EXHIBIT F

Lehman Brothers Holdings, Inc.

November 14, 2012 Hearing Transcript

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3
4 - - - - - - - - - - - - - - - - - - - x
5 In the Matter of:
6 LEHMAN BROTHERS HOLDINGS, INC., CAUSE NO.
7 et al, 08-13555(JMP)
8 Debtors.
9 - - - - - - - - - - - - - - - - - - - x
10 In re
11 LEHMAN BROTHERS, INC., CAUSE NO.
12 Debtor. 08-01420(JMP)(SIPA)
13 -x
14
15 U.S. Bankruptcy Court
16 One Bowling Green
17 New York, New York
18
19 November 14, 2012
20 10:02 AM
21
22 B E F O R E:
23 HON. JAMES M. PECK
24 U.S. BANKRUPTCY JUDGE
25 ECRO: MATTHEW

1 HEARING re Notice of Final Applications of Retained
2 Professionals for Final Allowance and Approval of
3 Compensation for Professional Services Rendered and
4 Reimbursement of Actual and Necessary Expenses Incurred from
5 September 15, 2008 to March 6, 2012 (ECF Nos. 31901)
6
7 HEARING re Plan Administrator's Cross-Motion to Compel
8 Giants Stadium LLC to comply with Rule 2004 Subpoenas and
9 Objection to Giants Stadium's Motion to Quash the Rule 2004
10 Subpoenas (ECF No. 31652)
11
12 HEARING re Motion to Quash a Subpoena filed by Bruce E.
13 Clark on behalf of Giants Stadium LLC (ECF No. 31339)
14
15 HEARING re Amended Motion of Giants Stadium LLC for Leave to
16 Conduct Discovery of the Debtors Pursuant to Federal Rule of
17 Bankruptcy Procedure 2004 (ECF No. 31105)
18
19 SIPA PROCEDURES
20 HEARING re Motion Pursuant to Federal Rule of Bankruptcy
21 Procedure 9019 for Entry of an Order Approving Settlement
22 Agreement Between the Trustee and Lehman Brothers Finance
23 AG, in Liquidation (a/k/a Lehman Brothers Finance SA, in
24 Liquidation)(LBI ECF No. 5362)
25

1 HEARING re Trustee's Motion Pursuant to Section 105(a) of
2 the Bankruptcy Code and Bankruptcy Rules 3007 and 9019(b)
3 for Approval of General Creditor Claim (I) Objections
4 Procedures and (II) Settlement Procedures (LBI ECF No. 5392)
5
6 HEARING re Debtor's Three Hundred Fifty-Seventh Omnibus
7 Objection to Claims (Misclassified Claims (ECF No. 31048)
8
9 HEARING re Objection to Claim No. 17763 Filed by Laurel Cove
10 Development, LLC (ECF No. 29187)
11
12 HEARING re Three Hundred Twentieth Omnibus Objection to
13 Claims (No Liability Rose Ranch LLC Claims)(ECF No. 29292)
14
15 HEARING re Debtor's Three Hundred Twenty-Ninth Omnibus
16 Objection to Claims (Misclassified Claims)(ECF No. 29324)
17
18 HEARING re Motion for an Order Pursuant to Section 105(a) of
19 the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing
20 and Approving the Settlement with Lehman Brothers, Inc. (ECF
21 No. 43)
22
23 HEARING re Turnberry Centra Sub, LLC et al v Lehman Brothers
24 Holdings, Inc., et al (Adversary Case No. 09-01062)
25 Transcribed by: Sheila Orms and Josh

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24 OTHERS PRESENT:
25 THERESA CARPENTER, BREGAL INVESTMENTS, INC.

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1 P R O C E E D I N G S

2 THE COURT: Be seated, please. Good morning.

3 MS. MARCUS: Good morning, Your Honor, Jacqueline

4 Marcus from Weil Gotshal and Manges on behalf of Lehman

5 Brothers Holdings, Inc. as plan administrator.

6 We're here this morning, Your Honor, for the fifty-

7 fifth omnibus hearing, as well as the rescheduled claims

8 hearing that had previously been scheduled for October 31.

9 We're glad that the courthouse has reopened, and that things

10 are starting to get back to normal.

11 The first item on the agenda, Your Honor, is the

12 fee hearing related to uncontested fee applications. Mr.

13 Gitlin will be handling that on behalf of the fee committee.

14 THE COURT: Fine. Mr. Gitlin, good morning.

15 MR. GITLIN: Good morning, Your Honor. Richard

16 Gitlin, chairman of the fee committee.

17 Your Honor, I'm very pleased to report to the Court

18 that the fee committee has reached a consensual agreement

19 with 25 of the 47 professionals, which is outlined in the

20 report that we submitted to the Court.

21 I would like to comment on the professionals, both

22 their work and their activity in working with the fee

23 committee, Your Honor. This has been an extraordinary

24 effort on behalf of the professionals and the Court to make

25 this happen in three years, as successfully as it has been

1 done.

2 And the professionals are to be complimented for

3 that. But they're also to be complimented for the civility

4 and attention they gave to the fee committee, as the fee

5 committee raised issues and issues that had to be resolved.

6 And I will say these 25 professionals in all acted in that

7 fashion, and they should be commended for that, Your Honor.

8 So I would respectfully request Your Honor to

9 approve the 25 uncontested professional final fee

10 applications. I would mention that the remaining 22 are

11 scheduled for November 29th. We are in conversation with

12 all them. We do have some sticky issues, we're still

13 dealing with, but we are hopeful that we'll be able to come

14 before the Court on the 29th with similar consensual

15 agreements. Thank you.

16 THE COURT: Thank you, Mr. Gitlin, and I'm hopeful

17 that you're successful with the remaining 22 myself.

18 I'd like to make a couple of comments. First of

19 all, all of the 25 applications that are the subject of the

20 committee's report are approved, with the adjustments

21 reflected in the schedule to your report. I also wanted to

22 say I found the committee's report to be remarkably well

23 prepared, nuanced in its treatment of the issues that were

24 addressed by the committee, and a model of the kind of work

25 that fee committees or fee examiners as they're sometimes

1 identified to be, can do in all significant cases. It's a
2 superb precedent, and I commend you and your counsel in
3 preparing it.
4 Additionally, a true public service has been done
5 here by members of the committee in making the fee
6 application process in the largest bankruptcy case in
7 history one that even through today has been consensual and
8 without public controversy. That is a particularly
9 remarkable accomplishment in consideration not only of the
10 size of the case, but the aggregate fee awards themselves.
11 Business publications including the Wall Street
12 Journal routinely have written about the burn rate in the
13 case and the aggregate fees in the case. I think your
14 report very appropriately puts those expenses in context,
15 compliments the professionals for their good work, but also
16 compliments them for their flexibility and integrity in
17 dealing with the fee review process.
18 One of the more telling comments made in the report
19 is that the approximately $1.8 billion in approved
20 cumulative professional fees in the cases represents, and I
21 haven't done the math, but I accept what you said,
22 approximately three percent of distributions to unsecured
23 creditors. In effect, the fees in this case represent on a
24 percentage basis a result that would be admirable in
25 virtually any bankruptcy case.

1 Under the circumstances, I am not only pleased to
2 approve the 25 applications that are the subject of today's
3 hearing, but to compliment you and the other members of the
4 fee committee for doing truly extraordinary work that
5 benefitted the Court, benefitted the professionals, but also
6 served the public interest in demonstrating that the
7 professionals in the case were held accountable, but were
8 held accountable in a manner that was sensitive to the needs
9 of the case, and to the issues that have been identified in
10 your report, which I commend you on again.
11 MR. GITLIN: Well, Your Honor, thank you very much
12 for your comments. But I must say that the report is a
13 reflection of the quality of the work that counsel has
14 provided in this case. Godfrey and Kahn has been the
15 machinery behind the ability to deal effectively with these
16 fees, and the draftsmen of that report. So I must extend
17 your compliments more to them, Your Honor, but I very much
18 appreciate your comments, Your Honor.
19 THE COURT: Anyone who had a hand in drafting the
20 report deserves praise.
21 MR. GITLIN: Thank you, Your Honor.
22 THE COURT: All right, fine.
23 MR. KORNBERG: Your Honor, Alan Kornberg of Paul
24 Weiss Rifkin and Garrison for Houlihan Lokey. We have one
25 technical issue with respect to Houlihan's final fee

1 application, which is the subject of the fee examiner's
2 report.
3 Your Honor may recall that the deferred fees paid
4 to Houlihan are paid as and when distributions are made to
5 general unsecured creditors. As we mentioned in our final
6 fee application, there need to be a procedure for payment of
7 those, and we have a form of order that we circulated, and I
8 believe is acceptable to the parties, that provides -- there
9 don't have to be further Court orders to approve those fees
10 when they're paid, as to when the distributions are made,
11 but there is a process by which Houlihan will send a fee
12 statement, the debtor, the U.S. Trustee, counsel for the
13 committee will have 30 days to verify that's correct. If
14 there's a problem, we can talk about it. If we can't
15 resolve it, we would then come back to the Court.
16 So we have a very simple form of order that
17 provides for that mechanism with respect to the deferred
18 fees.
19 THE COURT: Okay.
20 MR. KORNBERG: And I'd like to submit that to Your
21 Honor.
22 THE COURT: That's fine. Has that order been
23 reviewed by everyone who needs to see it and comment upon
24 it?
25 MR. KORNBERG: It has been reviewed by folks in

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1 your office.

2 MS. MARCUS: That was my question.

3 MR. KORNBERG: And the fee committee and the U.S.

4 Trustee, and I believe -- okay, so we'll show it to Malank

5 (ph) and then submit it, Your Honor.

6 THE COURT: Okay, fine. I just -- since you

7 mentioned the U.S. Trustee, I just would like to note

8 something on the record. We received a telephone call this

9 morning from Andrea Schwartz, who would have been here

10 today, but apparently suffered an accident on the way to

11 work in the subway, and has been taken to the hospital.

12 We believe this is not serious, but she wanted us

13 to know that her absence should not be viewed as an

14 indication that the U.S. Trustee did not take very seriously

15 the matters that were before the Court with respect to

16 professional fees. I understand that Susan Golden from her

17 office is participating by telephone, just in case --

18 MS. GOLDEN: Good morning, Your Honor. This is

19 Susan Golden, I literally just dialed in and heard the last

20 part of what you just said.

21 THE COURT: You missed the best part of the

22 hearing. I just wanted to note that the comments that I

23 made with respect to the fee committee certainly apply to

24 the role of the U.S. Trustee as a member of that committee.

25 And we hope that Andrea Schwartz has not been seriously hurt

1 and will be back in court soon.

2 MS. GOLDEN: To our knowledge, you know, she just

3 has a minor injury, but she'll be okay.

4 THE COURT: Okay.

5 MS. GOLDEN: Thank you for inquiring.

6 THE COURT: All right. And then as far as the

7 Houlihan Lokey order is concerned, which became an

8 opportunity for that digression, it will be entered as an

9 agreed order.

10 MR. KORNBERG: Thank you, Your Honor.

11 MR. GITLIN: Thank you, Your Honor.

12 THE COURT: And everyone who wishes to be excused

13 in connection with the fee issues that were just presented

14 may do so.

15 (Pause)

16 MS. MARCUS: Your Honor, the first group of

17 contested matters on the agenda relates to the plan

18 administrator's disputes with Giants Stadium. My partner,

19 Richard Slack will be handling those matters.

20 THE COURT: Okay. Let's wait for other counsel to

21 assemble.

22 MR. SLACK: Thank you, Your Honor.

23 THE COURT: Good morning. Before we get into the

24 argument with respect to this discovery dispute, I'll take

25 appearances, and I'm also going to ask some questions that I

1 would like you to focus on in your presentation.
2 MR. SLACK: Okay. So, Your Honor, Richard Slack
3 from Weil Gotshal on behalf of the plan administrator and
4 Lehman.
5 MR. CLARK: Good morning, Your Honor, Bruce Clark
6 from Sullivan and Cromwell for Giants Stadium. With me is
7 my colleague Thomas Wright.
8 MR. WRIGHT: Good morning, Your Honor.
9 THE COURT: Good morning. Okay. It's my
10 recollection and the recollection has been reinforced by
11 reviewing the papers that we last had a discovery argument
12 in connection with 2004 discovery in September of last year,
13 approximately 14 months ago.
14 The papers that I have read provide different
15 perspectives of what has occurred over the last 14 months.
16 But to me one of the revelations is that the claim
17 originally held by Giants Stadium is now held by an entity
18 affiliated with Baupost called Goal Line, and that an
19 intermediate transferee was Bank of America.
20 To me this is a result of -- as a result of this
21 revelation to me this becomes one of the first examples
22 presented to me in this case, although I'm sure there are
23 many others that are invisible to me, of the phenomenon
24 discussed by scholars as the so-called empty creditor.
25 The creditor that appears to have real party in

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1 interest status in a bankruptcy case, but who has actually
2 divested itself of all or substantially all of the economics
3 associated with that creditor interest, and it may have
4 other disguised interests that impact that creditor's
5 motivation within the bankruptcy case.
6 Henry (indiscernible) a professor of law at the
7 University of Texas, who for a time had a senior position
8 with the SEC has written extensively on this subject. And I
9 am personally not only familiar with it, but interested in
10 it. I bring this up because one of my real concerns here is
11 that the papers disclose apparently heroic good faith
12 efforts to settle disputes between Giants Stadium on the one
13 hand, and Lehman on the other, but uncharacteristically this
14 is one of the few cases presented to me at least on the
15 current docket, I don't know what next year will bring, in
16 which parties that have sincerely attempted to resolve their
17 differences have failed in those efforts.
18 As I understand it, a mediator who is one of the
19 mediators quite skilled in dealing with derivative disputes
20 in the Lehman case participated in at least a one day
21 mediation session, and that that session ended with no
22 agreement, and that thereafter at some point, the parties
23 endeavored to try to restart discussions. And the current
24 flap, if I can call it that, with respect to discovery is a
25 manifestation of the ongoing antagonism between the parties.

1 To me, at least, the discovery dispute represents deflected
2 antagonism and is subtext for what is really the ongoing
3 unresolved business issues among the parties.
4 I will note the obvious, this Court and every other
5 Court in the nation despises discovery disputes that cannot
6 be rationally resolved by experienced counsel, and here we
7 have experienced and skilled counsel on both sides. The
8 papers are voluminous and include declarations, references
9 to the transcript from September of last year, and involve a
10 level of effort that to me seems disproportionate to the
11 issues that are in dispute.
12 And so I have the following questions. First, what
13 is the explanation for the increase in the purported claim
14 amount from $301 million to $585 million? How did that
15 happen, what's the justification for it, and has that been
16 the subject of negotiations between the parties?
17 Secondly, who is Lehman negotiating with when it
18 negotiates? Are you negotiating with counsel for Giants
19 Stadium or counsel for Goal Line?
20 Third, why is historical counsel for Giants Stadium
21 still here purporting to act on behalf of an historical
22 creditor when, in fact, the real economics in whole or in
23 part, are elsewhere? To what extent does this represent
24 independent judgment of Sullivan and Cromwell's client and
25 to what extent does it represent Sullivan and Cromwell, and

1 I hate to use the term, as a puppet for other parties that
2 are driving this bus?
3 Those are my questions, and I want them answered
4 before we get into the merits of the discovery dispute,
5 which as I said, appears to me to be largely a strategyn
6 chosen by both sides to get into court. I don't view it as
7 a real dispute. I know you do, and you're going to have to
8 justify to me why this isn't one of the biggest wastes of
9 time since this case began.
10 MR. SLACK: So, Your Honor, starting right with the
11 questions that you've asked. I think it's fair to say that
12 the debtor that Lehman thinks that the claim amount that was
13 essentially doubled was done purely for negotiating
14 purposes. In other words, only after this Court back in
15 September sent us back to mediate or essentially to try to
16 resolve it, the claim essentially doubled.
17 We haven't had a stitch of discovery on who made
18 that decision, why it was doubled, what the justification
19 is. Obviously, they gave us a piece of paper, but unlike
20 the original 301 million, we haven't had any discovery
21 whatsoever under 2004 about that.
22 In terms of whether those matters were the subject
23 of negotiation, let me put it this way. Obviously the
24 parties had discussion over the amount of the claim, and
25 there was discussion about the amounts of the claim. I

1 don't think it's fair to say, however, that the debtor has
2 insight as to why it was done, what's the timing of it, what
3 the basis of it is. We haven't had insight into any of
4 that.
5 THE COURT: Well, let me just ask you a question,
6 and I don't want to know anything about the substance of the
7 negotiations that took place between the parties. But isn't
8 the first question that somebody sitting down to the
9 negotiating table would ask given this fact pattern, how on
10 earth can you justify an increase from $301 million to $585
11 million, what's that about? Isn't that the first question?
12 Perhaps not expressed in that way, but I think there would
13 be an element of huge exasperation built in the question.
14 MR. SLACK: There is that exasperation, and I'm
15 sure those were the subject of discussions, and again, there
16 was a piece of paper that's filed. There is an amended
17 claim that was filed. So, I mean, to the extent that
18 there's an amended claim, we could look at it and say here's
19 what's in it. But in terms of why it was done, who made
20 that decision, why didn't their original financial advisor,
21 Goldman, reach that amount, you know, two and a half years
22 earlier.
23 Again, we haven't had any kind of insight into any
24 of those kinds of questions, and those have not been
25 answered. And, of course, that's one of the reasons that we

1 wanted to continue the investigation. So that's, I think,
2 at least from our perspective, you may get another
3 perspective the answer to number one.
4 In terms of number two, at some point we were
5 informed once Baupost, Goal Line acquired the interest that
6 Sullivan and Cromwell was going to jointly represent Giants
7 Stadium and Goal Line. And so there have been
8 representatives, you know, Sullivan and Cromwell's been
9 involved, Baupost has been involved, and representatives
10 from Giants Stadium have been involved in the negotiations
11 throughout this period.
12 Now, that's not to say that every conversation
13 included representatives of all, but all parties at some
14 level have been involved in negotiations over the past year.
15 And I think that's -- I think that that somewhat
16 answers at least what we know about question three, which is
17 why is Sullivan and Cromwell still representing Giants. My
18 understanding again is that they're jointly representing
19 Giants and Baupost and Goal Line in connection with this.
20 What I can say is again, we haven't had any
21 discovery into that sale. We haven't seen the actual
22 transfer papers between Baupost, and I guess it's Bank of
23 America. We did see the original papers between Giants and
24 Bank of America. That's one of the things we asked for
25 again in our two thousand and --

