the standing motion seeks to recover property that would benefit the entire estate and not just a class of survivor creditors -- should not be penalized because of some missed deadlines that in retrospect, given the timing of the filing of the pleadings and when this hearing has actually been conducted, do not prejudice the parties in any way and we hope did not unduly inconvenience the Court in the consideration of the motions. In fact, the reply that was filed is now 45 days old in terms of relationship to this hearing date, notwithstanding the OSC regarding violation of the automatic stay, which was not a violation of the committee.

My firm and the committee and Mr. Bundy do not have a history of ignoring your rules and ignoring your orders. Mr. Rafatjoo at the May 7th hearing brought up the scheduling of the redacted motion and the reply and explained the reasons that we missed the deadline, and we missed it, for the filing of the redacted motion. Your OSC order came in on a Thursday afternoon when I was attending some other business in Portland. The mediation started the following Monday, it required travel both times, and while Ms. Boswell is certainly right I all but bragged that we could have the redacted motion turned around in hours because it really just involved the elimination of, I think, less than three lines of text, it didn't get done. We didn't get a call from the diocese

saying, "Jim, you missed it," but that speaks probably more towards how the parties are dealing with each other right now, and it's probably a shame that that's the -- kind of the relationship we're having, but that didn't happen either.

I've always tried to be careful about putting words in the Court's mouth, but we felt that when you allowed at that May 7th hearing another short -- well, you rescheduled, essentially, the deadline for filing the motion, you accepted our explanation. I'm sure Mr. Rafatjoo expressed his apologies for missing the deadlines, and we thought that was the end of the matter, but it wasn't because the diocese refused to withdraw the motion even though in this setting, given that there's no jury, given that you could easily read around those few offending lines, that this had to go forward.

As far as the timeliness of the initial reply is concerned, we were under the impression, but clearly not in conformity with the rules, that the practice of the Court was to make sure the replies got in on time, well before the hearings so that it could be heard with the Court having a chance to review the replies. Forty-five days have now passed, and when -- given the context of the importance of the issues we're talking about and the lack of prejudice to the parties, and, again, I hope not to the inconvenience of the Court, that the Court should allow the matter to be heard on a substantive basis. It is essential to the progress of this

case. Striking the motion and the issues the motion raises, which are the viability of avoidance actions, both as to the Catholic Trust of Northern Alaska and as to the parish properties and then the other avoidance actions we mentioned doesn't make the issue go away. These are all issues that will be heard in the context of plan confirmation, be it in the context of the fair and equitable test or the best interest of creditors test.

And Mr. Orgel will spend a little more -- Mr. Orgel is going to handle the disclosure statement aspect of the hearing, and he'll go into some more detail as to why we think the standing motion still should proceed, notwithstanding what I just said about how these issues will resurrect in the context of plan confirmation. But there are no judicial efficiencies, economies, or really any practical purpose served by striking the substantive motion.

So with that, Your Honor, I'd like to turn to the substantive motion.

There is no reasonable argument to be made that in the Ninth Circuit you lack the authority or the jurisdiction of the power to give the committee standing to bring an avoidance action motion over the objection of the debtor. The cases that Ms. Boswell and I have been throwing back and forth at one another are a little off point in the sense that they primarily deal with committees who are either seeking

co-plaintiff status with the debtor or are proceeding -- or trustee or with the consent of the trustee. And Judge Gerber (ph) in his *Adelphia (ph)* opinion at 330 B.R. 364 does a nice job of saying, look, there are three circumstances where this comes up: one, where the committee and the debtor are co-plaintiffs -- seek co-plaintiff status; second, where the debtor is silent and doesn't oppose; and, third, where the debtor actually opposes.

And when you drill down a little bit on the Ninth Circuit authorities we've cited, the case that seems to -- post-act case that seems to start this discussion is *Corey (ph) versus Sorenson (ph)*, which is cited, I believe, by the parties or at least cited within the authorities. It's a Ninth Circuit BAP decision. It was a lawsuit by creditors to bring a 548 action and to avoid stock under California law. The debtor opposed the committee status to move forward with the action, and the court said, "If a creditor is dissatisfied with a lack of action on the part of the debtor in possession, the creditor may petition the court to compel the debtor in possession to act or to gain court permission to institute the action itself."

The Spokane Bankruptcy Court in its trial decision which was reversed and remanded but not on this issue, made clear that relying on the authority of the Third Circuit in *Cybergenics* (ph), it could assign the committee the powers to

avoid -- I'm sorry, the BFP powers under 544(a)(3). Now, Judge Williams didn't give us those powers, although in her opinion on the debt relief action, she said--we'll get to this a little bit later--that if we did have those powers, we would succeed vis-a-vis a resulting trust, something that Judge Quackenbush (ph) didn't agree with, but she did say she could assign the powers to the committee. When you --

THE COURT: How about some of the other cases?

MR. STANG: Well, let me talk about that. You have another Ninth Circuit decision called *Spaulding Composites* -- I'm sorry, the other cases, the diocese cases?

THE COURT: Right.

MR. STANG: The matter, as I understand it from my general recollection and based on Ms. Boswell's papers, did not come up in Tucson.

THE COURT: Okay.

MR. STANG: She says that all the parties were well aware of the property issue and the parishes provided settlements that contributed towards the plan. In this case, at least to date, no parishes have stepped up in any of the mediations as far as we've ever been told. You know, there's nothing in the plan that -- where the parishes join in to say that they're going to make a financial contribution.

In the Portland decision--and I think I sat in on this first-day hearing--it was almost taken as a given that

the committee could proceed, and I don't even remember the debtor actually objecting.

In Spokane we asked three times. We were turned down each time. The case -- eventually the debtor filed the avoidance actions, but the case had settled already and we were just awaiting for plan confirmation. So, frankly, it was more of a placeholder than anything else. And I know there's no evidence per se. I was counseled there, and Mr. Cross, who was debtor's counsel, said to me that if the plan blew up and those actions had to proceed, he expected that the committee would step in. But Judge Williams, as I said, indicated in her opinion that she had certainly the authority to give it.

In San Diego, it was contested, and Judge Adler -- two of us, and Judge Adler allowed us to proceed on a number of test parishes, and I don't remember exactly how many. It was -- she had a -- I think I know why she picked the particular parishes she did. It had to do with a construction motion, much like the one you confronted earlier in the case, and I think she just went down the list of the parishes where construction was going on and said do these.

Davenport, we were committee counsel, it didn't come up. And part of the reason it didn't come up was -- it -- the relationship between the parishes and the diocese was always in the background, but the Iowa parishes have been incorporated for over a hundred years. All of the deeds are

in their name, I think, save one, which was transferred on the eve of the bankruptcy to the parish. And so from a BFP perspective, you know, that was a done deal. We had other ways of trying to attack the relationships, but it wasn't through 544(a)(3).

I am counsel in the Jesuit case, though we have conflict counsel for issues regarding this. This discussion has come up before Judge Perris. She has told us to talk about it, meaning the province and the committee, but we really haven't had that conversation yet. So I'm sorry that took a little while, but that was -- that's the head count.

The case that we do -- one of the cases we bounce back and forth is the *Spaulding Composites* case, which is another Ninth Circuit decision. That would fall in Judge Gerber's category of probably the debtor consenting. But when you look at the *Spaulding* case, it cites cases where there was opposition from the debtor in connection with the committee standing. And so while *Spaulding* itself was a case where there was no debtor opposition, and it may have been stipulated, or at least there was no opposition, it cites the *Louisiana World Exposition* case from the Fifth Circuit, which was clearly a case where the debtor opposed the committee standing, and *STN Enterprises*, which was a Second Circuit case, where the debtor opposed the committee standing because they were suing -- Mrs. Noyasu (ph) was the survivor of the

married principals.

So it seems to us that whether you're talking about cases where the debtor -- the case facts are that the debtor is opposing or the cases where the debtor is either not opposing or actually cooperating with the committee, in the Ninth Circuit the authorities cited include cases where the debtor was opposing.

In your decision in *Era Aviation*, the debtor was clearly opposing. I do not remember from the opinion that you ruled on your authority to grant the committee the power, but you certainly ruled that the lawsuit being proposed by the committee was unjustified, given that there was a settlement that had been reached with the debtor and one of the major creditors that allowed the plan of reorganization to proceed. But you didn't say that you didn't have the authority to give the standing.

And so given that you have the authority, what would be the standard for giving us the authority? The claim has to be colorable and we have to have made a demand. We did that. The debtor has to have unjustifiably refused. There is language that talks about abuse of discretion by the debtor in refusing. The diocese says it's a high standard of abuse of discretion. I haven't seen any cases that use the word "high standard." I'm not sure I understand what high standard means as opposed to -- or as opposed to just abuse. It has to be a

colorable claim, and it has to be beneficial to the estate.

And I want to turn to the beneficial to the estate part, because that seems to be -- there seem to be two issues that the diocese really focuses on. One is whether it's beneficial to the estate, and the second is, is there a colorable claim. As to whether it's beneficial, they glom onto a case called, I think, *In Re Gibson Group*, where the court uses, amongst other phrases, "cost benefit analysis," and the diocese says there's been no cost benefit analysis. And if what they're saying is you have to have testimony as to what the committee's fees would be and what the ability -- what the assets are worth that you're pursuing and your likelihood of success on that, the cases don't recite in their facts that that kind of presentation was made to the court. In fact, in the *STN (ph) Enterprises* case, which is one of the Second Circuit cases, the court said that can be determined by evidentiary hearing or otherwise.

But let's get back to what the standard is. Frankly, the language is all over the place. If you look at the *Curry* decision, it talks -- it's the one that uses, by the way, the abuse of discretion -- debtor's discretion, it talks about whether the initiation of the action would move the reorganization forward or whether it would be a detriment. That's how they phrase is. The *Monsieur (ph) Medical* case talks about the best interests of the estate in proceeding

with the litigation. *STN* talks about whether the action is likely to benefit the reorganization. The *Le World* (ph) case, it actually just uses the word whether there's a colorable claim. *Gibson* itself, cost benefit analysis, whether pursuing the claim would benefit the estate, and said on the face of the complaint, the face of the complaint, "Canadian Pacific," which is the creditor that was pursuing standing, "has stated a colorable claim under 11 USC 547 or 548 that would benefit the estate if successful." *Adelphia*, best interest of the estate, necessary and beneficial.

I mean, the bottom line is I don't think there are magic words that are going to be the key to this lock. You have to come away with the feeling that bringing this litigation would be a good thing for this case, be it to move it towards a consensual plan or to recover assets for the benefit of creditors, given what's at stake.

So what's at stake? You have $3 million in assets that the debtor moved to the Catholic Trust of Northern Alaska within the year prior to the filing. There is dispute that might go to whether there's a colorable claim, but that's what's at stake there, $3 million. And then you have the parish properties -- that's a fraudulent conveyance theory, and then you have the parish properties, which is a combination--and we'll get to this shortly--on whether there's a fraudulent conveyance by virtue of the recordation of those

notices of beneficial interest, and then depending on the impact of using 544 on those notices, whether -- I'm sorry, 548 and Alaska law through 544, once they're -- once they've been avoided, what is the ability then to use 544(a)(3)?

The parish properties are probably just of obvious value. There's been talk by Mr. Elsaesser from time to time about the bush properties, but there has been almost an -- really acknowledgment, not almost. There's been an acknowledgment that what people refer to as the self-sustaining parishes, and there are eight of them, have potentially -- have real value. And I started to stay potentially because one doesn't know until you actually try to market them or refinance them, but if you just look at the debtor's website of the pictures of these properties--and I have pictures with me--these are substantial buildings on substantial pieces of property.

The bank statements that Mr. Elsaesser has given me since, I think, May of last year for these self-sustaining parishes show no debt service, they're not encumbered properties. And so between the Catholic Trust of Northern Alaska and the properties themselves, which have been, I think, acknowledged to be of value, subject to RFRA, the Religious Freedom Restoration Act, and historical status and what the best use of the property would be, but they have value.

