

TRACY HOPE DAVIS
United States Trustee for Region 2
U.S. Department of Justice
Office of the United States Trustee
33 Whitehall Street, 21st Floor
New York, New York 10004
Tel. (212) 510-0500
By: Andrea B. Schwartz, Esq.
Trial Attorney

Hearing Date and Time:
September 11, 2012, at 1:30 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
In re	:	Chapter 11
	:	
PATRIOT COAL CORPORATION,	:	Case No. 12-12900 (SCC)
<u>et al.</u> ,	:	
	:	Jointly Administered
Debtors.	:	
	:	
-----X		

**DECLARATION OF ANDREA B. SCHWARTZ
IN SUPPORT OF UNITED STATES TRUSTEE’S MOTION,
PURSUANT TO 28 U.S.C. § 1412 AND FED. R. BANKR. P. 1014(a)(1), TO
TRANSFER VENUE OF THESE CASES IN THE INTEREST OF JUSTICE**

I, Andrea B. Schwartz, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Trial Attorney for the United States Department of Justice, Office of the United States Trustee located at 33 Whitehall Street, 21st Floor, New York, New York 10004. I am a member in good standing of the bars of the States of New York, New Jersey and California, and the Commonwealth of Pennsylvania, and am admitted to practice law in the United States District Court for the Southern District of New York.

2. Annexed hereto as **Exhibit 1** is a copy of the Entity Information Fact Sheet for PCX Enterprises, Inc. posted on the New York Department of State – Division of Corporations website at www.dos.ny.gov.

3. Annexed hereto as **Exhibit 2** is a copy of the Entity Information Fact Sheet for Patriot Beaver Dam Holdings, LLC posted on the New York Department of State – Division of Corporations website at www.dos.ny.gov.

4. Annexed hereto as **Exhibit 3** is a copy of Transcript of Court Hearing Held on April 12, 2005, in In re Winn-Dixie Stores, Inc., SDNY Case No. 05-11063 (RDD), concerning, among other things, motion of Buffalo Rock Company to transfer venue to the Middle District of Florida, Jacksonville Division.

Dated: New York, New York
August 22, 2012

/s/ Andrea B. Schwartz
Andrea B. Schwartz

NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through August 21, 2012.

Selected Entity Name: PCX ENTERPRISES, INC.

Selected Entity Status Information

Current Entity Name: PCX ENTERPRISES, INC.

DOS ID #: 4253084

Initial DOS Filing Date: JUNE 01, 2012

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC BUSINESS CORPORATION

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

C/O CT CORPORATION SYSTEM
111 8TH AVENUE - 13TH FLOOR
NEW YORK, NEW YORK, 10011

Registered Agent

C T CORPORATION SYSTEM
111 8TH AVENUE - 13TH FLOOR
NEW YORK, NEW YORK, 10011

This office does not record information regarding the names and addresses of officers, shareholders or directors of nonprofessional corporations except the chief executive officer, if provided, which would be listed above. Professional corporations must include the name(s) and address(es) of the initial officers, directors, and shareholders in the initial certificate of incorporation, however this information is not recorded and only available by [viewing the certificate.](#)

***Stock Information**

of Shares Type of Stock \$ Value per Share

1000 Par Value .01

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
JUN 01, 2012	Actual	PCX ENTERPRISES, INC.

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through August 21, 2012.

Selected Entity Name: PATRIOT BEAVER DAM HOLDINGS, LLC
Selected Entity Status Information

Current Entity Name: PATRIOT BEAVER DAM HOLDINGS, LLC

DOS ID #: 4258815

Initial DOS Filing Date: JUNE 14, 2012

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC LIMITED LIABILITY COMPANY

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

CT CORPORATION SYSTEM
111 EIGHTH AVENUE
NEW YORK, NEW YORK, 10011

Registered Agent

CT CORPORATION SYSTEM
111 EIGHTH AVENUE
NEW YORK, NEW YORK, 10011

This office does not require or maintain information regarding the names and addresses of members or managers of nonprofessional limited liability companies. Professional limited liability companies must include the name(s) and address(es) of the original members, however this information is not recorded and only available by [viewing the certificate.](#)

*Stock Information

# of Shares	Type of Stock	\$ Value per Share
No Information Available		

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
JUN 14, 2012	Actual	PATRIOT BEAVER DAM HOLDINGS, LLC

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 05-11063-rdd

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IN RE:

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WINN-DIXIE STORES, INC.

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United States Custom House

One Bowling Green

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New York, New York

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April 12, 2005

12

12:50 p.m.

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B e f o r e:

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ROBERT D. DRAIN,

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United States Bankruptcy Judge

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Motion to Transfer Venue of the Debtors'

19

Bankruptcy Cases to the United States

Bankruptcy Court for the Middle District

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of Florida, Jacksonville Division or Such

Other District Where Venue Would Be

21

Appropriate filed by Buffalo Rock Company

22

Application of Official Committee of

23

Unsecured Creditors Of Winn-Dixie Stores,

Inc., et al., For Order Authorizing

24

Retention and Employment of Milbank,

Tweed, Hadley & McCloy LLP as Counsel

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2 RE: Doc #561; Motion of Riverdale Farms,
3 Inc. to Join Motion of Buffalo Rock
4 Company to Transfer Venue of the Debtors'
5 Bankruptcy Cases to the United States
6 Bankruptcy Court for the District of
7 Florida

8 RE: Doc # 569; Debtors' Response to Motion
9 of Buffalo Rock Company to Transfer Venue

10 RE: Doc # 612; Motion for Relief from Stay
11 Motion for Relief from Stay Joint Motion
12 of Debtors and Commonwealth of Kentucky
13 for Relief from Stay to Allow for
14 Continuation of Condemnation Proceedings

15 Motion to Join in the Motion of Buffalo
16 Rock Company to Transfer Venue (related to
17 document(s)407) filed by Bradley T.
18 Keller, Richard S. Ehster

19 RE: Doc #624; Motion to Join the Motion of
20 Buffalo Rock Company to Transfer Venue
21 (related document(s){407}) filed by Ernst
22 Properties, Inc.