1 THE COURT: Why is that even relevant at this
2 point?
3 MR. SLACK: The only thing that potentially is
4 relevant is exactly I think the questions that you're
5 asking. We need to understand when we're talking to
6 somebody, for example, who is the interest. Who should we
7 be talking to Baupost or not. And that was part of it.
8 The other thing is, Baupost and Giants Stadium were
9 on opposite sides of that deal. I think we were entitled to
10 see what was disclosed during those negotiations, and we've
11 asked to see that. And we -- they're not privileged, and we
12 should have access to it.
13 THE COURT: Well, whether you should or should not
14 have access to it, I'm just going to make the general
15 observation that ordinarily when claims are transferred and
16 the Lehman case has been one of the largest unregulated
17 trading markets and distressed claims in the world during
18 the past four years. There's a routine that I'm familiar
19 with not from being a Judge, but having been a practitioner,
20 and you're not likely to find very much of value in the back
21 and forth relating to that claim tread, at least as it
22 relates to the value for purposes of any objection you might
23 file.
24 These are trades between so-called big boys, and
25 everybody makes their own judgments as to the likelihood of

1 success in future litigation with regard to the claim. You
2 may or may not be ultimately entitled to obtain that
3 information, but even if you do, in my view, it's a big so
4 what.
5 MR. SLACK: Might be. Look, you know, what you're
6 saying obviously from experience makes sense. What I would
7 say, Your Honor, is that this is a little bit unlike other
8 claims, in that it's obviously a very large one. It's
9 obviously unliquidated. It's obviously the main issues that
10 somebody looking to buy it are going to be asking themselves
11 are, at the end of the day, is it a receivable or is it a
12 payable, and if so, how much.
13 So I think, you know, it's a little bit different
14 than, you know, a claims market with liquidated claims.
15 But, you know, that's just the tiniest piece of what, you
16 know, we were seeking in our 2004.
17 So, Your Honor, would you like to hear the answers
18 to those questions from counsel, or would you like me to go
19 ahead with my argument? I mean --
20 THE COURT: I'd like to hear what counsel for
21 Giants Stadium has to say about the big picture questions
22 that I raised. And one of the reasons why I'm focused on
23 this is that I am concerned about more than the discovery
24 dispute that has been presented to me, I'm frankly concerned
25 as to why we're having the dispute at all, and why this

1 claim is different from other claims, so many of which have
2 already found their way into formal claims objections.
3 And I'm interested in that question, but before
4 getting to it, Mr. Slack, I'd like to hear comments from --
5 MR. SLACK: Okay.
6 THE COURT: -- counsel for Giants Stadium as to
7 some of the preliminary questions that I asked.
8 MR. SLACK: Sure.
9 MR. CLARK: Thank you, Your Honor. Again, Bruce
10 Clark for Giants Stadium.
11 Trying to take your questions in order, as to the
12 increase in the amount of the claim, when the claim was
13 originally filed, it was filed with five, I believe there
14 were five caveats as to items that have yet to be
15 quantified. And when the claim was revised at least two of
16 those items were the cause of the increase from 301 to 585
17 million.
18 One of them reflects the amount of a capital
19 charge, which the person stepping into the shoes of Lehman,
20 in our view, would've had to incur, in order to protect
21 themselves by way of reserves against the likelihood of a
22 further default. And the other was a difference in the
23 credit charge. That difference came about because the
24 original deal with Lehman involved raps by insurance
25 companies, either Figik (ph) or FSA, both of whom at the

1 time of the transaction reviewed were rated as AAA credits
2 in the market. And at the time of the putting out of the
3 proof of claim, the amended proof of claim, we quantified an
4 additional amount because those protections were gone. And
5 the amount that one would have to pay to get the equivalent
6 protection was greatly increased.
7 And I am not, I've got to say, I'm not trying to
8 duck this, but I am not the person who has studied this in
9 the last month and really can give you a better answer. But
10 that's my understanding of the two principal reasons that
11 the amount was increased between the first claim and the
12 second claim.
13 THE COURT: Okay.
14 MR. CLARK: As to --
15 THE COURT: Has that information which you just
16 shared with me previously been shared with Lehman when --
17 MR. CLARK: Yes.
18 THE COURT: Okay.
19 MR. CLARK: I mean, as Mr. Slack said, it's in the
20 -- a description of that much is in the amended proof of
21 claim, and neither Weil nor we particularly want to go --
22 and should go into the specifics of the conversations. But
23 the conversations during the settlement talks centered on
24 this and a lot of other points.
25 I don't know if the question you asked why did you

1 increase the 301 to 585 was the first question that came up.
2 But it certainly was a question that was explored.
3 THE COURT: Assumingly if I were on the receiving
4 end of a claim like that, even if we were talking about
5 hundreds of dollars instead of millions of dollars, the
6 first question I would ask, how on earth could you be
7 claiming that much more.
8 MR. CLARK: I think --
9 THE COURT: How did this claim double?
10 MR. CLARK: I think you're being more courteous
11 than the words I heard when the question was asked.
12 THE COURT: Okay. Well then --
13 MR. CLARK: And clearly that was asked.
14 THE COURT: Well, I'm in court so I have to be
15 courteous.
16 MR. CLARK: Right. But that -- I mean, my best
17 recollection is that was discussed. As Mr. Slack said, a
18 lot of the conversations in these settlement talks took
19 place with different people from the interested parties at
20 different times, and neither of us was party to all of them
21 by any means.
22 THE COURT: Okay.
23 MR. CLARK: I'd be astonished if that was not
24 talked at length.
25 Second, who was Lehman negotiating with, I agree

1 with what Mr. Slack said. I think I just said the same
2 thing, but they were negotiating with people from Sullivan
3 and Cromwell. We are representing both Baupost and Giants
4 Stadium. They were all negotiating with people from Baupost
5 at the same time, and Giants Stadium people as well. And
6 there were a variety of people on the Lehman side. I mean,
7 there must have been 20 that I met at one time or another.
8 So it was a very active negotiation or series of
9 negotiations over that time period.
10 THE COURT: One of my fundamental questions is
11 whether Giants Stadium has continuing economic interest in
12 this claim or is a so-called empty creditor. Is it an empty
13 creditor?
14 MR. CLARK: No, it's not. The reason it's not is
15 because the sale papers between Giants Stadium and Bank of
16 America which the debtors do have, and which they did ask
17 questions about in the deposition, make it clear that Giants
18 Stadium has a contingent interest in the result of the
19 negotiation or resolution of the claim. It depends on how
20 much is paid or how much is not paid. They do have a
21 material interest one way or another.
22 THE COURT: So as a kicker?
23 MR. CLARK: It's either a kicker or a pay back or a
24 clawback, one or the other.
25 THE COURT: Okay.

1 MR. CLARK: Okay. As to the question that came up
2 about the sale between Bank of America and Baupost, my
3 information on that is that Giants Stadium was not involved
4 in that. That was a transaction between Bank of America and
5 Baupost. They negotiated it. And I don't believe we have
6 anything certainly anything material to either produce or to
7 disclose about it. That is not a transaction that to my
8 knowledge, I just heard Mr. Slack say, they have information
9 about, but neither do we.
10 THE COURT: All right.
11 MR. CLARK: Have I addressed the preliminary
12 questions? I thought I took the list down right.
13 THE COURT: I think you have, although Mr. Slack
14 seems to want to interject at this point. Do you want to
15 proceed with your main argument?
16 MR. SLACK: Yeah, please, thank you, Your Honor.
17 THE COURT: And understand there is this other
18 question which in effect wraps all the other questions. Why
19 are we here with a discovery dispute as to a claim, that's
20 whether it's $301 million claim or a $585 million claim
21 appears at least in the Court's view to be more or less
22 indistinguishable from any number of other derivative type
23 claims in this bankruptcy case, and in effect, is a righted
24 question, are you gentlemen both serious about this dispute?
25 So much has gone into a 2004 examination request

1 and resisting that request and efforts to make it
2 reciprocal, that it raises more questions in the Court's
3 mind than it answers as to what's going on here. Now, I
4 want to know what's going on here.
5 MR. SLACK: Well, Your Honor, as I think you know
6 from the docket, the debtor has taken 2004 discovery with
7 respect to, you know, hundreds of counterparty, derivative
8 counterparties and we haven't had these issues. I mean, if
9 you think about the number of years that I've been before
10 you on matters, if we've had a couple of discovery disputes,
11 that's a lot.
12 And so I think we have a record frankly of these
13 kinds of situations, and this just hasn't gone the way of
14 the other ones. Because we have frankly been obstructed,
15 and we have a -- you know, we had a situation a year ago,
16 and that -- what happened a year ago in September is we had
17 another discovery dispute, and unfortunately, we had -- you
18 know, we listened to the Court tell us that frankly you
19 didn't like that discovery dispute.
20 THE COURT: I'll be very consistent. I'm not
21 likely to like any discovery dispute that you present to me.
22 MR. SLACK: But what happened in that hearing is
23 important for today. What happened in that hearing which
24 concerned a motion to compel Giants Stadium with respect to
25 privilege is Giants Stadium said, Your Honor, they won't

1 talk to us about the merits. They won't sit down with us
2 and talk. And I said, Your Honor, I was concerned. And my
3 concern was, we were in the middle of an investigation that
4 we had not finished, and we needed a little more time to get
5 it done, as long as we had cooperation.
6 And I said I didn't want a gotcha. I didn't want
7 to sit down in negotiations, talk about our preliminary
8 views of the merits, and then have, and be faced with the
9 argument that Giants Stadium says, well, obviously you know
10 the merits, you've had discussions with us on the merits,
11 you don't need anymore 2004 discovery. And I sought a
12 commitment from Giants that we wouldn't be faced with that
13 argument.
14 And the Court responded as follows, says, "You
15 don't even need that commitment because I'm going to give
16 you a gotcha from the bench, a no gotcha. If you choose to
17 have a conversation that could lead to some kind of
18 productive business-like resolution to this, doing that will
19 not constitute a waiver of any of your discovery rights or
20 your rights to continue with your investigation as you see
21 fit."
22 Now, I'd point out that at that time when the Court
23 gave us the assurance that, yes, we could enter into the
24 negotiations, so to speak, talk about the merits even though
25 we hadn't finished, that we weren't going to be faced with

1 exactly the argument we're being faced with today. Giants
2 Stadium stayed silent. They didn't raise their hand and
3 say, Your Honor, you can't do that, they're not entitled to
4 any discovery. They didn't say any of that. They stayed
5 silent.
6 THE COURT: Well, I understand what happened. I
7 actually remember it and my memory was further refreshed by
8 looking at the transcript. And I know that there's a point
9 that you've emphasized in your papers, and you're
10 emphasizing it again now.
11 But it's 14 months later. You've had some further
12 discovery, and you've had further business discussions, and
13 you've had a mediation session. Without going into the
14 substance of what was discussed in the various sessions, it
15 appears to me at least, that inevitably there has been a
16 sharing of information in positions by the parties, or there
17 could not have been open and good faith negotiations.
18 So today, almost Thanksgiving 2012, you must know
19 much more about the claims and the defenses to those claims
20 than you knew 14 months ago. It just seems to me impossible
21 that you are in effectively the same position today that you
22 were then.
23 So that's one concern I have relative to your
24 position. Another that I have is that Giants Stadium argues
25 in effect without using this hackneyed expression, what's

1 sauce for the goose is sauce for the gander. If there's
2 going to be discovery at this stage of the game, it should
3 be reciprocal. We shouldn't just be turning over 64,000
4 pages if that's the right number of discovery only to be
5 asked for more. When does this "investigation" come to an
6 end? Is it serious? Is it real? And why are you not
7 simply doing what you've done in other settings, file an
8 objection? We'll have a contested matter, we'll have
9 reciprocal discovery, and the 2004 discovery that we're
10 arguing about is rendered moot.
11 MR. SLACK: Well, there's a couple of pieces that I
12 want to answer first. We haven't had any other discovery in
13 the last year. Since that hearing, there has been no
14 discovery. Now, there has been discussions, but I can tell
15 you that we have not had a stitch of additional discovery or
16 information in our investigation.
17 Our investigation has been frozen by both agreement
18 and by the Court effectively during that 14 months. And --
19 THE COURT: Let me interject and say that when --
20 you're using the term discovery, I think you're using it as
21 a term of art. When I use the term discovery, I think I
22 have a broader sense of the term in mind.
23 Necessarily, you must be learning more than you
24 knew before simply by virtue of participating in
25 discussions, information is being shared. Otherwise, you're

1 not having good faith negotiations. Is it just pointless
2 posturing, or is there in fact some meaningful exchange of
3 information?
4 MR. SLACK: I don't believe that -- and I'm not
5 going to try to, you know, parse through, but I can tell you
6 this. I think the parties have had a number of intense
7 discussions on position. I don't believe there's been a
8 further exchange of what I would call information,
9 underlying information about the matters that we want to
10 investigate.
11 And so, yes, there have been a number of exchanges
12 of position. I don't want to -- I don't think it's
13 appropriate to go into that, but there hasn't been -- you
14 know, there hasn't been a sharing of additional information.
15 Effectively the investigation froze, and we said we would
16 have discussions with them on the merits based on what we
17 knew. And I have to tell Your Honor, what happened here is
18 exactly what I was worried would happen. And that is, we
19 would engage in good faith discussions on the merits, and
20 then be faced with an argument that said, okay, now you
21 can't have 2004 discovery to finish your investigation.
22 And I -- and that's compounded, Your Honor, because
23 not only did we get the Court's assurances, but Giants
24 Stadium actually made an agreement with us. In other words,
25 you know, Baupost and Giants Stadium when they were

1 negotiating with us after the failed mediation we wanted to
2 continue our investigation then. And they said, if you
3 engage in these principal to principal negotiations at that
4 point, we're not going to hold it against you. We actually
5 had a written agreement. It's Exhibit H to the Firestone
6 declaration.
7 And the agreement was, it says, Lehman's
8 "willingness to enter into settlement discussions does not
9 constitute any waiver of our rights and is without prejudice
10 to our ability to complete our investigation under
11 Bankruptcy Rule 2004."
12 I'm really at a loss, Your Honor, to understand how
13 the position that they're taking today isn't a direct breach
14 of that agreement, and frankly, the assurances that we
15 received from the Court should allow us to continue our
16 investigation as we see fit, because it hasn't continued at
17 all since then.
18 And, you know, and the question of when it's going
19 to end, if we had three to four months of cooperation from
20 Giants Stadium and the third parties, I think we would get -
21 - you know, we would get there. We haven't had that
22 cooperation, and it -- you know, all I can tell you is that
23 there are areas that we've laid out in our papers, and I'm
24 happy to go through, but there are areas that we still need,
25 you know, to investigate. We said we wanted to investigate

1 them back in September of 2011, and we wanted to complete it
2 then. But it was based on the assurances from the Court,
3 based on the agreement from Giants Stadium that we actually
4 went forward with the discussions.
5 THE COURT: Mr. Slack, let's circle back and
6 revisit particularly assurances from the Court that I recall
7 giving. I'm not breaching any commitment made to you. The
8 commitment related to a term that doesn't have legal
9 significance. It's gotcha. The idea was that participating
10 in settlement discussions would not be cause for you to end
11 up with forfeited rights of discovery.
12 I can say that for myself I never expected to be
13 talking about this with you more than a year later. And one
14 of the things that to me appears to be a changed
15 circumstance, and we can discuss whether it changes any
16 outcomes, is that at least from the perspective of Giants
17 Stadium, there is the protection that this 2004
18 investigation is more tactical than real, and that you
19 really have at a business level already determined that
20 you're objecting to the claim. So that you don't need the
21 further investigation to make a judgment as to whether this
22 is a claim you're going to say yes to. You already know
23 you're saying no to it.
24 Given that setting, I think things may have
25 changed.

1 MR. SLACK: Well, I have to tell you I don't think
2 they've changed one bit, and I don't agree with that at all.
3 And I -- I'm usually not so blunt with this Court, and I've
4 appeared many times in front of it.
5 THE COURT: Well then you're getting used to it.
6 MR. SLACK: The fact is, is that we have exactly
7 the same information that we had back when we started in
8 September of 2011. And what I was worried about was
9 somebody taking exactly the tact that Giants Stadium said,
10 and frankly that Your Honor just took, which is that if we
11 -- you know, obviously our discussions on the merits had to
12 include discussing preliminary views. And what I was
13 worried about is if we had discussions and we talked about
14 those views based on a partial investigation that someone
15 would say there's changed circumstances.
16 And the truth is, Your Honor, that's a gotcha,
17 because what we should've said is, Your Honor, then we'll
18 finish our investigation and then we'll talk. Because there
19 are still critical areas that we haven't had the slightest
20 stich of information because we talked for example, we
21 didn't take any information from the NFL.
22 Now, we have a subpoena outstanding to the NFL,
23 that's been frozen as well per agreement, and they've agreed
24 to produce documents now. There's Goldman Sachs. Goldman
25 Sachs did all of this work on the valuation, and again

1 that's been frozen while we've been in discussions. There's
2 insurers. The insurers here which insured the underlying
3 option rate securities, they had certain consent rights, and
4 they were actually -- there are e-mails and communications
5 with them, significant ones during the time frame of the
6 termination. And again, we have a subpoena outstanding with
7 respect to that, and it's waiting this.
8 We haven't taken any discovery with respect to, and
9 as I mentioned before, the amended claim as to exactly when
10 that was made, and what the basis of that is. And there are
11 serious issues with respect to one whether that claim should
12 be allowed to be amended at all, and then what it is.
13 So there are significant issues. And again what
14 I'm concerned about here is that nothing has changed from
15 September of 2011 except that we engaged in real and
16 hopefully good faith discussions, where we did discuss our
17 preliminary views of the merits. And based on those
18 preliminary views, and that's the only thing that's
19 happening, that's the only thing that's different, and
20 that's the only thing that's changed. We are now faced with
21 we're not allowed to finish our investigation.
22 And I can tell you this, this is not tactical.
23 This is not tactical. This is real. We need the
24 information, and this is information we sought and wanted in
25 September of 2011 before the discussions. It's not like it

1 was, you know, heaped on now. They knew we wanted this
2 information. It's not tactical. And other parties have
3 allowed us to take this kind of 2004, and we haven't had the
4 disputes. They've cooperated, it's gone quickly. And this
5 would go quickly if we had cooperation from Giants Stadium
6 and the third parties.
7 With respect to the -- you know, Giants Stadium's
8 motion to take 2004 --
9 THE COURT: Before we get to that, let me ask you
10 one more question. In what respect, if at all, would Lehman
11 be prejudiced if you simply objected to the claim now, based
12 upon what you know, and proceeded to take discovery in a
13 contested matter, everything presumably that would be the
14 subject of the 2004 request would simply be the subject of
15 ordinary course discovery in that contested matter?
16 MR. SLACK: What I can tell you is there has not
17 yet been a determination, that's one of the reasons that
18 this is a very complex, and I can tell you this, Your Honor,
19 honestly, that there has not yet been a determination by the
20 estate whether we are going to press that this is a
21 receivable to the estate or a payable.
22 There are very interesting issues. I'm happy to go
23 into what they are. But in that sense, this is very unlike
24 most of the claims, because in many of the claims, and in
25 many of the swap cases, we know it's either going to be a