Litigation is not going to cost $3 million. Ms. Boswell trots out the various expenses of the administration in the cases where these matters were contested, but those are bills for, at least, I think, in the case of San Diego, she gave you the entire cost of administration for the entire case, which had a lot of other issues going on. In Spokane it included two committees, there were extraordinary costs because of that structure, and so -- and in Portland, which had a lot of issues going on, including the fact that they had a defendant class action going on in the context of the property litigation, and we're certainly not intending to try to certify a defendant class in the property litigation that we would bring. We didn't do it in Spokane, and we wouldn't repeat that here.

So in summary, Your Honor, I go back to Judge Gerber's opinion in *Adelphia* where he says, "The practice of authorizing the prosecution of actions on behalf of an estate by committees and even by individual creditors upon a showing that such is in the interest of the state is one of long standing and nearly universally recognized." And in his footnote, he cites the Second, Third, Fifth, Sixth, Seventh Circuits, the Eighth Circuit BAP, the Ninth Circuit, the Ninth Circuit BAP, and notes that only the Tenth Circuit BAP, which is the *Fox* (ph) decision cited by the debtor, the only appellate decision as of 2005 that had failed to

recognize this Court's authority to allow this committee the standing.

The second issue the committee -- I'm sorry, that our focus is on is whether there are colorable claims. And I'd like to just be really clear about what this motion does and what this motion doesn't do. This motion does not seek authority to sue the parishes and possibly the diocese in a declaratory relief action as to whether the parishes are separate entities under Alaska law. It was clear from the Spokane decision, both at trial and on appeal before Judge Quackenbush, that that authority was not necessary. He said, Judge Quackenbush did, that maybe we should've asked, but he found that it wasn't jurisdictionally necessary.

And we have been, very surprising to me, almost faulted by the debtor for not bringing this debt relief action on the parish status earlier. A debtor that almost without fail at every hearing--and if you include the briefs, this hearing as well--says we do not have enough money to repeat the performances in some of the other cases, we're a poor diocese, we don't have the money to pay the admin expenses, and now we are faulted for having tried to give mediation a chance on two occasions for not having pulled the trigger on the property litigation.

Now, early in the case I asked you for, in -- maybe in the context of a status hearing, we talked about the

property litigation as far as the parishes are concerned. You said to me do not do anything until November 14th. I believe that was the date. That allowed the first mediation session to occur with Judge Bentonelli (ph). That didn't work out, and about a month later we started the demands upon the debtor. But, you know, to come in and say, "We never had the money to do the litigation that may be necessary in this case, so compromise, compromise," and then fault the committee for having given compromise a chance just seems to me to be just too inconsistent.

But I should point out that in terms of -- again, this is not an avoidance-action-standing issue, but I should point out that at least the Seventh Circuit and the D.C. Circuit and Judge Perris in Portland have all said that under applicable civil law, the parishes are not separately -- separate civil entities. And we'll have -- and Mr. Elsaesser and I went through this in Spokane, we may go through it again, but the standing action -- standing motion is related to it in the sense that they attempt to deal with the property-of-the-estate issue, but it's not really part of the standing motion in and of itself.

So do we have colorable claims? The -- there are various kinds of trusts that we talked about. I'm not going to go through in detail in each one, but the one that caused us the most indigestion in Spokane was the resulting trust

issue. Judge Quackenbush remanded the case, having found that on summary judgment there was evidence that either the parishes or parishioners had a resulting trust interest in the properties and that had to go to trial. But he -- at least at the bankruptcy court level, Judge Williams found that if we had the 544(a)(3) powers, that we would defeat the resulting trust. Judge Quackenbush said, well, I'm not sure you would because if you went to the church, you would see that someone occupies the property. And that would put you on inquiry notice to ask why those people are there. It was two sentences in his opinion, and it's an "of course" kind of conclusion by him.

We have gone through in our brief and pointed out the elements of inquiry notice as to an occupant under Alaska law, and Judge -- I'm sorry, Judge Perris, in her opinion, addressed that as well in much, much more detail than Judge Quackenbush did, and with due respect to him, she did a better job. I mean, she actually analyzed the issue and concluded, in kind of my shorthand summary, that if you went to a parish -- to a high -- Catholic high school or you went to a parish and you saw people there doing things that people do at such a religious building or educational building, that wouldn't cause you to think that there's a problem with the title. Having a priest at a parish and seeing the title in *The Catholic Bishop of Northern Alaska* would not put you on

inquiry notice. And she goes into some other detail about that, but that's essentially what she said. And I think that it's almost so obvious that one would have to conclude that that's true.

The debtor's response to statutory trusts, be it in the corporation's sole statute or the articles of incorporation, really go to reading canon law into the statute -- or into the articles. And Judge Perris talks about that at length in her opinions and says, look, you can use canon law in your operations and you can conduct each -- your relationship with -- be it internal to the diocese for canon law and your articles can provide for that, and you can do it as between the parishes, but your canon law doesn't control how those relationship are ascertained -- are characterized by, in her case, Oregon law. And that's got to be the law. No one can seriously say with a straight face that your decisions as to the rights of third-party creditors are determined not by the law of Alaska but by the canon laws of the Catholic Church. It just is so beyond imagination.

Now, Judge Williams asked Mr. Cross about that in the context of her authority to order the sale of property, and he said, well, above a certain dollar amount we'd have to get permission from the Holy See. And she said, well, what if you don't, and he said, well, that would be a violation of our First Amendment rights and we wouldn't have to follow your

order, and she leaned back and said what are you doing in my courtroom. And so it just can't be the case, and that's they keep on doing.

Now, they looked to the amended articles in 2007 as, aha, well, you know, maybe the language was a little unclear in the older documents, which really track the Oregon statute and the Archdiocese of Portland's documents, but in 2007 we fixed it, and it clearly says trust, it clearly expresses the intent. And it is certainly the committee's position that to the extent those articles are documents that reflect a conveyance of property, that they are fraudulent transfers, that the articles themselves would constitute a fraudulent transfer. Now, the dioceses know it just memorializes the relationships that existed before. Well, the old articles, as at least interpreted in analogous situations by Judge Williams, says you can't bring in canon law to somehow then cause the result under Oregon law that canon law controls with all the attendant claims of trust relationships.

As to the notices of beneficial interest, the debtor says those weren't transfers of property, and so because they weren't transfers of property, you can't avoid them. Well, I go back and look at 548(d)(1), which defines transfer in a fraudulent conveyance context, and as I read the statute, it says that a transfer occurs when the rights of a BFP are cut off. And the rights of the BFP -- I mean, this is what the

debtor relies on. The rights of the BFP were cut off when they recorded those notices of beneficial interest. So it wasn't when the property was acquired 40, 50 years ago and this trust relationship somehow instantly connected to the property or attached to the property when it was granted by Mr. and Mrs Smith. The transfer occurred, for 548 purposes, when something was done to cut off the rights of BFP. That happened within the year prior to the bankruptcy when they recorded notices of beneficial interest.

As to the Catholic Trust of Northern Alaska, I don't think there's really serious debate about what happened. There was money in an account that, as far as we understand, had the bishop's or the diocese's or the debtor's name on it. It contained funds that came up from the parishes, acknowledging for at least these purposes that the parishes even exist as a separate entity. There was money from KNOM in the account, and while the debtor may have been accounting separately from KNOM, they have never -- they certainly didn't say in their schedules that KNOM was a separate entity. It's part of the diocese.

The same was true for the schools: part of the diocese, separate name, maybe Mr. Vaderik (ph) kept separate books and records, but they've never contended it wasn't property of the estate. In fact, that's what their RFRA discussion is about vis-a-vis the schools. It is property of

the estate, but it doesn't get included for various tests under a plan confirmation.

And there were excess reserves, which means that that account was earning more interest than was payable back to the depositors. That was over a million dollars at the time that they said that they got divorced. And they said, okay, we're going to create the Catholic Trust of Northern Alaska, we're going to keep this reserve money, this excess, over what we have to pay the depositor and kick it into this trust account. I don't think they necessarily kicked out -- or kept the KNOM money. I think there's some testimony that that may have been transferred back over after the fact.

But it's clear that these monies were commingled, that they -- I think Bishop Kettler testified in his first-day declaration the monies have come to CBNA. And it is certainly colorable -- we're not conducting -- this is not a summary judgment hearing, but it's certainly colorable that that was essentially a debtor-creditor relationship, and while Ms. Boswell may take exception to our characterization of it as a bank because Mr. Bowder testifies there were never any loans. The fact of the matter is people had a contractual claim, evidenced by probably a myriad of different procedure manuals and the like, to get their money back. But the fact that they could separately account for it does not mean that there's not a colorable claim that that money was transferred

out of the estate when it was given to the Catholic Trust of Northern Alaska.

Almost done, Your Honor.

Ms. Boswell also says that even if we can avoid these notices of beneficial interest, that they're not void, that there's a difference. And because they're not void as of the petition date, they still give notice, and, therefore, you don't have a 544(a)(3) argument. Well -- and she points to Section 550, saying that tells you what avoidance means, and what it -- we all know it enables you to get something back from the transferee. Well, the title of Section 550, if you want to use the title of a statute for some help in understanding what's going on, is liability of a transferee. It is not meant to be a definition of what avoidance means in all of its contexts. It certainly tells you what avoidance means if you're chasing a transferee to recover property or to get money back from the transferee, but it doesn't define what avoidance means.

And there are at least two Ninth Circuit decisions which, in referring to Section 548, say that it voids the transfer. And this "a" becoming very important between void and avoid. And *In Re Preblic* (ph), at 46 F.3d 1144, says 548(a)(2) gives the trustee the power to void fraudulent transfers, and *In Re BFP*, 974 F.2d 1144, which was the case talking about whether a properly conducted foreclosure sale

could be a fraudulent conveyance, said, "It has been widely recognized allowing a bankruptcy court to undo a foreclosure sale," interpreting what the 548 application to foreclosure sale would mean, "carries with it..." and then it goes on to say something that's not (indiscernible) relevant. So avoiding a transaction under 548, we believe, voids it, voids it as of the petition date, and then you roll into the 544 powers.

Your Honor, the debtor talks about the *St. Paul Church* case and says that that case recognizes that the canon law trust principles are somehow imbued in the corporation-sole statute, and maybe if it were a different religion, it wouldn't be the canon law, but it would be their law, their religious law. Sometimes you have to -- when you read these cases on property disputes, you really have to remember who the parties are. And in the *St. Paul Church* case, which is an Alaska Supreme Court case, it was a local Methodist church and its governing Methodist organization.

So in that case, using neutral principles of law, the court looked at the various documents between the parties, read them from a neutral-principles perspective, and said, and I can't remember which one won, but "You win." That's not this case. This case is not an inter-church dispute. And so when you look at the documents that define the relationship, you have to look at the documents not as an inter-church

dispute where essentially the parties have agreed that those rules will govern their relationship, no matter how they're read--deference to superior authority, deference to the subordinate authority--you use neutral principles to interpret them. That's what the Alaska Supreme Court has said. And when you're looking at which documents to look at, you don't look at the documents that no one really has access to, which are -- and no one really thinks about when they're dealing with the debtor.

Finally, Your Honor, the committee's request to pursue the debtor's claims against the Holy See. When I first started this work about five years ago, people would say, laypeople, can you sue the Vatican? And I'd go, why, I can't sue the Vatican, come on, you know? They're halfway around the world, everyone knows that, you know -- at least, legal (indiscernible) knows they're separate country. And it took a long time between the efforts of some lawyers in Kentucky and lawyers litigating in the Ninth Circuit to establish that, yeah, you -- sometimes you can sue the Vatican and sometimes you can sue the Holy See. And the Ninth Circuit has ruled that there are circumstances under which there could be personal jurisdiction over the Holy See, notwithstanding the Foreign Sovereign Immunities Act.

And so the specter of another six years of labor in the Ninth Circuit to see if you can get jurisdiction over the

Holy See isn't going to be repeated. That work has already been done by an attorney named Jeff Anderson. We -- the debtor, although it does reserve its -- all of its objections, does not say that this trial manual, this Crimin (ph) -- I'm going to mispronounce the name, but it's the document that we attached to the exhibit, does not say that that's not a document that the Vatican issued. It -- that's an issue -- I guess, an issue of fact. Whether it came to Bishop Kettler's predecessors may be an issue of fact. But at least we've now had two circuit courts of appeal say there are circumstances in the context of sexual abuse claims where there can be jurisdiction over the Holy See.