23 RE: Doc #640 Response of Clorox Sales Co.
24 to Motion to Join the Motion of Buffalo
25 Rock Company to Transfer Venue

Objection of Official Committee of
Unsecured Creditors of Winn-Dixie Stores,
Inc., et al., to Motion of Buffalo Rock
Company, Transferring Venue of Debtors'
Cases

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2 RE: Doc #644; Objection of Edens & Avant,
3 Weingarten Realty Investors, Palm Springs
4 Mile Associates, Ltd., Villa Rica Retail
5 Properties, L.L.C., ALG Limited
6 Partnership and Curry Ford, LP to the
7 Objection of The Official Committee of
8 Unsecured Creditors

6

7 RE: Doc #647; Opposition by Buffalo Rock
8 Company Seeking Entry of an Order
9 Transferring Venue of Debtors' Cases
10 (related document(s)[407])

9

10 Objection of Wilmington Trust Company, as
11 Indenture Trustee, and Joinder in
12 Objection of Official Committee of
13 Unsecured Creditors of Winn-Dixie Stores,
14 Inc., et al., to Motion of Buffalo Rock
15 Company Seeking Entry of an Order
16 Transferring Venue of Debtor

13

14 Joinder of Certain Utility Companies in
15 Support of Motion of Buffalo Rock Company
16 to Transfer Venue

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17 Motion to Join in Support of Motion of
18 Buffalo Rock Company to Transfer Venue
19 filed by Dairy Farmers of America, Inc.

18

19 Motion to Join Motion of Buffalo Rock
20 Company to Transfer Venue filed by Ja-Ru,
21 Inc., Beaver Street Fisheries, Inc.

21

22 Motion to Join Motion to Transfer Venue
23 (related document(s) 407) filed by Florida
24 Power & Light Company

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2 RE: Doc #690; Omnibus Response to
3 Objections to Motion of Buffalo Rock
4 Company to Transfer Venue of the Debtors'
5 Bankruptcy Cases to the United States
6 Bankruptcy Court for the Middle District
7 of Florida, Jacksonville Division (related
8 document(s)[643])

6

7 RE: Doc #696; Notice of Hearing on April
8 12, 2005 (related document(s) [411], [23],
9 [562], [536], [296], [24], [489], [564],
10 [13], [472], [407], [612], [495], [510],
11 [487], [488])

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13 Reported by:
14 Todd DeSimone, RPR

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2 A P P E A R A N C E S :

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2 A P P E A R A N C E S: (Continued)

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2 A P P E A R A N C E S: (Continued)

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New York, New York 10004
23 BY: RICHARD C. MORRISSEY, ESQ.
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2 A P P E A R A N C E S: (Continued)

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6 Jacksonville, Florida 32207
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9 230 Park Avenue
10 New York, New York 10169
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22 HERRICK FEINSTEIN LLP
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2 A P P E A R A N C E S: (Continued)

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4 New York, New York 10178

Attorneys for various landlords

5 BY: ROBERT LEHANE, ESQ.

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2 THE COURT: Let's go on the
3 record on Winn-Dixie.

4 MR. RUBIN: Your Honor, I'm
5 counsel for the movant. Your Honor, if I
6 may, we have handed up to your clerk some
7 agreed stipulation of facts --

8 MR. BAKER: Excuse me, we had a
9 couple of noncontested matters. I wonder
10 if we could do those first in case anybody
11 is here for those.

12 THE COURT: Sure.

13 MR. BAKER: At the request of
14 the U.S. Trustee, your Honor, most of the
15 matters that were originally set today
16 were delayed or adjourned pending a
17 determination by your Honor of the venue
18 motion. There were I think three matters
19 that the parties conclude it probably made
20 sense to go ahead and present an order on.

21 The first of those related to
22 the Debtors' request for an order under
23 Section 365(d)(4) extending the time to
24 assume or reject nonresidential real
25 estate leases. There were I think five

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2 objections. What we agreed to with all of
3 the objecting parties was to seek a bridge
4 order that would simply continue the time
5 period for making that determination or
6 requesting a further extension to the next
7 scheduled hearing in this case. I think
8 all of the objecting parties were fine
9 with that.

10 THE COURT: All right. I've
11 reviewed that order, and that is fine.
12 That will be entered today.

13 MR. BAKER: The next matter,
14 your Honor, the Commonwealth of Kentucky
15 had started a condemnation action with
16 respect to two properties, or the frontage
17 along two store properties. We've talked
18 to the Commonwealth's Legal Office. They
19 convinced the Debtors that it made sense
20 to let that go forward. It will generate
21 a modest cash inflow to the Debtor, and
22 actually they think that benefits store
23 traffic. So they were willing to do that.
24 As far as we know, there are no objections
25 to that.

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2 THE COURT: Does anyone want to
3 be heard on that motion?

4 Hearing no one, I will grant
5 that based on the moving papers. It is
6 clearly in the interest of the Debtor.

7 MR. BAKER: The final matter,
8 your Honor, was to authorize the retention
9 of Milbank Tweed as Committee counsel.
10 Insofar as we are aware, no objections
11 were filed to that.

12 THE COURT: I haven't seen any
13 either.

14 Does anyone want to address
15 this motion?

16 Again, based on there being no
17 objections, as well as my review of the
18 moving papers and the affidavit, I will
19 approve the retention.

20 MR. BAKER: Thank you, your
21 Honor.

22 Now we are ready to go into the
23 venue matter, which Mr. Zimmerman will be
24 primarily handling for the Debtors.

25 MR. ZIMMERMAN: Your Honor, the

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2 Debtors have only one witness we would
3 like to call at this time, Mr. Larry
4 Appel.

5 MR. RUBIN: Excuse me, your
6 Honor, before we commence this proceeding,
7 we have a stipulation of facts that have
8 been entered into between the Debtors and
9 the movant. Pursuant to our telephonic
10 hearing on Friday, we were able to take
11 Mr. Appel's deposition yesterday.
12 Mr. Zimmerman and I have signed the
13 stipulation. We would like to submit it
14 to the Court. Then, of course, if he
15 wants to proceed with his testimony.

16 THE COURT: I'm assuming your
17 examination is premised on the facts being
18 agreed to, correct?

19 MR. ZIMMERMAN: Yes, but we
20 will not be repeating any of those facts
21 in the direct testimony.

22 MR. DESPINS: Luke Despins with
23 Milbank Tweed on behalf of the Committee.

24 The stipulation is between the
25 Debtors and the movant. The Committee

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1 APPEL - DIRECT
2 will cross the witness on the stipulation
3 when the witness is put up.

4 THE COURT: Okay.

5 MR. RUBIN: May we approach
6 with the stipulation?

7 THE COURT: Yes.

8 * * *

9 L A R R Y B. A P P E L:

10 called as a witness, having been first
11 duly sworn, was examined and testified
12 as follows:

13 DIRECT EXAMINATION

14 BY MR. ZIMMERMAN:

15 Q. Would you state your full name
16 for the record, please?

17 A. Larry Bruce Appel.

18 Q. By whom are you employed?

19 A. Winn-Dixie Stores.

20 Q. What is your current position
21 with Winn-Dixie?

22 A. Senior vice president, general
23 counsel, and corporate secretary.

24 Q. How long have you had that
25 position?

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1 APPEL - DIRECT

2 A. Approximately two and a half
3 years.

4 Q. Could you briefly summarize
5 your responsibilities as senior VP and
6 general counsel?

7 A. Sure. I supervise the Legal
8 Department. I oversee the operation of
9 our compliance program. As corporate
10 secretary, I'm responsible for
11 communications and operations between
12 management and the board of directors, and
13 I also oversee our Loss Prevention and our
14 Security departments as well.