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1 receivable and a payable. And because of some of the issues
2 here, which are very complex, the estate has not yet made a
3 determination whether to press this as a receivable, and
4 actually bring this as an affirmative claim, or whether
5 simply to treat it as an objection to a claim. And if we
6 object to the claim, again, what I can tell you honestly is
7 why we have preliminary views, there has been no
8 determination yet as a final matter, as what grounds we are
9 going to take, because again, there are many different
10 layers of this onion.
11 And I would say the following, Your Honor. It may
12 be that somebody comes in and files a claim, and you've
13 probably seen this in your career. They file an outrageous
14 claim, you know, they've got something that's $10 billion
15 they put in a claim. Well, it may very well be that the
16 debtor knows it's not going to pay $10 billion, and it's
17 going to quote object to the claim.
18 I don't believe that cuts off 2004 discovery to
19 figure out and understand the bases for that claim, and to
20 figure out the bases for the objection. And so whether or
21 not the estate -- you know, I can tell you this, the 600
22 million that they've put in their amended proof of claim is
23 more than the face amount of the underlying notes that were
24 being hedged.
25 So essentially they're taking the position that

1 they deserve in unwinding the hedge more than the underlying
2 face amount of the notes. Now, I can tell Your Honor that
3 sounds to me facially unreasonable. But that doesn't mean
4 that just because somebody files this wild claim and you're
5 going to say, hey, I know I'm not agreeing to 10 billion, it
6 doesn't mean you can't go and take 2004 discovery.
7 And the analogy on the other side, Your Honor, I
8 think is striking. What 2004 allows you to do when you're
9 filing an affirmative claim is to understand the bases for
10 it. It's not just enough to say, hey, I think at the end of
11 the day I'm going to file, you're allowed to go and
12 investigate, so you know the bases of your claim, so you
13 could actually bring a Rule 11 type claim on the affirmative
14 side. Well, it works the same way on the claims side.
15 So I don't think the question here is are we likely
16 to object to, you know, the 600 million in claims. I think
17 there's a really serious issue here as to whether this is a
18 receivable and a payable, and if so, what are the bases, and
19 I can tell Your Honor, there is no definitive view on that.
20 And we need to investigate in order to figure out whether
21 we're going to bring this as an adversary proceeding or
22 we're just going to object to the claim.
23 THE COURT: Okay.
24 MR. SLACK: I'm happy to talk about now the 2004
25 discovery. I think I can be a little briefer. Obviously I

1 was asking some questions from the Court, and do this all at
2 once rather than --
3 THE COURT: I'm treating this as one matter because
4 it has multiple parts.
5 MR. SLACK: Let me then speak to the Giant's motion
6 to take 2004.
7 So what the Giants has essentially done has said,
8 because we, the debtor, want to take more discovery, they'd
9 like to take some discovery. And the difference, of course,
10 is once they've filed the claim, the debtor here can make
11 two decisions. We could say, we agree with some or all of
12 that claim, and if we do that, much of the discovery that
13 they're going to seek could very well be premature and
14 frankly ultimately useless.
15 And so what makes sense here is to let us finish
16 our investigation, figure out are we bringing this as an
17 adversary proceeding, are we going to object to the claim,
18 and if so, on what bases. And then that will actually shape
19 the kind of discovery that ultimately if we're going to
20 object to it, that Giants Stadium will be able to get. If
21 you allow it now, you have a potentially wasteful and
22 unnecessary set of discovery that's unneeded.
23 Second, Giants Stadium is really unable to swear,
24 it never tries. Its own argument that it makes in
25 opposition to our 2004 with their request to take it, and of

1 course, we're in different situations. They actually cite a
2 case, GHR Energy Corp for the proposition that a party may
3 not use 2004 after it has determined to pursue a claim.
4 And, of course, it has filed claims. And what's -- they
5 never try to square these positions. They never try to
6 square the idea that they are in a situation, because of
7 course, they do have all the information. They never try to
8 square the
9 -- you know, that they have filed the claim, its detail.
10 And so under their own case law and authority,
11 they're simply not entitled to get any at this point.
12 Third, even if it wasn't, you know, facially
13 deficient, their request for 2004, as a matter of, you know,
14 policy, this Court shouldn't allow it. And that's because
15 there is a claims process when people file claims. And this
16 happens, I assume, you see it much more than I do, is people
17 file claims, and yes, debtors take 2004 discovery. And at
18 some point, debtors will object to those claims or not. And
19 if they object, there's a full process, sometimes outlined
20 by the Court, sometimes not, to take discovery. And that's
21 what should happen here.
22 And what Giants Stadium has essentially argued is
23 that they should jump that process, that the process that
24 applies to everybody else's claims shouldn't apply to
25 theirs. And they even make, I think the incredible argument

1 that creditors are actually permitted to take 2004 discovery
2 after filing claims to bolster those claims. Well, think
3 about that as a precedent for your cases.
4 If that were the case, you would expect to see I
5 think a number of cases where creditors do this all the
6 time. I can tell you that if that were the law, I'd think
7 we have hundreds if not more creditors in this case trying
8 to seek discovery on their claims.
9 And Giants states two cases that I do want to
10 discuss because we haven't had a chance to do that in any
11 kind of reply for that idea. The first is a Drexel Burnham
12 (ph) case back in 1991. That's a case that my colleague,
13 Peter Grunberger (ph) participated in. And in the Drexel
14 matter, one of the major creditors in that case was the FDIC
15 and there were also creditor's committees.
16 Well, at least one of those committees was taking
17 2004 pursuant to a stipulation. And what the FDIC wanted,
18 which was a major creditor in Drexel, was it wanted access
19 to the discovery that was being done by the creditor's
20 committees on other issues.
21 And what the Court said is the FDIC because it was
22 such a major creditor could have that discovery even if it
23 would bolster its claim. But what didn't happen in that
24 case is what Giants Stadium wants here, is that the FDIC was
25 allowed to put forth its own 2004 discovery on its claims.

1 That never happened. What they want here did not happen in
2 the Drexel case at all.
3 The other case cited by Giants Stadium is a Texaco
4 case, another case that Weil appeared in, in which Texaco's
5 largest judgment creditor, Pennzoil sought 2004 discovery,
6 again relating to issues in the case because it was the
7 largest judgment creditor in Texaco.
8 And there was no request to take discovery
9 concerning a filed claim, because remember it was a judgment
10 creditor, it'd actually gone to trial on its claim. And
11 that claim was not the subject of 2004 discovery.
12 So, you know, I think Giants Stadium is just simply
13 not correct on the law, that once you filed the claim as a
14 creditor, you can take 2004 discovery on that claim.
15 Certainly we see creditors in cases and creditor's
16 committees taking discovery, let's say there's third party
17 claims out there, the debtor's not pursuing, you certainly
18 see that kind of discovery. But what you don't see is 2004
19 discovery allowed on particular claims filed by those
20 creditors. And there's no case that they cite where that's
21 the case.
22 And again, if that was the case, it would really
23 blow up the claims process in a case like --
24 THE COURT: Let me ask you this question, which
25 doesn't relate to precedent that may or may not be directly

1 relevant or instructive to the current dispute. And instead
2 to focus on the current dispute.
3 You have acknowledged in your argument that the
4 underlying facts here are unusually complicated, and that
5 your own client, which is certainly as sophisticated as any
6 counter party has not yet concluded whether there is an
7 affirmative claim here or a defense of claim if there are
8 any defenses, for that matter.
9 Although at the preliminary matter, you've
10 acknowledged that given the change from 301 million to 585
11 million it is highly probable that some objection will be
12 made because you compared it with what might be called a
13 preposterously large claim.
14 But given the complexities that you have
15 acknowledged that underlie an analysis of claims and
16 defenses, is this not a somewhat exceptional circumstance in
17 which the typical discovery may be appropriate, and may not
18 lead to the adverse consequences that you've described of
19 hundreds of creditors coming in to seek what they're really
20 not entitled to discovery with respect to their claim?
21 MR. SLACK: You'd only see it if you granted it. I
22 think that the -- I think that you're likely --
23 THE COURT: Well, I'm asking the question intending
24 to probe some of the issues here.
25 MR. SLACK: No. And I think it's -- I think you

1 would end up frankly being in the same situation as many
2 other creditors, because every creditor is going to say,
3 they're not going to know the facts, the underlying facts of
4 Giants Stadium, they're going to say, Your Honor, we have a
5 complex derivative.
6 What I can tell you is this, is that the
7 information that we need or the information that's really
8 relevant to the determination is all on their side. Their
9 discovery is purely harassment. In other words, what they
10 want from us is purely just a harassing set of discovery.
11 They have told us so many times, even in their papers, they
12 don't like one-sided discovery. And that has stuck in their
13 crawl. And so what they're trying to do is purely as a
14 harassing matter.
15 Think about what they did in this motion and I
16 think you can understand that they don't need a stitch of
17 discovery. They filed this motion 18 months ago, and they
18 have adjourned it for 18 months in a row. And it wasn't
19 until the settlement discussions ended and we pressed our
20 continuation of the investigation that all of a sudden they
21 say, oh, we need discovery. And that's because the sole
22 purpose of it is to try to harass us.
23 The information with respect to the termination of
24 the transaction and what happened is all on the Giants
25 Stadium side, not on the debtor side. And the information

1 that they want here is, at the end of the day, we don't know
2 whether it's going to be irrelevant or not, but it may very
3 well be a waste of our resources to produce all of this
4 stuff now, when we haven't made a decision as to what our
5 defenses are actually going to be here.
6 Again, we have preliminary views or else we
7 wouldn't have been able to engage in the settlement talks.
8 But I can tell you that what's going on here is purely a
9 harassing set of 2004 requests. And they are unnecessary
10 because at some point, if we object, Giants Stadium will
11 have a complete opportunity to take discovery.
12 Thank you, Your Honor.
13 THE COURT: Okay. Thank you. Mr. Clark.
14 MR. CLARK: Good morning again, Your Honor.
15 You know, some of the points that you made in your
16 questions frankly fit rather well with the points I was
17 going to make to the Court. First of all, on the gotcha
18 issue, we have not argued at all, and I'm not arguing today
19 that because Lehman entered into settlement negotiations and
20 we had a mediation and all of that, that they somehow waived
21 their rights. That's not what we're saying, and I think
22 that's what Your Honor meant when you said there'd be no
23 gotcha. And I'm equally sure, although I didn't raise it
24 because I didn't think it was necessary, there was no gotcha
25 for the Giants either. I mean Giants Stadium wasn't waiving

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1 any rights because they went into a year or more of
2 discussions at the same time.
3 But it is a fact that the debtors today are in a
4 different posture, and not just because of the passage of
5 time, although there has been a lot of time that has passed.
6 They just conceded, as I think the transcript will show,
7 that they're not going to do anything other than object to
8 the claim in one form or another. They're going to object
9 to it, they're going to file an adversary proceeding to
10 collect on their view of what they have is right, but this
11 is going to become a contested matter in one form or
12 another. It already really is. And that's the problem.
13 In order to get this to the point where we think
14 the parties have a better chance to resolve this, if it has
15 to be through litigation, so be it, there has to be
16 discovery on both sides. This last point about us wanting
17 documents from them because of harassment is completely
18 unjustified.
19 If you look at the paragraphs of documents that
20 we're describing the documents we're asking for, and you
21 read the transcript of Mr. Slack's deposition of Ms. Procops
22 (ph), everything we've asked for practically is in there.
23 It's what's at issue in this case. It's not as though we're
24 wasting our time putting together document demands to make
25 them file a motion. We have no interest in that whatsoever.

1 I think the key in this situation is your question,
2 your point, that shouldn’t at this point the obligations to
3 produce information and to proceed be reciprocal. And I
4 think the answer to that has got to be yes. And as an
5 indication of the status that we're in, of the stage that
6 we're at, I refer the Court to the new deposition subpoena,
7 the second deposition subpoena, which is a 30(b)(6)
8 deposition. That is not an investigation tool. That's a
9 litigator's tool, to help resolve a dispute that is already
10 there.
11 They want us to educate Ms. Procops on all the
12 things that they say she didn't know about before, and on a
13 bunch of other topics. And the reason they gave was to bind
14 her to that testimony, and to bind us to that testimony.
15 That's not investigation, that's litigation. We're already
16 at that stage, and that's what they're asking for, and
17 that's why we think either of two things has to happen.
18 Number one, their current subpoenas for additional
19 documents, much of which is repetitive of what we already
20 gave them, and for this additional deposition should be
21 quashed, so that there is not this continuing façade of an
22 investigation. They should not be allowed to simply say
23 it's preliminary. They said that 14 times at least in the
24 papers that they submitted to the Court.
25 It's preliminary, therefore, it's likely to have a

1 white feather. We can continue to do whatever we want to do
2 and it's one way. There's no way that they have not made up
3 their mind that they're going to take action either to
4 object or to file an adversary proceeding. Nobody in this
5 courtroom can believe that, I hope Your Honor doesn't.
6 So if the motion to quash is granted, then we're at
7 a point where they would have to move forward, and either
8 object or file the adversary proceeding as far as I can see.
9 Our request for discovery under Rule 2004 is an alternative
10 if we're going to continue this 2004 process, we think we
11 should at least be allowed to begin to get the documents
12 from Lehman's files that bear on the same issues that they
13 have raised.
14 In another case mentioned, Mr. Slack mentioned the
15 FDIC application and Drexel Burnam. In the Federated case,
16 the FDIC came in the same way, and they had major claims,
17 and they wanted to take discovery, I think it was of the
18 creditor's committee, and the Court permitted that.
19 And the Court said I'm going to permit it because
20 these are people who are just preparing their arsenals for
21 battle. And the way they're going to get to a resolution at
22 the end of the day is if they both know as much as they can
23 about the other side's position. So that's where we are.
24 We would like to be able to have this is in a
25 position where we can take discovery, they can take

1 discovery. I think personally that that is the best way
2 we're likely to get to a resolution of this. And I think
3 it's fair at this point. The bankruptcy has been -- it's
4 over four years old. We've been in some sort of contest
5 with the folks from Lehman for over two years. It's simply
6 time to move on to the next stage, and that's why we're
7 objecting to their discovery and suggesting alternatives.
8 THE COURT: All right. Thank you. Anything more,
9 Mr. Slack?
10 MR. SLACK: Just a few -- a couple of minutes.
11 Your Honor, with respect to the 30(b)(6)
12 deposition, and I think it's important to understand that we
13 took a deposition of a particular person, Christine Procops,
14 who's the CFO of Giants and (indiscernible) Giants Stadium,
15 and there were many instances, and we've put it in our
16 papers where there were critical things that she didn't
17 know. So we actually had a conversation with counsel for
18 Giants, where I said, look, we can take, you know, the
19 deposition of the other people who all happen to be more
20 senior. They're the MARs (ph) and the TISH's (ph). And we
21 said, what we're willing to do is we're willing to take,
22 because we just want the information, we're willing to take
23 a 30(b)(6), you can designate whoever you want, but then you
24 have the obligation to educate.
25 It is purely an investigative tool to find out the

1 answers that we didn't get from that deposition. It is not
2 a litigation tool, and we took this tact because we thought
3 it would be more palatable, though, perhaps we should just
4 go and take the depositions of the other senior people, that
5 was another way, you know, of getting potentially to that
6 information. But it was purely seeking information and not
7 trying to, you know, go forward with any kind of litigation.
8 And other than that, Your Honor, I would say as
9 follows. Is that when they say that they've never tried to
10 say this is a gotcha, all you have to do is read the first
11 line of their reply. Where they say that debtor's cross
12 motion is premised on the unsustainable argument that
13 debtors have adopted only a preliminary position as to the
14 merits. And then they say, "To the contrary, although
15 Giants Stadium is constrained from disclosing the substance
16 of settlement negotiations, it's clear the debtors have
17 determined to object to the claims."
18 What they're saying, Your Honor, I think is exactly
19 the gotcha. It's exactly that because we entered into
20 settlement discussions which they had an agreement that we
21 could do and not give up our rights to 2004, and this Court
22 gave us assurances we would not, so.
23 THE COURT: How are you giving up rights to 2004 if
24 those rights are conditioned in whole or in part on some
25 reciprocal discovery?

1 MR. SLACK: Well, two fold on the reciprocal
2 discovery. I think that the idea of giving reciprocal
3 discovery for what is essentially a claims dispute doesn't
4 make any sense until there is a determination essentially in
5 the investigation.
6 And the reason for that is what I said, number one,
7 is that it might be wasteful, and number two, it sets a bad
8 precedent. But I would ask a different question on top of
9 that. Which is, what's the harm, assuming they're right,
10 that they're going to have a -- you know, an objection and
11 this -- you know, what's the harm in letting us finish our
12 investigation over the next three or four months, and then
13 if we file an objection, they'll get full discovery.
14 They need the discovery for the claims process, and
15 they'll have it, because Your Honor's going to make sure
16 that they have whatever they need. But that's the way all
17 the other claims work, and that's the way this should.
18 And I would ask the Court one other thing, which is
19 to consider that they still have not answered the
20 inconsistency in their own position between their motion to
21 quash and their motion to take discovery. Because if you
22 look at their argument, GRH and the other pages and pages
23 they raise, their own argument is that they're not entitled
24 to it once they file their claim, and they've never
25 addressed that inconsistency. Thank you, Your Honor.