And, again, we are not asserting the claims of sexual abuse victims. That's not what we're trying to do. We don't need to come to you probably for permission to do that. We would go to them for permission to do that. We are looking to assert the rights of the diocese, which entitled to have its assets protected by the Holy See, because under the canons, the Pope is the -- I believe the phrase is "supreme ordinary and administrator" -- I may not have this -- "administrator of all ecclesiastical property anywhere in the world," and all property of the church, be it a diocese or parish, is ecclesiastical property.

So that's the theory. We don't think we're climbing up the same mountain, and we think that the standing as to

that litigation is warranted as well. Thank you, Your Honor. I appreciate the time you gave me.

THE COURT: You're welcome. Ms. Boswell?

MS. BOSWELL: Thank you, Your Honor.

(Pause)

THE CLERK: Could you adjust the mic? Thank you.

MS. BOSWELL: Yes.

(Laughter)

MS. BOSWELL: Mr. Stang and I don't exactly use the same height of mic. I've been hoping that it hasn't happened.

Thank you, Your Honor. Let me address the authority issue because I think that the question of what are the claims and whether or not assuming that authority could be granted that they should be pursued is something that I will get to in a moment.

Obviously, Mr. Stang and I, the committee, and the debtor have significant disagreement in terms of what the law is in this circuit about the ability to pursue those claims over the objection or the ability of the Court, if you will, to grant authority to pursue those claims over the objection of the debtor. And we have the *Sparetos* (ph) and the *Car America* cases, and then we have the *Spaulding* case, we have -- which, as Mr. Stang acknowledges, was one where the debtor or debtor in possession in that case stipulated and agreed that the committee should be granted the authority to pursue those

claims. That, in fact, was the situation in *Parmatex* (ph) as well. The debtor in that case, in fact, agreed.

So the question becomes not what a judge did, Judge Gerber, in the Bankruptcy Court in the Southern District of New York, in the *Adelphia* case, but, more importantly, what is the law in this circuit. And, Your Honor, we submit that the law in this circuit is that under *Sparetos* (ph), and as confirmed, albeit not with a lot of comment, and I will certainly be the first to admit it, in *Car America* that the authority to pursue avoidance actions cannot be granted to a -- derivative standing cannot be given to a creditor or a committee over the objections of the debtor in possession. that does not mean there are not remedies, and the remedies are, as we recognize, you know, potentially drastic. But that does not change the fact that the Ninth Circuit in the *Sparetos* case determined that a creditor could not proceed and could not obtain those rights over the objections of, in that case, the trustee, and with a one-line comment, in the *Car America* case, said the same, Your Honor. And we believe that is the law in this circuit.

But even if the Court were to find that *Sparetos* and *Car America* don't really mean what they say, and for some reason it would be distinguishable from what is before the Court today, then, Your Honor, you do have to look to the test. It's a test that Your Honor certainly is familiar with

because, as Mr. Stang said, in either case, you articulated it.

The one that is mostly commonly looked at and which this Court clearly applied, even though you didn't articulate it as such, is not only whether there are colorable claims that benefit the estate. The way you determine that is to look at the cost benefit analysis, and I know that the committee tries to gloss over the cost by saying that somehow or other, by allowing them to bring the avoidance actions, it's different than the declaratory judgment over what is property of the estate, and therefore what you are dealing with is something much more simple to be able to determine, so from a cost benefit analysis, presumably the debt that is the same but the cost is much less. Well, we don't know that, and we don't that because what has been presented to you is simply allegations with no background and no facts other than the bare facts that were in the motion, the facts that we've now brought forth, and clearly with no cost. There is --

And, Your Honor, you have not seen a fee application in this case except from the Dorsey & Whitney firm, and there's a reason for that, and the reason for that is because, until something is done in terms of mortgaging property or selling some property, they're not liquid assets with which to be paying administrative costs right now, so it's not an administratively insolvent estate, it's a cash-strapped

estate, so from that perspective, the Court is somewhat in the dark as to what the administrative costs have been. I will say that until recently I think the parties have tried to keep the administrative costs down. Unfortunately, for a variety of reasons, things have escalated to a point where there is more litigation, and I view this and the debtor views this as really a threshold issue in terms of the direction that this case can take and will take.

The one thing that Mr. Stang said and the committee said in its motion was that for all intents and purposes this was a way to get leverage. I don't think you can take it as any other way of saying that, that this is a way to get leverage, and, Your Honor, that isn't what any of the tests are. Giving another party leverage is not the basis upon which to grant the ability to bring the type of litigation that the committee wants to commence, and so what we have is we have our position that under Ninth Circuit law they can't be assigned. Then you have, if they can, then clearly there has to be a cost benefit analysis, and that is not the debtor's obligation to provide the Court with the cost benefit analysis. That is the moving party's.

But I want to talk about what it is that the committee seeks to do and talk a little bit about the realities of that which they seek to go after under the 544 powers, and to date, we don't know what that complaint would

look like because we have -- that hasn't been prepared. We don't know whether in the context of that action the committee will indeed seek to determine what is and is not property of the estate, and, quite frankly, Your Honor, I don't know how you can make a determination as to whether or not parish properties, CTNA, the Catholic Trust of Northern Alaska, is or is -- can or cannot be avoided without also determining whether it's property of the estate.

Now, Mr. Stang may have in his head the way to do that. If he has, he hasn't shared it. He hasn't shared it with the Court, he hasn't shared it with us, and one can only presume what that litigation would look like, but they've had a significant amount of time to be far more specific in terms of what it is they would be doing, what discovery they think would be necessary, what they already have that they wouldn't need to do any further discovery on and how they think the case would proceed and what it might cost. That hasn't been done. And, by the way, Your Honor, I will address the motion to strike at the end. I've decided that I'd go in reverse order.

Your Honor, the actions that the committee seeks to bring also would not be, in my view, the end of the litigation because while there was discussion at the end of the motion about RFRA and trusts, et cetera, it was kind of like a throwaway, and one of the things that is not included in this

litigation, and properly so, I might add, Your Honor, are some of the trust issues that the committee has argued in other contexts, so what we're talking about are -- is parish property, the Catholic Trust of Northern Alaska and the claims against the Holy See.

With respect to parish properties, Your Honor, it would appear that Mr. Stang is conceding that out of the 48 parishes, the 36 non self-sustaining parishes that are located in the bush are probably not worth much, so I guess I don't know whether that means that they would include them, they wouldn't include them, but I think we can all assume that from the cost benefit analysis that these properties there isn't going to be great value to.

Mr. Stang says but we have these other properties and these other properties consist of these eight self-sustaining parishes. Well, what Mr. Stang doesn't tell you is that out of those eight self-sustaining parishes, four of those, Your Honor, are basically in locations where they are the single church in those locations. One is in Barrow, one is in Bethel, one is in Delta Junction, and one is in North Pole. That leaves four in Fairbanks. Of those four, as we indicated in our moving papers, the Immaculate Conception church is a historic designated church, so its use would be significantly restricted.

Mr. Stang does seem to recognize that even if the

Court were to determine that the committee should pursue the avoidance actions and even if the Court were to determine that under 544 that, notwithstanding all the evidence to the contrary, that the -- a BFP would prevail against the parishes and against CBNA with respect to those properties, there still has not been any indication of what, if anything, those properties could sell for or what, if any, value those properties would bring into this estate presumably for, as Mr. Stang puts it, the benefit of all creditors. That is a huge gap, that is a huge gap, because this is going to be a fact-intensive inquiry, Your Honor, as to all of the issues that the committee wants to pursue.

With respect to the legal issue, let alone the factual issue, there is a basic issue that the Court is going to have to determine if the Court gives the committee the authority to pursue these actions, and that issue, Your Honor, is whether or not, going back to 1952, under the Alaska Religious Corporation Act and the articles of this entity, Catholic Bishop of Northern Alaska, there has been a trust relationship that has existed from that period of time. That's number 1.

Number 2, whether or not the 2007 amendment, which clarified -- it wasn't new -- clarified the prior articles was indeed a transfer, and notwithstanding what Mr. Stang would read into 544 or 548, the statute still talks about a

transfer, so, you know, it isn't that a BFP just comes in and says "I like that, and I want to take that," there is a necessary step, and that is, in order for there to be an avoidance, there has to have been a transfer, so the question becomes did the amendment of the articles constitute a transfer. We say it didn't. They say it did. That's another issue the Court's going to have to determine.

The other issue, Your Honor, is whether the recording of notices of beneficial interest -- that's all they were, and you have a copy -- recording of notices of beneficial interest constituted a transfer. Again, Your Honor, that's a determination that this Court is going to have to make as a threshold issue, and a necessary precedent or first step is to determine whether or not a transfer occurred because if no transfer occurred, Your Honor, there is nothing to avoid.

So this is not a simple matter of the committee getting the avoidance actions and then commencing an action and then we all start producing documents and then come in with respect to ownership issues, Your Honor. There are some basic issues here that are going to need to be determined.

The other thing, Your Honor, is Mr. Stang, for obvious reasons, really likes to brush over Judge Quackenbush's opinion, which is the only appellate decision in this circuit on this issue, and talk about what Judge Williams

did, whose opinion was vacated, and talk about what Judge Perris did, whose opinion is a bankruptcy court opinion that was up on appeal but the case settled. And what Judge Quackenbush said was that each of these entities, each of these parishes, are individually fact-intensive inquiries that have to be determined prior to any determination of who owns the property and whether or not those interests can be avoided.

Whether it's under a 544 theory or a resulting trust theory, the 544 BFP powers is not a silver bullet. It does not take away the defenses that the parishes have or that CBNA has to these claims no matter what decision there is, and, in fact, even in Judge Perris's decision, she said, after she rendered her decision, that as to the parishes before her, and these were not all of the parishes -- I believe it was eight or 12, I don't remember; they picked the parishes -- she said that before any could be sold of those that they had picked, she would have to go through a RFRA analysis to determine whether or not those properties could be available for creditors or whether to do so would be a severe impact or a burden on the free exercise of religion.

So, again, what we are talking about here is complex, lengthy litigation, and you asked what happened in the other cases, Your Honor, and I think that Mr. Stang was correct. In Portland, the debtor ceded the powers on the

first day, and that -- we cited the order to you where Judge Perris referred to that. In Spokane, as Mr. Stang said, he asked three times and he didn't get it. In Tucson, the issue didn't come up, we settled it. In Davenport, the issue did not come up, and in San Diego, Your Honor, it wasn't that Mr. Stang necessarily asked for them, it was that Judge Adler (ph) asked him to bring the action, the motion, and she's the one who designated the parishes against whom the actions would be brought, and I would say, Your Honor, that I think that San Diego was an anomaly to the other cases, and I think Mr. Stang would frankly agree with me.

With respect to the Catholic Trust of Northern Alaska, Your Honor, there was a declaration from Mr. Bowder and we have offered to provide information to the committee, and I think the committee may even have some documents to this effect. It was not a commingled trust, it was not a commingled account. It has been and was always a custodial account that was so segregated, designated and invested by the diocese, Catholic Bishop of Northern Alaska, before CTNA was created. With respect to that, there was separate accounting. The investments were pooled, but that does not make them lose their character, nor were they commingled, if you will, or pooled with investments of CBNA other than some investments of KNOM and the Catholic schools, and we've disclosed that, we've accounted for it, and, Your Honor, we've indicated what that

is.

It's interesting that Mr. Bowder was asked, and I think it was at the first meeting of creditors, by Mr. Manley, "Do you have a single piece of paper that shows that there was any kind of agreement between CBNA and the parishes?" and, in fact, Mr. Bowder said, yes, he did. Your Honor, CTNA was the successor to a trust that existed prior to the time that CTNA was set up.

In addition, Your Honor, even if -- even if -- the Court were to determine that somehow or other it was a transfer that can and should be avoided, the inquiry does not stop there. The parishes, like CTNA, raise money for specific purposes. A part of that money, and a significant part of that money, constituted restricted funds that had been raised by the parishes for specific purposes so designated by the donors. So when all is said and done, it may very well be that even if this could be avoided, the net benefit to the estate will be a negative by the time you add in the amount of money that the committee has spent in litigating this issue.