15 Q. Just for convenience, I'm going
16 to refer to the Debtors as Winn-Dixie
17 unless I specify otherwise.

18 A. I understand.

19 Q. Mr. Appel, were you involved
20 personally in the deliberations by
21 Winn-Dixie leading to the filing of the
22 Chapter 11?

23 A. Yes, I was.

24 Q. Were you involved in the
25 deliberations leading to the selection of

16

1 APPEL - DIRECT

2 New York as the original venue?

3 A. Yes, I was.

4 Q. What other members of
5 Winn-Dixie management were involved in
6 those processes?

7 A. Winn-Dixie management would
8 have included Bennett Nussbaum, our chief
9 financial officer, Peter Lynch, our CEO,
10 and Jay Skelton, our chairman of the
11 board, as well as myself.

12 Q. In connection with the decision
13 to both file for Chapter 11 and the
14 initial selection of New York as a venue,
15 did you have any advisors participating in
16 those deliberations?

17 A. Yes, we did.

18 Q. Could you identify them?

19 A. We have legal advisors, King &
20 Spalding and Skadden Arps, and we have
21 restructuring advisors, Crossroads Group
22 and our investment bankers, Blackstone.

23 Q. Before deciding on New York as
24 the initial venue, did management consider
25 the possibility of commencing Chapter 11

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1 APPEL - DIRECT

2 in Jacksonville, Florida?

3 A. Yes, we did.

4 Q. Were you personally involved in
5 those deliberations?

6 A. Yes, I was.

7 Q. Did those deliberations include
8 an analysis of the potential benefits and
9 any downsides of Jacksonville versus New
10 York?

11 A. Yes.

12 Q. Can you tell us what you
13 remember being discussed about potential
14 benefits of a filing in Jacksonville?

15 A. The potential benefits of being
16 in Jacksonville, Florida, well, we
17 discussed the fact that company management
18 is located in Jacksonville and it would be
19 a little bit more convenient for us for
20 court hearings if we didn't travel back
21 and forth.

22 We also discussed the fact that
23 we are a Jacksonville-based company. We
24 are 75 years old. The founding family is
25 in Jacksonville. The company and the

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1 APPEL - DIRECT
2 founding family, the Davis family, have
3 substantial roots in Jacksonville, invest
4 in the communities civically and
5 charitably, and Jacksonville would be a
6 community that we had some goodwill and
7 would want Winn-Dixie to restructure
8 successfully.

9 Q. Were there any potential
10 downsides in the management discussions
11 about the possibility of Jacksonville as
12 the venue?

13 A. I wouldn't necessarily call it
14 a downside, but we did talk about the fact
15 that we were a very large, if not the
16 largest, company in Jacksonville, and that
17 if the proceedings were in Jacksonville,
18 there would be a lot of press coverage on
19 those proceedings.

20 And not that we were worried
21 one way or the other about it being good
22 or bad, but we definitely had a belief
23 that one of the keys to restructuring
24 successfully was sort of segmenting to a
25 small group the case management, to the

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1 APPEL - DIRECT
2 lawyers and some of the financial people,
3 and really keeping the large bulk of our
4 employees not distracted by restructuring
5 cases, but focused on what was important
6 to the operational turnaround, which is
7 taking care of our customers in the
8 stores.

9 And more coverage, whether bad
10 or good, might make it a little more
11 difficult, just the more people read.

12 Q. In the deliberations about
13 where to file venue, I take it there were
14 deliberations and discussions about New
15 York as a possible venue?

16 A. Yes.

17 Q. Did you participate in those
18 discussions?

19 A. Yes, I did.

20 Q. Could you tell me, was there an
21 analysis of the relative benefits and
22 downsides of filing in New York as well?

23 A. Yes.

24 Q. What do you remember about the
25 potential benefits being discussed about

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1 APPEL - DIRECT

2 New York as a venue?

3 A. The most significant benefit of
4 New York was our belief that our creditors
5 would find it a convenient forum for us to
6 be in. We had talked to our advisors. We
7 had talked to our outside restructuring
8 advisors, folks who have a lot of
9 experience in restructuring such as ours,
10 who have experience in retail
11 restructurings.

12 Based on their experience,
13 based on their understanding of our
14 specific facts, and I believe based on
15 their reaching out to, directly or
16 indirectly, to some of the significant
17 creditors that would be involved in our
18 case, they talked to us about the fact
19 that New York would be a good place to
20 establish a strong relationship with our
21 important creditors, and that having
22 strong relationships with the creditors
23 would be an important part of the
24 successful turnaround.

25 That was, to some extent,

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2 consistent with our own data. We looked
3 at our list of our top 100 creditors and
4 we saw 30 of them had offices in New York
5 and 9 of them had offices in Florida.
6 With travel schedules and everything we
7 looked at, it made sense to us. So that
8 was a major consideration.

9 Q. Do you know what specific
10 creditors your financial advisors may have
11 reached out to in advising you?

12 A. I believe that we had some
13 level of direct or indirect input from
14 some of our bondholders or their
15 representatives and from our lending
16 group.

17 Q. Who was the lender?

18 A. Wachovia is the primary agent.

19 Q. Do you directly have interface
20 with Wachovia?

21 A. Yes.

22 Q. Is there a specific branch that
23 is handling this?

24 A. Yes, the New York office.

25 Q. Was there any discussion of any

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1 APPEL - DIRECT

2 potential negatives with respect to New
3 York?

4 A. Other than I would have to take
5 a -- some people like me would have to
6 take a few more plane trips, no.

7 Q. Are you familiar with the
8 motion papers filed by Buffalo Rock?

9 A. Yes, I am.

10 Q. There was a suggestion that New
11 York was selected in an effort by the
12 Debtors to somehow escape or run away or
13 evade Jacksonville. Is that true?

14 A. That is patently untrue.

15 Q. Based on your personal
16 involvement in the deliberative process,
17 was there any discussion about escaping or
18 running away or in any way trying to avoid
19 Jacksonville?

20 A. I believe I was involved in
21 every discussion on this issue, and there
22 was none at any time. It was absolutely
23 to the contrary. We were trying to do
24 something that would make us most
25 accessible to the creditor community, not

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1 APPEL - DIRECT

2 inaccessible.

3 Q. In coming to New York, did the
4 management make a conclusion as to bottom
5 line whether New York would be an
6 appropriate place for this restructuring
7 to take place?