1 THE COURT: Okay. One more thing.
2 MR. CLARK: Okay. I'll address the inconsistency.
3 It's simply a situation of -- there are a number of courts
4 that have said you can have discovery even after you filed a
5 claim, so it's not inconsistent across the board. The only
6 thing we're trying to do, the only thing we're trying to do
7 is to have some sort of a process that will let this resolve
8 itself sooner rather than later.
9 And the things that we've asked about are not just
10 -- they are not under the control of Giants Stadium. We've
11 asked questions about how they evaluated and viewed the
12 termination process, about what if any steps they took, that
13 they were obligated to take under the papers, including
14 going out and getting quotes in the market, and doing a
15 number of other things. These are all issues, they're all
16 documents that are directly tied to issues that are
17 presented in this case.
18 We think the best thing to do would be to go to the
19 next stage, whether there's an objection or an adversary
20 proceeding, and then you're right, all this discovery gets
21 resolved hopefully without Your Honor ever seeing us again
22 for that purpose.
23 But if we're going to have this continuing Rule
24 2004 discovery, then the only way it seems fair to us is to
25 have both sides have access to it. And, you know, if you

1 look at the -- I know Your Honor's familiar with all this,
2 so I'm not going to belabor it, but if you look at the
3 background, the Cameron case and all the other cases that
4 dealt with the origins of Rule 2004. Originally it dealt
5 with a situation where a receiver came in, wasn't familiar
6 with the debtor, and had to have an expansive and quick,
7 quick review of the debtor's assets in order to protect
8 creditors. That's what any number of the cases have said.
9 It is not an excuse to allow a debtor in the
10 circumstances present here to just continue with their
11 investigation because the investigation is preliminary and
12 not final, and it's not final because it's preliminary.
13 That's what they're saying. It's a little circular, and I
14 think we ought to move on. Thank you.
15 THE COURT: Okay. Well, thank you for your candor
16 in answering the Court's questions and in your
17 presentations. I don't see this as a typical use of Rule
18 2004. Nor do I see it as a case that will open the
19 proverbial floodgates of other discovery in part because Mr.
20 Slack in his presentation, candidly observed that at this
21 juncture, more than four years into the Lehman bankruptcy
22 case, his client really doesn't fully understand all
23 elements of claims arising out of this complicated auction
24 rate hedge.
25 And it's apparent that if they could determine now

1 that they had an affirmative claim, they would assert it.
2 Lehman has not been shy about asserting such claims in the
3 past. Additionally, it seems fairly obvious that if Lehman
4 had sufficient information available to it that would
5 support not just a shotgun approach objection but a specific
6 and tailored objection to the claim, it would file it.
7 Throughout this case, Lehman has been active in
8 filing and pursuing objections to claims, and in fact, part
9 of this morning's agenda relates to objections to claims.
10 And so I view this as an exceptional case. And, in fact,
11 that was one of the reasons I asked a number of questions at
12 the outset to determine to what extent the issues that
13 related to this discovery dispute were exceptional and
14 unique, and to what extent this was just another example of
15 a derivatives dispute, this one happening to have the
16 negative gloss of active discovery disputes, as opposed to
17 active negotiations leading to a settlement.
18 I believe a continuing 2004 discovery under the
19 circumstances makes sense, although the fact that this is
20 occurring 14 months after our last discovery dispute is a
21 terribly negative fact. One conclusion to be drawn from the
22 mere timing of this, is that this dispute is taking too long
23 to resolve, and that despite best efforts, reasonable people
24 are unable to get to yes, and they should.
25 And so I'm going to propose that counsel meet and

1 confer in an effort to develop what I'll call a reciprocal
2 discovery protocol, and it is not necessarily limited to
3 2004. I believe that one of the things that distinguishes
4 the dispute that I've heard a lot about this morning from
5 other disputes, is that there is no foreseeable outcome here
6 in which Lehman is not objecting, or bringing affirmative
7 claims relief.
8 This is not a situation in which Lehman is engaging
9 in a 2004 process to later shake hands, and say here's the
10 money. I also believe even though everybody has denied this
11 that the 2004 dance that we're engaged in necessarily has
12 tactical aspects to it. And so here's what I am directing.
13 Between now and the first of the year, I would like
14 the parties to develop and agreed discovery protocol that
15 will be applicable whether we're dealing with 2004 discovery
16 or claims related discovery. It would be extraordinarily
17 wasteful for the discovery that's taken in 2004 to be
18 replicated again. And in the case of Ms. Procops, that's
19 already happening. Enough already.
20 I recognize that the 2004 sword is more properly
21 used by the debtor than by the creditor in this instance.
22 And so discovery from third parties and discovery from
23 Giants Stadium and discovery from Goal Line may be more
24 appropriate than discovery from the debtor. But that does
25 not mean that some discovery from the debtor is not also to

1 be part of this process.

2 One of the mysteries from the perspective of the

3 Court is that this third party discovery and discovery from

4 others is so critical from the debtor's perspective in being

5 able to formulate its own position with respect to the

6 claim. But I accept the representations made that ongoing

7 2004 discovery is needed in order for the debtor to complete

8 its investigation to use its words.

9 I would ask the parties to report the results of

10 these efforts at the December omnibus hearing. You don't

11 have to the point of an agreement, in fact, you could be to

12 the point of no agreement. I'd like to know that, in which

13 case I will then be able to either rule or take this matter

14 under advisement, but I have I think provided sufficient

15 guidance here to suggest that what I consider to be an

16 appropriate result is reasonable discovery going in both

17 directions with the understanding that the need for that

18 discovery is more obviously greater for the debtor. And

19 this is not an example of gotcha because I am indicating in

20 agreement that continued 2004 discovery is appropriate for

21 the debtor and the debtor's benefit.

22 I'm also noting the time's up in effect. This has

23 to come to a conclusion. And I don't expect there to be

24 another discovery dispute between the parties until there's

25 active litigation between you. And I hope that doesn't

1 occur at that point either. So I'll hear from you next
2 time.
3 MR. CLARK: Your Honor, just a question of
4 clarification. How does the January 1st deadline fit with
5 the next omnibus hearing? I'm not --
6 THE COURT: I don't know.
7 MR. CLARK: Okay.
8 THE COURT: I'm just looking for a status report at
9 the next omnibus hearing. And if it doesn't fit well for
10 the parties, it can always be put off, and then we can make
11 that a telephone conference.
12 MR. CLARK: Thank you, Your Honor.
13 MS. MARCUS: Your Honor, the December hearing is
14 December 19th.
15 THE COURT: 18th?
16 MS. MARCUS: 19th.
17 THE COURT: That seems like a perfect date for a
18 status report.
19 MR. MARGOLIN: The omnibus hearing is on December
20 12th, Your Honor.
21 THE COURT: Why am I hearing different dates?
22 MS. MARCUS: Sorry. Sorry, Your Honor. December
23 12th, sorry about that.
24 THE COURT: December 12th is a perfect date, too.
25 Either one's fine.

1 MR. CLARK: Thank you.

2 MR. SLACK: Thank you, Your Honor.

3 MR. MARGOLIN: Good morning, Your Honor. Shall we

4 wait until --

5 THE COURT: Why don't we just wait for those people

6 that are leaving to exit.

7 MR. CLARK: Thank you.

8 (Pause)

9 MR. MARGOLIN: Good morning, Your Honor, Jeffrey

10 Margolin, Hughes, Hubbard and Reed for the SIPA Trustee, Mr.

11 Giddens. We have two uncontested matters on this morning's

12 agenda. The first one is a settlement agreement proposed

13 with the LBF Chapter 15 debtor that is going to be handled

14 by my colleague, Mr. Greilsheimer, and then a portion of the

15 trustee's general creditor claim procedures motion which is

16 going to be handled by my colleague, Meghan Gragg.

17 THE COURT: Okay.

18 MR. MARGOLIN: Thank you.

19 MR. GREILSHEIMER: Good morning, Your Honor, Jeff

20 Greilsheimer for the SIPA Trustee.

21 This is a global resolution of all of the claims

22 between LBI and Lehman Brothers Finance. It was an

23 aggregate amount of about 6 billion that was submitted to

24 LBI by LBF. We have resolved that allowing a claim of

25 approximately 190 million as a customer claim and 360

1 million as a general creditor claim against the estate. And
2 it is a complete resolution of everything that we have going
3 between the estates. We believe it is well within the
4 trustee's discretion, and is an excellent result for the
5 estate.
6 If Your Honor doesn't have any questions, Mr.
7 Krakow on the Chapter 15 proceeding.
8 THE COURT: I'll handle them together. I've
9 reviewed the papers. It seems like a very fair and balanced
10 approach, and there are no objections. So this becomes as
11 close to a lay up as we get when we're dealing with $6
12 billion.
13 MR. KRAKOW: Your Honor, Robert Krakow for LBF.
14 I'm not sure there's anything I need to add then. This is a
15 very fair and substantially negotiated settlement that's the
16 combination of months of efforts by accountants and lawyers,
17 and ultimately the business people on both sides, so it is a
18 fair and reasonable settlement, as reflected by the fact
19 that there are no objections either with respect to the LBF
20 case or the LBI case.
21 THE COURT: I'm very pleased with the outcome, and
22 I know that these things when they're finally resolved look
23 fairly plain and straight forward on the docket, especially
24 when they're uncontested, but that in dealing with the
25 disputes between these two estates over the years, I know

1 that there have been any number of difficult issues that
2 needed to be reconciled, and I'm delighted that they have
3 been. It's approved.
4 MR. KRAKOW: Thank you, Your Honor.
5 MR. GREILSHEIMER: Thank you, Your Honor.
6 MS. GRAGG: Good morning, Your Honor, Meaghan Gragg
7 from Hughes Hubbard and Reed on behalf of the SIPA Trustee.
8 The next matter on the calendar is the Trustee's motion for
9 approval of general and credit objection procedures.
10 After consulting with parties in interest, we
11 decided to bifurcate the motion, so we're only presenting
12 the motion as it pertains to the objection procedures today.
13 We've not received any objections. We have incorporated
14 comments received from LBHI, Libby and the ad hoc group, and
15 those changes are reflected in the revised proposed order
16 that we submitted on Monday.
17 You'll see in the revised proposal we've removed
18 the provisions related to the settlement or the settlement
19 procedures. And the motion as pertaining to the settlement
20 procedures will be presented at the December 12th hearing.
21 So unless Your Honor has any questions about the objection
22 procedures, we respectfully request that Your Honor grant
23 the motion as it pertains to the objection procedures.
24 THE COURT: It's unopposed and is procedural. It
25 reflects the comments of principal parties in interest and

1 it's approved.
2 MS. GRAGG: Thank you.
3 MS. MARCUS: Your Honor, I think that brings us to
4 the claims hearing portion of our agenda.
5 MR. MARGOLIN: Your Honor, may counsel for Hughes
6 Hubbard, the SIPA Trustee be excused?
7 THE COURT: Yes.
8 MR. MARGOLIN: Thank you.
9 MS. MARCUS: I think that brings us to the claims
10 portion of the agenda. Just a note for the Court. There
11 were quite a few matters that have been scheduled to the
12 October 31 hearing. We did submit, I think it's two
13 separate certificates of no objection that dealt with most
14 of those because many of them were uncontested.
15 The first matter for the Court's consideration
16 today is an uncontested matter that will be handled by my
17 colleague, Kyle Ortiz. It's number seven on the agenda.
18 MR. ORTIZ: Good morning, Your Honor, Kyle Ortiz of
19 Weil on behalf of Lehman Brothers Holdings, Incorporated as
20 plan administrator.
21 As Jackie said, the next item on the agenda is the
22 357th omnibus objection which is an uncontested matter. The
23 357th omnibus objection seeks to reclassify certain claims
24 that asserted either priority or secured status as general
25 unsecured because the claims do not meet the criteria

1 required to be entitled to priority or secured status.

2 The 357th omnibus objection included four claims.

3 Three of the four claims asserted priority claims under

4 Section 507 of the Bankruptcy Code, but did not provide any

5 basis upon which they are entitled to such claims, and LBHI

6 did not receive a response from those three claimants.

7 The fourth claim subject to the 357th omnibus

8 objection was asserted by Magnetar Structured Credit Fund

9 and asserted a secured claim based on an alleged right of

10 set off. Although Section 506(a)(1) of the Bankruptcy Code

11 does provide that a claim subject to set off under Section

12 553 is a secured claim, Magnetar has not asserted any

13 obligations that it's seeking to set off, and thus has no

14 valid basis for its claim to be classified as secured.

15 Although Magnetar did not file a formal response,

16 they did however reach out to LBHI, and requested that we

17 add certain language to the order explicitly reserving

18 certain of their rights, clarifying that the order has no

19 res judicata estoppel or other effect on any future rights

20 they may have to assert a valid right of set off.

21 We did agree to this additional language and it's

22 consistent with language that we've included in other orders

23 that we sought to reclassify secured claims that were based

24 on set off as unsecured claims. I do have clean and marked

25 copies of the revised order with me today, if Your Honor

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1 would like to review those at this time.
2 THE COURT: If you have a blackline version, why
3 don't you hand it up.
4 MR. ORTIZ: Absolutely. May I approach the bench?
5 THE COURT: Yes. Thank you.
6 MR. ORTIZ: The added decreetal paragraph is on the
7 second page. If Your Honor has no questions at this time, I
8 would request that this order be, that is uncontested, and
9 we did add the language requested by Magnetar be entered at
10 this time.
11 THE COURT: The objection is approved on an
12 uncontested basis, consistent with the language of the order
13 as amended.
14 MR. ORTIZ: Thank you, Your Honor. I will now turn
15 the podium over to my colleague Jackie Marcus.
16 MS. MARCUS: Thank you, Your Honor. The next
17 matter on the agenda number 8, is the objection filed by
18 Lehman to a claim filed by Laurel Cove Development.
19 Your Honor, we've been before you on this matter
20 several times in the past. I suspect that you may remember
21 the facts, but I'm just going to go into them very briefly.
22 Laurel Cove has filed a claim in the amount of $150
23 million against LBHI. The claim allegedly arises out of
24 LBHI's failure to fund the remaining balance of $34 million
25 under a construction loan provided by LBHI to Laurel Cove.

1 LBHI entered into the construction loan agreement
2 in May of 2007, and funded approximately $86 million under
3 that loan agreement. On September 14th, 2008, just one day
4 before the commencement of the Chapter 11 case, Laurel Cove
5 requested a further draw in the amount of $5 million.
6 The draw request was defective, and was not funded
7 prior to the commencement of LBHI's Chapter 11 case. Over
8 the next two weeks, representatives of TriMont Realty
9 Advisors, the loan servicer, and Laurel Cove engaged in
10 exchange of e-mails regarding the draw request. Copies of
11 that e-mail correspondence are attached to our reply.
12 In the meantime, on September 17th, an LBHI
13 affiliate, Lehman Re notified LBHI that it was in default
14 under a series of repurchase agreements, and therefore,
15 Lehman Re was taking possession of certain repurchased loans
16 including the Laurel Cove loan.
17 In the objection, Lehman has asserted numerous
18 bases for its contention that it has no liability for the
19 Laurel Cove claim. First and most importantly we contend
20 that after the default date, which was September 17th,
21 Lehman Re rather than LBHI bore responsibility for funding
22 the construction loan. And second, in the unlikely event
23 that the Court determines that LBHI is responsible for the
24 funding obligations, we take issue with Laurel Cove's
25 assessment of damages and the magnitude of the damages.

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1 In response to LBHI's objection, Laurel Cove
2 essentially makes three arguments. First, that the
3 September 14th draw request was not defective. Second, that
4 the settlement agreement represented the settlement
5 agreement between LBHI and Lehman Re represented an
6 impermissible assumption and assignment of the loan
7 agreement without notice. And third, that LBHI may have
8 assigned its rights under the loan, but it did not assign
9 its obligations under the loan.
10 As to whether or not the draw requests was
11 defective, in its reply as I mentioned, LBHI attached the e-
12 mail correspondence which indicates that Laurel Cove had
13 failed to properly substantiate its draw request, and that
14 Laurel Cove was, in fact, made aware of that failure. Thus
15 the statement in the Najohn (ph) affidavit filed by Laurel
16 Cove to the contrary is belied by the evidence.
17 Moreover, we have also filed the declaration of
18 Nicholas Lane of Trimont in support of the objection that
19 indicates that virtually every draw request that Laurel Cove
20 had submitted was initially deficient, and it was in all
21 cases, a back and forth between Lehman, Lehman's
22 representative, Trimont and Laurel Cove regarding the draw
23 request. Mr. Lane couldn't be here in person today, but he
24 is on the telephone from Atlanta.
25 The documents between the parties in the prior

1 proceedings before the Court reflect that Laurel Cove's
2 second and third arguments are simply wrong. Pursuant to
3 the settlement agreement that I eluded to between LBHI and
4 Lehman Re, the parties agreed as follows, and I quote,
5 "One, Lehman Re is and has been the sole owner of
6 the Laurel Cove loan since the default date. Two, Lehman Re
7 shall have all of the Lehman U.S. entities right, title and
8 interest as lender under the Laurel Cove loan as of the
9 default date. And three, Lehman Re shall have assumed all
10 of the Lehman U.S. entities' obligations as lender arising
11 from the documents evidencing the mortgage loans as of the
12 default date and thereafter."
13 That's paragraph 1 of the settlement agreement.
14 The settlement agreement was approved by this Court in
15 August 2009. The language in that order provides that the
16 Lehman Re MRA loans were not and never were property of
17 LBHI's estate, or LCPI's estate. Therefore, there was no
18 need for LBHI or LCPI to assume and assign the construction
19 loan under Section 365.
20 Indeed paragraph 13 of the settlement agreement
21 itself expressly provides that "nothing in this settlement
22 agreement is or shall be construed to be an assumption or an
23 assumption -- an assignment of the MRA by LBHI or LCPI
24 pursuant to the Bankruptcy Code, including under Section
25 365."

1 Moreover, when Laurel Cove moved for an emergency
2 hearing by order to show cause in January of 2010, to
3 prevent a foreclosure in Tennessee, the Court determined and
4 Laurel Cove conceded that Laurel Cove had actual notice of
5 the settlement agreement prior to the hearing for Court
6 approval of the settlement agreement.
7 Counsel for Laurel Cove also acknowledged that at
8 least as of October and November 2009, it was quote,
9 absolutely aware that Lehman Re was the appropriate party
10 with which to discuss any protective payments and settlement
11 issues, and I refer the Court to the hearing transcript at
12 page 27.
13 The Court should fine, as it did at the January
14 2010 hearing, that Laurel Cove's attempt to collaterally
15 attack the validity and enforceability of the settlement
16 order, quote, is based upon allegations that are simply not
17 credible, close quote. And that was the transcript at page
18 41.
19 Finally, the terms of the settlement agreement and
20 the Court's findings with respect thereto also address
21 Laurel Cove's argument that LBHI assigned its rights but not
22 its obligations under the construction loan. The loan
23 agreement did not include any limitation on LBHI's rights to
24 assign the loan, or include a proviso that any assignment
25 would be ineffective to transfer liabilities. This was a

1 sophisticated borrower, and it could've negotiated for that
2 language, but it did not.
3 LBHI was in the business of making loans and
4 transferring them, so it's not even clear whether LBHI would
5 have made the loan if it so admitted. The Court rejected
6 Laurel Cove's privity argument at the January 2010 hearing,
7 calling the argument quote, a quaint notion in a world in
8 which loans are routinely transferred and securitized, close
9 quote. That's page 24 of the transcript.
10 Furthermore, there's no question, Your Honor, that
11 Laurel Cove treated Lehman Re as the lender after the
12 default date. It received over $800,000 in advances from
13 Lehman Re. Laurel Cove entered into a pre-negotiation
14 letter with Lehman Re in April 2009, and Laurel Cove engaged
15 in extensive negotiations with Lehman Re throughout the
16 autumn of 2009.
17 For all of the foregoing reasons, Your Honor, LBHI
18 requests that the Court enter an order expunging the claim
19 in its entirety. In the alternative, if the Court does not
20 grant the relief, then LBHI requests the right to contest
21 the amount of the damages at a future hearing.
22 THE COURT: Let me just ask you a couple of
23 procedural questions.
24 MS. MARCUS: Sure.
25 THE COURT: And I'm aware of both the hearing in

1 August of 2009 and the hearing in January of 2010, and in
2 connection with my preparation for today's hearing, I
3 reviewed the transcript of the hearing from January of 2010.
4 And one of the questions I have relates to the
5 preclusive effect, if any, of the determinations made during
6 the January 2010 hearing, particularly since they were made
7 in the context of an emergency hearing seeking injunctive
8 relief, in reference to a foreclosure sale in Tennessee.
9 And my findings with respect to this Court's intervention in
10 a state law action in Tennessee speak for themselves, but
11 it's not clear to me that they have preclusive effect. I'd
12 like you to comment on that.
13 Secondly, I know based upon the record that the
14 loan in question was transferred from Lehman to Lehman Re in
15 accordance with the terms of the settlement agreement that
16 was approved in August 2009. What is not clear to me is the
17 impact, if any, of that transfer upon the rights of Laurel
18 Cove to pursue claims for damages associated with the
19 affiliate to fund the loan. And so I'm interested in your
20 views as to that.
21 And finally, and this is a question that really
22 goes to counsel for Laurel Cove, whatever claims Laurel Cove
23 may have, presumably should be made against one responsible
24 party, that's not to say those claims have merit. What is
25 the status of claims made as to Lehman Re?

