

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 19-23649-rdd

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5 In the Matter of:

6
7 PURDUE PHARMA L.P.,

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9 Debtor.

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11
12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15
16 July 29, 2021

17 2:10 PM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: JUSTIN WALKER

1 HEARING re Notice of Agenda / Agenda for July 29, Hearing

2
3 HEARING re Motion of Debtors for Entry of an Order

4 Authorizing Implementation of 2021 Key Employee Incentive

5 Plan and 2021 Key Employee Retention Plan filed by Eli J.

6 Vonnegut on behalf of Purdue Pharma L.P. (Solely with

7 respect to the 2021 KERP) (ECF #3077)

8
9 HEARING re Objection to Motion of Debtors for Entry of an

10 Order Authorizing Implementation of 2021 Key Employee

11 Incentive Plan and 2021 Key Employee Retention Plan (related

12 document(s) 3077) filed by Paul Kenan Schwartzberg on behalf

13 of the United States Trustee (ECF #3137)

14
15 HEARING re The Non-Consenting States' objection to motion of

16 debtors for Entry of an Order Authorizing Implementation of

17 2021 Key Employee Incentive Plan and 2021 Key Employee

18 Retention Plan (related document(s) 3077) filed by Andrew M.

19 Troop on behalf of Ad Hoc Group of Non-Consenting States.

20 (ECF #3320)

21
22 HEARING re Reply to Motion / Debtors' Omnibus Reply in

23 Support of Motion for Entry of an Order Authorizing

24 Implementation of 2021 Key Employee Incentive Plan and 2021

25 Key Employee Retention Plan (related document(s) 3077) filed

1 by Eli J. Vonnegut on behalf of Purdue Pharma L.P. (ECF
2 #3334)

3
4 Notice of Hearing on Debtors Motion for Entry of an Order
5 Authorizing Implementation of 2021 Key Employee Incentive
6 Plan and 2021 Key Employee Retention Plan (related
7 document(s) 3077) filed by Eli J. Vonnegut on behalf of
8 Purdue Pharma L.P. with hearing to be held on 7/29/2021 at
9 2:00 PM at Videoconference (ZoomGov) (ECF #3192)

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25 Transcribed by: Sonya Ledanski Hyde

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21 BY: BENJAMIN HIGGINS

22

23 ALSO APPEARING:

24 JON LOWNE, Purdue Controller

25

P R O C E E D I N G S

1
2 THE COURT: -- program or plan. So, I'm happy to
3 go forward with the hearing. I've reviewed the original
4 motion and the exhibits and support the objections by the
5 U.S. Trustee and the so-called nonconsenting states, the Ad
6 Hoc Group of Nonconsenting States, more formally, and the
7 Debtor's reply with the exhibits.

8 MR. VONNEGUT: Thank you, Your Honor. For the
9 record, this is Eli Vonnegut of Davis Polk & Wardwell on
10 behalf of the Debtors. Can you hear me clearly?

11 THE COURT: Yes, and see you.

12 MR. VONNEGUT: Thank you very much, Your Honor.
13 So, correct, we do have only one time on the agenda today
14 but it's a very important one. The Debtor's 2021 KERP
15 motion filed June 28th at Docket 3077.

16 Your Honor, we are -- we're nearing the end of
17 these cases and are slated to commence our plan confirmation
18 hearing in about a week and a half on August 9th. Support
19 for the Debtors plan continues to build. Most notably,
20 through the agreement of 15 of the 24 members of the
21 nonconsenting states group to support the Debtors proposed
22 plan and settlement. This latest milestone was achieved
23 with the assistance of Judge Chapman as our mediator, for
24 which we are all extremely grateful.

25 The goal of the plan and the goal of this entire

1 proceeding is to put all of the estate's value to work
2 helping creditors and fighting the (indiscernible) crisis.
3 That's what we commend this bankruptcy to do. Preservation
4 of the value of the enterprise is critical in order to
5 achieve that goal and we can't do that without preserving
6 the workforce.

7 In designing the 2021 KERP, frankly, our goal was
8 to be as boring as we possibly could because we want the
9 company's employees focused on running the business, and we
10 want creditor focused on getting this company out of
11 bankruptcy. A tremendous amount of time and energy went
12 into the 2020 programs that were approved by the Court, and
13 so for 2021, we structured the KERP to mimic last year's
14 program with changes limited to those caused by ordinary
15 course base salary increases and promotions.

16 As is reflected in the declaration submitted by
17 Josephine Gartrell of Willis Towers, marketing positioning
18 for the program stayed consistent with last year. And
19 because this is now the third time we've done this in this
20 case, nothing has changed in our methodology for identifying
21 insiders, nobody has taken issue with our method for doing
22 that.

23 Since the initial filing of the motion, the
24 Debtors have engaged with our creditors, as we always do,
25 chiefly to ensure that the plans align both with the

1 company's immediate needs but also with the post-emergence
2 plans of the public creditor that will be our residual
3 stakeholder of the plan.

4 Happily, as we noted in the reply we filed
5 yesterday, we've reached agreement with the Ad Hoc
6 Committee, the MSGE Group and the UCC to make certain
7 modifications to the proposed KERP and to delay the hearing
8 on the KEIP until August 19th, which we are hoping will be
9 the tail end of our confirmation hearing.

10 I'll turn to the objections momentarily but first
11 I want to briefly outline the proposed 2021 KERP, including
12 the changes that we agreed to with our creditors. The 2021
13 program includes the same three elements as the 2020 program
14 in similar amounts. The annual award is approximately \$16.1
15 million total. That's lower than 17.2 million from 2020.
16 The long-term award is approximately \$6 million, down from
17 6.1 in 2020. And the targeted retention payments are
18 approximately \$7.2 million in total, down from 8.1 in 2020.

19 In working with the creditors, we agreed to a
20 couple pretty straightforward changes to the program. So,
21 first, the proportion of the annual award paid in October
22 2021 was reduced from half for all participants, to one-
23 third for employees below VP and one-quarter for VPs and
24 above, with the balance to be paid in March of 2022. The
25 long-term award is no longer going to be subject to

1 acceleration at emergence. That will be paid in June 2022,
2 subject to a claw-back through March of 2024.

3 And, lastly, instead (indiscernible) paid in the
4 fourth quarter of 2021 and the first quarter of 2022, the
5 targeted retention payments will be paid 25 percent around
6 December 30 of this year, 25 percent on March 30 of next
7 year, and 50 percent on June 30 of next year. With those
8 provisions having been incorporated into the program, the Ad
9 Hoc Committee, the MSGE Group and the UCC do not object to
10 the KERP.

11 THE COURT: Can I -- can I interrupt you? I
12 thought none of the awards under the amended program would
13 be subject to acceleration upon emerging from bankruptcy.

14 MR. VONNEGUT: That's correct, Your Honor. I
15 didn't mean to suggest that the other ones would accelerate
16 at emergence.

17 THE COURT: Okay. All right.

18 MR. VONNEGUT: Great. So, before turning to the
19 objections, I'd just like to give a little bit of context
20 for what the company's dealing with currently and why this
21 program is so important.

22 As we noted in our motion, the claw-back period
23 for the 2020 annual award expired on June 30th. We were
24 worried going into this about losing people in July and we
25 were right to be worried. The Debtors lost 17 people in

1 July so far, compared to an average of five in July from
2 2018 to 2020. That's more than an entire quarter's worth of
3 attrition in less than a month. During July, when we were
4 discussing this program with creditors, we kept having to go
5 back to them every few days to update our attrition
6 statistics because resignations just kept coming.

7 To keep the workforce in place and preserve the
8 value and stability of the business so that we could
9 distribute that value to our creditors we need to be able to
10 give our employees comfort that they will be fairly
11 compensated. Your Honor has noted in the past that the KERP
12 is not really a bonus in the sense of extra compensation but
13 it's an expected part of our employees' annual compensation
14 and we can't ask the workforce to hold tight and wait for
15 decisions about their pay for the work they're doing right
16 now to be made in the future.

17 We delayed consideration of the KERP this year as
18 long as we did to try to avoid disrupting the ongoing
19 mediation and, frankly, the company suffered for it.
20 Putting the KERP in place now to provide employees with
21 certainty is critical to stemming the attrition that's going
22 on.

23 Now, with that context on the table, I should
24 first deal with housekeeping and then I'd like to turn to
25 the objections that we did receive. The Debtors submitted

1 two supporting declarations with this motion. One from Jon
2 Lowne, our CFO, one from Josephine Gartrell, a senior
3 director at Willis Towers Watson. The Lowne declaration and
4 Gartrell declarations were both attached to the motion at
5 Docket 3077. Yesterday, we submitted a supplemental
6 declaration from Mr. Lowne with the Debtor's reply at Docket
7 3334.

8 The Debtors move to officially enter these
9 declarations into the record as evidence and, of course,
10 both Mr. Lowne and Ms. Gartrell are on the line should the
11 Court have any questions. My understanding from discussions
12 this morning is that the objectors do not intend to cross-
13 examine the witnesses but I'll ask them to pipe up if that's
14 not right.

15 THE COURT: Well, let me first turn to Mr. Lowne.
16 And for the court reporter, that's L-O-W-N-E. Good
17 afternoon.

18 MR. LOWNE: Good afternoon.

19 THE COURT: Mr. Lowne, you just heard the Debtor's
20 counsel stating that you submitted two declarations in
21 connection with this motion. The first is dated June 28,
22 2021, and the second one was submitted yesterday as an
23 exhibit to the Debtor's omnibus reply and it is dated June -
24 - July 28, 2021, namely, yesterday.