8 MR. RUBIN: Objection to the
9 form of the question, your Honor.

10 THE COURT: On what basis?

11 MR. RUBIN: Calls for a mental
12 conclusion on the part of the witness.

13 MR. ZIMMERMAN: I think a
14 witness is, first of all, permitted to
15 testify about his own mental conclusions,
16 because I don't know who else could.

17 THE COURT: Why don't you
18 phrase the question just in his role as
19 general counsel.

20 Q. Based on your understanding,
21 based on your role as general counsel and
22 your involvement in the process, can you
23 tell me what the bottom-line conclusion
24 was of the company with respect to the
25 appropriateness of New York as a venue for

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1 APPEL - DIRECT

2 this filing?

3 A. Sure. That New York was an
4 appropriate venue for us.

5 Q. Based on the developments that
6 have occurred subsequent to the filing,
7 including the Buffalo Rock motion, do you
8 know whether management's assessment and
9 conclusions that you've just testified to
10 changed in any way?

11 A. No, they haven't changed at
12 all.

13 Q. You still believe New York is
14 an appropriate forum?

15 A. Absolutely. To the extent that
16 one of the main considerations was
17 convenience to creditors, the fact that
18 the Creditor Committee and several of our
19 trade vendors and landlords and others
20 have submitted motions to that effect
21 suggest that we were right.

22 Q. Did management at one point
23 become aware of the fact that Buffalo Rock
24 had filed a motion to transfer venue?

25 A. Yes.

25

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2 Q. Do you know how they became
3 aware of that?

4 A. I believe that either Jan Baker
5 or somebody else at the Skadden firm
6 provided me a copy of the filing, and we
7 made management aware of it.

8 Q. Did you review the motion to
9 transfer?

10 A. Yes, I did.

11 Q. The fact that the motion to
12 transfer had been made, did that receive
13 press in Florida?

14 A. Yes, it did. It received a
15 great deal of press.

16 Q. Were there any press reports
17 purporting to summarize or quote from some
18 of Buffalo Rock's moving papers?

19 A. There were many.

20 Q. Buffalo Rock, in its motion,
21 suggests that the Debtors selected New
22 York to somehow reduce or eliminate
23 creditor involvement in the proceedings.
24 Are you aware of that? Are you familiar
25 with those charges?

26

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2 A. I know what it says.

3 Q. I know you testified to it

4 before, but was that the intent of

5 Winn-Dixie in selecting New York?

6 A. Absolutely not. Nothing could
7 be farther from the truth.

8 Q. Was it ever discussed to file
9 in New York to reduce or eliminate
10 creditor involvement?

11 A. The opposite was discussed.

12 Q. Did management discuss and
13 consider an appropriate response to the
14 motion that was made by Buffalo Rock?

15 A. Yes, we did.

16 Q. Did you personally participate
17 in those discussions?

18 A. Yes.

19 Q. Did the company ultimately
20 reach a decision as to how to best respond
21 to the motion?

22 A. We ultimately decided to file
23 the response which we did requesting a
24 transfer of venue to Florida.

25 Q. Who else other than yourself

27

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2 was involved in that deliberative process?

3 A. The same individuals from
4 management that I mentioned before. That
5 would be myself, Peter Lynch, Bennett
6 Nussbaum, Jay Skelton, and the same
7 advisor group, being Blackstone,
8 Crossroads, Skadden Arps. At that point I
9 don't think King & Spalding would have
10 been involved.

11 Q. Does the Debtor still believe
12 that New York is an appropriate venue?

13 A. Yes.

14 Q. Why has the Debtor decided to
15 now ask this court to transfer these
16 proceedings to Jacksonville?

17 A. Basically all of the facts that
18 caused us to make the initial decision,
19 none of them had changed. But there was
20 one new intervening subsequent event or
21 fact, if you will, which was the filing of
22 the motion.

23 It was a motion that I think
24 purposely contained some very harsh
25 language and was picked up that way in the

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2 press. It said things like "fabricating
3 venue." It talked about management making
4 decisions to hide from creditors. It
5 talked about bad faith, references like
6 Enron, comparisons like Enron. The press
7 asked questions like did we pick New York
8 because it was debtor-friendly, because we
9 would get larger retention programs,
10 because our advisors would make more
11 money.

12 All of those things were
13 inaccurate. None of those things were
14 things that we discussed, considered.
15 They were just absent. As a result, A, I
16 don't want to use the word offensive, but
17 it was offensive to the management team.
18 Nobody likes to be painted with that kind
19 of brush.

20 More importantly, you could use
21 the word distracting, but damaging, the
22 distraction was damaging to the company.
23 I had business leaders who travel
24 regularly, our CEO saying he gets asked on
25 every trip why are we in New York and are

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2 we hiding from something not being in
3 Florida. Our HR Group was telling me
4 there was a huge awareness within just
5 sort of general associates of this issue
6 and are we doing something shady.
7 Frankly, that was damaging to us.

8 As I said before, one of the
9 things we thought was important was to
10 segregate case management and allow the
11 large majority of our associates to focus
12 on the business. We were being damaged by
13 all of the inaccurate statements that came
14 out as a result of that motion. We had
15 said all along we would be happy in
16 Florida and we weren't hiding from
17 anything.

18 And, frankly, we needed to stop
19 that damage, and actions speak louder than
20 words, so the best thing we need to do is
21 file the response we did and say we always
22 would have been happy in Florida, let's
23 move it to Florida.

24 Q. Do you believe that moving to
25 Florida, to Jacksonville, Florida, will

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2 undo all of the harm that has been caused
3 by these charges that were publicized
4 against you?

5 A. No, we don't. I think once you
6 cast those aspersions out in the air,
7 there is no way to undo all of it.

8 Q. Then tell us why you believe
9 that since those charges have now been
10 cast, why moving to Jacksonville is better
11 for the company in the company's view than
12 staying.

13 A. All of this is a balance. On
14 the one hand, we can stay in New York and
15 people can read about a legal decision
16 that was entered, or we can come back to
17 Jacksonville and physically show people
18 that we are there and we have nothing to
19 hide. On balance, the latter of those two
20 may be more powerful and more effective.

21 I think the most important
22 thing that can come out of today is for
23 our communities and our associates and our
24 constituencies to understand after this
25 process that we, as a company, did nothing

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2 inappropriate, illegal, unethical, or in
3 bad faith. Those kinds of innuendo are
4 damaging to our state.

5 MR. ZIMMERMAN: No further
6 questions, your Honor.

7 THE COURT: Okay. Does anyone
8 wish to cross-examine Mr. Appel?

9 MR. DESPINS: Your Honor, just
10 a question. I'm not sure where we are
11 procedurally in the sense that it is the
12 movant's motion, they tendered stipulated
13 facts, but then the Debtor presented a
14 witness.