And, Your Honor, the -- it is not a situation where the diocese money was taken and it was transferred to the parishes on the eve of filing, and we are confident, Your Honor, that if this matter goes forward that there will not be a finding that there was any type of fraudulent transfer, which is the only theory here. There is no BFP theory here.

It's either a fraudulent transfer or it's not a fraudulent transfer, so unlike the parish property, where Mr. Stang needs the 544 powers, he thinks, in order to prevail as somehow a magic bullet, that would not be the case with CTNA.

Your Honor, with respect to whether or not the parishes will participate in the plan, I think Mr. Stang is jumping to some conclusions that he should not jump to. The plan does provide for participating third parties, and we believe that, in fact, there will be some participating third parties that will be brought before the Court as a settlement, and hopefully with the concurrence of the committee, but I do not know at this point whether that would be the case.

Your Honor, I think the other thing that the Court has to look to with respect to determining the property rights here is, in fact, the religious corporation sole statute and also the canons of the Catholic church. Mr. Stang at least acknowledges the *St. Paul Church* case, and he tries to argue that -- and this is the Alaska Supreme Court case -- and it was a dispute between the local church and the Methodist -- the United Methodist Church regarding church ownership -- I mean, property ownership, but, Your Honor, it was the same situation where in that case the property was to be held in trust for its parent, and the dispute was whether or not the members who wanted to split off and form a different church had the right to take that property, the contention being that

since the deed did not reflect the trust relationship between the local church and the United Methodist Church, although it was required to, and although the canon -- I'm sorry -- both under the canons of that religious entity and also under the Alaska religious corporation sole statute, the Court correctly looked at the Supreme Court decisions, and in particularly *Jones v. Wolf*, and *Jones v. Wolf* is very often cited for neutral principles, and then the next sentence goes on to say neutral principles means that you disregard in total any of the internal documents or canons or constitution of the religious entity and you apply only civil principles. That is not what *Jones v. Wolf* says, Your Honor, and, in fact, *Jones v. Wolf* says neutral principles and also considering the statutes, the canons, the constitution of those religious entities. It also stands for the principle that certainly the courts cannot involve themselves in intra-church disputes.

Your Honor, I think that the *St. Paul v. Board of Trustees* Alaska Supreme Court case is controlling here in terms of determination of the property interests and is another issue that the Court will have to consider if it allows the committee to go forward.

Finally, Your Honor, let me talk about the Holy See claims. I believe the most telling part of the motion is that -- and this is on page 20 -- it says, "The committee believes that such a complaint is appropriate as compared to

the plaintiffs in the state court actions in ending their complaint so as to avoid a defense by the Holy See that it is protected by the statute of limitations." Your Honor, estate assets absolutely should not be used and should not be allowed to be used to pursue a claim against the Holy See that could have been brought by the individual claimants had they chosen to do so starting back in 2000 when -- or 2002 when they started filing claims against the Catholic Bishop of Northern Alaska. In neither of the Ninth Circuit case, the California case, nor in the Kentucky case was there an attempt to force a diocese to bring that claim, and, in fact, what it was in both those cases -- well, at least, in the Kentucky case -- is a class action.

Your Honor, Mr. Stang would have the Court believe that because of the rulings in the Ninth Circuit and in the Sixth Circuit, now the way has been paved and there will be no further impediments to a suit against the Holy See, and you won't see another six years going up through various motions and appellate decisions, et cetera. Your Honor, you may not see another six years, you may see another 12 years. The Sixth Circuit case is now before the Supreme Court on a petition for writ of certiori. The Ninth Circuit case, I believe, is still awaiting whether or not it will be granted *en banc* review.

In addition, Your Honor, in the Sixth Circuit case

and in the Ninth Circuit case, you have never gotten beyond, in all these years, the issue of subject matter jurisdiction, and I feel pretty confident that if a claim is brought in a bankruptcy case, chapter 11 case, as a derivative claim on behalf of a diocese, that there will be its own set of unique issues that will wend themselves through the courts for many, many, many years.

In addition, Your Honor, as the Ninth Circuit said in that decision, they chided the attorney for the Holy See for bifurcating his motions and not bringing a 12(b)(6) motion at the same time that he brought the motion to dismiss on the basis of subject matter jurisdiction and made it very clear that their ruling did not rule on the validity of the claims. The only thing they ruled on is that there was not a per se immunity for all claims against the Holy See.

It also, Your Honor, brings up a whole other set of issues because if these priests and if the diocese or this bishop was an employee of the Holy See, then perhaps, Your Honor, there are no claims against CBNA. Furthermore, Your Honor, Mr. Stang says, well, what we want to do is we don't want to assert the rights of the state court claimants. We understand why, because they think they have statute of limitations issues. What we want to do is we want to use these estate assets, and we want to assert these claims on behalf of CBNA against the Holy See, and, Your Honor, in order

to do that, we are going to have to, of course, deal with the issue of canon law. Well, Your Honor, I suggest to you that when you get into the relationship between the diocese, the bishop and the Holy See as opposed to a third-party claimant suing on a tort theory, that you're going to have a very, very different litigation than what has already been before the courts.

In addition, Your Honor, Mr. Stang -- the thing that forms the linchpin for this litigation is the premium and the directive or the asserted directive of the Holy See with respect to what a diocese or a bishop or a priest should or should not do with respect to allegations of childhood sexual abuse, and, Your Honor, in that situation, one of the key issues is whether or not that document ever went out to any of the bishops or any of the priests, because, if it didn't, then it would seem to me that the whole linchpin of their allegations and of their claim is significantly flawed.

Finally, Your Honor, with respect to that, Mr. Stang says, well, what we want to do is we want to bring these claims on behalf of the diocese because they owed a duty to the diocese which was breached -- the Holy See owed a duty to the diocese which was breached, and as a result of that, terrible things happened, and we understand -- we agree these were terrible things -- and as a result of that, because of these terrible things, then the Holy See is liable to this

estate.

That sounds an awful lot like a contribution or indemnification claim to me, and, Your Honor, this is exactly the same kind of claim that Mr. Stang in pleadings in the *Jesuit* case has said does not apply in Alaska as his justification for why Pachulski Stang could represent the committee in the *Jesuit* case against whom the diocese believes it has significant claims, given the fact that all of the priests and all of the bishops until Bishop Kettler were, in fact, Jesuits, and now he's standing before you and saying but let me use estate assets to chase this lawsuit on what sounds to me like would be very much the same claim that I'm already on record saying does not apply in Alaska.

Your Honor, for all of these reasons, we would ask that the Court deny the committee standing to bring these actions.

Let me address very quickly the motion to strike. Your Honor, I am only mildly amused that Mr. Stang would say that I didn't call him and tell him that they should have filed their motion, and that's kind of indicative of the way the case was going. In fact, when I filed the motion for order to show cause, I called Mr. Stang, and I asked him for more time to respond to the avoidance action motion because we had filed this OSC and because we believed that it was appropriate to have the Court rule on the OSC before we

proceeded even though the committee was not part of the OSC except insofar as what was in the motion. I was told that I could have 48 hours, and then, if the Court will recall, we were before you because you entered the OSC and the committee asked for expedited relief in order to require us to file our response because it was important to get the litigation going, to get this matter determined, so for Mr. Stang to now stand before you and say, well, don't fault us because we really wanted to give the mediation a chance, I think is just belied by the record.

Your Honor, I'm not going to spend time on this. I think the rules are the rules, and that's why we brought this motion, and, Your Honor, we just stand on our pleadings with respect to that.

THE COURT: Thank you very much. Okay, Mr. Stang, rebuttal?

MR. STANG: Briefly, Your Honor.

THE COURT: You bet.

MR. STANG: Ms. Boswell and I can agree on something. Quote, "basic issues -- these are basic issues that need to be determined." These are basic -- she's right, they are, and you can have the longest confirmation hearing probably known to a bankruptcy court in recent history to have all these issues resolved because they're going to get addressed, or we can do it in a different fashion, have them

addressed first and see if the resolution of those issues can lead to a consensual plan, and, as I said before, Mr. Orgel has more to say about that.

The *Corey versus Sorenson* case talks about -- and I quoted it -- the things that can be done when there's a nonconsensual motion for standing, and at headnotes 4 and 5, the Court says you can bring a motion to dismiss; you can bring a motion to convert, not possible in this case; you can bring a motion for the appointment of a trustee, probably pretty unlikely given what you've been hearing about RFRA, and having a trustee actually administer these churches and schools; or you can get the -- move to compel the debtor to do it, not really very satisfying since they'd be reluctant; or the committee can ask, and so there are alternatives. None of them would particularly work well except for the one that we've proposed.

In *Corey*, the courts, in articulating the standard about whether you should give the community standard, said would the initiation of the action move the reorganization forward or would it be a detriment. Now, maybe that's Ms. Boswell's word for leverage. From our perspective it's to get these issues resolved. But she said something very telling. After Judge Perris ruled in Portland, the case settled. You know, when there's risk to people -- and there's no risk to them now on these issues -- when there's risk to

people, they reevaluate their positions and maybe the case can be resolved consensually. This is the only case in all of the diocese cases, and Jesuits were early, that has gotten to this point, and I know the insurance litigation may help resolve some things, but this property issue needs to get resolved, and I suspect upon resolution, whoever is going to win it, even at the trial level, this case will make a big step forward.

Well, we reached a settlement in Spokane with the debtor after Judge Williams' trial court decision. Now, she didn't approve that settlement because it was not in the context of a plan though it was subject to plan confirmation, but that case moved forward, and when Judge Quack -- so it moved forward, frankly, more on our terms than the diocese, but then when Judge Quackenbush ruled, there was an overall settlement reached but the other way, so, you know, call it leverage, you can call it what you want. The question is does it move the case forward.

Ms. Boswell talks a lot about the cost benefit analysis. These -- as I said, these issues are fundamental to their confirmation of their plan. She's not -- this estate is not escaping dealing with whether or not parishes are separate or not, whether or not these transfers are avoidable, whether or not the notices of beneficial interest are avoidable.

I didn't quite understand the argument about we have

to establish what is property of the estate in the context of these parish properties. Every deed or every deed of any substantial property says the Catholic Bishop of Northern Alaska owns these properties, and that was the theory we went forward on in Spokane. Because we didn't have the 544 powers, we couldn't deal with the resulting trust argument, and that's really why, frankly, the dec relief action hasn't proceeded. We were going to have to deal with the avoidance powers, and we didn't have them as early as Ms. Boswell has encouraged to have filed that litigation.

We don't necessarily concede that the bush churches don't have value. I honestly don't know. My point was that -- I think everyone agrees that the Fairbanks properties do, and the fact that there are four parishes that are somehow community-centered or the only churches in their particular town, the parishes in this diocese lease property to where their churches are, and that was pointed out in the debtor's papers. You don't necessarily have to own the property to have a church on it or to conduct your religious services there, and substantial burden and RFRA issues are something that Mr. Orgel will get into a little more in the disclosure statement context, but, you know, the Ninth Circuit has been clear that you're not necessarily guaranteed the place to worship where you -- that you've identified as the one that you want.

The -- but Judge Quackenbush did say that the resulting trust trial would be fact-intensive, but we didn't have the avoidance powers. You could almost concede there's a resulting trust if you're comfortable in a summary judgment context on your 544(a)(3) powers. You don't have to get into whether or not there's a resulting trust or not. You concede there was and then say, look, 544(a)(3) works, so that specter of I think it was 98 parishes in Spokane just doesn't exist here, and, frankly, Judge, if you said to me that you and Ms. Boswell need to figure out some test cases, that was done with Judge Adler, regardless of who initiated the desire to have the litigation done; it was done in Portland; and it can be done here.

The new articles of incorporation did not clarify the former articles. All you have to do is look at them. It says the new -- these articles supersede, not clarify, supersede all prior versions. That's what the articles of incorporation say. And Ms. Boswell talks about BF -- the church (indiscernible) BF powers needs a transfer. No, they don't. 548 needs to avoid transfers. BFPs or the debtor-in-possession, the trustee, has the rights and powers of a debtor-in-possess -- of a bonafide purchaser of real property. It also has the power to avoid transfers, but the trustee also has the rights and powers of a BFP, and that gets you back to the recording statute and the priority vis-a-vis recorded

interests versus unrecorded interests.