1 MS. MARCUS: Okay. As to preclusive effect, Your
2 Honor, I recognize from reading the transcript that at least
3 some of your findings on that day had to do with whether it
4 was appropriate to run into court at the eleventh hour and
5 try to prevent the foreclosure.
6 But in connection with that, for example, a finding
7 that Laurel Cove had notice of the settlement agreement and
8 the hearing and knew what was -- the settlement agreement
9 between Lehman Re and LBHI, had notice of it, could have
10 appeared, did not, that kind of finding I think should have
11 preclusive effect on Laurel Cove. They were here, they were
12 arguing, and that should have preclusive effect on them.
13 Similarly, I think other factual determinations
14 that the Court made as to what was going on, the fact -- the
15 privity argument, the fact that Lehman really wasn't in the
16 business of making loans and holding them, but the
17 environment, the business environment then was you make a
18 loan and you transfer it. Those, I believe, should have
19 preclusive effect.
20 As to the second question, which is the transfer of
21 the loan from Lehman to Lehman Re, I agree with Your Honor
22 that to the extent there would have been a damage claim for
23 something that happened before that moment, and the moment
24 really isn't in November of 2009 when the settlement
25 agreement is signed, because on September 17th, I believe it

1 was, it may have been a few days later, Lehman Re said, I
2 own this loan, and I am now taking over for this loan.
3 But damages that may have occurred before that
4 transition happened, I think might be the basis for a valid
5 claim. But for Lehman Re to have engaged in negotiations,
6 accepted funding -- excuse me, for Laurel Cove to have
7 engaged in negotiations and accepted funding from Lehman Re
8 for quite some time, $800,000, significant even in this
9 case, and then to take the position that the whole sequence
10 of events that occurred thereafter was LBHI's fault we think
11 is inappropriate.
12 And that there are a number of cases that say that
13 a party can quote, consent to release the original obligor
14 by its actions as well as by affirmatively consenting. And
15 unfortunately, the cases in this area are all about one
16 page, and they don't get into very much legal reasoning.
17 But they all quote -- I think the leading case is Manley v
18 Fisher, where they say, the parties, the original party
19 either has to consent in writing, or through its actions.
20 And here Lehman -- excuse me, too many L's. Laurel Cove's
21 conduct here directly manifests that Laurel Cove was looking
22 to Lehman Re.
23 Third, and I know this one was a question more for
24 Laurel Cove's counsel, my understanding is that Laurel Cove
25 has filed a claim against Lehman Re, and I think Lehman Re's

1 counsel is here as well.

2 THE COURT: Okay. Thank you.

3 MS. GOLDSTEIN: Good morning, Your Honor, Cara

4 Goldstein from Stagg, Terenzi, Confusione & Wabnik on behalf

5 of Laurel Cove Development LLC.

6 Just to I guess start in the order that Lehman's

7 counsel started, going back to the draw request. The draw

8 request in September and October of 2008 were in

9 substantially the same form as all of the prior draw

10 requests, which were approved. Each time there was back and

11 forth between the parties for additional back up, additional

12 detail, but the form of the request was never noted as

13 defective. It was the same form that was approved.

14 As a matter of fact, in the ultimate notice of

15 default that was sent to Laurel Cove, the default was never

16 based on defective draw requests. It was based on various

17 expenses not being paid which was a result of the funding

18 never being provided.

19 Then as far as the privity question, it is Laurel

20 Cove's position that it entered into the construction loan

21 agreement with LBHI, that whether the agreement was

22 ultimately assigned or sold, or became the property of

23 Lehman Re that Laurel Cove is in privity with LBHI. It did

24 not consent to the assignment of LBHI's obligations under

25 the construction loan.

1 And you expressly or impliedly Lehman -- Laurel
2 Cove, at some point was dealing with LBHI and Lehman Re
3 because between the two parties, there was a time when they
4 were not sure who was actually responsible, and so Laurel
5 Cove was trying to deal with both of them. They were trying
6 to get funding to get the property continuing to engaged.
7 It had gone up to phase one through August prior to the
8 bankruptcy. Clearly the funding requests in September were
9 at the time of bankruptcy. So we understand why they
10 weren't funded, but that's what's led to the ultimate
11 default.
12 We have filed a claim against Lehman Re, they
13 actually just sent us documentation requesting additional
14 information on the claim. So we feel that LBHI is the party
15 that we contracted with, that has an obligation to Laurel
16 Cove. You know, that's where we are at this matter. We
17 haven't gone any further with Lehman Re.
18 THE COURT: I understand what you just said, but
19 you're also telling me that you are playing both sides of
20 the field on this one. That you're seeking to prevent
21 expungement of a claim against Lehman, at the same time that
22 you're pursuing claims against Lehman Re. Are you claiming
23 that Lehman Re had a funding obligation, too?
24 MS. GOLDSTEIN: Well, I think we're trying to
25 protect Laurel Cove's rights in the event that it's

1 determined that LBHI is not going to have liability. It's
2 clear that somebody has to have liability for the lack of
3 funding. And whether it's ultimately LBHI or Lehman Re,
4 we're trying to, you know, file the timely claim in both of
5 those actions to protect Laurel Cove's rights.
6 THE COURT: Okay.
7 MS. MARCUS: Just to clarify, Your Honor, with
8 request to the draw requests. Our position with respect to
9 the draw requests wasn't that it was fatally defective, and
10 therefore Laurel Cove was in default. Our position is the
11 timing, which as you know more than anyone, is so critical
12 in this case, their request came in on September 14th. It
13 was an LBHI obligation on that date, but it wasn't a valid
14 and appropriate request.
15 By the time the kinks were ironed out, the loan had
16 already transitioned to Lehman Re, and therefore, it was a
17 Lehman Re obligation rather than a Lehman obligation.
18 THE COURT: Okay. I'm not going to rule on this
19 today. And I believe that the record needs to be
20 supplemented with information concerning what happened on
21 September 14 in connection with the draw request. To the
22 extent that the draw request was in a form comparable to
23 similar requests made and honored prior to that date, that
24 may be a fact of significance to the analysis. I'm not
25 making any preliminary judgments on this at this point,

1 except to say that I think the record is insufficient to
2 expunge the claim. It may be sufficient in the future to
3 expunge the claim.
4 And would suggest that the parties, if they haven't
5 already done so, consider the most expedient means to
6 develop and process the facts relating to the draw requests
7 and other issues surrounding any liability that LBHI may
8 have with regard to the unfunded loan.
9 These discussions conceivably could lead to some
10 agreement to compromise the dispute, and that would be
11 perfectly acceptable to the Court.
12 MS. MARCUS: Thank you, Your Honor. For calendar
13 purposes, should we just carry this?
14 THE COURT: Carry it to some workable date in the
15 future.
16 MS. MARCUS: Okay. We'll do that, Your Honor.
17 The next matter will be handled by my colleague,
18 Candace Arthur.
19 MS. ARTHUR: Good morning, Your Honor. For the
20 record, Candace Arthur of Weil, Gotshal & Manges, on behalf
21 of Lehman Brothers Holding, Inc. as plan administrator.
22 We're moving forward today with respect to the
23 single remaining claim on the 320th omnibus objection. The
24 plan administrator filed the 320th omni seeking to expunge
25 and disallow those claims filed against LB Rose Ranch, for

1 which Rose Ranch does not have any liability.

2 Specifically, we are addressing proof of claim

3 number 24572 which is filed by Mr. Richard Cogden (ph) and

4 Ms. Rosemary Knox (ph). The claimants are seeking

5 reimbursement of their membership agreement that they

6 entered into with LB Rose Ranch on April 29, 2003.

7 The terms of the golf club membership agreement

8 provided that the claimants had to submit a deposit in the

9 amount of $35,000, and it also was a proviso in the

10 agreement that stated, in the event that the membership

11 agreement was terminated, they would receive a refund on

12 their deposit.

13 In connection with the confirmed Chapter 11 plan of

14 LB Rose Ranch, affiliated debtors, Rose Ranch moved to

15 assume, among others, the membership agreement of Mr. Cogden

16 and Ms. Knox. The claimants did not object to the

17 assumption. It was reflected in the plan supplement, and

18 they did not object to the cure amount in the cure notice as

19 is reflected.

20 Accordingly, the membership agreement was assumed

21 under Section D-65 of the Bankruptcy Code and any claims

22 that the claimants would have otherwise had based upon a

23 prepetition breach of Rose Ranch with respect to the

24 agreement was effectively waived.

25 To date, Your Honor, Mr. Cogden and Ms. Knox still

1 enjoy the privileges and rights under the agreement. They
2 have not terminated the agreement. And upon receipt of
3 their August 7th response to the omnibus objection, I did
4 personally reach out to them, clarify the plan
5 administrator's position, provide them with excerpts from
6 the plan supplement, and also confirmed the status of their
7 membership, the claimants did express that they would like
8 to maintain the golf club membership as it is.
9 It is unclear how the claimants have a right or
10 entitled to receipt of the membership deposit as well as can
11 remain active members. Accordingly, and unless Your Honor
12 has any questions, the plan administrator seeks to have the
13 320th omnibus objection granted with respect to this claim,
14 and have the claim expunged, and disallowed in its entirety.
15 THE COURT: Are the claimants participating in this
16 hearing either in person or on the telephone?
17 (No response)
18 THE COURT: I hear no response. They're enjoying
19 the benefits of their membership, and they have no claims as
20 a result, and I wish them a good golf game in the future,
21 and they have no claims in this case.
22 MS. ARTHUR: Thank you, Your Honor. Also, in
23 addition to the 320th omnibus objection, as we have noted,
24 we did receive a response by Ms. Kay Young, and she's proof
25 of claim number 8241. I just wanted to provide a status

1 update, that in connection with our discussions as well, and
2 in correspondence, providing her the same excerpts,
3 clarifying the effect of Rose Ranch's assumption. She has
4 agreed to not object to the expunging of her claim, and to
5 the extent that you'd like to see the e-mail traffic between
6 myself and the claimant, we have that today as well.
7 THE COURT: Okay. Fine. Thank you.
8 MS. ARTHUR: Thank you, Your Honor.
9 THE COURT: And you'll be submitting orders
10 reflecting what --
11 MS. ARTHUR: Yes, Your Honor, we will.
12 THE COURT: -- we've just discussed?
13 MS. ARTHUR: The next matter on the agenda will be
14 handled by my colleague, Kyle Ortiz.
15 THE COURT: Okay. Thank you.
16 MR. ORTIZ: Good afternoon again, Your Honor. Kyle
17 Ortiz from Weil on behalf of Lehman Brothers Holding,
18 Incorporated as plan administrator.
19 The next and final item on the contested agenda is
20 the 329th omnibus objection. This is a carryover from two
21 prior hearings. The 329th omnibus objection relates to the
22 claims that were filed by employees that asserted priority
23 status under Section 507(a)(4) of the Bankruptcy Code, that
24 exceeded the $10,950 cap in place for such claims at the
25 time of LBHI's Chapter 11 filing.

1 LBHI is not contesting the merits of any of these
2 claims on the 329th omnibus objection, or addressing the
3 question of whether any of the claims on the 329th omnibus
4 objection are, in fact, entitled to priority under Section
5 507(a)(4) up to the cap. Rather, the 329th omnibus
6 objection simply seeks to reclassify any amounts in excess
7 of the $10,950 statutory cap provided in Section 507 of the
8 Bankruptcy Code, in order to allow LBHI to more closely
9 align its reserves with what maximum distributions may
10 actually be.
11 And LBHI does reserve all rights to object to the
12 claims on the 329th omnibus objection, based both on their
13 merits, and with any portion of such claims is in fact
14 entitled to priority status in the future.
15 The vast majority of the claims in the 329th
16 omnibus objection were reclassified on an uncontested basis
17 at the August 23rd, 2012 hearing. The 329th omnibus
18 objection was then contested by two claimants at the
19 September 27th, 2012 omnibus claims hearing, and the Court
20 did enter an order granting the relief requested by LBHI at
21 that time with regard to those two claims.
22 Today, we have one remaining response, contesting
23 the 329th from Claimant Theresa Carpenter. Ms. Carpenter's
24 claim is based on amounts allegedly owed under a severance
25 agreement that she entered into with LBHI on September 9th,

1 2008.

2 Ms. Carpenter checked the box under proof of claim

3 form indicating that her entire claim was entitled to

4 priority status under Section 507(a)(4). And Ms.

5 Carpenter's response to the 329th omnibus objection, she

6 states that she was informed by Lehman Brothers human

7 resources that her severance package would be fully paid,

8 and thus her full amount should be paid and should not be

9 categorized as unsecured. And she did provide her September

10 9, 2008 severance letter as evidence to support this

11 assertion.

12 But LBHI does not dispute at this time that a

13 severance agreement was entered to. And as previously

14 noted, LBHI by the 329th omnibus objection does not take any

15 position to whether any portion of Ms. Carpenter's claim is

16 entitled to priority. Rather, LBHI is simply asserting that

17 to the extent any portion of Ms. Carpenter's claim is

18 entitled to priority, that is nonetheless still subject to

19 the cap applicable with such claims, and thus, all portions

20 of Ms. Carpenter's claim asserted as priority in excess of

21 the $10,950 cap imposed by Section 507(a)(4) of the

22 Bankruptcy Code in place at the time of LBHI's filing should

23 be reclassified as unsecured.

24 Your Honor, I do not believe that Ms. Carpenter's

25 in the courtroom today, but to the extent --

1 THE COURT: She is. She just raised her hand.

2 MR. ORTIZ: Sounds great.

3 THE COURT: And she's coming forward. See

4 courtroom events are almost always surprising.

5 MS. CARPENTER: Good morning.

6 THE COURT: Good morning.

7 MS. CARPENTER: So --

8 THE COURT: Actually good afternoon now.

9 MS. CARPENTER: Oh, is it? Okay.

10 So, yes, I'm here to object to reclassifying my

11 claim as unsecured. The amount over --

12 THE COURT: 10,950.

13 MS. CARPENTER: 10,950, yes.

14 THE COURT: Now, has Lehman's counsel fairly

15 characterized in his presentation the basis of your claim,

16 which is you had a severance agreement that was entered into

17 on September 9, and that human resources represented that

18 everything in that document would be paid in full, and

19 that's the basis for your claim?

20 MS. CARPENTER: Yes. I think that what the

21 debtor's position is to state it in my words, is that

22 they're not taking any position as to the merits of your

23 claim as an unsecured claim at this point, but rather

24 seeking to reclassify that portion which exceeds a statutory

25 limit, which is imposed under Section 507(a)(4) of the

1 Bankruptcy Code, and which provides a limit upon
2 compensation related claims that are treated as priority
3 claims, for purposes of a distribution.
4 Do you have any legal argument, other than in
5 effect, having relied upon what you were told at the time
6 you were terminated?
7 MS. CARPENTER: I mean, my situation was a little
8 unusual, in the sense I had just returned from maternity
9 leave, and my job was given to someone else, and then the
10 severance package was null and void, and you know, it was a
11 major hardship on my family for the entire thing, four years
12 later, and I'm still standing here trying to --
13 THE COURT: I'm sure that's true, and I'm aware of
14 the hardship caused by the Lehman bankruptcy everyday that
15 we have a hearing in the Lehman case, particularly when
16 employee related claims are presented.
17 As a matter of bankruptcy law, I conclude that the
18 arguments made by Lehman are, in fact, correct as a matter
19 of law because employee claims are limited to, from a
20 priority perspective, are limited to the statutory cap.
21 And there's a reason for that. It provides certain benefits
22 to employees that other creditors don't enjoy, in the sense
23 that there's a priority distribution, but it's limited
24 because generally in bankruptcy there's a balancing between
25 the interests of creditors. So that those creditors that

1 enjoy a priority, for example, taxing authority, as well as
2 employees, have certain rights that trade creditors or other
3 creditors don't have. But they're not limitless.
4 So I'm granting the objection without prejudice to
5 the treatment of other claims that you may have in excess of
6 the $10,950 cap under the severance agreement, and I wish
7 you well.
8 MS. CARPENTER: Thank you very much.
9 THE COURT: Okay. So the objection's granted. And
10 does that -- that concludes the agenda?
11 MR. ORTIZ: Yes, Your Honor, that does conclude the
12 agenda for LBHI's afternoon now.
13 THE COURT: Fine. Please submit orders with
14 reference to all the matters on this morning's agenda that
15 require orders. And for purposes of anybody who may be
16 returning at 2 o'clock, there's a hearing at 2 o'clock in
17 the Turnberry matter. We're adjourned until 2.
18 (Recessed at 12:10 p.m.; reconvened at 2:18 p.m.)
19 THE COURT: Be seated, please.
20 We're off to a late start.
21 Mr. Meister, it's your motion.
22 MR. MEISTER: Thank you, Judge Peck.
23 Your Honor, we're here on a very targeted and
24 limited reargument or reconsideration motion in adversary
25 proceeding, 09-0162, which is the single adversary

1 proceeding within the call to town square matter.
2 And we're just here on the third count, which was
3 a count for a promissory estoppel that was dismissed by the
4 Court's previous order.
5 The order is clear, the oral argument, I think, is
6 clear or the Court's statements and oral arguments are clear
7 that the Court's decision dismissing the third count, the
8 promissory estoppel count, was predicated on the integration
9 clause in the $95 million dollar loan in that matter.
10 That integration clause states -- and I'd just
11 like to focus on two fragments on it -- quote, "The
12 agreement/disagreement and other loan documents embody the
13 entire agreement and understanding between the parties and
14 have with respect to the Loan, and that's capital L, and
15 supersede and cancel all prior loan applications,
16 expressions of interest, commitments, agreements, and
17 understandings, whether oral or written, relating the
18 subject matter here hereof, except to specifically agreed to
19 the contrary."
20 The two fragments I would like to focus on briefly
21 this afternoon, Your Honor, are with respect to the loan and
22 the subject matter, hereof, which I think just simply
23 relates back to the first fragment with respect to the loan.
24 The loan is defined, and there's no issue that it is, the
25 $95 million dollar loan.