25 Would you raise your right hand? I have a

1 question to ask you about them and I'd like to swear you in.
2 So, do you swear or affirm to tell the truth, the whole
3 truth and nothing but the truth, so help you God?

4 MR. LOWNE: I do.

5 THE COURT: Okay. Let me turn to the first
6 declaration, the June declaration. Knowing that it's to be
7 your direct testimony in this proceeding, is there anything
8 in it besides the description of the KERP program that has
9 been changed, as reflected in the reply, that you would like
10 to alter?

11 MR. LOWNE: Nothing to be altered other than the
12 updates we gave on the attrition rates and the resignations
13 that were previously stated.

14 THE COURT: Okay. And with regard to that, let me
15 focus on the July 28th declaration. I appreciate that was
16 just yesterday but is there anything in it, knowing that it
17 would be your direct testimony, that you wish to change?

18 MR. LOWNE: Nothing to change, no.

19 THE COURT: Okay. And does anyone want to cross-
20 examine Mr. Lowne on either of his declarations?

21 MR. HIGGINS: Your Honor, this is Ben Higgins for
22 the U.S. Trustee, I'm filling in for Mr. Schwartzberg today.
23 We don't intend to cross-examine but there were some
24 conversations in connection with Lowne's supplemental
25 declaration between Debtor's counsel, Mr. Troop, and myself

1 regarding certain exit surveys that were conducted with some
2 of the employees that left. And, as I understand it, we
3 have an agreement that some of that information can come in
4 as either stipulated facts or we could make representations
5 to that information. And with that understanding we would
6 not seek to cross-examine Mr. Lowne on those facts.

7 THE COURT: Okay, is that your understanding, Mr.
8 Vonnegut?

9 MR. VONNEGUT: Yes, that's correct, Your Honor.

10 THE COURT: And, Mr. Troop, I see you. I think
11 you're nodding there.

12 MR. TROOP: I am, Your Honor. I was trying to get
13 myself off mute. Andrew Troop, Nonconsenting States.
14 That's accurate, Your Honor.

15 THE COURT: Okay, very well. I don't have any
16 questions of your, Mr. Lowne, so you can go off the screen
17 and consider yourself no longer testifying.

18 MR. LOWNE: Thank you.

19 THE COURT: Okay. And then let me then ask Ms.
20 Gartrell to come on the screen. There she is. Okay. Would
21 you raise your right hand, please? Do you swear or affirm
22 to tell the truth, the whole truth and nothing but the
23 truth, so help you God?

24 MS. GARTRELL: I do.

25 THE COURT: And it's Josephine Gartrell, G-A-R-T-

1 R-E-L-L?

2 MS. GARTRELL: That's correct, Your Honor.

3 THE COURT: Okay. So, Ms. Gartrell, you also
4 submitted a declaration in support of this motion that's
5 dated June 28, 2021. I'll ask you the same question I asked
6 Mr. Lowne. Sitting here today and knowing that that
7 declaration would be your direct testimony in this matter,
8 is there anything in it that you would wish to change, other
9 than the description of the KERP plan that the Debtors are
10 presently seeking to have approval of, that were described
11 in their reply?

12 MS. GARTRELL: No, no other changes, Your Honor.

13 THE COURT: Okay. Does anyone want to cross-
14 examine Ms. Gartrell?

15 MR. VONNEGUT: No, Your Honor, thanks.

16 THE COURT: Okay. And that was a no from Mr.
17 Troop, too?

18 MR. TROOP: It was a no for me.

19 THE COURT: All right. I did have one question
20 for you, Ms. Gartrell. I want to make sure I'm clear on the
21 chart on page 23 of your declaration.

22 MS. GARTRELL: Okay.

23 THE COURT: If you have that declaration there.

24 MS. GARTRELL: I am pulling it up.

25 THE COURT: Okay.

1 MS. GARTRELL: Your Honor, could you reference the
2 paragraph, please?

3 THE COURT: 48 and it's table 7.

4 MS. GARTRELL: Okay, great. Thank you. Okay, I'm
5 there.

6 THE COURT: Okay. So, paragraph 48 says, the
7 aggregate market positioning is shown in table 7 below. Do
8 you see that?

9 MS. GARTRELL: Yes, I do.

10 THE COURT: So, I just want to make sure I
11 understand. When you say aggregate market positioning, who
12 -- what is the market that you're looking at here? You have
13 -- the first column is Employee Group and you have Non-
14 insider (Executive Survey) and then below that you have Non-
15 insider (Middle Management and Professional Survey). So,
16 what is the -- what is the group you're comparing the
17 Debtors' KERP participants to?

18 MS. GARTRELL: Sorry, Your Honor, that is the
19 Willis Towers lots in 2020 pharma survey that we used last
20 year as well. And so it splits out the employee groups into
21 executives as well as middle management and professional,
22 which is a leveling exercise for that -- from that
23 perspective. And then we look at the variants of -- to
24 market TDC, Total Direct Compensation Opportunities, among
25 all those different measurements. So, 25th percentile

1 median, 75th percentile.

2 THE COURT: Okay, so it's comparing the pharma
3 group competitors, in essence, to the Debtors for personnel?

4 MS. GARTRELL: That's correct.

5 THE COURT: Okay. And this is -- this is a review
6 of compensation, right? This is not a cost review?

7 MS. GARTRELL: That's correct.

8 THE COURT: It's just comparing the
9 characteristics of the KERP participants or the proposed
10 KERP participants' compensation versus the competitors?

11 MS. GARTRELL: That's correct.

12 THE COURT: Okay. SO, the next column, as you
13 noted, has three sub-columns in it: P25, P50, P75, which I
14 gather is 25th percentile, 50th percentile and 75th
15 percentile, right?

16 MS. GARTRELL: That's correct.

17 THE COURT: And it says, variance to market TDC.
18 And then in parentheses it says, "Purdue Target TDC". And I
19 just want to make sure I understand what those two phrases
20 mean. When you say TDC, what do you mean with that
21 designation?

22 MS. GARTRELL: So, when we're talking about market
23 TDC in our surveys, that reflects base salary, target annual
24 incentive, bonus opportunities, as well as target long-term
25 incentives. And here we're comparing, when we say Purdue

1 target TDC, because we don't have typical TDC in practice
2 during bankruptcy, that is specifically comparing the base
3 salaries plus the KERP without the targeted retention
4 amounts, as well as the discounted L-trip award
5 opportunities. And then it shows, compared to market, where
6 they fall, you know, in the two different cuts of the survey
7 group.

8 THE COURT: Okay. So, when we have Purdue Target
9 TDC here, it's everything other than the third aspect of the
10 KERP, which is the target retention payments?

11 MS. GARTRELL: That's correct. And then that's
12 reflected -- all of those amounts are reflected in the
13 second set of columns for transparency purposes.

14 THE COURT: Right. And that -- and the only
15 difference there is the parenthetical that says, Purdue TDC
16 plus retention?

17 MS. GARTRELL: Correct.

18 THE COURT: Okay. And when it says market TDC in
19 both of those columns, do they -- does that include any
20 retention component similar --

21 MS. GARTRELL: No, our survey --

22 THE COURT: -- similar to the one in the KERP
23 that's included in that third column?

24 MS. GARTRELL: No, Your Honor. Our survey data
25 for normal course non-debtor businesses is reflective of

1 base salary annual bonus opportunity at target and target
2 long-term incentive opportunity. But since we don't have
3 all those elements, this is just to show the total
4 opportunity if we included the targeted retention amounts as
5 well, compared to what we would consider the market for
6 talent for Perdue employees, which is normal course, non-
7 bankruptcy pharmaceutical companies of similar size.

8 THE COURT: Okay. Is it the case that those
9 normal pharma companies, competitor companies, don't have a
10 separate element of compensation, i.e., sort of a reserve
11 fund to pay important people or key people, rather, who
12 might otherwise leave?

13 MS. GARTRELL: No, certainly companies have
14 retention programs, it's just that they're not typically
15 reflected in the total target direct compensation data that
16 would be reflected in, you know, retention plan or severance
17 plan data. So, there are many other elements of pay that
18 could be used as tools to retain people or -- or offer them
19 severance opportunities. But because we don't have the
20 traditional elements of pay in bankruptcy, our methodology
21 is to show the Court and all constituents all elements of
22 pay and tools that are available to this company in
23 bankruptcy, as compared to their market for talent which is
24 ongoing non-bankruptcy pharmaceutical companies in this
25 case.

1 THE COURT: Okay. Well, how would you know then
2 that other companies do have -- or do use a separate tool
3 for retention, namely, you know, an amount that they set
4 aside to pay people that they don't want to leave and feel
5 that they would otherwise leave?

6 MS. GARTRELL: A few ways I know that, Your Honor.
7 One, I do retention programs for companies that are not in
8 bankruptcy on a regular basis. Willis Towers Watson also
9 has retention survey data that we collect. And so just
10 based on my experience, I know that we have -- that
11 companies do utilize retention and other tools to maintain
12 their workforce.

13 THE COURT: Okay. So, just walking through the
14 chart then, it appears to me that, based on the data you've
15 used, at the midlevel, the 50 percent level, the Purdue
16 target TDC is slightly over the market, right? Eight
17 percent and 11 percent, respectively?

18 MS. GARTRELL: That's correct. Although I would
19 add that, from a methodology perspective, when we're
20 comparing total direct compensation to the market, we would
21 consider a competitive range to be 50, being plus or minus
22 20 percent. So, in our nomenclature we would say that the
23 variance to market TDC, looking at Purdue's proposed
24 compensation programs plus base salary, would be within the
25 competitive range of (indiscernible) 50 of medium.