On the *St. Paul* case, Your Honor, application of neutral principles of law does not mandate the review of every single piece of paper that exists between the parties. Now, in the context of an intra-church dispute, it would be natural to look at their governance documents, because both parties essentially agreed to be governed by those documents, but it doesn't require that you undo every scrap of paper, and Mr. Manley asked Mr. Bowder at the 341 -- it's in the exhibits to the disclosure statement objection -- do you have a single nonreligious secular document that establishes this relation -- these trust relationships, and the answer was one word -- no. So they may have religious documents that say it; they don't have a single secular document that a civil court would be looking at when determining the rights of nonaffiliated third parties vis-a-vis the debtor.

Your Honor, the discussion regarding the Holy See, I'd just like to make two points. I do not believe there are any rights of contribution or equitable indemnification in Alaska. I briefed that issue, I went through it in Portland, and, you know, it's not even a matter of eating my words, there just isn't. This is an issue of the duty of the Holy See to the diocese to protect the diocese's assets, and it's an entirely separate matter as to -- it is a separate entirely claim for relief. Now, if Ms. Boswell is right that it's

really the same, then you should be able to add the Holy See under the civil rules to make it another party, if you will, not an empty chair, and let the parties in that context, let the diocese in that context point to the Holy See or not point to the Holy See, but if it were involved, (indiscernible) would come out, but, you know, it's not just -- the statute of limitations doesn't limit, as far as I understand the rule, the ability to bring someone in for apportionment of liability under the Alaska trial rules.

Is it going to be simple litigation? No, it will not be simple litigation. Is it litigation that should be brought? Absolutely. And the notion that somehow that the inquiry into the relationship between the Holy See and the diocese is too overwhelming for the Court, well, you're going to be asked over the next several weeks or months to get to exactly that kind of understanding of relationship vis-a-vis the diocese and the parishes. I mean, there are some different rules, there are some different things you'd have to look at, but understanding the relationships between at least these ecclesiastical entities -- we don't recognize them being civil entities, but in their world, separate ecclesiastical entities -- they call them juridic persons -- that's something you're going to have to do, and so this is just taking it, if you will, to a different level on the organizational chart.

Thank you, Your Honor.

THE COURT: Thank you. Why don't we take a break for 10 minutes, and then we'll resume. All the parties that are appearing telephonically, we'll keep you on the line, and we'll -- we won't recall anybody. Anyway, we'll take a break for 10 minutes and resume at about 10:43.

(Court recessed at 10:31 a.m., until 10:44 a.m.)

THE COURT: Motion for authority to commence, prosecute and settle litigation and the debtor's motion to strike will be taken under advisement.

The next matter before the Court is the disclosure statement, and, Mr. Orgel, were you going to handle that?

MR. ORGEL: Yes, Your Honor.

THE COURT: Okay. Of course, I will allow the debtor to proceed first with the disclosure statement, so go right ahead.

MS. BOSWELL: Just wondering.

THE COURT: No.

MS. BOSWELL: Just wondering. Thank you, Your Honor. Your Honor, my partner, Mr. Paige, is on the phone if we get into insurance-specific questions. He doesn't speak bankruptcy and I don't speak insurance, so we make a team here.

Your Honor, the objections really fall into two categories even though all of the insurers except Alaska National either filed joinders or somewhat filed their own

objections, but they basically fell into the same objections that Continental had to the disclosure statement, so when I talk about Continental's objection, I'm really including all of the insurers. It's just a way of shorthand. And then we had the objection from the committee.

Your Honor, I don't think anybody disputes the fact that these are all difficult cases and this is, in its own way, a particularly difficult case just because of the number of claims and the financial circumstances of CBNA and certainly the significant issues with the insurers that appear to be wending their way through litigation as opposed to resolution, and, Your Honor, the problems are not of this administration's making, they're not of this bishop's making, but he is the one who's here and the one who is responsible for trying to resolve and solve these very difficult issues. That's why we came into a chapter 11 was the knowledge that at that time there were over a hundred claims and the likelihood that there would be significantly more claims and, given the limited resources of this entity, a way to try to devise a plan that would, to the extent possible, again, balance the interests of the tort claimants and those who depend on CBNA for some pretty basic services, and that's what we're talking about here are some pretty basic both religious and social services.

What we tried to do and what we are trying to do in

the plan is to access the value of all of the assets that are either not absolutely necessary to the mission or are not excluded in one way or another and specifically the issue with respect to the endowment that has been brought up in the moving papers by the committee. The alternative, which you've heard, to not being able to confirm a plan in one way or another could be dismissal, and there is at least some suggestion in the committee's papers that perhaps dismissal wouldn't be that bad for the claimants, and, Your Honor, I beg to differ because, if this case is not resolved either through a litigated confirmed plan of reorganization or resolution, it will go into free-fall, and the very reason that this entity entered chapter 11 was to prevent that kind of free-fall. The assets are limited. Even if the committee were to win on every issue that they contend should be included, the fact remains there is a limited pot, and it is very limited.

With that, Your Honor, I want to address the specific objections, and I did want to put them in the context of why we're here and why we are here with the plan that we have submitted.

Let me address Continental's objections first to the disclosure statement, and I've put them into some categories. Continental's first objection seems to be that there's an ambiguity about who the avoidance -- I'm sorry, I have that on the brain -- who the insurance actions would be assigned to if

they were to be assigned under the plan. As the Court might recall, we have provided for an alternative, either the CBNA continues to pursue the litigation or, if it would not violate the cooperation clause and if CBNA determines that it should, it would assign them. We will clarify as to who those would be assigned to, and I would hope that that could be a topic of conversation between Mr. Stang and myself. While I know that there may be some disagreement about whether or not they should be assigned, I would hope we could at least agree on, if they were assigned, who they would be assigned to.

The -- Continental also says that we failed to attach the settlement trust document, the litigation trust document, we don't identify the trustee, and we don't identify the special arbitrator. That, again, Your Honor, is a document that I think -- those documents, I think, can be presented prior to confirmation, and that is if we get an approved disclosure statement, certainly, the identity of the trustee, the identity -- or the selection of the trustee, the selection of the special arbitrator, the terms of the settlement trust and the terms of the litigation trust would be something that I would expect and hope that the committee would participate in, both selection and what those documents would look like.

If, in fact, the Court determines that they need to be a part of disclosure, then we will provide draft copies

prior to the time that the disclosure statement would go out. I don't know that from Continental's point of view or any of the insurers' point of view it will make one difference to them, and I think it is noteworthy that of the insurers who have objected, the only one who actually is a creditor who might vote on the plan, might be entitled to vote on the plan and might not, is Continental, so, like I say, I seriously doubt that the existence of these documents will make a difference if Continental can vote how they vote.

They say that we fail to include examples of distribution, and they are correct, we don't. And the range, Your Honor, is, as the Court is aware, because of the contingencies in the plan and certainly the contingencies of the insurance litigation, wide, and we talked about whether or not we would include something like that in the disclosure statement, and, as we tried to work through that, believed that it might be even more confusing than it would be illuminating, but certainly we are willing to provide some examples with respect to what the range of recoveries would be, depending upon whether there's insurance recoveries, how much those would -- might be, a range of those recoveries without obviously any prejudice to us nor any waiver or estoppel with respect to those amounts.

Another objection of Continental was the lack of insurance company participation in claims determination based

upon the -- and this was a number of the insurers' position -- that based upon their position that their insurance contracts give them the right to participate in the claims determination. There may be situations where they are not -- have lost the right to participate. Mr. Paige can speak more to that. Rather than get into that issue now, I have -- we have no problem simply putting in the plan and in the disclosure statement that, to the extent that it is determined that an insurance company has the right to so participate, they will be allowed to do so.

They also take issue with the fact that we have provided in the plan an alternative with respect to the statute of limitations. We have provided that the statute of limitations, which is a defense to these claims, would not be asserted in -- with respect to any claimants who stayed in the settlement trust. However, if it was determined that the failure or the waiver, if you will, of the statute of limitations would be a violation of the cooperation clause, then we would -- that defense would be asserted and would be something that the special arbitrator would take into account. That is not the case in the litigation trust. The litigation trust all defense are preserved.

I'm not sure what Continental's issue is with this since it's an alternative and since this Court, if there is an objection to the waiver by an insurance company, will make

that determination as part of confirmation. I don't think this is a disclosure issue. I think it's a confirmation issue and need not be decided now.

The other objection was that there's nothing in the plan and the disclosure statement that basically what the insurers call insurance neutrality, and that is the preservation of the insurers' state law rights. First of all, with respect to Continental, notwithstanding the fact that they attempted to reserve their rights in their proof of claim, they have filed a proof of claim, and I believe, by virtue of filing the proof of claim, submitted themselves to the equitable jurisdiction of this Court, but, regardless, Your Honor, that is not an issue of disclosure; it is simply an issue at the time of confirmation whether or not this Court can affect the state law rights, if any, of the insurers or if any of those rights are, in fact -- excuse me -- being affected by virtue of the plan, so, again, since only one of the insurers may be voting on the plan, I don't think that the inclusion of insurance neutrality in the disclosure statement is a valid disclosure statement objection.

Finally, Your Honor, Continental does not like the characterization of at least the CBNA's view of what led it into chapter 11 and Continental's position with respect to that. I think everybody understands that a disclosure statement is the debtor's position and in no way analysis, but

if Continental feels strongly about this, I am perfectly happy to put a sentence in the disclosure statement that says that Continental disputes the debtor's position, and that should take care of that objection.

With respect to the committee, Your Honor, first of all, there were two areas that were covered by the committee in their objection that were, frankly, troubling to us. One of those, Your Honor, was the whole discussion of the best-interest-of-creditors test and the absolute-priority rule in the context of this plan and Ninth Circuit law, and, Your Honor, what was troubling to us is that there is binding Ninth Circuit law that the committee did not cite. They cited the bankruptcy court decision of the *In re General Teamsters, Warehousemen and Helpers Union, Local 890*, which was the Northern District of California 1998 case, in passing and for a separate proposition but did not either as showing having been affirmed or as citing separately the Ninth Circuit case that affirmed the bankruptcy court and has some significant holdings in it with respect to chapter 11 cases and plan confirmation of nonprofit corporations, and that was a 2001 case that the Pachulski firm actually represented the plaintiff appellant in that case.

Your Honor, I think that the *Teamsters* case, as we've said in our reply to the objections, is, in fact, controlling and deals with and disposes of, quite frankly,

many of the committee's arguments with respect to both interests -- best interests and the absolute-priority rule to the extent that there is an implication somehow that the absolute-priority rule does, in fact, apply to a nonprofit. I believe, notwithstanding their failure to bring this case to the Court's attention, the fact is that those are confirmation issues, they are not disclosure issues, as are many of the objections that the committee has brought.

The other area, Your Honor, that is troubling with respect to what the committee's position is in their objection is the discussion in the objection with respect to the dissolution of a nonprofit corporation under Alaska law, and in that regard, they cited the *Crossroads* case, and basically what the committee was suggesting is that, because of the distribution scheme with respect to nonprofit corporations under the Nonprofit Corporation Act, and pursuant to a DC case, the *Crossroads* case, if a nonprofit corporation is dissolved, then its assets, regardless of restriction, are first distributed to pay the debts of the nonprofit corporation and then to other charitable purposes.

The problem, Your Honor, is that -- and I'm sure Mr. Stang is aware of this -- that there is, in fact, Alaska law that makes it very clear that the provisions of the Nonprofit Corporation Act do not apply to religious corporations unless specifically so provided in the statute,

and we've cited a case to that effect, the -- we've cited the statute, and so, Your Honor, that issue is a nonissue in this case with respect to both best interests, absolute-priority rule and the fair-and-equitable test.

What I'd like to do is turn to the exhibit A of the committee's objection and go through some of their objections that, Your Honor, do go to disclosure and for which -- those that we will address in the disclosure statement and those that we will not. One is that we do not provide a liquidation analysis, and that is correct, we did not provide a liquidation analysis. If that is a significant issue, then, Your Honor, we are perfectly -- we'll do a liquidation analysis, and we will -- our liquidation analysis will be consistent with the *Teamsters* case and the holding in that case as to what assets would or would not be included with respect to a liquidation, even though one could not occur in a nonprofit.