1 Our claim is that a promise was made for a $625
2 million dollar take out. The Court hasn't gotten to the
3 evidence of that promise because the case was -- the claim
4 was dismissed, but we believe, respectfully, it was
5 incorrect to say that the whole integration clause and the
6 $95 million dollar agreement bars a promissory estoppel
7 claim with respect to the $625 million dollar take out
8 promise I'll call it because that's a separate subject
9 matter from the loan and there's no -- the $95 million
10 dollar loan -- and there's no statement whatever in the $95
11 million dollar loan agreement that references the $625
12 million dollar or any larger take out.
13 In addition, Your Honor, the borrower -- the
14 borrowers, I should say, under the $95 million dollar loan
15 were two individuals, Jack -- Jacqueline and Jeffrey Soffer,
16 and the two promisee or the beneficiary of the alleged $625
17 million dollar take out promise was the owner, which is
18 Turnberry Centra Sub, LLC, I believe, which is a Plaintiff
19 in the adversary proceeding.
20 So, therefore, Your Honor, we think that the --
21 that applying the interest integration clause in the $95
22 million dollar loan agreement effectively against Turnberry
23 Centra Sub is applying -- not only does it, we believe, not
24 apply to bar a promissory estoppel claim about this separate
25 subject matter, but, additionally, it's being applied

1 against an entity, which is not a party to the $95 million
2 dollar loan.
3 The way that I like to think about this is --
4 perhaps this is a bit of a simplification -- but if I was
5 going to a bank and I was buying a house for a million
6 dollars and I asked for a loan and the bank said we'll give
7 you a 60 percent or a $600,000 loan, meaning I had to come
8 up with $400,000, and I asked the bank for some more money
9 and the bank said to me, Well, we'll give you a personal
10 credit line for 100,000, so you're down payment is reduced
11 to $300,000.
12 If the bank then made me that 600 -- that $600,000
13 loan and reneged on the $100,000 credit line, I don't think
14 a Court would use an integration clause in a $600,000
15 mortgage instrument to bar my promissory estoppel claim
16 because the $100,000 credit line is separate subject matter
17 to at the $600,000 mortgage.
18 Now, the two are, obviously, somewhat related or
19 connected and we don't back away from our previous
20 assertions that they're connected. In other words, we said
21 that the $95 million dollar loan operates, in effect, as an
22 advance, or an initial advance or an interim advance or a
23 bridge, whatever words you would like to use, with respect
24 to the $625 million dollar loan. But that connection
25 doesn't make them one in the same; it makes them related,

1 but not -- it doesn't merge the two.

2 THE COURT: But Mr. Meister, your theory in the

3 case up until today has been that the connections between

4 the two transactions are more than just incidentally

5 related. They were, in effect, one in the same. That the

6 inducement to enter into the $95 million dollar loan was the

7 promise that was hanging out there somewhere in the air that

8 there was going to be this additional financing. That was

9 always the theory of your case and you're changing it now.

10 MR. MEISTER: Well, Your Honor, I don't think I'm

11 changing it.

12 THE COURT: I think you are and I'm challenging

13 you on that.

14 MR. MEISTER: Okay. So, let me see if I can meet

15 that challenge, Your Honor.

16 It is true that we, in fact, said there was a

17 three-property integration -- to use the term loosely --

18 that there was this (indiscernible - 6:44) refinancing, that

19 Lehman wanted that refinancing to anchor a $3 billion

20 securitization, that we agreed to give them that.

21 In exchange, Lehman agreed to finance

22 Fontainebleau and to issue the $625 million dollar take out

23 commitment, and as part and parcel of that $625 million

24 dollar take out commitment, this $95 million dollar loan was

25 made as an initial advance where it was contemplated that

1 that would be repaid out of and when -- from the proceeds of
2 the $625 million dollar financing.
3 I'm not backing away from that. What I am saying
4 is that yes, they were all connected in that sense. From a
5 business practical sense, they were discussed together, but
6 that doesn't mean, Your Honor, that the integration clause
7 in the $95 million dollar loan bars a promissory estoppel
8 clause.
9 I'm not here -- this is a very targeted motion --
10 I'm not here saying I was fraud -- today at this moment on
11 this motion to reargue saying that I was fraudulently
12 induced into borrowing the 95 million.
13 What I'm saying is that a promise was made to fund
14 a $625 million dollar loan, that in reliance in that
15 promise, I dropped three other specific commitments or
16 expressions of interest from major banks that were -- that
17 otherwise would have made this agreement, who did not go
18 bankrupt.
19 And that as a result of my not going forward with
20 those and three others, which I did -- or which my clients
21 did because of the $625 million dollar promise -- I lost my
22 equity in the project and that's a recoverable damage under
23 a promissory estoppel theory.
24 So, I'm not saying to Your Honor that we -- my
25 client doesn't owe back the 95 million because of this other

1 promise that the integration clause would bar. What I am
2 saying is that it was not correct, Your Honor, to say that
3 integration clause in the $95 million dollar loan bars my
4 promissory estoppel claim. More specifically, because this
5 claim that I'm asking you to reinstate is not even a
6 contract claim -- in essence, it's a quasi-contract claim.
7 It's a promissory estoppel claim. Really, the only
8 relevance of the integration clause is that it arguably
9 bears under justifiable reliance element of promissory
10 estoppel. Because promissory estoppel includes, as one of
11 its elements, that the promisor, here, Lehman, would
12 reasonably expect to induce action or inaction on the part
13 of the promisee, here, Turnberry Centra Sub, or the Soffers,
14 if you'd prefer.
15 And -- so, let me say it to you this way: If the
16 interest rate in the $95 million dollar loan were ten
17 percent, hypothetically, and I came to court and said, Hey,
18 they promised us -- Lehman said they would reduce it to five
19 percent. Obviously, the integration clause would bar such a
20 promissory estoppel claim because you would say,
21 Mr. Meister, no one could reasonably rely on a promise of a
22 five percent interest rate when they just signed a loan
23 agreement for ten percent that contains an integration
24 clause.
25 But, the same cannot be said about a $625 million

1 dollar take out commitment when there's a $95 million dollar
2 loan. In other words, it is not correct, in my opinion,
3 Your Honor, to say that it was unreasonable, as a matter of
4 law, within the context of the 12(b)(6) motion on the
5 pleadings for the Soffers or for Turnberry Centra Sub to
6 have relied on the $625 million dollar take out commitment
7 promise simply because of the integration clause in the $95
8 million dollar loan.
9 THE COURT: Let me ask you a hypothetical
10 question.
11 Assume, for the sake of discussion today, there
12 were no $95 million dollar loan and that it was simply a
13 discussion that the Soffers had with Lehman about take out
14 financing and Lehman said we're going to give you that
15 financing, don't worry.
16 Are you saying that that would have been an
17 enforceable promise, that you could have enforced that
18 financial accommodation, that it would have been reasonable
19 for your clients to have not pursued other lenders to obtain
20 such financing?
21 MR. MEISTER: Your Honor, I think the answer to
22 that question is a bifurcated one as follows.
23 If I were suing for a breach of contract -- if I
24 said that that promise resulted in the formation of a
25 contract, we'd likely get into term sheets and caveats and

1 term sheets and all the things that we have seen in our
2 respective careers.
3 And I would likely have difficulty in that
4 contract claim; however, that is the reason that there is a
5 quasi-contract cause of action for promissory estoppel,
6 which really says -- or the policy behind it, in my view
7 is -- where the promise is such that it does not give rise
8 to contract formation, but it would be reasonable for the
9 promisor to believe that the promisee would be induced into
10 action or inaction. And that inaction or action occurred,
11 and, in fact, it would be unjust not to allow damages. I
12 wouldn't say enforce in a specific sense, then a claim is
13 made out for promissory estoppel.
14 So, there was no pre-negotiation agreement that
15 I'm aware of here that disclaimed, which often is in these
16 situations. So, my answer to you would be that if there
17 were no $95 million dollar loan and all the other facts that
18 are present here were present, I certainly think I would
19 have a claim for promissory estoppel that survives a
20 12(b)(6) motion.
21 THE COURT: Here's the problem I'm having.
22 I was assuming away the most critical fact in this
23 case which, there is, in fact, a $95 million dollar loan,
24 and the $95 million dollar loan includes an integration
25 clause, which you've read. And my understanding based upon

1 the original and amended complaint and the argument that
2 took place leading up to the granting of the 12(b)(6) motion
3 in Lehman's favor, is that your clients took the position
4 and really aren't backing away from this today. That at the
5 time of entering into the $95 million dollar loan, there was
6 an expectation of a related incremental financing of $625
7 million dollars, and as a result, I don't understand how
8 you're able to back away from the promissory estoppel
9 problem you have in the integration clause.
10 This is, in effect, one thing, and while you
11 rather (indiscernible - 14:59) say the capitalized term loan
12 is equivalent to the subject matter hereof. In fact, the
13 subject matter hereof may be read more broadly and I'd like
14 you to respond to that because your argument is predicated
15 upon the equivalence of those two words and phrases.
16 When, in fact, one could argue the subject matter
17 hereof is everything we talked about as we were getting
18 ready to enter into this loan, including that $625 million
19 dollar incremental loan and your litigation position up to
20 including the time of ruling against you was that these were
21 really closely tied together.
22 MR. MEISTER: Your Honor, okay. Fair enough.
23 Let me see if I can address that cogently.
24 In the integration clause, that first fragment is
25 with respect to the Loan, capital L, which is the 95

1 million.

2 The second fragment says relating to the subject

3 matter hereof. I think the "hereof," I would read that

4 under the last antecedent rule to directly reference the

5 previous fragment and the loan.

6 In addition, there's a -- you have (indiscernible

7 - 16:28) between 625 and 95. It's not another $10 million

8 dollars or another $15 million dollars. It's many fold the

9 95 million. In addition to that, there's two different

10 completely different borrowers.

11 I believe that there is a problem with using the

12 integration clause to bar the promissory estoppel claim

13 because you are essentially enforcing the $95 million dollar

14 loan agreement that is not party to the agreement and that's

15 a significant issue, I think, Your Honor, that's not dealt

16 with in the decision.

17 There are -- one of the Plaintiffs to this

18 adversary proceeding is Turnberry Centra Sub, LLC -- I hope

19 I've stated the name correctly -- that owns or owned -- it

20 doesn't own anymore -- the Town Square Shopping Center.

21 That entity was the beneficiary of the alleged promise and

22 that entity is not a party to the $95 million dollar loan

23 agreement.

24 I did think hard about my simple example and I do

25 think it has some utility. In my example there's a mortgage

1 loan commitment and a line of credit -- it happens to be
2 with the same borrowers, so, in that sense, it's not on all
3 fours.
4 But the net effect of those two arrangements in my
5 hypothetical is to create 70 percent financing, and one
6 could say it's the same thing. Meister is getting 70
7 percent financing for the home he wants to buy.
8 But the law would say that there are two separate
9 transactions that the bank is contemplating into with their
10 client. One is a mortgage loan and one is a line of credit.
11 And if the mortgage loan has an integration clause that says
12 this agreement or instrument is the entire agreement and it
13 embodies the entire understanding of this loan, then that
14 would not bar a promissory estoppel claim on the line of
15 credit.
16 There's a case, Your Honor, that we cite to in our
17 oral argument motion -- Roderick -- sorry, Broddick (ph).
18 And it's a 2009 first Department case -- complicated set of
19 facts, but sort of dumbed down a bit. A man who was in the
20 investment banking field got a call from his cousin in
21 Texas.
22 Come move to Texas, give up your job with your
23 big, fancy investment bank, help me find money for an oil
24 venture and I'll make you a partner in this venture.
25 He moves his family down. He gets $150 million

1 dollars of financing from some source. The oil venture is
2 launched and the cousin reneges on the alleged promise to
3 make him part of the -- to make him an owner of the company.
4 He signs two documents: An at-will employment
5 agreement and some sort of a fee agreement where he was paid
6 some sort of fee for finding the money. Both those
7 agreements contain venture clauses that they are entire
8 agreements with respect to their respective subject matters.
9 The trial court dismisses his fraud and promissory
10 estoppel claims based upon the agreements and the venture
11 clauses very much in a similar way to Your Honor's decision
12 here. It goes up to the first Department and the decision
13 is reversed because the subject matters of those two
14 agreements are not identical, although clearly related to
15 the allege promise to become a partner.
16 So, I think that case is meaningful here and
17 instructive. I think it accurately reflects New York law
18 and I think that New York law does not, in an overly broad
19 way, read integration clauses.
20 And I think that reading an integration clause in
21 a $95 million dollars loan made to Jackie and Jeffrey Soffer
22 to stop Turnberry Centra Sub from making a promissory
23 estoppel claim on a $625 million dollar alleged take out
24 promise or commitment is a -- is not an accurate application
25 of New York law as it relates to these integration clauses.

1 You know, on a practical level, we're pretty close
2 to completing document discovery here, which will be fairly
3 substantial, I think. The parties are set to exchange
4 documents in December, early December. I supposed -- and
5 there's thousands of documents in each side. I supposed
6 there will be depositions in January or February.
7 I just think that it would be better for the Court
8 to be considering this claim in the context of a Rule 56
9 summary judgment motion instead of a 12(b)(6) motion on the
10 pleadings and applying this promissory estoppel -- applying
11 the integration clause -- pardon me -- in the $95 million
12 dollar loan agreement.
13 I'd like the Court to see the quality of the
14 evidence about this promise, the term sheets -- which both,
15 by the way, pre-dated and post-dated -- in other words, they
16 were drafts -- then it pre- and post-dated the execution of
17 the $95 million dollar loan agreement. I'd like the Court
18 to see the e-mails between the parties.
19 The Court has already seen, I hope it recalls, the
20 Ersoft (ph) affidavit, a former Lehman executive who
21 attested that -- very clearly, that there was a very
22 significant relationship between Turnberry and Lehman. That
23 Lehman wanted this (indiscernible - 23:00). That Lehman did
24 commit to a $625 million dollar take out commitment. That
25 Lehman had -- that this is the way the parties did business.

1 They did promises to one another and followed through. That
2 Lehman, in fact, breached its promise on the $625 million
3 dollars and he says that to the best of his recollection,
4 prior to Lehman's bankruptcy, it had never failed to perform
5 a loan transaction it had agreed to do with any of
6 Turnberry's entities. So, there's already -- this is a
7 Lehman manager attested to this.
8 So, you have already before you credible unrefuted
9 evidence that we are being truthful when we speak about this
10 commitment. There are documents which you will see in this
11 motion which corroborate what we're saying and I think that
12 it is incorrect, Your Honor, respectfully, to use the merger
13 clause in the $95 million dollar loan agreement with the
14 individual Soffers on a 12(b)(6) motion to bar a promissory
15 estoppel claim by a corporate entity or an LLC entity, on a
16 much larger transaction, despite, as you accurately say,
17 that the two are related.
18 Your Honor, we also ask, alternatively, for leave
19 to amend only because we were not clear that the promise for
20 the 625 million was made both before and after the $95
21 million dollar loan agreement was signed.
22 The clause -- the integration clause is clear --
23 it has the word "prior" which modifies a series of words
24 that follow it, one of which is "understanding" and
25 "agreements." And so it would have no application to -- it

1 would have no application to a promise made.
2 Just an hour before coming here, I reviewed a term
3 sheet that was disseminated by Lehman a month after this
4 loan agreement was executed. So, at a minimum, we would
5 like permission to amend to make that one allegation clear
6 as to the timing of these promises and then I don't see how
7 the integration clause is relevant, temporally speaking.
8 THE COURT: Okay. Thank you.
9 MR. MEISTER: Thank you, Your Honor.
10 MR. McCARTHY: Good afternoon, Your Honor.
11 Ed McCarthy from Weil Gotshal, on behalf of LBHI,
12 the lender, here.
13 I'll try not to repeat what was in the briefing
14 already, Your Honor. It's clear you understand the issues
15 here.
16 Needless to say, Lehman objects to the motion.
17 It's procedurally improper, as we see it. There's nothing
18 new to reconsider. There's no new facts. There's no new
19 law that they've pointed to and it's substantively
20 deficient. There's no --
21 THE COURT: Well, let me just break in on "no new
22 facts."
23 MR. McCARTHY: Sure.
24 THE COURT: Mr. Meister's alternative relief to
25 reconsideration is leave to amend the complaint presumably

1 for purposes of emphasizing the facts that were not adverted
2 to in the second amended -- or the first amended complaint.
3 This would be the second amended complaint if I were to
4 approve that request.
5 And his focus is now there are multiple term
6 sheets, some were presented before the execution of the $95
7 million dollar loan and at least one was presented
8 subsequent to execution. So, to the extent that there's an
9 integration clause issue that might otherwise bar a
10 promissory estoppel claim, I still have the claim on account
11 of this more recently crafted term sheet. So, the facts may
12 be different based on that or at least there's a different
13 emphasis on the same facts.
14 MR. McCARTHY: I would lean heavily towards the
15 second, Your Honor.
16 THE COURT: Right.
17 MR. McCARTHY: These aren't new facts; they're
18 simply not. And the notion that stressing the fact that
19 this discussion regarding long-term financing, which my
20 client has conceded throughout the course of this
21 litigation, which has gone on for years -- and we would
22 actually look at this amendment as probably the third
23 considering they already changed their theory of the second-
24 amended complaint -- of the first-amended complaint,
25 dropping the repo claims. So, was that an amendment or was

1 it not?
2 In any case, when you look at those -- what
3 they're claiming are new facts, it's truly irrelevant.
4 This -- sure, the integration clause is dated in a finite
5 agreement, the loan for the $95 million dollar loan. That
6 loan was amended and extended twice. And in those
7 extensions, which came at the Soffers' request, of course,
8 all the terms of that $95 million dollar loan were extended
9 as well. The parties thought about that. They were
10 represented by counsel. We can't forget that these are very
11 sophisticated parties. All the cases address that.
12 So, I would say that although it's not -- the
13 notion that they can amend or perhaps stress these facts
14 that the promisor -- the so-called promise was made after
15 the first $95 million dollar loan, I would say that it's
16 really irrelevant here because the timing of the original
17 $95 million dollar loan isn't finite of itself. Because per
18 the request, it was extended twice up until the very day
19 that the Soffers filed suit, and they were the ones who
20 brought this suit first, the day the loan came due.
21 So, I think any reasonableness -- and of course
22 we're talking about reasonableness here -- how reasonable
23 was it for the Soffers to rely on a supposed handshake deal
24 that was going to be for over a half a billion dollars in a
25 fully mortgaged sophisticated transaction, how reasonable

1 was that?