1 THE COURT: Okay. And then when you get to the
2 next column, at least for the 41 covered in the non-insider
3 executive survey, it seems to be outside of that range.
4 It's 39 percent, whereas the middle management is 16
5 percent, which is in that range.

6 The reason I was asking you the questions about
7 what was included in the market TDC and whether they had --
8 those competitors also have a similar -- or regularly use
9 the type of retention payment that is covered by the third
10 aspect of the KERP proposal, i.e., the target retention
11 awards -- is to lead up to this question, which is in your
12 experience, are those competitor's target retention awards
13 similar to, greater than, less than the proposed component
14 for these Debtors?

15 MS. GARTRELL: I would say that they're similar
16 to, but I would also add that retention is very
17 differentiated based on a company's needs. So, for example,
18 you could have a set of a senior leadership team whereby,
19 you know, certain of them are leveled -- they have a
20 different level of criticality than others, as determined by
21 the CEO, the board, or some manager. And so they could be
22 highly differentiated.

23 But I would add that I don't think that what the
24 company is proposing here is out of the ordinary in any way,
25 shape, or form.

1 THE COURT: And would that be the case also for
2 the size of the -- you know, per person? The size of the
3 fund?

4 MS. GARTRELL: Yes, the size -- when we compare
5 this cost per person here, you would see in a different
6 table that we're actually lower than I believe the 25th
7 percentile compared to market. So, I don't think -- the
8 cost per person on average is not excessive either.

9 THE COURT: Okay. And, again, this -- your
10 answers to the last couple of questions that I had, that's
11 based on your own experience advising other companies on
12 their compensation structure?

13 MS. GARTRELL: That's correct. That's correct,
14 and very current experience, Your Honor, because we have a
15 market for talent whereby it's very difficult to keep people
16 in the workforce at this moment in time. So, we are looking
17 at retention programs for a number of our clients.

18 THE COURT: Okay. All right, does anyone want to
19 question Ms. Gartrell on that series of questions that I
20 asked? No? Okay. Very well. Those were all of my
21 questions, MS. Gartrell, so you can consider that you're no
22 longer testifying and sign off from the screen.

23 MS. GARTRELL: Okay, thank you, Your Honor.

24 THE COURT: Okay. All right. Is there any other
25 evidence that the Debtors wish to present?

1 MR. VONNEGUT: No, Your Honor, that's it.

2 THE COURT: Okay. All right. Well, I think
3 rather than have Mr. Vonnegut reply to the objections, which
4 the Debtors have already done in their reply, I think I
5 should hear from the objectors and then he can reply to
6 that. Although, again, I've read both of the objections and
7 if you want to stand on that, that's fine, but if you don't,
8 feel free to speak at this point.

9 MR. HIGGINS: Thank you, Your Honor, I'll go
10 first, I think. This is Ben Higgins for the United States
11 Trustee. I don't have a lot to add besides what's in the
12 papers. We've raised two points in our objection. One is
13 with respect to the overall cost of the KERP program, and
14 the second is with respect to the timing of the motion
15 itself.

16 On the cost, we do recognize that Your Honor has
17 ruled on similar objections with respect to the 2020 plan,
18 so I really don't intend to add much beyond the papers on
19 these two points. The two issues we wrote -- we raised --
20 the two points we raised with respect to cost, we're one,
21 looking at the cost of the KERP as a percentage of revenue
22 puts it among the 90th percentile. And then the other point
23 is with respect to direct compensation that puts the
24 participants above market in the 75th percentile range.

25 And, again, Your Honor, I know where you've ruled

1 in the past on these issues. So, unless you have specific
2 questions, I really don't have much to add on the cost
3 component.

4 THE COURT: Okay. Well, let me -- I guess, on the
5 latter point -- and it was one of the reasons I went through
6 table 7 with Ms. Gartrell -- the non-insider survey actually
7 doesn't show that, right? It shows that it's, in her
8 testimony, at the 50 percentile range within the competitive
9 range and 1 percent below the target at 75 percent. And for
10 the non-insider executive survey, which is the smaller
11 number of people, it is slightly out -- more than slightly -
12 - it's outside of the range on 50 -- at the 50th percentile,
13 and 10 percent over the range at the 75th percentile;
14 although her testimony was also to the effect that the TDC
15 of the market, to which this was being compared, actually
16 didn't include any specifically targeted retention payment
17 pool, which she said was in line with, in her experience, on
18 a market basis, the Debtor's proposed retention payment pool
19 -- which would, I think take it back to the -- or make it
20 consistent with the first column, which shows it within the
21 competitive range at 50 percent and under the 75 percent for
22 both categories.

23 Am I missing that? That's what I took away from
24 her testimony at least.

25 MR. HIGGINS: No, Your Honor. I -- I -- that's

1 what I took away as well from her testimony. I don't have
2 anything to refute that point with, so I'll just rest on the
3 papers. I won't add anything on that particular point, Your
4 Honor.

5 THE COURT: I mean, I think -- I do understand
6 your -- that needed to be cleared up, in my mind at least.

7 MR. HIGGINS: Sure.

8 THE COURT: Because it wasn't clear to me what was
9 in the variants to market TDC for that -- that second
10 column.

11 MR. HIGGINS: Right.

12 THE COURT: Okay.

13 MR. HIGGINS: And then, Your Honor, our second
14 primary objection is with respect to timing. And as Your
15 Honor knows, this is the third motion we've had in this case
16 seeking relief under Section 503(C). The original wage
17 motion was filed just after the case was filed back in
18 September of 2019. And that relief with respect to the non-
19 insiders, I believe, was granted in October. And then the
20 2020 KERP was again filed in September of 2020, and that
21 relief with respect to the KERP was granted in October of
22 2020.

23 And here, I note in the Debtor's reply that they
24 say, it's not early with respect to their prepetition
25 bankruptcy practice, but it is earlier than what's happened

1 in this bankruptcy case and where -- confirmation is right
2 around the corner. And our basic point is that they're
3 moving it up here, and there should be an opportunity for
4 the new entity's new board to have an opportunity to weigh
5 in here on this. And the Debtors, in their reply, they cite
6 some evidence of attrition in their workforce. And this is
7 where I did want to raise just what came up in our
8 communications with the Debtors and basically what we were
9 trying to seek out and what Mr. Troop was trying to seek out
10 is whether the employees that have left, are they doing it
11 because of the KERP or the claw-back? And what information
12 did the Debtors have in that regard? And we understand that
13 the Debtors have conducted exit surveys.

14 So, I'm just going to read from the information
15 that was provided to us, and I'll let Mr. Vonnegut, if he
16 thinks anything is inaccurate or needs to be clarified, I'll
17 let him weigh in. But basically what was relayed to us is
18 that Perdue sends an exit survey to each employee who
19 voluntarily leaves the company. And it seems that the
20 information from the most recent quarter is not available at
21 this time.

22 But, just to compare in quarter two, 2021, eight
23 employees who voluntarily left the company responded to the
24 survey, and all eight such employees indicated in the survey
25 that they were leaving the company for at least \$10,000 more

1 in compensation, and that their responses to the survey of
2 those employees also cited the following as reasons for
3 leaving the company: Job security, increased compensation,
4 bigger roles, flexible work schedule and retirement/early
5 retirement. And none of these eight employees specifically
6 mentioned the KERP or claw-back provisions in their
7 responses to the survey.

8 And so I think the point we just wanted to
9 illustrate to Your Honor is just that the Debtors, while
10 they are suffering from employee attrition, it is not
11 necessary a direct correlation between the KERP and the need
12 for the KERP and the claw-back and employees leaving.
13 There's a whole host of other reasons, as Ms. Gartrell just
14 testified. Employees are leaving employers all over the
15 place and it's hard to keep people employed. So, it may not
16 necessarily be because of the KERP or the claw-back.

17 That's the only point we wanted to raise on that
18 in response, Your Honor. And so our concern is just that
19 they seem to be accelerating it here. It's not clear that
20 they've demonstrated the need to move this up. And we would
21 just ask that this request be adjourned, at least consistent
22 with what has been done with the KEIP. And I'll pause there
23 for any questions, Your Honor.

24 THE COURT: No, that's fine. Thank you.

25 MR. HIGGINS: Thank you.

1 MR. TROOP: Good afternoon, Your Honor. Andrew
2 Troop for the nonconsenting states.

3 THE COURT: Afternoon.

4 MR. TROOP: Your Honor, I'm going to try to be as
5 brief as my (indiscernible) was. First, I'll note that
6 there are 25 members for the group. We may be called the
7 nonconsenting states but we have 24 states and the District
8 of Columbia, and the District hates to be left out.

9 Secondly, Your Honor, I'm not going to add
10 anything to the discussion about (indiscernible).

11 THE COURT: I'm sorry, I just didn't hear that.

12 MR. TROOP: I'm sorry. I'm not going to add
13 anything with regard to the amount of the KERP or the issues
14 (indiscernible) with Mr. Higgins. Your Honor, I will simply
15 note that the changes to the KERP that had been announced by
16 the Debtors in negotiation with the AHC, BCC and the
17 (indiscernible) while they address some of the concerns that
18 we have (indiscernible).

19 Third, Your Honor, on this issue of urgency, when
20 I finished reading Mr. Lowne's supplemental declaration
21 yesterday, I was left with the clear impression that the
22 KERP had to go forward now because the lack of the KERP was
23 the reason that people were losing -- the company was losing
24 employees. Your Honor, that's been confirmed not to be the
25 case or at least not directly causal.