Also, Your Honor, the committee argues that certain assets -- under the best-interest test, certain assets should be included and their value wasn't considered or there wasn't sufficient discussion of why we believed that they're restricted or, more importantly, I guess, the committee's position that they aren't restricted. To the extent that with the plant fund and the current fund, if we need to do further description of the fact that these constitute restricted

funds, I think Mr. Bowder testified in the construction hearing that when restricted donations are received, if they are for the plant, for building purposes, they are put into the plant fund, that is the way that they are kept and invested, and also with respect to the current fund, that is also where the CBNA puts both restricted and unrestricted moneys. If we need to put that description in there more thoroughly, we can certainly do it.

The next objection of the committee is that the plan fail -- or the disclosure statement, and I'm not sure that this is -- in fact, I don't think it is a disclosure objection, fails the fair-and-equitable test, and it, first of all, alleges that the plan unfairly discriminates. I believe, Your Honor, that is absolutely a confirmation issue and not one that this Court can determine at this stage. And the other one is that the debtor is arbitrarily withholding assets that could be contributed, such as the rights to receive assistance from other dioceses, ability to borrow against properties to which no borrowing is proposed.

Your Honor, let me address those. Number 1, I think the -- what I'll call the "dialing for dollars," for lack of a better word, that the committee is criticizing the diocese for not doing, number 1, is exactly the same argument that was made in the *Teamsters* case and that was that, in fact, the union had the ability to raise dues and therefore commit those

to the payment of claims. Again, I think that's a confirmation issue, but we will put in the disclosure statement all the time that Bishop Kettler and Mr. Bowder have spent pursuing other dioceses for loans or gifts in order to be able to garner sufficient -- as much as possible in order to fund this plan.

To suggest that these people have been sitting up in Fairbanks, Alaska, simply looking around and saying, "Well, what do we have?" and, "Gee, that's all we have, and there's nothing really else we can do," simply is not true, Your Honor, and we will put in a complete description of all the time that is spent doing this and the result. Believe me, if the results had been significant, people would know about it, and we're still pursuing that, which is one of the reasons why, in the plan and in the amended plan, there's a provision for either a sale of property that would require CBNA to vacate its offices and try to find other space and lease it or to be able to go out and find a loan, which they are continuing to pursue.

The other is that the debtor does not exercise its power with respect to the endowment, and, again, Your Honor, I think this is a confirmation issue, and the committee is being, I think, rather generous, let's say, in its reading of the endowment documents in pulling out one little piece in terms of whether or not the bishop can amend and the

circumstances under which he can amend the documents. Your Honor, we believe that the law with respect to this issue is pretty clear, and that is that this endowment is a trust and an express trust that cannot be reached. In any event, it is a confirmation issue, and it is not a disclosure issue.

If the committee wants a full recitation in the disclosure statement of why it is we think that the endowment -- a further recitation is not includable in property that would be committed to the plan, we're certainly happy to put that in, and I'll also put in a sentence that says that the committee disputes that.

With respect to the objection on the Alaska Shepherd agreement, and it says, number 1, it's unclear or disputes the manner in which we propose that the Alaska Shepherd moneys come in, and I will say that this change was made specifically because of some concerns that we understood that there was on the part of the committee with respect to a specific appeal only for purposes of funding the settlement or the pool for payment to tort claimants. There was someplace in the objection to the disclosure statement that we were now criticized because we were limiting it to this and why weren't we doing a special appeal solely for purposes of funding the plan for payment of tort claims.

Your Honor, the committee just needs to tell us what, in their view, do they believe is the most effective way

to raise the most funds in order to fund that pool. We may not agree on the method, we may not agree on the split, and we may not agree as to what the threshold is, and that may be something you'll have to decide at confirmation, but if somebody wanted to pick up the phone and say, "You know what, Susan, we don't like this change quite the way it is; have you thought about this?" that would be a constructive conversation that ought to take place, Your Honor, and if that's the case, we'll be happy to include something in the disclosure statement.

To the extent that we have to provide more information with regard to the proposed sale to KNOM, which is not selling it to ourselves, it is a management group unaffiliated with CBNA, other than the fact that they have run the radio station, we can certainly do that. We have investigated the radio station and the problems, given where it is and the demographic and the audience that it reaches, such as whether or not it actually could be more profitable as a commercial with some religious aspects to it, and there are some real problems with that, but if we need to put that in the disclosure statement, we will, Your Honor. I think the committee is well aware of those issues because my memory isn't the greatest, but I believe that I have had some of those conversations with Mr. Stang.

One of the objections, Your Honor, is that there is

no shared sacrifice and that we do not intend to eliminate any current programs and instead increase funding to programs and also to add programs. Your Honor, if you read the assumptions, which is really the business plan that is attached to -- it's actually attached to -- as part of exhibit 7 in the disclosure statement, Your Honor, I think it's pretty clear that increased funding for programs, expansion of programs and capital expenditures that are listed here that the committee has so criticized CBNA for are to be paid totally out of any restricted moneys that are given or paid. That's what the column "temporarily restricted" means.

To the extent that we need to have more clarity on that, notwithstanding the provisions in the business plan that talk about the fact that grant revenues will be sought and that capital -- in fact, it says, "Capital project outlays will be limited to grant and donation revenue received," so the suggestion that the diocese is going to be spending money improving projects at the expense of what would otherwise go to claimants, Your Honor, just is not correct. I believe it's in there, but to the extent that we need to make it more clear, we will do so.

There is no description of the avoidance actions, and we will, to the extent we need to, put in our position and put in the committee's position, so there, again, the committee believes that there needs to be an estimate for

claimant recoveries, and, as I've said, we will do that.

They are also -- say that there is no disclosure of how the sales of properties will occur, if there are sales, and there actually are two contemplated potential sales. One is, Your Honor, the raffle that we've talked about. That will come before the Court on motion. The other is the sales of the properties that are listed on exhibit A to the plan, if they cannot be financed. We have absolutely no problem bringing those property sales to the Court for approval with notice to whatever entity post confirmation, post effective date, is governing, so to the extent that's an issue, we will take care of that.

There's criticism that there -- because on the two river lots we say we are going to give them back to the donor, again, I am a little puzzled by the committee's dispute about that because that is another topic where I've had discussions with Mr. Stang, as has Mr. Bowder, about the fact that when the lots were donated or bequeathed to the diocese, the donors retained the right to approve the purchasers of those lots if those lots were sold, and we have been unable over years to sell those lots or obtain approval. If the committee has another idea of what to do that they think can actually render some value, then I suggest that they tell us about that.

I did not understand the comment with respect to -- and this is on page 6, number 35 -- on the financial exhibits,

it says that "the four-year go-forward projection purports to include 2008 unaudited results, but the figures in the 6/30/08 column are approximately double the figures in the 12/31/08, suggesting the two columns might be reversed." I don't understand that. The diocese or CBNA is on a 6/30 fiscal year, so you would expect that the numbers at 6/30 would be higher than they were at 12/31, and maybe there was just some confusion there. To the extent we need to say that the CBNA is on a fiscal year, then we will do so.

Your Honor, the committee also says that they have been thwarted in their efforts to discover or to be able to analyze the financial condition of CBNA because we have objected to their retention of their financial advisor, and, Your Honor, once again, I am both puzzled and a little disturbed by the suggestion that somehow or other the CBNA and its attorneys have been less than cooperative with the committee in terms of information, and I really do hate situations, and I'm sure I could not hate them more than the judges hate them, of the he said/she said, but when somebody puts it in a pleading, I am going to respond, Your Honor.

It has been about a year ago that we were requested to provide documents to the committee regarding donations and the endowment. I personally was in Fairbanks. I visited the Fairbanks -- the offices. I saw how the information was kept, I saw the volume of the information and started discussions

with the committee counsel with respect to the most economic way to review those documents and provide them with everything that they wanted. In addition, they wanted information regarding donors, and we asked for a confidentiality agreement with them because the names of our donors, obviously there's an expectation that their names will not be out in the public domain, and certainly what they have given and when they have given.

We looked back in our system, and the first time that that confidentiality agreement was sent to the committee was in September of '08. It was not, Your Honor, until April and May of this year that I would say the committee ramped up and started requesting documents, and then we received the document request that is attached to our objection to the retention of their experts. That matter is not before you today, but let me tell you, the objection to the retention of the expert was not an attempt to thwart the committee's ability to analyze the financial information which we have been willing to give them for some period of time, Your Honor, so to suggest that, had they had the information or had we been cooperative, that their objections to the disclosure statement may have been different or that somehow that would have allowed them to do a more thorough job is not a problem or cannot be laid at the feet of CBNA, Your Honor.

With that, Your Honor, again, I think many of these

issues are confirmation issues. We've indicated which of those issues we'll address. I don't know how the Court wants to handle that, if you want us to make the amendments and have a continued hearing, which we will do expeditiously, or what the Court's desire is. With that, Your Honor, I would reserve time and also to the extent that there is specific insurance issues that Mr. Ekberg is intending to raise, that Mr. Paige would respond.

THE COURT: Okay. Mr. Ekberg?

MR. EKBERG: Excuse me.

(Pause)

MR. EKBERG: Good morning, Your Honor.

THE COURT: Good morning.

MR. EKBERG: Charles Ekberg on behalf of the Continental Insurance Company, one of the insurance companies --

THE COURT: Sir, Mr. Ekberg, I'm sorry you've had to wait so long.

MR. EKBERG: No, that's quite all right. I am, though, somewhat pleased to hear Ms. Boswell admit that the disclosure statement was missing some things and needs some cleaning up because these are the kind of things that normally you would have hoped would have been resolved before we had to come to court today, and it isn't because people didn't try, and it's unfortunate that we had to continue to file pleadings

and come to court without being able to get these things resolved.

I think the first areas that she discussed, where we argued that the disclosure statement is internally inconsistent and ambiguous, hopefully she will address all of those issues in some revised disclosure statement, and it isn't so much that things may not have been provided; it's because they even said -- for example, there are certain instances when they talk about the compensation ranges in the matrix where they said that information will be provided no later than 10 days before the hearing on the disclosure statement or in some cases where they talk about the fact that the identity of the trustees will be made known before the hearing on the disclosure statement. That's the part that troubles us is when we point these things out and they didn't get addressed that we have to still file objections because that is information which I believe is needed in order to make a proper disclosure to the parties in the case and the parties in interest.

Again, the lack of the proper identity of the assignee of the insurance actions, it seemed to be very all over the place. At one point it was the settlement trust, at one point it was something called "the fund," as if it had some type of independent legal existence. In some cases, there's even a reference in the plan to the fact that they'd

be assigned to the committee. These are the kinds of things that should not have had to wait until a hearing to get resolved.

And who is the special arbitrator? What qualifications will he or she possess? And given that Rule 2002(b) does require at least 25 days' notice of a hearing on a disclosure statement, a lot of this stuff, even when they said they were going to provide it on 10 days' notice, wouldn't have been sufficient under the rules to provide for adequate notice for approving this disclosure statement, which is what they've asked the Court to do.

I remember when the concept of the disclosure statement was first introduced as part of the 1978 Reform Act, courts kind of struggled at first as to what would be a disclosure statement, and it's not surprising that you saw a lot of early opinions -- the *Stanley Hotel* case, the *Ligon* (ph) case, *Cibatella* (ph), that dealt with issues about what should be in a disclosure statement, but then I think it's interesting, a lot of those cases you don't see anymore. And why is that? Because people realized that a disclosure statement itself shouldn't become an adversary proceeding. It should be a process in large part collaborative. In fact, in some districts, it's required that counsel meet and confer before a hearing simply to see how many of these issues can be resolved without having to take up the Court's time, and

that's what I had hoped that we would see in this case, but unfortunately those errors have not been corrected, those mistakes, and if they're going to be, that's fine, but I would have hoped that they wouldn't have come here today saying, you know, approve our disclosure statement because it contains adequate information.

She has indicated that she will cover the possibility that insurers would be parties in interest under section 502, with the ability to object to claims, which is fine, and that she will also include other information about the trust agreements, I would hope, so parties can see just exactly what it is since that's going to -- mechanism is going to be established, rather than just talk about it, and who the assignee will be.