15 So are the movants -- is their
16 case closed? Where are we in the process?
17 I don't want to cross-examine until I know
18 where the movants are. First they have to
19 put their case on.

20 THE COURT: But you don't wait
21 for their case to close to cross-examine.
22 Are you asking whether the movants want to
23 examine on direct?

24 MR. DESPINS: That is the first
25 question. It is their case to put on

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2 first. Is their case closed?

3 THE COURT: Do you want any

4 additional direct examination of

5 Mr. Appel?

6 MR. RUBIN: We would like to

7 ask a couple of questions.

8 THE COURT: Okay. Why don't

9 you go ahead and then we will have

10 cross-examination.

11 DIRECT EXAMINATION

12 BY MR. RUBIN:

13 Q. Mr. Appel, in your testimony

14 today you indicated that financial

15 advisors on behalf of the company talked

16 to bondholders and lenders prior to the

17 filing of the bankruptcy case in respect

18 to the choice of New York as the venue for

19 this case; is that not correct?

20 A. I said that I believe they did

21 speak either directly or indirectly to

22 those constituencies or their advisors.

23 Q. Did you not in your deposition

24 yesterday testify that none of your

25 advisors spoke with any of the trade

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2 creditors who are also creditors in this
3 case, that the discussion of venue was
4 limited to bondholders and lenders?

5 A. No, I think what I said
6 yesterday is I was unaware whether they
7 had spoken to any trade creditors, but
8 they very well may have. I don't know of
9 that.

10 Q. You are not aware of any trade
11 creditors that your advisors spoke to in
12 respect to the issue of venue prior to the
13 filing of the petition, are you?

14 A. That's correct.

15 Q. I will ask you, sir, have you
16 seen the stipulation of facts that has
17 been filed this morning?

18 A. Yes, I have.

19 Q. And you've authorized your
20 counsel to execute that stipulation on
21 behalf of the company; is that not
22 correct?

23 A. Yes, I have.

24 Q. The facts as stated in the
25 stipulation are true and correct to the

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2 best of your knowledge, information, and
3 belief; are they not?

4 A. To the best of my knowledge,
5 information, and belief, yes, they are.

6 MR. RUBIN: Now, in addition to
7 the stipulation, there were certain
8 exhibits introduced into evidence
9 yesterday in respect to the deposition,
10 Judge, which we would like to make part of
11 the record in respect to the stipulation.

12 All of the exhibits which we
13 wish to introduce, starting with Exhibit 3
14 and ending with Exhibit 11, are pleadings
15 that have been filed in this case and the
16 Court could take judicial knowledge of.

17 THE COURT: You don't need to
18 introduce those. I will take judicial
19 knowledge of them. You can identify them
20 for the record.

21 Q. First of all, Mr. Appel, you
22 did identify for us --

23 MR. RUBIN: And if I may
24 approach the witness, your Honor?

25 THE COURT: Sure.

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2 Q. Mr. Appel, for the record, you
3 did identify as an exhibit the articles of
4 incorporation of Dixie Stores, Inc.?

5 A. I did, yes.

6 MR. RUBIN: We offer that.

7 Q. You also identified as an
8 exhibit to your deposition the petition
9 that was filed by Dixie Stores, Inc.; is
10 that not correct?

11 A. I did.

12 Q. You then also identified an
13 engagement letter dated February the 7th
14 by and between Skadden Arps and Winn-Dixie
15 Stores, Inc. in respect to the engagement
16 of Skadden; did you not?

17 A. Yes, sir.

18 Q. You did also identify the
19 bankruptcy petition of Table Supply Food
20 Stores Co., Inc.; is that not correct?

21 A. Yes, that's correct.

22 Q. You did identify the
23 declaration of Bennett L. Nussbaum
24 pursuant to Local Bankruptcy Rule 1007-2
25 in support of first-day motions and

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2 applications; did you not?

3 A. Yes, sir.

4 Q. You identified also as an
5 exhibit to your deposition the summary of
6 the schedules of Winn-Dixie Stores, Inc.;
7 is that not correct?

8 A. Yes.

9 Q. You identified, did you not,
10 sir, as part of your deposition testimony
11 the motion of Richard J. Ehster and
12 Bradley T. Keller to join in the motion of
13 Buffalo Rock; is that not correct, sir?

14 A. Yes, it is.

15 Q. You also identified as an
16 exhibit to your deposition a part of the
17 schedules of Winn-Dixie Stores, Inc.,
18 paragraph 18 of the schedule statement of
19 affairs, including the nature, location,
20 and name of each business of each Debtor;
21 is that not correct?

22 A. Schedule 18 of the statement of
23 financial affairs, yes.

24 Q. You also did identify for the
25 purposes of your deposition the Debtors'

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2 response to the motion of Winn-Dixie
3 Stores, Inc.?

4 A. I believe I did.

5 MR. RUBIN: Judge, we offer all
6 those. I ask the Court to take judicial
7 knowledge of those.

8 THE COURT: I will take
9 judicial knowledge.

10 MR. RUBIN: Thank you, sir.

11 Q. You are aware of the fact, are
12 you not, sir, that there were also not
13 only joinders filed in respect to the
14 Buffalo Rock motion, but also joinders
15 filed by others in support of Buffalo Rock
16 as well as joinders in opposition to the
17 motion filed with the Committee? There
18 were joinders on both sides?

19 A. Yes. I specifically mentioned
20 the Creditor Committee because our
21 understanding is they act as fiduciaries
22 for all creditors.

23 MR. RUBIN: Those are all the
24 questions. We would like the opportunity
25 to argue the stipulation to the Court at

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2 the appropriate time, go through the
3 stipulation, and give the Court our
4 version of what we think the law is.

5 THE COURT: Okay, very well.

6 MR. McFARLIN: Your Honor, may
7 I ask a couple of questions on direct
8 examination before we get to that?

9 My name is David McFarlin. We
10 are representing a couple of the employee
11 creditors and retirees of Winn-Dixie.

12 THE COURT: Okay.

13 MR. McFARLIN: Just a couple of
14 questions, Mr. Appel.

15 DIRECT EXAMINATION

16 BY MR. McFARLIN:

17 Q. You had indicated that employee
18 distraction or avoiding employee
19 distraction was one of your considerations
20 in selecting venue; is that correct?

21 A. It was a small factor, but
22 sure. We wanted to have our associates
23 focused on the task at hand, taking care
24 of customers.

25 Q. And associates are employees?

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2 A. Yes. We use the term
3 associates to refer to employees.

4 Q. Are you familiar with the
5 Winn-Dixie nonqualified deferred
6 compensation plans, in particular a
7 management security plan and a
8 supplemental retirement plan?