1 HR apparently at Perdue has received comments from
2 active employees about future KERP and claw-back, but we
3 received no detail on what those comments are. And,
4 therefore, I infer -- because I assume there were comments
5 that said, oh, my God, we're leaving if we don't get the
6 KERP -- that would've been relayed to us by the Debtors.
7 And in the context of this case --

8 THE COURT: I'm sorry, I thought -- I thought they
9 provided you the surveys. That's what I took away from Mr.
10 Higgins.

11 MR. TROOP: No, nothing.

12 THE COURT: Or was it just a summary?

13 MR. TROOP: Just a summary, Your Honor. We didn't
14 see the --

15 THE COURT: Okay. All right.

16 MR. TROOP: The surveys themselves are apparently
17 check the box, multiple choice, fill in a comment section.

18 THE COURT: Okay.

19 MR. TROOP: And this was the summary provided by
20 the Debtors. I don't think the Debtors were under any
21 misapprehension as to why I was asking the question. So, I
22 assume that the answer is as much as (indiscernible) in
23 terms of being able to draw conclusions.

24 Your Honor, in the context of this case, in 20
25 days, give or take, however long thereafter it takes you to

1 rule, we'll know if there's a confirmed plan or not. And it
2 would seem to make the most amount of sense in making these
3 decisions about the patron of the company (indiscernible) a
4 potentially new management after that decision is made.

5 THE COURT: Now, there's some logic to that point
6 but the Debtors reply that the new board actually won't be
7 in place until sometime next year, in all likelihood.

8 MR. TROOP: Your Honor, my understanding is that
9 the new board and new management are being actively sought
10 out and interviewed now. That it is the intent of parties
11 to have these people identified as soon as possible.
12 Indeed, in connection with confirmation of 1129, we're going
13 -- someone's going to have to make some disclosures. We
14 will not --

15 THE COURT: I understand -- I understand that
16 point. But as far as being able to make decisions, they
17 wouldn't be able to make decisions until they're in place.

18 MR. TROOP: That's true, Your Honor, but that
19 isn't to say they wouldn't be able to have input, looking
20 towards the future of the company. And we take input from
21 all sources in this case.

22 The third issue, Your Honor, is what I'm going to
23 call general (indiscernible) quality.

24 THE COURT: I'm sorry? Before you go to the third
25 issue --

1 MR. TROOP: Yeah, of course.

2 THE COURT: Your clients, the committee, the other
3 states and, frankly, everyone else in this case that's been
4 active in the case hasn't been shy in expressing their views
5 as to any number of issues. I understand that people who
6 will be serving as a board, to some extent, have a different
7 skillset but your clients are very sophisticated people.
8 They run very large offices, have to make serious personnel
9 decisions. Isn't their input sufficient at this point if I
10 conclude that this isn't some sort of strategic ploy just to
11 jump the gun and get through something that's unusual before
12 the company changes hands?

13 MR. TROOP: Your Honor, we are specifically
14 looking for board members and officers (indiscernible) to
15 adapt and adjust this company to its new future post-
16 confirmation. And those issues require a level of skill,
17 expertise and understanding with regard to a workforce that
18 lawyers generally don't have. This isn't like running --

19 THE COURT: Well, I'm not talking about lawyer.
20 I'm talking about your clients, who are lawyers, but they
21 run a -- they run attorney generals' offices.

22 MR. TROOP: Which are very different than running
23 a manufacturing facility in North Carolina or a salesforce
24 in North Carolina or Connecticut, Your Honor.

25 THE COURT: Okay.

1 MR. TROOP: And we're putting our -- you know,
2 we're putting our faith in a process to find people who will
3 be able to achieve those goals.

4 THE COURT: All right, I understand that point.

5 MR. TROOP: Thank you.

6 THE COURT: One last question on this. This is a
7 -- a compensation program for 2021. It's for the calendar
8 year 2021. Some of these payments are not going to be paid
9 until, if I approve it, well into 2022. But it's
10 essentially for the past work, right? So, the resizing, if
11 you will, or the repositioning of Perdue, if it emerges
12 after confirmation, the confirmation hearing, is really to
13 happen in the future as opposed to 2021. At least that's
14 the point I think -- one of the points the Debtors are
15 making.

16 MR. TROOP: Your Honor, and I do understand that.
17 But the very purpose and structure, particularly the changes
18 (indiscernible) is to incent retention through 2022. Right?
19 So, while it is compensation for current services, it really
20 is focused on retention, not this year, but for at least
21 half of next.

22 THE COURT: But isn't that, in essence, to give
23 the Debtors, the organized Debtors, optionality? I mean,
24 the committee made this point for the 2020 compensation
25 structure, that they wanted to have it be more retentive so

1 that you get more value as the company than have it be less
2 retentive, have it be for a shorter period, so the payments
3 are stretched out over more time. You can still terminate
4 someone, right? And 2022 wouldn't have been set.

5 MR. TROOP: But if you terminate them with this
6 plan in place, other than (indiscernible) you're still going
7 to have certain liabilities.

8 THE COURT: Right, but that's for 2021 again.
9 Again, the payments are for 2021 work.

10 MR. TROOP: Right. But the optionality is to keep
11 it around until 2022 --

12 THE COURT: But the optionality is all in the
13 company's favor, not the employees' favor.

14 MR. TROOP: But I think once the plan is set
15 (indiscernible) what kind of behavior (indiscernible) -- I'm
16 sorry, Your Honor, there's feedback, I don't know what --

17 THE COURT: Yeah, you're feeding in and out.
18 Maybe if you get closer to the microphone?

19 MR. TROOP: I'm afraid that my face
20 (indiscernible) --

21 THE COURT: That's okay. I'm not getting the
22 window -- the nose in the window yet look.

23 MR. TROOP: Thank you, Your Honor. Your Honor,
24 these are all very difficult questions and the question
25 really becomes whether these decisions should be made

1 (indiscernible) the people who are responsible for guiding
2 the different Purdue under (indiscernible). And, Your
3 Honor, I don't have much more to say (indiscernible)...

4 THE COURT: Okay.

5 MR. TROOP: Your Honor, the third issue that we
6 have, and it's one that we (indiscernible)...responsibility
7 of the company...

8 THE COURT: Are you still hearing feedback?

9 MR. TROOP: I am, Your Honor. I was trying to
10 figure out whether it's --

11 THE COURT: Can I ask Mr. Vonnegut and Mr. Higgins
12 to put their microphones on mute? Everyone else, I think,
13 is on mute, right, Arthur?

14 ARTHUR: Yeah.

15 THE COURT: All right, so maybe that'll work.
16 Hopefully.

17 MR. TROOP: Thank you. So, Your Honor, we've had
18 one meaningful changes since we were last before you on the
19 KERF. When you last approved the KERF in September of 2020,
20 one of your observations was that there were no facts before
21 you with regard to the company's wrongdoing or ill conduct.
22 And within weeks of that hearing, the company pled guilty to
23 felonies spanning ten years.

24 That changes the marketplace. And as -- changes
25 the framework. And as their chief law enforcement officers,

1 the attorney generals in the nonconsenting states uniformly
2 believe that it is not only appropriate but good management
3 for this company to confirm that the people that they have
4 in their employ have not improperly contributed to improper
5 conduct by Purdue.

6 And what we found out since then is, well, Your
7 Honor, that to our knowledge, no one's been fired, no one's
8 been reprimanded, no one didn't get a bonus because of any
9 participation either in the commission of the crimes that
10 have been pled to or otherwise with regard to improper
11 conduct over (indiscernible) period of time. And that is an
12 important issue for the attorney generals in the
13 nonconsenting states.

14 It's not an answer, frankly, as they Debtors did
15 in their reply. And what we went through last time, we took
16 whatever data we had received from the company, and where I
17 was able to identify seven or some -- a number of people
18 that we wanted them to look into, and they provided us some
19 information about those people. Because, frankly, we don't
20 know what we don't know. We understand that there were many
21 hundreds of people in the process. We don't know what they
22 reported.

23 And, finally, Your Honor, it's not a touchstone
24 that individuals weren't indicted or did not themselves
25 plead guilty as part of the DOJ pool because we --

1 THE COURT: I don't think the Debtors are
2 suggesting that that's the cutoff, though. I don't think
3 that they've made that argument.

4 Let me cut to the chase. I understand your point
5 as a general matter. And I think while the Debtors clearly
6 were more than willing to work with your clients, and the
7 committee, and the other states to address any individual
8 questions that they had based on what they did have
9 information on -- and I don't think you'd dispute that
10 because there was the carve-out for the eight people and the
11 like -- it's true, they know more than you know,
12 notwithstanding all the discovery and disclosure, etc.

13 On the other hand, the -- I'm looking at the
14 actual language because, you know, when you have a -- a
15 right to money which can be taken away, you really do need
16 to have -- I think generally, unless someone's being
17 retained at a much higher level than these people are --
18 clarity as to how it can be taken away.

19 And the order that was in place for 2020 and which
20 the debtors are proposing to replicate with regard to this
21 motion -- well, I'll read paragraph 9 of their proposed
22 order.

23 It says, "Any 2021 KERP participant" -- the old
24 order said 2020 KERP participant -- "to the extent that any
25 2021 KERP participant is determined by a final order of this

1 Court or any court of competent jurisdiction to have, a)
2 knowingly participated in any criminal misconduct in
3 connection with his or her employment with the debtors, or,
4 b) been aware, other than from public sources, of acts of
5 omissions of others that such participant knew at the time
6 were fraudulent or criminal with respect to the company's
7 commercial practices in connection with the sale of opioids
8 and failed to report such fraudulent or criminal acts or
9 omissions internally at the company or to law enforcement
10 authorities at any time during his or her employment with
11 the company shall not be eligible to receive any payments
12 approved by this order," and then all parties rights, if
13 any, to seek disgorgement following the entry of final order
14 are reserved.