Now let's talk about the plan and the problems that the insurers face or potential -- or possible insurers face. We believe that the plan may be patently unconfirmable on its face because it may impair the rights of the insurance parties, including Continental, to the extent it's proven there is an insurance policy, with respect to certain provisions which would, in essence, waive the statute of limitations on claims assigned to the trust. This is extremely puzzling because we understand there's at least one state court decision in this state where the statute of limitations has been upheld as a defense, and you wonder why

the debtor would then intentionally agree to waive it in all other cases where people then want to go before a special arbitrator, and it isn't so much that that might violate the cooperation clause as much as it also may violate the provisions and policies which usually give the insurer the ability to control the defense in settlement of the case.

Also, there's another provision in most policies which does not obligate the insurer to indemnify or pay for the damages until after a final judgment by trial or with settlement approved by the insurer. Those aspects are missing from this plan.

Now, to the extent that a debtor's interest in liability insurance policies becomes property of the estate under 541(a), the nature and extent and existence of those rights are still defined by applicable nonbankruptcy law or state law. Nothing -- you know, when the property comes into the estate, it comes in with all the limitations and restrictions and defenses that might have been available outside bankruptcy as if the debtor had never filed. Nothing in the bankruptcy law changes those obligations or those defenses or those interests, and that's why most -- a lot of the cases have held nothing in the bankruptcy code nor can the bankruptcy court do anything to impair the rights of not only the insurers but also the insureds under those policies if a debtor wants to claim the benefits of those policies, and that

is why in many cases -- and I -- most insurance companies, most plans that involve insurance policies, will usually contain some insurance neutrality language which was missing here, which basically says all defenses, rights and obligations of the parties are preserved notwithstanding confirmation of the plan, so that if the case is going forward and the insurers are being asked to participate or defend or do anything, those rights that they had under nonbankruptcy law will still be preserved.

And the bankruptcy estate, of course, has no greater rights in those interests than the debtor had prepetition when it comes in under section 540(a)(1), and most policies will contain provisions, as I indicated, that the insurer will have the right to control the investigation and settlement and defense of the claim. They condition payment of claims on a final judgment against the insured after an actual trial, not a mediation or an arbitrator, and require the insured to cooperate and in many cases preclude the assignment of interest in the policies without the insured's consent.

Now, in this case, we have two adversary proceedings currently pending before you, one of which we call the policy existence case and one which we call the insurance coverage action where issues relating to coverages defenses, existence of policies, will be determined. We believe the proper place for any issues relating to those will be in those adversary

proceedings and would not -- should not be part of any confirmation process, as the debtor would propose in its plan, and that's what makes the plan basically unconfirmable is it's asking the bankruptcy court for, in essence, an advisory opinion that somehow the waiver of the statute of limitations won't affect the ability to claim coverage under any of the policies or give the insurers a defense to payment of any claims. Those are issues that I think are best reserved and are reserved, in fact, to the extent they exist and will exist, in the insurance coverage action or the policy existence cases.

I was also curious about Ms. Boswell's comments. There are statements in the latter part of the proposed disclosure statement which paint a very one-sided picture of the debtor's claims against Continental and Continental's alleged responses. It's one thing for a disclosure statement to indicate and contain adequate information, but that has to be based on fact, not argument or opinion. If the debtor wants to make those arguments, they should be labeled as such and not appear as they do as if they were statements of fact, and I -- if she's not willing to do that, then I would also ask for opportunity for rebuttal with the idea that we can present our arguments, as well, but simply to state that Continental -- the case had to be filed because Continental wouldn't contribute or Continental wouldn't settle, those are

opinions, and they should be labeled as such and not simply made to appear as if they were absolute statements of fact, which is what the problem is in the current disclosure statement.

In the reply brief which we received last night, debtor takes issue with some of the interpretations of whether or not certain defenses would be available to insurers under Alaska law, under the cooperation clause or the settlement clause. I'm not prepared to discuss the insurance defense issues in detail -- Mr. Nash, my co-counsel, is, if necessary -- but we believe that the debtor's reply misstates and does not fully state Alaska law on all of those issues. If the Court believes that those issues relating to whether or not an insured can settle without the consent of insurer or whether that means the insurer has no further obligation or no further right to seek a review of that settlement is material to its decisions today, we would request the opportunity to file, with authorities and short summary of our arguments in response to those, because we do not believe that they're accurate.

It is true that the *Great Divide* case cited by them recognized that if an insured settles after a breach of duty to defend, the insurer is not precluded from litigating defenses it relied upon in coverage or challenging the reasonableness of the settlement, but if the Court wants to

get into a discussion of Alaska insurance law, we would request the opportunity to file a short reply to the arguments raised by the debtor's counsel in the reply we received last night.

And with that, we will request that we will rely on our submission.

THE COURT: Thank you, Mr. Ekberg. Mr. Orgel?

MR. ORGEL: Thank you, Your Honor. Robert Orgel, Pachulski Stang, for the committee.

Your Honor, the committee opposes approval of the debtor's disclosure statement. The two strictly legal grounds are the underlying plan is unconfirmable and disclosure is inadequate. But practically, as well, Judge, this plan will not lead to a conclusion of the case or to a consensual reorganization, and that's probably the biggest problem. Moreover, with the acknowledged supplements that the debtor has indicated it would be making, in any event, we'd all need to see it again with a liquidation analysis, with a -- some kind of an analysis of what creditors would get, have an understanding of those really key fundamental disclosures which is normally what you'd be talking about here are those two big disclosures. What do people get? What's the liquidation amount?

Your Honor, the best way to move this case forward, the best way, is to deny this disclosure statement approval

motion outright, slow the plan process while granting the standing motion. Your Honor, if we get to a confirmation hearing at which all issues will be decided, all parties will be spending a lot of money preparing on a lot of issues to litigate each one. Is the endowment separate, as the debtor alleges? Are the funds alleged to be in the endowment, do they belong there, because, factually, what are the donor's right on -- what was the donor intent? Does the debtor, even if all that's true, have a good-faith obligation to try and make some of that asset available to creditors?

Restricted funds, very similar. Under law, in this context, are they available or are they not available? To what extent are they available? Factually, are the funds alleged to be restricted funds which really determines what creditors get? I mean, that's what we're talking about, how much is available for creditors. We'd have to look and see how much is available for creditors. Factually, are these properly denominated as restricted funds? And, again, even if that's the case, we'd have to walk through to see does the debtor have an obligation to try and make some of these funds available to creditors.

And, Your Honor, as discussed as to the parish properties, are they already assets of the estate the value of which would have to be made available to creditors? The argument for that which we've set forth is the argument that

the parishes aren't separate entities. That would have to be addressed because if that -- those assets are available, then they become part of the best-interest analysis. The -- so this would be, again, an issue for confirmation. And separately, even if the parishes are separate, then as Mr. Stang walked through, we'd have to get to the issue of whether the claims, the avoidance claims, if there were a resulting trust -- first, we'd have to look at that, express trust, resulting trust -- if there were resulting trust in favor of a separate parish, what's the value of the avoidance claims? Are those values being put on the table? To analyze the best-interest analysis, we'd have to get there. One way or another we'd have to get there.

So, Your Honor, either we'd go through all these steps, and there are really more issues -- maybe I should mention RFRA -- we'd have to confront RFRA at the confirmation hearing. We'd have to confront the issue of how this is getting funded and how the diocese is going to provide a third-party discharge to parishes, which is what it mentioned -- parishes would contribute and get a discharge. If they're separate, are they getting a discharge? Can you do that in the Ninth Circuit or not? It goes on and on. This confirmation hearing, Your Honor, would have as many heads as the mythical Hydra. This would be a difficult hearing and one where all of these major issues would have to be addressed,

and it would assure one thing, Your Honor -- no settlement.

How could there be a settlement? You're facing all the issues at one time, and you're getting one answer. Yes, no. It's an up-or-down vote. That's what they're teeing up. Why? The only way, Your Honor, that that would be cheaper than hitting these issues one -- at least hitting a major issue first, the only way it would be cheaper is if the parties don't get a chance to prepare, if things go quickly enough that nobody really gets a chance to get these issues out. Otherwise, it's not going to be cheaper.

THE COURT: What's going on out there?

UNIDENTIFIED SPEAKER: The maintenance is doing something (indiscernible).

THE COURT: Could you ask them to stop?

UNIDENTIFIED SPEAKER: (Indiscernible).

THE COURT: My apologies.

MR. ORGEL: Would you like me to wait, Your Honor, or keep going?

THE COURT: No, go ahead.

MR. ORGEL: Okay. Your Honor, on the other hand, the good news is that unlike the mythical Hydra whose head kept growing back, once you cut these off, they're done. Once we hit an issue and it gets resolved by Your Honor, it's done, or once we get far enough that there's a signal on that issue, it's done. The committee believes that's the smartest way to

go, that instead, that just teeing up the parish property issue alone, as to both the avoidance issues, as to the separateness, distinctness, of the parishes, whether it be as to test cases or otherwise, doing that would do far more in a much more cost-effective way to move this case forward.

Ms. Boswell talked about leverage. I don't understand that. This is -- we're talking about coming to Your Honor and asking for a ruling on an important issue, just not asking for a ruling on every important issue at the same time. That's the way a lot of these get moved forward. Otherwise, we aren't going to be in a position to ever separately consider them, and you're -- we're going to be spending a lot -- preparing for a lot of issues that really wouldn't have to be spent -- money wouldn't have to spent on if we hit the big issue first and get an answer.

Your Honor, in all events, at the most, the debtor should be obliged to remedy the disclosure inadequacies and give the parties a chance to respond. The debtor's reply attempts to rely in large part on the *Teamsters Union* case, and there are certainly similarities.

THE COURT: Excuse me just a second.

MR. ORGEL: Sure.

THE COURT: Yeah, this is Judge MacDonald. I'm talking to our telephonic friends. If you have a mute button, please use the mute button, because we are getting a fair

amount of noise in the courtroom. Thank you very much. Go ahead.

MR. ORGEL: Sure. Your Honor, while there are certainly similarities with the *Teamsters Union* case, and we did cite the case below, and it's true, we probably should have cited the other case because it's certainly relevant authority, but we didn't challenge it. This isn't the confirmation hearing. What the debtor misapprehends about the committee's approach here is the committee didn't come out and say -- we didn't say it violates the absolute-priority rule, which is the key holding there as to how that works in charity situation. We didn't challenge that.

We said fair-and-equitable has got to mean more, and we cited cases -- we cited authorities and cited from cases saying it means more than that, and, in fact, the *Teamsters* case supports that it means more than that. If factually found, it went into they asked members to try and get dues a number of years before, it was unsuccessful, this was evidence that they did all they could to bring in the assets. It says specifically that all the real and personal property asset values were provided to creditors, other than two assets, which was they didn't go for members' dues and they explained why, and the collective bargaining agreement they said had no value because it was unassignable, but they went through that analysis.

The committee's point was here are all these places, and we went through them, where money -- attempts could be made to bring money in. Where's the effort? Where's the good-faith effort on the part of a debtor to show that it's really trying to put in front of the creditors all the assets it could? We certainly appreciate that there's some effort here. It's not we're saying there's none; we're saying there needs -- there are a lot of assets that were just being said, well, it's an excluded asset. If we have any basis for telling you you can't get an asset, it's not available. Whether that be because we're going to say it's protected through RFRA, whether that's -- for the schools, whether that's going to be because we say it's an endowment so the only thing we're going to do is change the formula by a percent that a lot of institutions apparently are doing at this point because they might not have any income off these for a bit, (indiscernible) no explanation of why they're not doing more, no even addressing it. We think they needed to do that. That was our point for a disclosure hearing as opposed to a confirmation hearing. At a confirmation hearing, though, the rest of these issues will come up.

The -- you know, another note in the *Teamsters Union* case there, Your Honor, the growers in that case got a $527,000 judgment, and the plan offered them $300,000 plus. I don't know that we're looking at the same return. And we

certainly -- maybe I should stick to -- I don't know if we're looking at the same return, maybe that should have been my emphasis because we don't have the chart, the exhibit, that gives tort claimants an idea of what they'd get based on their claims. And I understand that's a difficult thing to do at this point. There's going to be uncertainties, but I think the debtor is committed they will try and do something.