2 So when you look at whether a promise was made

3 before or after the first $95 million dollar loan, you need

4 to look at the big picture of what the case is saying here,

5 Your Honor. And I think the fact that the loan was extended

6 and it became another meeting of the minds of the parties

7 here to extend it, extend all the original terms, shows that

8 that integration clause -- you can't even put a finite term

9 on that.

10 THE COURT: Let me ask you to comment on

11 Mr. Meister's contention that the integration clause, no

12 matter how you interpret the words "the subject matter

13 hereof," is applicable to parties who are different from the

14 parties who are alleging reliance on the proposed $625

15 million dollar advance.

16 MR. McCARTHY: I think the facts there may not

17 have come out as accurate as I think they are where the

18 actual -- the Turnberry parties are parties to the $95

19 million dollar loans. Because they were the mortgagors --

20 and I may be mistaken there -- but you have the Turnberry

21 parties that hold the property, which was the collateral for

22 the $95 million dollar loan. And that foreclosure was on-

23 going and that's one of the first amendments that came up

24 when they amended their complaint to bring up the repo claim

25 to prevent that foreclosure.

1 So, I think those parties are a little bit closer
2 to that $95 million dollar loan than maybe was put out
3 there, but separately, we're not talking about enforcing a
4 $95 million dollar contract. I mean we are, but that's why
5 we want to focus on in this dispute, but with respect to
6 looking at promissory estoppel, we're not talking about
7 enforcing that promise.
8 We're saying in light of the integration clause
9 that's there, how reasonable was it for these other parties,
10 these sophisticated business parties, to rely on this
11 supposed handshake deal?
12 So, I don't think they could ever make the
13 argument with a straight face that the Turnberry entities
14 weren't aware of the integration clause even if they weren't
15 parties to the original loan agreement.
16 THE COURT: Yes, but here's the issue that's
17 presented by Mr. Meister and I don't have the facts before
18 me at the moment as to who signed what and to who knew what.
19 He is, however, arguing that the integration clause, even if
20 you were to construe it strictly would be construed against
21 the parties to the $95 million dollar loan and would not
22 preclude other related parties, even if they knew about it,
23 from asserting a promissory estoppel claim.
24 What's your position with respect to that
25 argument?

1 MR. McCARTHY: I think that is a far too granular
2 reading of the integration clause and of the $95 million
3 dollar loan. Again, we're not talking about small numbers,
4 even with the $95 million dollar loan. We're talking about
5 a loan that was fully collateralized and even per the terms
6 of the integration clause, when you look at it, it's much
7 broader than just saying it's a finite integration clause
8 that only applies to the parties, whether it be Jack and
9 Jeffrey Soffer -- Jacqueline and Jeffrey Soffer that signed
10 the actual promissory note.
11 We're talking about a fully integrated, complex
12 business transaction, even when you're looking at the $95
13 million dollar loan by itself.
14 And I think Your Honor was correct when you
15 pointed to the final sentence of the integration clause
16 which talks about "the subject matter hereof." And while
17 we're looking at the subject matter hereof today, and for
18 this case in general, we've been talking about this since
19 the first complaint that was ever filed in this case, this
20 being an interim loan, a loan that would be taken out.
21 So, when you're talking about this loan, how is it
22 going to be taken out? It's going to be taken out by this
23 supposed long-term financing. So, even when you're -- even
24 if you look at it in a granular spirit, that this loan, in
25 and of itself, when they were talking about it was called

1 the "take out loan" because it was going to be repaid,
2 supposedly by this long-term loan.
3 That has been their theory and that's why it would
4 be absolutely unreasonable for a party to think that the
5 terms of this contract, that was, by their own
6 allegations -- and we're not talking about someone just
7 standing up in court -- we're talking about pleadings.
8 We're talking about sworn statements, even from Brett Ersoft
9 who says this was a loan that was going to be taken out by a
10 long-term loan.
11 It would be absolutely unreasonable for a party to
12 think that you could have a handshake deal in light of this
13 integration clause that you could rely on and then go about
14 your business as if the integration clause never existed.
15 I think you were also correct, though, that this
16 case isn't just about an integration clause. The ruling --
17 the Motion to Dismiss ruling stands on its own. And I think
18 the cases, Your Honor, cited, within that ruling which
19 haven't been addressed, the Klineberg (ph) case, the Kelter
20 (ph) case, those are controlling cases and they're spot on.
21 They talk about promises made before and after contracts and
22 whether it's reasonable to rely on those promises, and, of
23 course, we know how those come out. They weren't even
24 addressed in the briefing.
25 But, here, Your Honor was spot on that this

1 promissory estoppel claim fails even if the integration
2 clause did not exist and there's several reasons for that.
3 One, procedurally, as we talked about, there's no
4 new facts or new (indiscernible - 34:20) but substantively
5 we're talking about -- the Courts that look at this,
6 especially in the Second Circuit, look at the transaction as
7 a whole. And what we're looking at here is more than a half
8 a billion dollars in a complicated deal that they're saying
9 was just reasonable to assume it was going to go forward
10 when you had a handshake.
11 In light of this -- in light of the type of
12 transaction it is, even if you didn't have an integration
13 clause, you couldn't have promissory estoppel here.
14 If Your Honor allows them to amend, we will be
15 right back here. Not on a motion for summary judgment;
16 we'll be here on a motion for dismiss if Your Honor allows
17 it first, because they cannot meet the bare bone elements of
18 promissory estoppel, which is clear in the Second Circuit.
19 You need an unambiguous promise, you need that reasonable
20 reliance, and you need a particularized injury, and they
21 can't meet any of those three prongs.
22 When you're talking -- this is especially true
23 when you have a contract that would otherwise be barred by
24 the statute of frauds. And this is precisely that type of
25 contract. You have a contract here for a long-term

1 construction loan, again, for over a half a billion dollars.
2 It's barred by the statute of frauds because both it could
3 never have been completed in a year, even by its own terms,
4 and even if you exclude that, it's a contract that concerns
5 real property. This was going to be fully mortgaged.
6 So, when Courts look at using promissory estoppel
7 to get around a statute -- a claim that's otherwise barred
8 by the statute of frauds, it requires an unconscionable
9 injury, a particularized unconscionable injury.
10 And the cases are very clear. The Klineberg case
11 actually cites to this and talking about an unconscionable
12 injury in the case Your Honor cited. But there's other
13 cases as well and they talk about lost profits, lost
14 business opportunities, damages that kind of flowed from the
15 expected promise. Those are simply not the unconscionable
16 injuries that could ever survive under a promissory estoppel
17 claim when you have statute of fraud otherwise applying.
18 And that's taken apart, moving aside from the integration
19 clause.
20 Even if the integration clause wasn't applicable,
21 which of course it is, and we think that's the easy and
22 correct way to dismiss this -- even if it wasn't there --
23 you have grounds -- more than enough grounds to get away
24 with this claim on a Motion to Dismiss.
25 So, the integration clause is there. It certainly

1 strengthens our analysis, but the integration clause isn't
2 the only writing that strengthens our analysis. The term
3 sheets, which have been brought up here today, those are
4 made clear by their own terms that this is a non-final term
5 sheet and needs to be executed, as any term sheet for a
6 large construction loan does.
7 This isn't -- when Your Honor's presented with
8 this evidence, if it ever comes before you, these aren't
9 going to be surprising term sheets to you. You've seen
10 deals that have been negotiated like this.
11 So, what they're talking about now is that it was
12 reasonable to rely and rule upon this. That flies in the
13 face of both the integration clause and the terms sheets
14 because those term sheets say this isn't a final promise.
15 In light of that, when you're looking at a type of
16 oral promise that flies in the face of prior written
17 agreements, Courts will simply will not enforce the
18 promissory estoppel claim.
19 THE COURT: There is an element that Mr. Meister
20 emphasized in reading the S draft declaration, which is the
21 (indiscernible - 37:26) practice between the parties in
22 reference to financing transactions, that -- and I'm not
23 dignifying the argument, I'm just restating it -- that give
24 the borrower an added sense of comfort in relying upon not
25 fully documented commitments from future financing.

1 Because what I think Mr. Meister is saying -- and
2 I'm not trying to be his spokesperson here, I'm simply
3 trying to engage in a conversation -- I think he's saying
4 because of the history in the course of dealings between the
5 parties, in a setting in which it might not have been
6 reasonable for a stranger to rely, it might have been
7 reasonable for these borrowers to rely, notwithstanding the
8 legends that were printed on the term sheets, because in the
9 past, at least, these negotiations always resulted in
10 consummated financings. I think that's what he's saying.
11 Given that, do you give any credit to that course
12 of dealing argument for purposes of the promissory estoppel
13 claim that he wishes to preserve?
14 MR. McCARTHY: I don't, Your Honor, and I can't,
15 in light of the full Ersoft affidavit and in the light of
16 everything else I've seen in this case. The Brett Ersoft
17 affidavit talks about, yes, the course of dealing with these
18 parties and the fact that Mr. Ersoft who had a strong
19 relationship as the face man for Lehman when he was there
20 with the Soffers. And as Your Honor said at one point in
21 this litigation before, I'm sure those parties did shake
22 hands throughout the course of their dealings, but what the
23 Ersoft affidavit says is that there was never a promise that
24 Lehman made in the past that didn't come to fruition in a
25 final written agreement. That's what he's talking about.

1 He's not saying that we made handshake deals in
2 the past and we just went ahead and loaned them $600 million
3 dollars without ever finalizing something in writing.
4 That's not what Mr. Ersoft says in his affidavit; that's
5 simply not true.
6 And then when you look at the rest of the Ersoft
7 affidavit, he goes right back to what the prior allegations
8 were and prior sworn statements of a lot of people in this
9 courtroom, that this was a take out loan. That these
10 transactions were very similar. That's been their
11 allegation. That's been their theory. And they have a
12 sworn affidavit from Mr. Ersoft that this was supposed to be
13 a take out loan.
14 So, it ties you right back to that integration
15 clause and whether or not it was reasonable for any of these
16 parties to rely on oral promises when you have a fully
17 written agreement that has an integration clause and you
18 have a history of dealing, a long history of dealing where
19 every other contract has been put in writing.
20 Even smaller contracts, this smaller, $95 million
21 dollar loan is put in writing. That's what Mr. Ersoft is
22 talking about. He's not talking about a history, of course,
23 of dealing with oral promises.
24 THE COURT: Okay.
25 MR. McCARTHY: Your Honor, I think a better

1 analysis here, other than -- Mr. Meister used a couple
2 creative analyses to talk about what was really happening
3 here in this case.
4 What's really happening here is you're talking
5 about a party saying they agree with the Court that it was
6 improper, unreasonable for them to rely on a promise, to
7 enter into a $95 million dollar loan, but then they're
8 saying it was reasonable for the very same party, very same
9 group of entities to rely on that exact same promise to do
10 something else.
11 If you want to take a simple transaction, I think
12 the proper analysis would be if you have a seller and a
13 buyer of goods. You could have someone on the street
14 selling, for instance, bicycles, and you tell the buyer,
15 this bicycle is going to really work great for you.
16 But the buyer looks at the bicycle and they can
17 see it's not a very good functioning bike. It's got flat
18 tires and it's not going to be a good bike. And then that
19 buyer comes to this Court and says, Your Honor, well it
20 might not have been smart or reasonable for me to rely on
21 his statement to buy that bike, which I did, but it was
22 reasonable for me to stop negotiating with other sellers of
23 bikes.
24 And that's what they're saying here. They're
25 saying, Well, I shouldn't have relied on that promise to

1 enter into the $95 million dollar loan. They've now
2 conceded that point. They said in light of the integration
3 clause, that was unreasonable. It was reasonable for me to
4 stop negotiating with other lenders to go and get another
5 loan add that's not -- Courts don't look at your actions and
6 what you did to determine whether it was reasonable.
7 The first focus is on the substance of the
8 promise. Was there any -- was it reasonable to rely on the
9 substance of that promise? And here we're talking about an
10 oral promise, a supposedly oral promise -- of course we
11 refute that that oral promise was ever made -- but they're
12 talking about relying on an oral promise to enter into a
13 transaction with multiple parties for millions and millions
14 of dollars in a complicated deal that was going to be
15 collateralized by property.
16 It's absolutely unreasonable, any way you take it,
17 for them to have relied on this promise and stop negotiated
18 with other lenders.
19 THE COURT: Well, that may be, but we're dealing
20 with a 12(b)(6) motion, not a motion for summary judgment or
21 a trial on -- that goes to judgment. And part of what
22 Mr. Meister is doing here is looking for another bite of
23 this from a slightly different angle. He seems to be saying
24 it's true that I previously that this was in a sense a fully
25 integrated transaction in which the $625 million dollars in

1 take out financing was tied to the $95 million dollar loan
2 and my clients relied upon the availability of the $625
3 million dollar loan in entering into the $95 million dollar
4 loan, which also includes the integration clause.
5 But he's spinning it differently today and he
6 spins it differently toward the end of his Motion for
7 Reconsideration. He's basically saying I want a do-over in
8 my ability to show that there are certain promises that
9 either do or do not give rise to cognizable promissory
10 estoppel claims that were made following execution of the
11 $95 million dollar loan. And on that basis alone, I want
12 the ability to go through discovery and if I'm knocked out
13 at the summary judgment stage, maybe then I'll complain
14 then, too, but at least I'll have my ability to deal with
15 this later and not at the pleading stage. That's what I
16 hear him telling me today.
17 What's your response to that?
18 MR. McCARTHY: My response to that, Your Honor, is
19 12(b)(6) serves a very specific purpose and that is to
20 prevent parties from having to go through a boondoggle of
21 discovery when there's absolutely no support at all for
22 their claim, and that's what we have here.
23 And I think when you look at this case, which, of
24 course, started in February of 2009 -- this isn't a new
25 case -- and you look at the history of what's happened here,

1 you backtrack a bit, you can really see what's going on.
2 This isn't about buying some extra time for a promissory
3 estoppel claim or about the substance of their claim,
4 because there is none. It's about delay and we get that.
5 This isn't a targeted motion. This is about
6 buying time again, so they can bring back in a full new
7 theory of their case that's not targeted when you look at
8 what's going to happen. It's a strategic decision they've
9 made -- a defense decision -- it gets made all the time, and
10 it's a game of delay here. To delay paying the creditor who
11 has a written contract and that deserves repayment.
12 And it's not just here. There are other cases out
13 there. We've seen that in diligence. We've seen that in
14 discussions. There are numerous other creditors; it's
15 nothing new.
16 But considering where we've been in this case --
17 and I'll trace it for just a moment -- the time of delay
18 needs to come to an end now. As we were here last time, we
19 talked a little bit about how the harm to my client -- harm
20 to Lehman has now become imminent. Other cases are moving
21 forward. Other cases are -- there's a concern that there
22 could be other judgments against the Soffers and Lehman now
23 deserves a chance after more than two years of litigation to
24 try and get in line to streamline this case and try to get
25 in line with the other creditors and see what is really the

1 issue here, which is, is there a chance to collect, and if
2 so, how much can you collect? That's what this is really
3 going to come down to and we understand that, and we're
4 trying to push the litigation in a streamlined manner so we
5 can get there.
6 Now, Your Honor mentioned this already a little
7 bit, but this isn't the first time they've had an
8 opportunity to do a redo. In February of 2009 they brought
9 this case the first time. Their argument then was breach of
10 contract because the supposed take out loan was intertwined
11 with the long-term handshake deal and that was their
12 original claim.
13 Two years later, approximately, when they wanted
14 to prevent a foreclosure, they asked for a redo and they
15 asked for our consent for that redo and they came to court
16 and asked for consent. We understood that consent was
17 coming with a -- in agreement -- at least in my memory it
18 was that that would be the last redo, obviously it wasn't.
19 We allowed that claim to go forward and Your Honor listened
20 to our hearing and was very gracious in the time you granted
21 us listening to the dismissal only to send us back to
22 mediation so that we could try and settle this thing and see
23 what was really there.
24 That had some months in delay. I won't get into
25 the substance of the mediation, Your Honor, but certainly it

1 did not resolve these disputes. We came back before the
2 Court and we asked -- we were here, again, and we saw
3 another redo, where, for the first time we heard when we
4 were sitting at this table -- it was the first time that you
5 heard it as well -- that their theory of fraud based on repo
6 is no longer their theory.
7 And now they want to rely on this promissory
8 estoppel claim -- or at least the first promissory estoppel
9 claim. And so we went back to mediation, again, but, yet,
10 fruitless again and more months go by. More months go by
11 and we have to come back and I had to ask Your Honor to rule
12 on the motion and, you know, this Court did exactly as it
13 said it was going to do and ruled with a very thoughtful
14 opinion and you told the parties to focus on the substance
15 of the claim.
16 We went back thinking we would do this, instead we
17 have this motion and now they're asking for a total another
18 redo, a totally new theory, and this would prejudice my
19 client.
20 They're seeking full discovery in all of this --
21 we're not trying to bar discovery. We're actually being
22 very (indiscernible - 47:39) in the documents that we're
23 turning over. We've had numerous conversations about this.
24 But as we see it, the only things that is driving this
25 litigation at this point is that my client has had to take a

1 bullish position and we have to in negotiations in saying
2 delays can no longer happen.
3 We've had some delays in discovery that we've had
4 to bring up. We've had even delays in some substance.
5 Recently, we had about a week-long delay where we thought we
6 were going to have to be here asking for a default because
7 there wasn't an answer to our counterclaims. We had to make
8 hard decisions, internally, about whether we bring those
9 forward to the Court for decisions or whether we try to
10 focus on the substance of these claims.
11 And instead we've chosen to focus on the substance
12 of the claims. And the substance here, are the undisputed
13 facts. You have sophisticated parties, sophisticated
14 entities that are listed on these pleadings. They
15 negotiated a contract, a final written contract for $95
16 million dollars. Pen was put to paper and it was negotiated
17 with well-paid, well-regarded counsel of everybody's own
18 choosing.
19 Those are the facts. That's the undisputed facts
20 of this case and that's what we want to focus on. We're not
21 trying to prevent people from seeking other evidence that
22 might be tangentially related, but if we allow this claim
23 back in after everywhere we've already been, it will be a
24 complete boondoggle and we'll be starting from square one,
25 because we will move to dismiss that claim.