15 So that's pretty clear standard to follow, and I
16 think your point raises two separate points. One is, what's
17 proposed in the objection is a different standard, and then
18 secondly, you want to debtors to actually confirm that they
19 have done their own due diligence on whatever standard is in
20 the order, included it will be, a minimum, the one that the
21 debtors have proposed. It's two separate points, right.
22 You want them to -- the debtors to perform their own due
23 diligence, and separate, you want to have to have a slightly
24 different -- not slightly -- a different standard for not
25 being eligible for the payment. Is that fair? They're two

1 separate points?

2 MR. TROOP: Your Honor, I think that, with regard
3 to the standard point, I would be prepared to say we could
4 live with the standard as articulated in the prior order --

5 THE COURT: Okay. All right.

6 MR. TROOP: -- but we do agree that it's time for
7 the debtors to step up and do their diligence.

8 THE COURT: Okay. Good. I just wanted to make
9 sure we knew what was at issue here. And, frankly, I
10 understand the second point. I think that's important. I
11 think any company should do that, and it's important to Mr.
12 Vonnegut should address because my inclination is to agree
13 with you on that point, that the debtors should represent
14 that they will undertake to determine whether any of the
15 recipients of the 2021 KERP fall into one of these
16 categories.

17 Now I appreciate it says, "final order," but I
18 think if they at least think that someone is in that
19 position, my guess is -- my -- not guess -- my inclination
20 is that they should be treated like the eight people that
21 you inquired about -- you and others inquired about -- with
22 the 2020. I mean, obviously there's due process. They
23 can't just be excluded with any inquiry, an explanation, et
24 cetera, but at least there should be some mechanism for
25 review if they -- if the debtors reasonably conclude that

1 someone might fall into either category A or category B in
2 that paragraph 9.

3 MR. TROOP: Your Honor, that would be satisfactory
4 on this point (indiscernible).

5 THE COURT: Okay. All right. Okay. So I think
6 that -- is that -- that's your conclusion for your remarks,
7 Mr. Troop?

8 MR. TROOP: I have one more that's more of a
9 housekeeping detail that I can save for the end, Your Honor,
10 so that Mr. Vonnegut can talk (indiscernible) in specifics
11 now in order, if that's okay.

12 THE COURT: Well, okay. If it's not -- it's
13 really not that material, it's just clean up, that's fine.
14 Okay. All right. Okay. Mr. Vonnegut, do you have -- why
15 don't you respond to that point we just covered first as far
16 as the debtors performing their own due diligence here and
17 building in a mechanism for that and that hold back to
18 review further if someone falls into one of those two
19 categories.

20 MR. VONNEGUT: Sure. Thank you, Your Honor. So
21 the most important point on this one is that I have learned
22 from dealing with this subject matter that it's very
23 delicate and that I have to be very careful. And so bottom
24 line, I'm going to need to consult the company's counsel
25 that has been addressing the DOJ investigations and the

1 investigations by the state attorneys general.

2 Just to give an example to explain what I'm
3 talking about, there is a provision in our agreement with
4 the Department of Justice that says, effectively, the
5 company cannot stand up and publicly and proclaim its own
6 innocence. And so there are limitations on what the company
7 is able to do in light of both the concluded investigation
8 and the terms of our agreement with the Department of
9 Justice. And so one of the difficulties that we had,
10 frankly, in our discussions with Mr. Troop and others on the
11 side of the nonconsenting states is, they will ask for
12 public declarations that we explain we are not able to make,
13 given all of the different intersecting investigations.

14 I very much understand the Court's concern and
15 what you're looking for, but these are very serious matters.
16 I don't want to wing it, and so I think I will need to
17 consult with our criminal law experts and revert.

18 THE COURT: Okay. Although it would seem to me
19 one could draft this in a way where the debtors are not -- I
20 think what you're concerned about is that by implication if
21 the debtors identify someone -- and I'm assuming it's
22 identifying it internally and to the person but not making a
23 public declaration about it, although during the course of
24 this case, parties and interest might well have the ability
25 to question you about that --

1 MR. VONNEGUT: Yes --

2 THE COURT: -- but I think what you're concerned
3 about, though, is that by implication, if you haven't
4 identified anyone, you're asserting somehow the debtor's
5 innocence. I think that can be drafted around. I think
6 that's not really -- I think everyone understands that's not
7 what this exercise is about. And when I say "exercise," I
8 don't mean it's an empty exercise. It's a serious exercise.
9 But I don't think that's what it's about. It's not about
10 the debtors saying, you know, we are innocent. It's about
11 saying that someone who is still working for us and eligible
12 for this payment really shouldn't get it.

13 Now there may be --

14 MR. VONNEGUT: Yeah --

15 THE COURT: -- there may be other concerns in your
16 agreements with the Department of Justice and individual
17 attorneys general in connection with investigations, and
18 clearly, there are definitely employment law concerns as to
19 how you go about taking actions for cause. I understand
20 both of those things. And again, I think you can draft
21 around -- I mean, you can draft consistent with that. But
22 there's a fundamental point which is, these programs already
23 recognize that you don't get the KERP if you're terminated
24 for cause so to me, if someone has engaged in the type of
25 activity described in either A or B of paragraph 9 that

1 would -- in my view, I guess, be grounds for cause.

2 Now you have to have a --

3 MR. VONNEGUT: Yes, you -- Your Honor --

4 THE COURT: -- you have to have a program that
5 complies with employment law in airing -- you know, in
6 raising those issues and dealing with them, and I'm not
7 intending to prescribe how you do that. The language would
8 say, consistent with, you know, applicable non-bankruptcy
9 law pertaining to employment matters and any agreements with
10 law enforcement agencies. But I think the basic concept is
11 one that should be recognized.

12 MR. VONNEGUT: Yes, Judge. Let me be very clear.
13 If we believed that a current employee committed a crime or
14 was aware of crime or fraud and did not report it, they
15 would be fired. I want to be very careful about exactly
16 what we say on this subject matter because I know I'm a
17 restructuring lawyer. I'm not a criminal lawyer. I don't
18 want to make it up. But we are in full agreement on that
19 fundamental premise. I think the point from the company's
20 perspective is that these are serious and important matters
21 and we need to get the language exactly right. That's,
22 frankly, why so much thought went into articulating the
23 exclusion standard the way that we did.

24 THE COURT: All right. It's really -- I think the
25 change -- and maybe it isn't a change -- but I think the

1 change would be an affirmative undertaking by the debtors to
2 actually perform their own due diligence on these points --
3 on points A and B.

4 MR. VONNEGUT: Understood, Your Honor.

5 THE COURT: Okay. All right.

6 MR. VONNEGUT: Okay. I will just briefly address
7 the other commercial points that were raised by the two
8 objectors. I don't think there's a ton to discuss there,
9 Your Honor.

10 So with respect to the timing of the program, this
11 notion that we are approving the programs early is just not
12 right. Historically, employees of the company were told
13 what they were going to be paid in the first quarter of the
14 year. For 2019 -- obviously, they were told that early in
15 2019 and then we filed for bankruptcy in the fall so we
16 couldn't get court approval until after we filed for
17 bankruptcy.

18 For 2020, we had an ongoing mediation that was
19 very delicate. Everybody asked us to delay consideration of
20 the programs. We accepted that request. We delayed
21 consideration. It was not helpful for the business. It's
22 not the normal practice to ask people to work the whole year
23 and then find out in the fall whether they're going to get
24 paid anything above base salary. We just think that's not
25 the right idea. I think the thing that I would quote is

1 Your Honor's commentary in the Topps Holding case that the
2 debtor should have to be made to gamble that employee would
3 elect to stay with the company even if the KERP were not
4 approved. I think that's exactly the right way to look at
5 the question of when in a year its programs are approved.

6 With respect to the idea that the new board should
7 be involved in compensation for 2021, frankly, I think Your
8 Honor picked up on many of the exact same (indiscernible)
9 that I was going to raise. Fundamentally, they're at the
10 same timing (indiscernible) that if you want the new board
11 to opine on these programs, the new board doesn't exist yet,
12 and they're not going to be able to do it for quite some
13 time so you're going to be asking the work force to accept a
14 lot of risk and we think that would be damaging to the
15 enterprise.

16 It's also just not normal course to ask boards for
17 reorganized companies to approve compensation for periods in
18 which they had no control over the enterprise whatsoever.
19 The new board can and should set go forward compensation
20 however it sees fit, but we don't think it's right for them
21 to address 2021 compensation. The current board needs to be
22 able to decide now how to pay the employees for the work
23 that they are doing now.

24 With respect to the commercial metrics, points
25 raised by both of the objectors, again, I'll be very brief

1 because I think Your Honor touched on many of the points
2 that I was going to raise. The market positioning is
3 effectively right where these programs were last year. I
4 think Your Honor was exactly right, and I don't want to put
5 words in your mouth, but the way that we view, the most
6 informative comparison is to take the Purdue total target
7 compensation excluding the retention and compare that to the
8 market because we know that that is an apples-to-apples
9 comparison so we think that's the better way to look at it.

10 And with respect to the commentary on the exit
11 surveys and this idea that employee attrition just doesn't
12 have to do with employee compensation and it's driven by
13 other things, Your Honor, we just don't find that
14 persuasive. We have employees telling us when they are
15 leaving that they are leaving for opportunities that pay
16 more money. We had an extraordinarily large surge in
17 attrition happening directly after the claw back expired on
18 the last programs. We just think it's exactly speculative
19 under those circumstances to say, maybe people are leaving
20 for reasons to do other than compensation. We think it just
21 stands to reason that compensation is a significant portion
22 of anybody's decision on whether they stay with a job or
23 leave that job.