In that context, Your Honor, I'd note the statute-of-limitations defense has to be addressed because who's going to choose settlement if they find out that, wait a minute, that's going to be an issue even in how much they get in a settlement. That may really affect who's going to make those choices. So we do need to see again what -- the debtor says they're going to provide a chart. We need to see that before this could go forward, in all events.

Your Honor, when we say all this, that there has to be an effort, as I noted, debtor's response seems to be, well, we don't have to provide these assets and here's why. Your Honor, that isn't right, and it can't be right, and the debtor argues that granting standing on the avoidance action will cost the estate more. As we've said, setting this course on the plan confirmation is just going to lead to the higher cost and the protracted litigation. The debtor could only get this through by -- and would only get leverage by giving -- would get leverage by having a condensed hearing. It's only by

having a full hearing they wouldn't. It would be less costly to do it separately.

The -- Your Honor, and for a liquidation analysis, as well -- I want to go through some of these individual items -- the debtor has said they'd do a liquidation analysis, but they're going to exclude certain items. Since they're disputed, they should include the values. Whether they then drop them to a bottom line as to their belief as to whether they'd be available is a separate question. They could do it separately. But for disclosure, they should be disclosing the values that either are available or that may be available because if they don't do that, how do people make informed decisions? The disclosure should be there of all the key values. Certainly, it can be the debtor's valuation and we can deal with that, but there has to be some disclosure of the values, included and excluded, that are under discussion.

As well, Your Honor, comparative projections are needed showing historical and go-forward numbers. Your Honor, exhibit 8 to the disclosure statement does that for the schools. It has the unaudited numbers from 2008 and it has go-forward numbers. Exhibit 7, which appears to do it for the rest of the diocese doesn't. It really needs the same thing so that there's in effect a baseline to see -- so you can see what's being -- what was done and what's being proposed.

As well, Your Honor, I note on the comment about a

financial advisor, I think Ms. Boswell pointed out that the fiscal year end for the diocese is 6/30 and that's why the 6/30 numbers were higher than the 12/31. Perhaps that would have been either evident or readily ascertainable by a financial advisor, but we don't have one, so you had a lawyer looking at it saying why is 6/31 [sic] number higher than 12 -- I mean, 6/30 numbers higher than 12/31 and raising that that may be an error. We didn't -- I don't think anywhere -- narratively, we didn't mention it, we put that as an error that should be looked at and corrected. We're now understanding that it's because of the fiscal year end, but it only points out that's only one place. We really need a financial advisor to help us make sure for creditors that the financial information being provided is adequate and is clear and provides the necessary disclosure to enable and inform the vote which is the key to this process.

And if RFRA is to be asserted, Your Honor, at confirmation to justify exclusion of the schools or any other values, the debtor should disclose more on its analysis, its reasoning, the alternatives it considered. That is the burden under Ninth Circuit law, and the disclosure should be there. This is an unusual case with -- it's going to have -- as I say, it's going to be a Hydra of a sort at confirmation, but the way to address it, the way to narrow this and clarify it is to provide the disclosure that helps people understand what

the issues are before they're coming up.

Your Honor, as to the Alaskan Shepherd agreement, I was a little confused by comments made because I don't think -- and it could be that we just weren't clear as to what our issue was. Our issue was that debtor proposes that there's this sharing arrangement but puts two holes in it and says there's a sharing arrangement, but before we start sharing, we're going to take off the top an operating reserve and an agreed minimum. Okay, but no estimates, no -- we have no idea what we're talking about and how that gets -- what the process is for getting resolved and thus what the proceeds expected from this sharing arrangement are.

That was our point is there needs to be estimates there. Even if the estimates are arranged, even if the estimates are just that, there needs to be something, otherwise, how do you come to a conclusion as to whether this is a fair effort? If the reserve is high enough, if the agreed minimum is high enough, then nothing comes out of this arrangement at all, so we need an understanding on that, Your Honor.

We appreciate the offers of Ms. Boswell to supplement the disclosure. We accept all of those. We're thrilled to see more disclosure. I don't want to leave it unclear that we -- to say to the extent there was an offer, to the extent the committee's being asked would you want that

disclosure, absolutely, but the -- you know, one thing I thought was a little telling for us, Your Honor, was in the reply about the Alaskan law permitting self-settled trusts, spendthrift trusts, and that the spendthrift trust law applies -- somehow shields all of the endowments.

Whether accurate or not on this narrow point is not something I'm going to try to discuss after reading it for the first time yesterday, but the bigger picture this suggests is troubling because all of what the debtor does, all of what they do, is arguably religious or charitable, I mean, presumably is religious or charitable. Yet -- and this is a formidable enterprise with a lot of expenses and expenditures and people who are affected by its operations. Can it really organize itself so virtually all of its available assets could -- even if they're not -- could be put -- shielded from creditors? Is that what it's saying, that really they could take -- get -- solicit money to put into a separate place where they can run their operations and never have that money touched, so even if operations, even if the plumber demands money, you can't access it unless they agree to pay it because the money has been solicited for charitable purposes and set aside (indiscernible). Something's wrong with all that, and I thought this is really no way to get at this, and I think thankfully the bankruptcy law does afford us a side door, a couple of side doors through which to get at the question.

In the committee's objection, we cite the *Walker* case, and at page 8 of that case there's a short quotation, one sentence. "The failure of a debtor to use the full reach of its disposable resources to repay creditors is evidence that a plan is not proposed in good faith." Similarly, Your Honor, the *Montgomery (indiscernible) Department* case cited by the committee states that the fair-and-equitable rule -- states at page 24 of that case that the fair-and-equitable rule requires that, quote, "for an unsecured class, the percentage or formula for proposed payment has to demonstrate a good-faith effort to repay those obligations."

Your Honor, where we stand now the disclosure statement should not be approved. Thank you.

THE COURT: Thank you. Ms. Boswell -- well, first of all, are there any parties appearing on the phone that wish to make some comments relative to the disclosure statement?

MR. POMPEO: Your Honor, Michael Pompeo on behalf of Travelers.

THE COURT: Go right ahead, Mr. Pompeo.

MR. POMPEO: Thank you, Your Honor. Your Honor, I know we've been going at this for quite some time. I will be brief.

Your Honor, at the very outset of this hearing, Ms. Boswell said that everyone would agree that these cases are difficult. Well, I think with regard to the insurers,

that may not be the case and that actually, Your Honor, the debtor is actually making these cases more difficult than they need be. I know Mr. Ekberg, on behalf of Continental, had forwarded to Ms. Boswell some insurance neutrality language which certainly would have simplified these cases vis-a-vis the insured. It may not resolve all the issues, but it certainly would go a long way.

I was -- instead of putting in those insurance neutrality language, she's intending that insurance coverage issues be decided at the confirmation hearing, and I was listening here when Ms. Boswell was giving her presentation of all the issues that she was reserving for confirmation, and, quite frankly, Your Honor, I ran out of room on my pad. A lot of these issues, especially with regard to the insurers, would go away, and, Your Honor, I don't think that having the insurance coverage litigation litigated here at confirmation is appropriate. The Court's already made a determination that the insurance coverage litigation itself is (indiscernible), and that's where those issues should be resolved, and with that, Your Honor, I will -- that's all I have, Your Honor.

THE COURT: Thank you very much, Mr. Pompeo. How much do you have?

MS. BOSWELL: Very little, Your Honor.

THE COURT: Okay. Let's go ahead.

MS. BOSWELL: Your Honor, first of all, with respect

to the insurance, there is a basic disagreement, obviously, with respect to insurance neutrality, but I think there may be some confusion because it is not -- and to the extent that there was a suggestion that there was an intent to circumvent the adversary by virtue of confirmation, that is not the case. If the insurers believe that the possibility of an assignment would do that, I don't believe that that is the case, but to that extent, I guess perhaps Mr. Ekberg and Mr. Pompeo and Mr. Paige and I can talk off line and we can figure out where the confusion seems to lie. We have a schedule that the Court has set, and we intend to proceed with the adversaries as the Court has set them, so I guess now I'm confused as to why there's confusion, but to the extent that we need to straighten that out, we can do that.

With respect to the comments of Mr. Ekberg with respect to statute of limitations and other things such as that, again, Your Honor, I don't think those are issues of disclosure, and I believe I have taken care of Continental's issues with respect to disclosure. Also, with respect to the issue of the application of the *Great Barrier* case and the other legal issues that Mr. Ekberg addressed, again, we presented the *Great Barrier* case in response to their suggestion that the controlling law was this bankruptcy case out of Pennsylvania. I think everybody will agree that the rights and obligations under these contracts are probably

going to be determined under state law, so I see no reason to allow additional briefing, and I'm sure that those issues will come up in due time.

With respect to Mr. Orgel's comments, it sounded to me like we were going to re-argue the avoidance action motion again, and I guess, number 1, I have a very basic disagreement, and Mr. Orgel said something that was very telling in the context of let the avoidance actions go forward and not confirmation because, for some reason or another, that's going to be simpler because, after all, we are going to have to determine, as well, whether or not the parishes are property of the estate in that context. That is contrary to what Mr. Stang argued earlier with respect to the avoidance action motion, and, Your Honor, I think that Mr. Orgel's characterization of it is probably, frankly, the accurate one in terms of what will have to be determined if that goes forward.

The plan, Your Honor, I believe, the debtor believes, is the best way to move this case forward and whether or not it means that this Court then sits for however many days in confirmation or we set a schedule for how these issues are going to be resolved, then, you know, unfortunately, so be it. It will either result in a resolution of this case or it will result in this Court determining whether or not in the first contested confirmation

of a diocese, the plan can be confirmed as it is ultimately presented to the Court for confirmation.

We were, in one sense, if I recall correctly, faulted for not going forward with the plan. Now we're being faulted for trying to go forward with the plan. Your Honor, the fact is that this case needs resolution. Whether it's resolution by the Court or whether it's resolution consensually, it needs resolution. To not move forward with confirmation is not going to advance the ball for any of us.

I understand the risk. My client understands risk. Mr. Stand understands risk, Mr. Orgel does. We all have risks by virtue by having confirmation go forward, and we understand that, but there is no alternative at this point. That is not a disclosure issue. That is not a reason not to confirm or approve the disclosure statement, Your Honor. With some limited changes, that disclosure statement is -- contains adequate information, and we will provide the information that we said we would, and if Mr. Orgel thinks that we need to include the fact that under binding Ninth Circuit law the things he is talking about need to be included are not included, we'll include that, as well.

THE COURT: Okay.

MS. BOSWELL: With that, Your Honor, we would ask that we be given an opportunity to make some of these changes --

THE COURT: Okay, we'll --

MS. BOSWELL: -- submit them back to the Court.

THE COURT: Right. Let's hold off on your changes until I've ruled on the UCC's motion to commence actions --

MS. BOSWELL: Okay.

THE COURT: -- until I've ruled on Continental's and the debtor's motion for summary judgment --

MS. BOSWELL: Okay.

THE COURT: -- and until I can give you a punch list of the items in the disclosure statement that need to be changed.

MS. BOSWELL: Very well, Your Honor.

THE COURT: And so this -- I want to get this case moving, I know you do, I know that Mr. Stang does and Mr. Orgel and everyone here. I think that's the best way to do it, and so it will be a little prolonged, but we'll -- there'll be more information available, and we'll know at least some of these issues will have some resolution. Okay?

MS. BOSWELL: Very well, Your Honor. I will hold off, and I think that hearing is June 30th --

THE COURT: 30th.

MS. BOSWELL: -- as I recall.

THE COURT: That'll be in 12 days.

MS. BOSWELL: Yes.

THE COURT: Great.

MS. BOSWELL: Very well. Okay.

THE COURT: Well, any comments from anybody? Mr. Stang? Any comments from our friends on the phone? I take it not. Then the disclosure statement is taken under advisement, and the Court will issue a written decision with regard to it, and thank you all very much. Court is now adjourned.

(Proceedings concluded at 12:04:22 p.m.)

CERTIFICATE

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

s/M. Gaylene Larrecou — August 27, 2009

M. Gaylene Larrecou, Transcriber — Date
United States Court Approved
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