9 A. Yes, I am.

10 Q. What are those?

11 A. They are deferred compensation
12 retirement plans.

13 Q. Who gets to participate in
14 those?

15 A. Well, the plans set forth the
16 criteria, but, broadly speaking,
17 management employees.

18 Q. Would you be able to
19 participate?

20 A. I would.

21 Q. Could you tell me approximately
22 how many participants are involved in
23 those plans?

24 A. I'm sorry, I don't know the
25 answer to that.

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2 Q. Can you tell me, give or take
3 \$50 million, the total amount of the
4 obligations of Winn-Dixie under those
5 plans?

6 A. I apologize, but no, I can't.
7 I don't know the number.

8 Q. Even give or take \$50 million?

9 A. I really don't. If I had an
10 opportunity to look at financial
11 statements, I'm sure I could derive it,
12 but I don't know it sitting here right
13 now.

14 MR. McFARLIN: Thank you, I
15 appreciate it.

16 THE COURT: Before we get to
17 cross, does anyone else want to ask direct
18 questions?

19 MR. RUBIN: I have one more
20 question, your Honor. May I ask it?

21 THE COURT: Yes.

22 DIRECT EXAMINATION

23 BY MR. RUBIN:

24 Q. Mr. Appel, in the stipulation
25 your counsel signed, in paragraph 12 it

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2 states "All of the Debtors' employees are
3 employed in the southeastern United
4 States." You agreed with that statement.

5 But the one thing that is
6 missing, how many employees are there of
7 the company?

8 A. I think what I had asked it to
9 say is "substantially all." But it is
10 substantially all. It may be all. I'm
11 not sure. It is roughly 79,000.

12 Q. 79,000 employees?

13 A. I think that is the right
14 number.

15 Q. Substantially all of those are
16 in the southeastern United States?

17 A. I believe that's correct.

18 MR. RUBIN: Thank you, Judge.
19 That is it.

20 MR. MARTIN: Your Honor, Warren
21 Martin for Riverdale Farms. I joined in
22 the motion. A couple of questions.

23 DIRECT EXAMINATION

24 BY MR. MARTIN:

25 Q. Mr. Appel, you testified quite

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2 clearly that it was not Debtors' intention
3 to limit creditor involvement in choosing
4 New York as a venue?

5 A. Absolutely not, that's correct.

6 Q. Does it have that effect,
7 though, in any event?

8 A. I don't think so.

9 Q. How about employees?

10 A. Involvement?

11 Q. Yes. Let's say you were to
12 file a motion affecting employees. Do you
13 think employees would show up here in New
14 York?

15 A. It is undeniable the large
16 majority of our associates are in the
17 southeast and it would be easier for them
18 to be in Jacksonville, marginally easier
19 for them to be in Jacksonville than New
20 York. That is true. But it would never
21 have been our intent to choose New York to
22 limit their ability to attend here.

23 Q. Would the same go for your
24 run-of-the-mill trade creditors such as my
25 client, Riverdale Farms, which is located

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2 in Florida?

3 A. If your client is located in
4 Florida, that would be true. I don't know
5 what "run-of-the-mill trade creditors"
6 means. So no, I don't think it would
7 generally be true of run-of-the-mill trade
8 creditors. When we looked at our top 100,
9 30 of them had offices in New York and 9
10 had offices in Florida.

11 MR. MARTIN: No further
12 questions.

13 MR. HELD: Your Honor, I have a
14 couple of questions. I'm Edwin Held on
15 behalf of Beaver Street Fisheries.

16 DIRECT EXAMINATION

17 BY MR. HELD:

18 Q. Mr. Appel, are you aware of any
19 objections by the members of the Committee
20 individually in their capacity as
21 creditors to Buffalo Rock's motion for
22 change of venue?

23 A. I don't think so, no. Are
24 there? I don't think so.

25 Q. I'm not aware of any.

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2 Are you aware of any members of
3 the Committee in their individual capacity
4 joining in with the Committee --

5 A. Wait, did New Plan file? I
6 can't remember. I thought New Plan had
7 filed a motion, but I may be wrong.

8 MR. DUNNE: Your Honor, I will
9 help him out. The clients are listed in
10 the relevant pleadings.

11 A. I just don't remember, I'm
12 sorry.

13 Q. With respect to employees,
14 isn't it true that more employees are
15 located in Jacksonville than in any other
16 area of the country?

17 A. That may be true. We have a
18 substantial store base there and we have
19 our corporate office there. But we have
20 more stores in Miami. There are a large
21 number of employees in Jacksonville. I
22 don't know if there are more there than
23 anywhere else.

24 Q. Do you know approximately how
25 many employees are employed in the

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2 administrative offices?

3 A. A couple of thousand maybe.

4 Q. Do you know approximately how
5 many employees are employed in the general
6 distribution center?

7 A. I'm sorry, I don't know.

8 Q. Would it be in the hundreds or
9 thousands?

10 A. My guess is it would be in the
11 hundreds, but I really don't know.

12 MR. HELD: No further
13 questions, your Honor.

14 THE COURT: Mr. Despins?

15 CROSS-EXAMINATION

16 BY MR. DESPINS:

17 Q. Good afternoon, Mr. Appel.

18 A. Good afternoon.

19 MR. DESPINS: May I approach
20 the witness with the stipulated facts?

21 THE COURT: Yes.

22 Q. Just a few questions regarding
23 the agreed facts, Mr. Appel.

24 The first one, let me direct
25 your attention to paragraph 2, which says

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2 "Dixie Stores was the first filed
3 bankruptcy case, and the Debtors selected
4 venue for the bankruptcy cases in New York
5 Bankruptcy Court by virtue of their status
6 as affiliates of Dixie Stores."

7 Two questions regarding this.
8 First, there is another debtor called I
9 believe Table Supply?

10 A. Yes.

11 Q. Is it the company's belief that
12 that debtor could file on its own in New
13 York without relying on the affiliate
14 provision of 1408?

15 A. Yes.

16 Q. So, therefore, when you use the
17 word "Debtors" there, it probably should
18 read "the Debtors other than Table
19 Supply"?

20 A. I guess that is technically
21 correct, yes.

22 Q. The second point is, it says
23 "The Debtors selected venue for their main
24 bankruptcy cases based on the affiliate
25 provision."

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2 It could be semantics, but do
3 you mean to say there that the Debtors
4 relied on that section of 28 USC rather
5 than that was the reason why you came to
6 New York?