24 I believe that that covers, frankly, all of the
25 points raised by the objectors. The bulk of my discussion

1 on the exclusion standard was going to be about the standard
2 itself and we've dispensed with that. So unless Your Honor
3 has any further questions, I don't think I have anything
4 further.

5 THE COURT: I'm sorry, you said the exclusions --
6 maybe I just misheard -- the exclusion standard. What --

7 MR. VONNEGUT: I'm sorry, Your Honor. I was
8 speaking too fast. I was going to say that about the
9 exclusion standard for the programs, the bulk of my
10 discussion was going to be (indiscernible) --

11 THE COURT: Oh, who would be excluded from it. I
12 got it. I understand.

13 MR. VONNEGUT: So, sorry.

14 THE COURT: Right.

15 MR. VONNEGUT: We've now put that to the side.

16 THE COURT: Okay. Okay. All right. Anything
17 else from anyone? No. All right.

18 I have before me a motion by the debtor in this
19 case, only one portion of which they're seeking to proceed
20 with today. It is for approval of their KERP, K-E-R-P, or K
21 -- key employee retention plan -- program for 2021, i.e.,
22 the year that we're now at the end of July in. They're
23 seeking to do that under section 503(c)(3) of the bankruptcy
24 code which provides that other transfers or obligations that
25 are outside the ordinary course of business than the

1 transfers specified in paragraph C(1) and C(2) which are
2 transfers to "insiders" of the debtor are not -- can be made
3 -- but are not justified -- unless they are not justified by
4 the facts and circumstances of the case.

5 The courts have construed that provision, i.e.,
6 the court's review of transfers to employees other than
7 insiders or the incurrence of obligations to them. Under
8 the standard that courts generally apply under 363(b) of the
9 Bankruptcy Code to actions, requests of approval of actions,
10 that is, and transactions proposed by a debtor out of the
11 ordinary course. See in *Re Velo Holdings, Inc*, 472 B.R.
12 201, 212 (Bankr. S.D.N.Y. 2012; in *Re Borders Group, Inc*,
13 453 B.R. 459, 473, (Bankr. S.D.N.Y. 2011; and in *RE Dana*
14 *Corp*, 358 B.R. 567, 576 through 77, (Bankr. S.D.N.Y. 2006.

15 As I have frequently held, this business judgment
16 standard is not the same standard as the corporate law
17 business judgment standard which is highly deferential to a
18 corporation's board of directors in deciding to take an
19 action out of the ordinary course unless there is an
20 exception under applicable state law, albeit, that some
21 courts do apply that standard, including in this district,
22 as stated many years ago by Judge Mukasey in the *Integrated*
23 *Resources* case.

24 Rather, because Congress requires notice and the
25 opportunity for a hearing and, therefore, the opportunity to

1 object by parties and interest and ultimately a decision by
2 the Court as to whether the action is properly taken, I
3 think that the appropriate standard is whether, ultimately,
4 in the Court's judgment informed by the parties and
5 interest, both by their objections and if there's no
6 objection, by the lack of an objection, as to whether the
7 action makes good business sense. Stated, for example, in
8 in *Re Orion Pictures, Corp.*, 4 F.3d 1094.

9 With regard to 503(c)(3) determinations, the
10 courts have long considered specific factors that inform
11 whether the decision makes good business sense and they are
12 traceable back to Judge Lifland's decision in the Dana case,
13 although, one is not limited to those factors in deciding
14 whether the debtor has exercised sound business judgment in
15 making the proposal.

16 Those factors are, is there a reasonable
17 relationship between the plan proposed and the results to be
18 obtained, i.e., will the key employees stay for as long as
19 it takes for the debtor to reorganize or market its assets
20 or in the case of a performance incentive, is the plan
21 calculated to achieve the desired performance; is the cost
22 of the plan reasonable in the context of the debtor's
23 assets, liabilities and earning potential; is the scope of
24 the plan fair and reasonable -- does it apply to all
25 employees, does it discriminate unfairly; is the plan of

1 proposal consistent with industry standards -- what was the
2 due diligence conducted by the debtor in investigating the
3 need for a plan; analyzing which key employees need to be
4 incentivized or induced to stay and what is generally
5 applicable in the particular industry in regard to similar
6 plans; and lastly, did the debtor receive independent
7 counsel in performing due diligence and in creating and
8 authorizing the incentive compensation.

9 In addition, as I just noted, the Court's also
10 informed by the views of other parties and interest, both
11 their objections and, where they are active in the case on
12 other matters, the fact that they have not objected to the
13 proposal at hand.

14 The gateway to applying this standard as opposing
15 to -- opposed to a standard that required to focus on
16 incentivization and targets for performance is whether or
17 not, as I said, the participants in the KERP program are not
18 insiders. Insiders is separately defined or insider is
19 separately defined in the bankruptcy code and there is no
20 objection to this motion to the debtor's assertion that the
21 participants in the proposed KERP are not insiders.

22 For purposes of the KERP, the company categorized
23 an employee as an outside and therefore not eligible for the
24 KERP if the employee met any one of the following five
25 criteria. The employee, one, is an officer appointed by the

1 board; two, hold the title of chief executive officer, chief
2 financial officer, chief operating officer, general counsel
3 or senior vice president; three, reports to the board; four,
4 has authority to make company wide or strategic decisions
5 including critical financial decisions; or, five, is in a
6 position to determine his or her own compensation.

7 I agree with District Judge Oetken in *Herrington*
8 *v. LSC Communications, Inc.*, in *Re LSC Communications, Inc.*
9 which was recently decided earlier this month, 2021 U.S.
10 Distr. LEXIS 128403, (S.D.N.Y. July 9, 2021), that in some
11 respects the law as to who is an insider for these purposes
12 is somewhat murky. However, consistent with that opinion, I
13 agree if someone is in fact appointed by the board as an
14 officer, there is a strong presumption that requires
15 substantial evidence to rebut that they would not count as
16 an insider for purposes of this section, but, again, that's
17 the first category of someone who is excluded from this
18 group, i.e., that they weren't an officer appointed by the
19 board.

20 It does not appear to me, independent of the fact
21 that there are objections on this point, that any of the
22 debtor's analysis here as to who is within the program and
23 who is without it is inconsistent with the better recent
24 case law on this issue, including the cases summarized by
25 and to some extent followed by Judge Oetken in the LSC

1 Communications case.

2 So I do apply the Dana business judgment framework
3 here to this motion and the relief that is being sought
4 today from that motion, and I will note in that regard that
5 consistent with this KERP program not applying to insiders,
6 it is frankly a rather simple program that is consistent
7 with the debtor's compensation practices for decades for
8 these types of employees. It is clear from Ms. Gartrell's
9 testimony that if one looks solely at these employees' base
10 salary, their base salary is under market compared to the
11 total compensation paid by the debtor's competitors in the
12 industry and substantially so.

13 It is clear to me from the record of this hearing,
14 which through Ms. Gartrell's declaration incorporates the
15 record of the more extensive hearing that I held with regard
16 to the 2020 compensation program, that the KERP program is
17 necessary to bring the debtor's non-insider employees who
18 are within the program up to a competitive compensation
19 level with the competitors in the debtor's industry. This
20 is laid out in table of her declaration as well as in her
21 live testimony today.

22 I do not view this program, therefore, as one
23 would, as a lay person, typically view a bonus program.
24 Generally, one views a bonus program as an enhancement to a
25 normal compensation program to reward an employee for

1 meeting difficult targets or sharing in unanticipated
2 success of the organization for which the employee works.
3 This is, again, as far as the KERP goes, much more of a
4 normal compensation component, and without it, these
5 employees would not be compensated at market.

6 I think that is an important point for people to
7 understand given the somewhat loose usage of the term
8 "bonus" and I take seriously evaluating whether, in fact, an
9 asserted program falls into one or the other categories. Of
10 course, sometimes a bonus, a true bonus, may be warranted
11 based on unusual circumstances. But I do not view this
12 program as falling into that category. Rather, it's one
13 that makes the company's non-insider employees compensated
14 on a basis consistent with industry standards. It also
15 appears to be, not to be discriminatory as among the non-
16 insider employees and both of those conclusions, which I've
17 reached based on the evidence before me, are also supported
18 by independent analysis by the company's, Watkins Tower
19 Advisor, and presumably, the analysis by the Creditor's
20 committee, which has its own professionals who are experts
21 in this area and other parties in interest that are well and
22 sophisticatedly represented in these cases. I agree with
23 the input that the committee and others have had on the
24 original proposal. When I read the proposal initially, I
25 had the same reaction as to the final payments being made

1 upon emergence as opposed to potentially later. And I think
2 it is in the Debtors' and therefore their creditors'
3 interest that the payments, albeit for 2021, work are
4 staggered so that they went through the month of June in
5 2021 in some instances in a material way.

6 The U.S. Trustee objected to the KERP program
7 request on two grounds, with regard to the Dana factors in
8 the best interest analysis. I've addressed one and I
9 believe that, frankly, Ms. Gartrell's follow up testimony at
10 the hearing today disposes of it.