1 Whether -- if the Court allows it -- whether on a
2 Motion to Dismiss or summary judgment because there is
3 absolutely no foundation for the claim as we see it, Court's
4 routinely dismiss promissory estoppel claims on a Motion to
5 Dismiss exactly for this reason and there's numerous courts
6 in this district in this circuit.
7 THE COURT: Okay. Before giving Mr. Meister an
8 opportunity to respond, I have a question that really
9 applies to both of you, not directly relating to the
10 argument, but stimulated by the argument.
11 One of the reasons the Motion to Dismiss was
12 decided when it was is that I received an unsolicited
13 telephone call in August from the mediator who was handling
14 your mediation discussions. It's the first time in my
15 experience that a mediator has ever contacted me in
16 connection with a matter on my docket and, frankly, it's the
17 first time, to my knowledge, a mediator has ever contacted a
18 Court directly. It's just not done.
19 And what I was told was that it might well
20 expedite a resolution of the business issues between the
21 parties if the Court were to, without delay, decide the
22 pending Motion to Dismiss.
23 Immediately before the hearing, in connection with
24 my rendering of a ruling on the Motion to Dismiss, you and
25 your colleagues filed a status report that indicated that

1 the mediation had failed, that it was futile to continue the
2 discussions and that -- and I'm paraphrasing -- regardless
3 of the outcome of the Motion to Dismiss, mediation was no
4 longer something that Lehman was prepared to engage in
5 because it was no longer productive. That's my paraphrase
6 of what I recall.
7 My question today is this: Apparently, the
8 parties having involved in efforts to move forward with
9 document discovery. Mr. Mister has referenced the fact that
10 there might be some depositions in the early months of 2013.
11 I have no idea where your overall discovery schedule will
12 take you. But this is a time consuming and expensive
13 process. Your stated goal, which is to get on with some
14 kind of judgment against your Defendants, so you can get in
15 line is not necessarily consistent with your stated
16 strategy, which is to litigate, because litigation is time
17 consuming and expensive and fraught with risk and
18 uncertainty, including appeal risk, and any appeal,
19 undoubtedly will add even more time to your timeline,
20 presumably to the estate's detriment.
21 With that preamble, my question is: Why are you
22 gentlemen not proceeding back to the mediation table?
23 Because it seems to me that you are very familiar with the
24 circumstances. You are certainly able to address the
25 potential outcome of the issues, whether or not the

1 complaint is ever amended. And it seems to me that
2 everybody is wasting time here in litigation.
3 Question to Lehman: Do you persist in the views
4 stated in your filed report that mediation is simply
5 something you're no longer prepared to consider?
6 MR. McCARTHY: Your Honor, I don't want to clarify
7 what our report says --
8 THE COURT: It says what it says.
9 MR. McCARTHY: Exactly. Exactly, Your Honor.
10 Lehman's position is that's its ears are open and
11 it certainly views this as a case that could be settled, and
12 the type of case as many other cases as my co-counsel with
13 Weil and other counsel have been here before Lehman have
14 settled cases with you. Our position in this particular
15 case, and in call cases, is that it takes two to settle.
16 And when we viewed the prior mediations -- and
17 they were extensive; both parties were there for numerous
18 hours with representatives -- we looked at what happened
19 there and we said at this point in time we need to cut it
20 off because those particular mediation attempts, those
21 settlement attempts were not getting anywhere. The parties
22 were at a stalemate for so long with us viewing -- and this
23 is our view -- with nothing meaningful on the table.
24 And so that's why we told Your Honor at is that
25 point in time that the efforts were futile. Now, I thought

1 Your Honor might ask you about this and I certainly wanted
2 to give you an update on it and so I did ask my client
3 whether there have been any new updates, whether any parties
4 have changed their position based on the recent rulings or
5 not so recent rulings anymore, but based on the recent
6 occurrences and your instructions, which I think have been
7 clear throughout the course of this case to try to continue
8 to see if we can make this happen and there hasn't been any
9 new change in position, based on what I've been told.
10 Our ears are open and we are ready to listen if
11 there is an offer on the table. And they continue to be
12 open, but this type of case, where we've had these efforts
13 before, where we've been with a mediator before, who used a
14 lot of different techniques to try and bring us together --
15 and simply there was no ground being made.
16 I think it would be futile again to send us back
17 to mediation. We are hopeful that there is an offer or
18 something that comes across the table at some discussion
19 point that would tie us back into having a meaningful
20 settlement discussion, but at this point, I would have to
21 stand by our statement, which was sending us back to
22 mediation would be futile because we've seen what happened
23 there and we had -- from our view, at least -- no reason to
24 believe that there was going to be any change in position
25 which would allow Lehman to settle in good faith.

1 So, I think at this point, Your Honor, absolutely,
2 our ears are open, but we view this as a type of case where
3 a streamlined litigation, one where 12(b)(6) motions have
4 already been briefed extensively, argued extensively, and
5 ruled on thoughtfully, the case should move forward in a
6 streamlined fashion.
7 If there comes a time down the road or it makes
8 sense to cut off the well, cut off the spigot, so that the
9 parties can conserve some costs and try to really meaningful
10 settle, we won't hesitate to get back here, Your Honor, and
11 tell Your Honor that and ask to take a reprieve from the
12 schedule.
13 But at this point, we don't see any reason to do
14 that and it would just be more delay. And more delay to the
15 pardon me of my client.
16 THE COURT: Okay. Thank you.
17 MR. McCARTHY: Thank you, Your Honor.
18 THE COURT: Mr. Meister?
19 MR. MEISTER: Thank you, Your Honor.
20 I'll be brief.
21 Let me proceed sort of backwards starting with the
22 discovery and mediation issues. With respect to discovery,
23 I believe what happened was that the electronic search terms
24 were agreed to a long time ago before Your Honor entered a
25 decision dismissing claims, and, therefore, those search

1 terms were fashioned in a manner where they were designed to
2 pick up the term sheets related to the $625 million dollar
3 take out and those documents have already been isolated on
4 both sides.
5 So, it is simply not true that there is any delay
6 or dilatory aspect to this at all. I believe, certainly on
7 our side, and I believe, for the reasons I just articulated
8 on the Lehman side, there wouldn't be a second of delay.
9 There would simply be captured into the discovery documents
10 already isolated over the past several months by search
11 terms that were designed before the decision when this claim
12 was in the case. And the depositions are not going to
13 change -- at least the persons deposed won't change.
14 So, there's no delay associated with the request
15 to amend the claim or the request to reverse the decision,
16 based on the reasons I articulated.
17 In addition, I think -- let's think together for a
18 moment about what happens in the absence of that. If you
19 were to deny all the relief that we have requested, I
20 suppose I would ask the Court under 8003, I believe it is.
21 It's essentially for permission to appeal a non-final order.
22 I don't know whether, of course, the Court would grant that.
23 I think I might have to actually ask the District Court as
24 well.
25 If I was denied that relief, I would likely be

1 forced to appeal it when I could appeal it when it became
2 final because, Your Honor, if the situation doesn't change
3 and all the claims that Lehman has on its loans are one
4 without any offsets by my clients -- on my client's
5 behalf -- it is of a magnitude that would annihilate my
6 clients, which is why you may recall the negotiations and
7 the mediation were very difficult and trying because they
8 kind of took the form of a virtual bankruptcy discussion of
9 my clients.
10 So, I think what we're headed for in the absence
11 of some relief here is my clients or another bankruptcy
12 trustee or a debtor in possession or in some form or another
13 seeking an appeal here. And if, after all this discovery is
14 concluded, and we cut short the discovery on the $625
15 million take out, it would be very inefficient in my view.
16 I want to turn to one sentence, Your Honor, in the
17 Ersoft affidavit because I think counsel was not accurate in
18 his characterization. The one sentence reads -- it's in
19 paragraph two of the declaration, quote, "The relationship
20 with these clients and others like them was such that Lehman
21 and Turnberry would quickly agree to the terms of financing
22 on an oral and formal basis and documents would be prepared
23 later" closed quote.
24 So, Ersoft does plainly say that there was this
25 course of dealing. Of course they can refute it, but the

1 Ersoft does say that and I think that does lend significance
2 credence to our client that it was reasonable for us to rely
3 and that corresponding with it was foreseeable on Lehman's
4 part to expect our reliance.
5 Counsel had made the comment that somehow
6 Turnberry/Centra Sub was a party to the loan agreement.
7 That's not true, Your Honor. I have the loan agreement in
8 front of me. It is in the record. There are three parties
9 to the loan agreement: Lehman Brothers Holdings, Inc.,
10 Jeffrey Soffer, and Jacqueline Soffer. It's on the first
11 page of at the document.
12 There are some other parties that consent to it,
13 but it's not Lehman, Turnberry/Centra Sub the promisee of
14 the $625 million dollar take out.
15 In addition, there was some loose talk sort of
16 assuming that there was caveats, for lack of a better term
17 or conditions, in the $625 million dollar term sheets that
18 made them non-binding.
19 The first instance, I want to point out -- and if
20 I'm wrong, counsel will correct me -- but to my knowledge,
21 those term sheets are not been the Court. The $95 million
22 dollar loan agreement, of course, is before the Court, but
23 the term sheets are not been the Court.
24 Second of all, it's not true. The term sheet
25 says, "Lender's obligation to make the loan for borrower

1 shall be subject to lender's review and approval of the
2 items on Schedule A."
3 So, that sounds more to me like a conditionally
4 binding agreement. If -- whatever the conditions are in
5 schedule A, which I didn't go back and study -- then, they
6 are bound.
7 But I think the important point here is this is
8 not a summary judgment motion; it's a 12(b)(6) motion and
9 those documents are not in front of the Court.
10 I want to remind the Court respectfully, again,
11 that the yes, it is true, Your Honor, that I am asking the
12 Court in the alternative to allow me to amend, to plead, and
13 after a post-$95 million dollar loan execution, a statement
14 of the $625 million dollar take out commitment.
15 By the way, these are not oral promises; they are
16 written promises. Whether they're binding writings is a
17 separate matter, but they are certainly written. I have
18 them on my desk right now.
19 But I do want to be clear that while we are
20 definitely asking for that relief and while we can't see how
21 the integration clause could possibly be involved with those
22 statements because they are subsequent to, not prior to the
23 $95 million dollar loan agreement, we are also alternatively
24 saying both, one, that the $95 million dollar loan agreement
25 is a document to which the Plaintiff on this claim is not a

1 party and that is just erroneous to use the integration
2 clause to bar a claim to a non-party -- asserted by a non-
3 party and that it isn't the subject matter.
4 It's very clear to me, Your Honor, that the words
5 "subject matter" mean the loan, and the loan is the $95
6 million dollar loan.
7 I don't think any reasonable person would --
8 signing that $95 million dollar loan would think it means
9 that it vitiates the $625 million dollars take out
10 commitment.
11 And I want to take exception to counsel's
12 characterization of our position. I am not saying that in
13 this motion that it was unreasonable for us to rely on the
14 $625 million dollar take out for purposes of the $95 million
15 dollar loan, but it was reasonable for us to forego
16 discussions with other lenders. What I'm saying is, yes, we
17 believe the 625 million was true, based on the course of
18 conduct described in the Ersoft declaration. We relied on
19 it when we enter into the $95 million dollar loan and we
20 relied on it when we discontinued conversations with the
21 Bank of America, Merrill Lynch, and Goldman Sachs, all of
22 whom had made written offers to finance the shopping center.
23 And if we had gone with any of them, my clients would own
24 that shopping center today.
25 What we are saying is that the integration clause

1 bars the Soffers from arguing that they don't have an
2 obligation to repay the $95 million dollars, but it does not
3 bar Turnberry/Centra Sub from making a claim on a promissory
4 estoppel basis that it suffered damages, in the form of lost
5 equity, by relying on the $625 million dollar promise and
6 that it was inappropriate -- it was particularly
7 inappropriate, we respectfully submit, on a 12(b)(6) Motion
8 to Dismiss that claim.
9 Your Honor, my -- I was pretty deeply involved in
10 the negotiations that took place in the mediation. I have
11 not been involved since the mediation formally ended. My
12 understanding is that there have been conversations between
13 principals of my client and principals of Lehman or perhaps
14 the trustee. I am not privy to those conversations. I
15 don't know exactly where they have left off, but we are more
16 than happy to go back to mediation.
17 We tried very hard -- obviously I'm not going to
18 get into the substance, but I do want to assure the Court
19 that there were substantive discussions and meaningful
20 substantive offers. It was a very difficult negotiation and
21 we're happy to go back.
22 But I don't want that to be misconstrued by my
23 adversary. I'm not looking to delay these proceedings.
24 This motion is targeted, contrary to what counsel says. It
25 will not delay discovery. We are not looking to slow the

1 case down. If Lehman is willing to go back to mediation, we
2 want to settle the case and we want to litigate the case,
3 professionally and efficiently.
4 We think that, frankly, leaving things where they
5 stand is an inefficient way for the reasons I previously
6 said. And what I see on the horizon in the event that
7 things -- the discovery is not opened or is closed to this
8 issue, I just think it's an inefficient way to proceed
9 because ultimately, it's such a massive matter from the
10 perspective of my client that I see it involving leaving no
11 stone unturned -- for lack of a better expression.
12 And if a District Court on appeal were to agree
13 with my analysis, it would be a shame years from now,
14 literally, this then go back to the discovery. It seems to
15 be much more practical to -- since all the discovery has
16 been done on the search terms, to, at a minimum, allow us to
17 amend, get those documents out and include them in the
18 examinations before trial, and, frankly, I don't think there
19 should be another Motion to Dismiss. I think we should get
20 some evidence before the Court.
21 Thank you very much, Your Honor.
22 THE COURT: Do you have anything more?
23 MR. McCARTHY: I just want to clarify a point on
24 production and this might just be a miscommunication, but I
25 think as Mr. (indiscernible - 1:08:04) and I have discussed

1 regarding discovery a bit, those search terms were run on
2 the documents regarding the supposed long-term financing.
3 We are not preventing -- we are not holding those back
4 because it would be almost too costly to rereview all of
5 them. We see nothing in there that would want us to prevent
6 from holding them back. My point on delay -- so they will
7 see those docs and if they want to bring them before the
8 Court for whatever reason, they certainly can.
9 But my point on delay, Your Honor, is the exact
10 reason a Motion for Reconsideration requires a demanding
11 standard. We're not here on a 12(b)(6) anymore. We're here
12 on a motion to reconsider a ruling that the Court already
13 made.
14 The point on delay is even if they get those
15 documents, if they're able to amend or able to keep their
16 claim back in, we would be rearguing, rebriefing,
17 reinvestigating something that already happened. And that's
18 why a motion to reconsider requires such a demanding
19 standard; one they have not met here.
20 And that's why I want to leave the Court pointing
21 to the fact that we're not looking at 12(b)(6) again. We're
22 looking at whether you should reconsider. And that's what
23 allows us to look beyond what we talked about in 12(b)(6)
24 and look into if these claims do survive, what's going to
25 happen with these claims?

1 And the Court is allowed to look at the claims and
2 see whether they will survive or won't. Is there any
3 futility in letting a claim survive and we are -- we're
4 telling the Court that there absolutely is. This type of
5 promissory estoppel claim that they're now alleging requires
6 a particularized unconscionable injury. It's one they
7 simply cannot allege. It's one they haven't even tried to
8 allege. That comes from a case called 720 Lex Acquisition,
9 which is 2011 West Law 5039780, Southern District of New
10 York, and another one, Darby Trading 568 F Supp.2d 329,
11 Southern District of New York, 2008.
12 Cases like this required an injury is separate and
13 apart from what you would have expected if the promise was
14 actually made. All they're saying is they lost the
15 opportunity to get another lender. That is exactly -- that
16 is a lost business opportunity, one that is strictly
17 forbidden under the law.
18 And also, we're allowed to look up how did -- what
19 are those damages? What are they going to prove up?
20 These damages are entirely too speculative. We've
21 had it in our briefing before. They're going to prove that
22 they would have been able to get another loan from another
23 lender. That loan would have been on terms that would have
24 been great for them. It would have saved their project. It
25 would have made it so they wouldn't have gone through with a

1 foreclosure that's already happened.
2 I mean how many ifs are we going to go down once
3 this claim is -- if it's allowed back in -- and that's
4 what -- on reconsideration, Your Honor, you are allowed to
5 look at that and we should to see if it's futile to let this
6 claim back in.
7 Nothing else, Your Honor. Thank you.
8 THE COURT: Okay. Thank you.
9 I'm going to take this under advisement. The
10 parties are encouraged to return to mediation between now
11 and the end of the year. I'm not ordering it. I think that
12 this case has many twists and turns to it.
13 The damages, as noted are speculative on these
14 claims. These claims are of highly questionable value even
15 if they are part of the compliant, but I believe that the
16 mediation that I'm encouraging should at least assume the
17 possibility that these claims may be reinstated at some
18 point, either through amendments to the complaint or
19 possible reconsideration of the 12(b)(6) dismissal.
20 I say that because I only think it appropriate to
21 level the playing field, somewhat, for purposes of
22 conversations that may take place.
23 The waste associated with this litigation is
24 manifest and should be factored into your consideration as
25 to whether proceeding promptly with some additional

1 mediation sessions may be sensible.

2 I hope to have a decision before the end of the

3 year either way. We're adjourned.

4 MR. McCARTHY: Thank you, Your Honor.

5 (Proceedings concluded at 3:30 PM)

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1 R U L I N G S

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3 DESCRIPTION PAGE

4 Notice of Final Applications of Retained 11
5 Professionals for Final Allowance and Approval
6 of Compensation for Professional Services
7 Rendered and Reimbursement of Actual and
8 Necessary Expenses Incurred from
9 September 15, 2008 to March 6, 2012
10
11 Plan Administrator's Cross-Motion to Compel 56
12 Giants Stadium LLC to comply with Rule 2004
13 Subpoenas and Objection to Giants Stadium's
14 Motion to Quash the Rule 2004 Subpoenas
15
16 Motion to Quash a Subpoena filed by 56
17 Bruce E. Clark on behalf of Giants
18 Stadium LLC
19
20 Amended Motion of Giants Stadium LLC for 56
21 Leave to Conduct Discovery of the Debtors
22
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24
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1 R U L I N G S, CONTD.

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3 DESCRIPTION PAGE

4 Motion for Entry of an Order Approving 62

5 Settlement Agreement Between the Trustee and

6 Lehman Brothers Finance AG, in Liquidation

7 (a/k/a Lehman Brothers Finance SA, in

8 Liquidation)

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10 Trustee's Motion for Approval of General 63

11 Creditor Claim, Objections Procedures

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13 Debtor's Three Hundred Fifty-Seventh 66

14 Omnibus Objection to Claims

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16 Objection to Claim No. 17763 Filed by Laurel 77

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20 to Claims (No Liability Rose Ranch LLC Claims)

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22 Debtor's Three Hundred Twenty-Ninth Omnibus 85

23 Objection to Claims (Misclassified Claims)

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3 DESCRIPTION PAGE

4 Turnberry Centra Sub, LLC et al v Lehman 134

5 Brothers Holdings, Inc., et al, Motion to

6 Reargue and for Reconsideration

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1 C E R T I F I C A T I O N

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I, Sheila G. Orms, certify that the foregoing is a correct

3 transcript from the official electronic sound recording of

4 the proceedings in the above-entitled matter.

5

6 Dated: November 17, 2012

7

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9 Signature of Approved Transcriber

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Veritext

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