7 MR. RUBIN: Objection. The
8 document speaks for itself. It has been
9 submitted by his counsel.

10 MR. DESPINS: I can
11 cross-examine him on the intent.

12 A. When I read this, and if I read
13 this wrong, I'm sorry, "selected" meant
14 that was the provision we relied on.
15 Absolutely, the reason we, quote, selected
16 New York were all of the reasons that I
17 talked about before, not a provision in a
18 bankruptcy statute.

19 Q. I will direct you to paragraph
20 5 and 9 of the stipulated facts. Those
21 paragraphs are essentially the same,
22 except one relates to Dixie Stores, the
23 other relates to Table Supply. Both of
24 them say that these entities have no
25 business operations, no physical presence

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2 in New York, no employees, and no
3 prepetition liabilities.

4 I would like you to focus on
5 the words "prepetition liabilities" which
6 are repeated in paragraph 5 and paragraph
7 9.

8 First, a preliminary question,
9 are you familiar with the concept of
10 control group liability? Do you know what
11 that term means?

12 A. Yes.

13 Q. Can you describe --

14 A. In certain circumstances,
15 whether with respect to employee benefit
16 plans, tax, liability, or otherwise,
17 subsidiaries and parent that are part of a
18 control group can be jointly liable for
19 certain things, certain obligations.

20 Q. Do you believe that Dixie
21 Stores and Table Supply would both be part
22 of the Winn-Dixie control group?

23 A. We did not focus on control
24 group liabilities when we drafted this.
25 But if your question is could there be

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2 control group liabilities that Dixie
3 Stores, prepetition, could have been
4 liable for, I think the answer is probably
5 yes.

6 Q. Just to be clear, Dixie Stores
7 and Table Supply are both 100 percent
8 controlled by Winn-Dixie?

9 A. Absolutely, they both are.

10 Q. Let me direct your attention to
11 paragraph 14. It says "All of the
12 Debtors' officers and directors and
13 management are located in the southeastern
14 United States."

15 "Located" can have many
16 meanings. What did you intend to convey
17 by "located"?

18 A. I believe all of our officers,
19 their primary company office, if you will,
20 is in the southeast. For our directors,
21 they all either own a home in the
22 southeast or have an office in the
23 southeast.

24 Q. But these directors might very
25 well have other homes elsewhere?

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2 A. Sure, absolutely.

3 Q. For example, isn't it a fact
4 that the chief financial officer of the
5 company has his primary residence or one
6 of his residences in California?

7 A. I believe his primary
8 residence, his wife and young child live
9 in California, and he commutes from time
10 to time back and forth. He also has a
11 home in Miami.

12 Q. Paragraph 16 says "A
13 substantial number of the Debtors'
14 creditors have offices in the southeastern
15 United States."

16 Couldn't the same be true of
17 the New York area?

18 A. Yes. As I said, 30 of our
19 largest 100 have offices in the New York
20 area.

21 Q. Turning to paragraph 18, it
22 says that "The Debtors believe that they
23 can achieve a successful reorganization in
24 the Florida Bankruptcy Court."

25 Same question, couldn't the

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2 same be true of the Southern District of
3 New York Bankruptcy Court?

4 A. Yes, absolutely.

5 Q. The last paragraph is paragraph
6 19, and it says "The Debtors believe that
7 it may be less expensive to administer
8 these bankruptcy cases in the Florida
9 Bankruptcy Court than in the New York
10 Bankruptcy Court."

11 First question is, is that
12 really a statement of intent or goal, or
13 do you think it is a fact that it will be
14 cheaper if the case is in Florida?

15 A. I believe both are true. It is
16 a statement of intent and goal, and I do
17 believe it is a fact that they may be less
18 expensive in Florida than in New York.

19 Q. You used the words "may be."
20 Actually, the stipulation uses the words
21 "may be." So it may not be as well?

22 A. Yes. I mean, I don't have a
23 crystal ball. There are a lot of things
24 that will change. We are going to have
25 certain New York advisors who end up

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2 having to take trips to Jacksonville that
3 they otherwise wouldn't have had to take.
4 We will have certain local counsel for the
5 company or some of the other
6 constituencies that the estate ends up
7 paying for. They will add local counsel
8 in Florida.

9 When I looked at it from the
10 company's perspective, I tried to decide,
11 whether through thoughtful delegation of
12 assignment and Skadden rates and local
13 Florida counsel rates, I reached the
14 conclusion I very well might be able to
15 manage the case in such a way that the
16 overall expense would be lower in Florida
17 than in New York.

18 Q. What kind of analysis have you
19 done to reach that conclusion?

20 A. Back of the napkin. You know,
21 I've looked -- I know what it costs to fly
22 here. I know what my New York lawyer,
23 sort of what the range and average rates
24 are. I know what quality local counsel in
25 Florida, what the range and average rates

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2 are. I took a look at some of the
3 activities and tried to decide what I
4 might be comfortable letting Florida
5 counsel run lead in. I tried to think
6 about what percent of the case that might
7 be, what average case fees are.

8 Like I said, I don't have a
9 crystal ball, but I did the best that I
10 could to try to think about how I would
11 manage fees appropriately for the benefit
12 of the estate.

13 Q. But your back of the napkin
14 analysis, did it focus on the Debtors'
15 side of professionals?

16 A. Yes, that is the only thing
17 that I'm really aware of, is the Debtors'
18 side.

19 Q. But you are aware that the
20 Committee has its own set of
21 professionals, correct?

22 A. Absolutely. And I'm assuming
23 that the Committee would equally try to
24 manage expense and utilize lower-cost
25 providers for servicers that are

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2 appropriate.

3 Q. But you have no control over
4 that part, as the company?

5 A. I don't know what control I
6 have over -- I don't know what I get to
7 say about fee applications that the estate
8 pays for from non-company advisors.

9 Q. What about the banks, the banks
10 have counsel?

11 A. Yes.

12 Q. And the company reimburses the
13 banks for their cost of counsel, correct?

14 A. It is absolutely fair to say
15 that my back of the napkin analysis was
16 based on company cost, and I am aware that
17 there are other parties that would have
18 other costs. That is why, at the end of
19 the day, it says "may."

20 As you said, that would be my
21 intent to try to accomplish that. We will
22 never know, because we will be in one
23 place or the other. We won't be in both.
24 We will never get to look back, I think,
25 unless you have something in mind that I

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2 can't conceive of right now. I'm not
3 trying to be difficult.

4 Q. Let's talk about the employees
5 for a second.

6 If the employees were able to
7 participate in court hearings by
8 conference call, by phone, do you think
9 that that would minimize this issue of
10 convenience to the employees?