11 Although I can understand why there was some
12 confusion in the objection over it, namely the role played
13 by the third component of the KERP program, the targeted
14 retention payments, which are consistent with last year's
15 targeted retention payments, and whether those payments take
16 this program out of the ordinary are customary for the
17 industry, it's clear to me from Ms. Gartrell's testimony
18 that that is not the case, that an important way
19 (indiscernible) was comparing apples to, if not oranges,
20 then persimmons in the variance to market versus Purdue
21 total, including all of the current payments in that it left
22 out the special retention payments that she testified are
23 common in the Debtors' industry and not reflected in the
24 variance to market analysis.

25 The other point that the U.S. Trustee raised,

1 although I don't believe anyone else did, with regard to the
2 business judgment aspect of the Motion, is related to one of
3 the Dana factors, namely, is the cost of the Plan reasonable
4 in the context of the Debtors' assets, liabilities and
5 earning potential. It is true, as described in Ms.
6 Gartrell's Declaration, that the cost of the program,
7 compared to the percentage of revenue, is materially higher
8 than the comparators. However, the Debtors, I believe, have
9 a reasonable response on that point.

10 The Debtors, like all companies, are in some ways
11 unique. And one is that they filed, with essentially no
12 secured debt and have built up both pre- and post-filing, a
13 substantial amount of cash. So, the primary concern that
14 that Dana factor is an end to address, namely, are these
15 awards going to eat up recoveries for creditors
16 disproportionate to the Debtors' earning capacity and the
17 benefit to the creditors from the employee's work. Here, I
18 don't believe that is the case.

19 The Debtors have been focusing on substantially
20 altering their business to be consistent with the parameters
21 started even before the case was filed, after the departure
22 of various Sackler -- the remaining Sackler board members
23 that accelerated with the filing and the entry of the
24 Preliminary Injunction, which included a major focus on
25 abatement programs and a switch from active marketing. That

1 also included, of course, the role of the compliance
2 monitor. The Debtors, I think, adequately address the role
3 that the employees have undertaken with that modified
4 mission, which is certainly consistent with the Debtors'
5 Plan, which is on for a confirmation hearing starting August
6 9th.

7 So, I don't believe that the cost data of -- cost
8 compared to revenue data, rather, Dana factor here, argues
9 for a different result or for granting the U.S. Trustee's
10 objection. I also note that nowhere in any court's analysis
11 has there been any per se analysis of distributions that
12 will be made to individual creditors in a case when
13 analyzing a proposal under 503(c)(3) of the Bankruptcy Code,
14 as it appears the U.S. Trustee is suggesting. The focus
15 really needs to be on the value of the entire enterprise and
16 what the employees contribute to that, rather than to
17 individual percentage recoveries.

18 Of course, if the employees are reducing the value
19 of the enterprise, that will reduce pro rata recoveries by
20 employees. But there's no evidence here that that is what
21 is happening. To the contrary, the evidence reflects, as it
22 did with the 2020 KERP program, that the employees' work is
23 maintaining the value for employees and enabling the
24 Debtors, in addition to move to a focus on, in large
25 measure, abating the opioid crisis.

1 Both the U.S. Trustee and the non-consenting
2 states group have also objected to this aspect of the Motion
3 based on the timing of the Motion. The Motion, as I noted,
4 was filed at the end of June, more than halfway into 2021.
5 The Court has already held hearings on similar requests for
6 approval of a KERP program. First for calendar year 2019
7 and the second for calendar year 2020. I should note, in
8 passing, that there's nothing odd and certainly nothing
9 nefarious in the Debtors seeking approval of their annual
10 programs every year.

11 It's not like, the Debtors are, as one might infer
12 from language in the U.S. Trustee's objection, constantly
13 asking for additional payments for their employees. Their
14 compensation programs work on an annual basis. In fact, in
15 each of the last three years, 2019, 2020 and 2021, they have
16 asked for approval well into the year as to which program
17 applies. In essence, backloading a significant part of the
18 non-insiders' compensation.

19 So, I don't view the timing here to be at all
20 improper in that sense. The Debtors did delay the Court's
21 consideration of the 2019 and 2020 programs. With regard to
22 the 2019 program, I believe that delay was, in fact, more
23 than proper, rather than baking that program in pre-
24 bankruptcy, and they sought approval from the Court after
25 the bankruptcy commenced in the Fall of 2019, thereby

1 subjecting it to greater scrutiny by the parties in interest
2 and the Court, as opposed to simply imposing it pre-
3 bankruptcy.

4 As far as the 2020 program is concerned, the
5 Debtors (a) delayed it because of quite sensitive
6 negotiations among multiple parties in the case and (b)
7 because there were substantially greater negotiations over
8 it among those parties and the Debtors, informed, in part,
9 by the results with regard to the 2019 program, but which
10 had their own complexities.

11 This program, to the contrary, reflects those
12 agreements, including the \$4 million reduction in the KERP
13 and also timing considerations. So, the negotiations here
14 only required a short adjournment for the Creditors'
15 committee and other parties in interest to come on board
16 with the economics of the program, which again, except for
17 the U.S. Trustee, are not objected to by the party in
18 interest or any claimant that is therefore in the case.

19 So, it is understandable to me that the hearing on
20 this matter is coming on earlier than it did with regard to
21 the other two programs. And again, it is a hearing for
22 approval more than halfway through the year in which the
23 program applies.

24 So, I don't view the timing here is somehow trying
25 to rush a determination prematurely simply based on the

1 economics and the timing of the program and the past
2 history. That doesn't really reflect the last point,
3 though, related to timing, or deal with the last point
4 related to timing of this Motion, which is made both by the
5 U.S. Trustee and by the non-consenting states group. They
6 contend that because the Court will be considering
7 confirmation of the Debtors' proposed Plan imminently, I
8 should defer ruling on this aspect of the Motion until not
9 only the conclusion of that hearing, but also until the
10 formation, if I confirm the Plan of a new Board of
11 Directors, which would then separately review the metrics of
12 the KERP program. In the right context, that argument, to
13 me, would make sense. But I don't believe that is that
14 context.

15 I say that for the following reasons: first,
16 again, we're focusing on non-insider employees for the year
17 that we're already halfway through, 2021. Secondly, the new
18 Board, if I confirm a Plan for these Debtors, will not be
19 appointed anywhere close to the end of August and I believe,
20 given the nature of the Debtors' settlement with the DOJ,
21 quite possibly not until well into 2022. That Board, at
22 that point, would not have the experience with regard to
23 this company for 2021, when they were not serving as a
24 Board. Secondly, Congress, in the Bankruptcy Code, did not
25 defer ruling on such issues until a new Board is appointed

1 for a reorganized company. In fact, it requires Bankruptcy
2 Code -- in Bankruptcy Code Section 503(c)(3), that there be
3 notice of a hearing and ultimately review an approval or
4 rejection by the bankruptcy judge.

5 The Debtors, if I confirm the Plan, may have a
6 different employee structure in the future and it certainly
7 would be well within the advent of a new Board to tailor
8 compensation programs to that new mission or new structure.
9 But given that this is compensation for 2021 and is intended
10 to maximize the Debtors' ability to retain employees and not
11 leave the new Board with fait accompli of material exoduses
12 of employees before the new Board even really gets its feet
13 on the ground. It appears to be that, given the economic
14 simplicity and (indiscernible) in nature of the KERP that
15 I've already gone through at length, and the due diligence
16 that has been done by the Creditors' committee and all their
17 well-represented groups, that I should make this decision
18 now, based on that record and that work. Again, it is for
19 2021, not for the future.

20 I have little doubt that the primary reason for
21 employees leaving Purdue, and Mr. Lowne's Declaration and
22 Supplemental Declaration are eloquent on the increased
23 number of employees who have left over the last quarter,
24 would not be stated as, "I'm unsure about whether I will
25 participate in the KERP."

1 On the other hand, the record does reflect that,
2 in addition to wanting to have more responsibility about a
3 retirement program and/or more certainty of that in the
4 future, employees have listed better compensation among
5 their reasons for leaving. Clearly not providing in
6 reasonable time, assurance as to this significant aspect of
7 their reasonably anticipated compensation for 2021, would
8 logically exacerbate the company's ability to retain
9 employees. They would have less certainty with regard to a
10 material portion of their compensation for work they've
11 already done.

12 On the other hand, particularly with the
13 adjustments to the KERP that have been negotiated with the
14 Creditors' committee and others, the Debtor and, if I
15 confirm the Plan, the new Board, would have more flexibility
16 going into 2022 to keep these employees because they would
17 have a greater incentive to stay to receive the backend
18 portion of their compensation for 2021.

19 So, I conclude that the timing here with regard to
20 these non-insider employees and in my decision, is not a
21 reason to put off the decision for the Board to be appointed
22 following confirmation and the effective date of a Chapter
23 11 Plan, if it is confirmed. That raises one last point on
24 the timing. I'm going in, as I said, to the confirmation
25 hearing starting on August 9th. As I said, I may or may not

1 confirm the Plan. It seems to me that I should at least
2 wait to enter the Order to assure myself that the Plan
3 would, in fact, be confirmed or a plan would be confirmed as
4 opposed to a liquidation where you would have a totally
5 different group of employees, I would assume. So,
6 particularly given the second aspect of my ruling here,
7 which would deal with the other objection raised to this
8 Motion, which was raised by the non-consenting states alone,
9 I won't enter this Order until I'm assured that the Debtors
10 will not be liquidating, which I don't think should come as
11 any surprise to any employee. It is quite possible that I
12 wouldn't enter the Order in any event until well into the
13 confirmation hearing, given the remaining aspect of my
14 ruling. The non-consenting states have sought, and this has
15 been clarified during oral argument, that in addition to
16 paragraph 9 of the proposed Order, which has been in the
17 Order previously with regard to 2020 and 2019, the Debtors
18 undertake to perform their own due diligence and in some
19 way, shape or form confirm that they are not aware of any
20 employee that would fall into either of the two categories
21 in paragraph 9 that would require that the employee not
22 receive payment under the current. As I said during oral
23 argument, I agree with that basic proposition.

24 I also agree that we should not tinker with the
25 language that's in paragraph 9. It sets a clear objective

1 standard. And I also agree with the comments by the
2 Debtors' counsel that one needs to draft the undertaking by
3 the Debtors carefully, not to fall the foul of either
4 undertaking that the Debtors have made to the Department of
5 Justice or other law enforcement bodies or applicable non-
6 bankruptcy employment law. But I believe that can be done.
7 It may take some time, which is why I don't think this Order
8 is going to be entered tomorrow, but probably more likely in
9 -- sometime in the first -- would sometime be entered, in
10 any event, in the first week of August.

11 So, I will approve the Motion, as modified, as set
12 forth in the Debtors' Replay. And in addition, as set forth
13 on the record today, in general terms, with regard to the
14 Debtors' undertaking to perform the due diligence with
15 respect to the exclusions set forth in paragraph 9.

16 MR. VONNEGUT: Your Honor, excuse me, could I just
17 -- I'd like to ask some clarifying questions to make sure
18 we're clear on how we are to proceed on this point. Is that
19 all right?

20 THE COURT: Sure.

21 MR. VONNEGUT: Sure. Okay, I'm concerned there's
22 a misimpression about what has been done to date, frankly.
23 The Debtors have cooperated fully with exhaustive
24 investigations brought by the Department of Justice and the
25 Attorney General of most of the states in the country. I

1 think the idea of a new investigation is what troubles us
2 very much because frankly, there has been an exhaustive
3 investigation to date and so, if what Your Honor is
4 concerned with, that on the basis of all the analysis done
5 to date, the Debtors know somebody to be subject to the
6 clawback standard and are not telling people. That I can
7 address. That is very much not the case.

8 I think our principal concern is that some kind of
9 new investigation not be undertaken, because we think that
10 would be very, very duplicative of the work done to date and
11 a waste of estate resources.

12 THE COURT: Well, I frankly don't know what the
13 Debtors have access to from those other investigations.
14 They weren't investigations by the Debtors, right?

15 MR. VONNEGUT: They were investigations initiated
16 by outside parties with which the Debtors cooperated fully.
17 In that entails a certain amount of investigation done by
18 the Debtors. So in --

19 THE COURT: I think ultimately this is a judgment
20 call by the Debtors, by their senior management and HR
21 people as to whether, based on what they know, they can
22 determine reasonably whether someone at least should be held
23 back for now, subject to the appropriate non-bankruptcy
24 employment law due process concerns, or if they need to know
25 anything more. I just don't know. And I think they need to

1 ask that question.

2 I think it's a proper question for the Board to
3 ask. Do we know enough, based on what we have already? If
4 they do and they can answer that in good conscience, that's
5 all you need. But they need to ask that question. If they
6 don't have enough, that they have to go where they would go
7 to answer it.

8 MR. VONNEGUT: Okay.

9 THE COURT: I'm not appointing someone to do it.
10 It's not an examiner type of inquiry. It's an internal
11 board and human resources inquiry.

12 MR. VONNEGUT: Okay. I understand. Just to be
13 very clear, the Board, if management believed any employee
14 were subject to the clawback standard, action would be taken
15 against that employee. So Your Honor's comments are well
16 taken.

17 THE COURT: Okay.

18 MR. PREIS: Your Honor, I'm sorry. it's Arik
19 Preis from Akin Gump, if I could speak. Can I ask a
20 question about the colloquy you just had?

21 THE COURT: Sure.

22 MR. PREIS: So I think there are some people on
23 this phone who have experienced something similar to what
24 you are proposing, but it was a little different. In the
25 INSYS, which you may recall from the beginning of the case

1 was the original case that had the clawback --

2 THE COURT: Right. INSYS.

3 MR. PREIS: Correct.

4 THE COURT: Yeah.

5 MR. PREIS: Correct. We also had a process by
6 which management had to actually self-investigate. Now, it
7 was a different issue. It was a severance component. It
8 wasn't a KERF. But I recall -- and Mr. Troop was involved
9 in that case as well -- that framing that process, that
10 self-investigation, ended up taking some period of time to
11 negotiate, because ultimately, the result was that somebody
12 from the company would have to make a representation under
13 oath that the company was comfortable paying, in that case,
14 the severance, after due investigation.

15 Is that what you are mentioning here?

16 THE COURT: I don't contemplate something under
17 oath. I contemplate that the Board will make sure that this
18 due diligence is done. If it's already been done, they
19 would have to do due diligence to confirm that. I'm not
20 really talking about a certification. I'm just --

21 MR. PREIS: I got it.

22 THE COURT: I just want to make sure that it's
23 been done, that it's been looked into.

24 MR. VONNEGUT: Yeah. Your Honor, I think the
25 concern that we have is certain of the things that have been

1 requested by the Non-Consenting States amount to a request
2 effectively that we prove a negative with respect to every
3 employee of the company, or that we --

4 THE COURT: Well, no, look -- I would expect the
5 Board would need to do this, would need to assure itself
6 that they're not retaining -- the company's not retaining
7 people that would fall into one of those two categories in
8 Paragraph 9. And I think that the Committee and other key
9 parties, including Mr. Troop's clients, can talk to the
10 Debtors, you know, and get confirmation that they have had
11 that process.

12 I'm not really looking at this as a judicial
13 process that would lead to a hearing. It's just good
14 corporate management that you do this.

15 MR. VONNEGUT: I understand, Your Honor. I think
16 a lot of the confusion and concern, frankly, comes from the
17 deposition transcript that the Non-Consenting States cite,
18 in which Dr. Landau says he did not order an investigation.
19 Frankly --

20 THE COURT: Well, okay, very well. But I just
21 think, to me, given the plea agreement and the
22 representations that the Debtors have made, for example,
23 that they sold -- they got rid of their sales force, et
24 cetera, that this should be a relatively easy but important
25 step for the Debtors to take.

1 And it may be, as you say, Mr. Vonnegut, that they
2 have already taken it. I'm not sure they have in the sense
3 that I have in mind, which is that they literally -- the
4 Board asks key people the question, how do you believe that
5 these people are not in these two categories, either of
6 these two categories. And they will hear the answers. And
7 it's not an investigation, just how do you know? And if
8 they have questions, then they'll ask them, and people will
9 have to follow-up on it.

10 For most of these people, I'm assuming it will be
11 a really easy answer. They worked in a different
12 department, you know? They worked for Rhodes Industries,
13 and they did something completely different. They will
14 probably -- you know, at some point you'll narrow it down to
15 a very small group, if none.

16 But I just want to have some assurance that those
17 questions have been asked in a directed, focused way, as
18 opposed to just responding to investigations by the DOJ and
19 other law enforcement bodies. But it's not to --

20 MR. VONNEGUT: Understood, Your Honor.

21 THE COURT: It's not to come up with a report
22 under oath or anything like that, although it's certainly
23 within the Committee's mandate and other parties' mandate to
24 inquire of you about, okay, did you do it? And there's
25 nothing...

1 Look, the Debtors have said they're perfectly
2 willing to sit down with people who are active in the case
3 and talk with them. I don't know why Mr. Miller, after
4 having those questions answered, wouldn't be willing to sit
5 down and talk with the Committee or Mr. Troop's client to
6 just say, yeah, we did this, and this is what we did.

7 MR. VONNEGUT: Understood, Your Honor.

8 THE COURT: Okay. And I appreciate this may take
9 a little while to draft, but I don't view it as like turning
10 into a four-page paragraph. I view it much more as a
11 representation that the Debtors will undertake a due
12 diligence review, based on what they know already, and
13 whether they need to supplement that in any way to
14 reasonably assure themselves that no one falls into one of
15 these two categories.

16 MR. VONNEGUT: Thank you, Your Honor.

17 THE COURT: Okay. Mr. Preis, you look very
18 thoughtful right now. Does that raise an issue for you?

19 MR. PREIS: No, no. I appreciate you explaining
20 that.

21 THE COURT: Okay.

22 MR. PREIS: That's much clearer.

23 THE COURT: Okay. All right. All right, so I
24 would normally say just email me the order and copy the
25 parties who you normally copy, including Mr. Higgins and Mr.

1 Troop and Mr. Preis. But I think you're going to have to
2 circulate the order with a little more talk as to, you know,
3 the actual language in Paragraph 9.

4 But I want to be clear, I do not have in mind here
5 a complicated multi-sentence specification of an
6 investigation. That's not what I have in mind. It's the
7 type of due diligence that a board would conduct or direct
8 to be conducted in this situation.

9 Okay. Anything else? Did you have any other
10 questions, Mr. Vonnegut, or does anyone else have a
11 question?

12 MR. VONNEGUT: No, Your Honor. Thank you.

13 THE COURT: Okay. All right. All right, so I'll
14 look for that order. You should send it promptly. And I
15 want to be clear, I'm granting the motion on one condition,
16 which is that I don't determine to liquidate the company.
17 Some of the objections to confirmation actually seek that,
18 it seems. And if that were the case, then I don't think a
19 KERP program -- I think it should be looked at again.

20 MR. VONNEGUT: Understood.

21 THE COURT: Okay. All right. Very well.
22 Anything else? All right. Thank you.

23
24 (Whereupon these proceedings were concluded at
25 4:06 PM)

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

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.



Sonya Ledanski Hyde

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Date: August 3, 2021

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