11 A. Surely if you can participate
12 by conference call, then that is helpful,
13 sure.

14 Q. Are you aware that is what is
15 done in the Southern District of New York
16 for the other large cases?

17 A. Specifically with respect to
18 employees, I wasn't aware of that. I'm
19 aware of the fact that we have
20 participated in a number of meetings with
21 various creditors, and here I assume we
22 are talking about employees that are
23 creditors, which is by no means all of our
24 employees, the large majority of whom,
25 under our first-day motions, we were able

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1 APPEL - CROSS
2 to pay their prepetition claims. And the
3 large majority of our associates -- that
4 is just the term we use, I apologize, it
5 is a habit -- won't be creditors.

6 But I have participated in
7 meetings here in New York with creditors
8 and had various creditors and their
9 representatives participate
10 telephonically.

11 Q. Have you ever had any contacts
12 with representatives from the movant,
13 Buffalo Rock?

14 A. Yes, I have.

15 Q. Can you describe in what
16 context?

17 A. Sure. I had a telephone
18 conversation with the general counsel of
19 Buffalo Rock shortly after their motion
20 was filed.

21 Q. How did that come about? Was
22 it telephonic?

23 A. It was a telephone call. I
24 actually was here in New York at the time.
25 I took it from Skadden Arps' office.

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1 APPEL - CROSS

2 Q. Who was the representative from
3 Buffalo Rock that you talked to?

4 A. The general counsel of the
5 company.

6 Q. Do you recall the general
7 counsel's name?

8 A. I apologize, I should, but I
9 don't have it at the tip of my tongue.

10 Q. Who initiated the call?

11 A. I called him.

12 Q. After pleasantries were
13 exchanged, I assume, what did you tell
14 him?

15 A. Essentially I said a
16 two-sentence summary of a lot of what I
17 said today. I said "We chose New York
18 because we thought it would be more
19 convenient for the creditors, not because
20 we were trying to hide from any creditors.
21 We were taken aback by the severity of the
22 language that you used, and we would like
23 to understand why you did what you did and
24 where we are going to go from here."

25 Q. What was the response from the

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1 APPEL - CROSS

2 general counsel of the movant?

3 A. We talked back and forth for a
4 little while, and ultimately he indicated
5 that they had, I don't know whether he had
6 come or his outside advisors, but Buffalo
7 Rock had been represented at the Creditor
8 Committee formation meeting, I think that
9 is the appropriate term for it, here in
10 New York, and that they did not feel that
11 they had been treated appropriately.

12 They were disappointed that
13 they were not on the Creditor Committee.
14 They were concerned about their ability to
15 have access to the matter in New York.

16 Q. Was the statement made, and I'm
17 going to read from your deposition
18 yesterday, by the general counsel of
19 Buffalo Rock, something to the effect of
20 "We can be in Jacksonville, we can be in
21 New York, we just want to be on the
22 Creditors Committee"?

23 A. Yes. When he said "We can be
24 in Jacksonville or we can be in New York,"
25 or whenever he said "Jacksonville is okay,

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1 APPEL - CROSS

2 New York is even better," and he said "We
3 just want to be on the Creditor
4 Committee," I remember it distinctly,
5 because, A, it was the last sentence of
6 the call. It was sort of the summary of
7 the call, if you will.

8 B, because, frankly, it was a
9 little bit difficult to hear. We had been
10 dealing for several days with the rhetoric
11 of that motion, with the publicity
12 fallout, with feeling like we were being
13 painted by doing something in bad faith.
14 And, you know, I will admit to not being
15 pleased to hear that at the end of the day
16 they didn't appear to care about the
17 underlying issue very much.

18 Q. In fact, didn't that general
19 counsel for Buffalo Rock state something
20 to the effect that if they can be on the
21 Creditors Committee, this motion would go
22 away?

23 MR. RUBIN: Your Honor, I
24 object on the basis of Rule 408 of the
25 Federal Rules of Evidence. That would be

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1 APPEL - CROSS
2 settlement negotiations between the
3 parties and inadmissible into evidence as
4 to what would cause the motion to be
5 withdrawn, if it was withdrawn.

6 MR. DESPINS: Your Honor, if I
7 may be heard on this issue.

8 408 says that you cannot put on
9 evidence to prove liability or the
10 weakness of the claim. The claim at issue
11 here is whether venue should be changed.
12 So if the general counsel of Buffalo Rock
13 told Mr. Appel "We think our basis to
14 change venue is weak, we don't have a good
15 case," that couldn't come in as part of
16 the settlement discussion. That is not
17 the case here. We are trying to put this
18 in to show intent. Our view, frankly, is
19 it is incredibly improper to use a motion
20 to change venue to essentially circumvent
21 the U.S. Trustee's decision to appoint or
22 not to appoint somebody to the Committee.

23 In fact, Judge Gonzalez, in the
24 WorldCom decision, reached a similar
25 conclusion of 408 on different facts. But

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1 APPEL - CROSS
2 in that case the taxing authorities moved
3 to disqualify the debtors' accountants.
4 That threat came in the context of
5 settlement discussion about the merits of
6 the taxing authorities' claims. When the
7 debtor tried to put on evidence of that
8 threat, the taxing authorities said "Oh,
9 408, settlement privilege, we can't use
10 that." Judge Gonzalez said "No, this has
11 nothing to do with the merit of the
12 claims. It has to do with why this motion
13 to disqualify the accountants was brought
14 by the taxing authorities."

15 It is exactly the same issue
16 here. That is why we should be hearing
17 from the witness what the answer was.

18 THE COURT: I agree with that.
19 The objection is overruled. I think that,
20 again, Buffalo Rock, I fully believe that
21 the objection is meritorious, but I don't
22 believe the question goes to that issue.

23 Q. Let me restate the question.

24 Was there a statement from the
25 representative of Buffalo Rock in that

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1 APPEL - CROSS
2 conversation, to the effect, not
3 literally, but if they were placed on the
4 Creditors Committee, this motion to change
5 venue would go away?

6 A. First of all, for whatever it
7 is worth, I didn't think of the
8 conversation I had as settlement
9 discussions. I always prefaced that in
10 the discussions.

11 The answer to your question is
12 yes. Because they had indicated that they
13 were frustrated and didn't think they
14 would get transparency in the matter in
15 New York, I said to them there were
16 certain things that were under our
17 control. "If we agree to have regular
18 conversations, whether it is general
19 counsel to general counsel, CFO to CFO,
20 would that help you?"

21 Over the course of the
22 conversation, that evolved into
23 essentially a three-tier discussion. "If
24 we are on the Creditor Committee and have
25 a vote, we are done. If we are on the

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1 APPEL - CROSS

2 Creditor Committee and we don't have a
3 vote, I can't tell you we are done, but I
4 think I can sell that. And informal
5 discussions aren't going to cut it."

6 Q. Let's focus for a minute on the
7 company's decision to not object to a
8 change of venue to Florida, which was
9 already explored on direct, but I will
10 spend a minute on it.

11 Would it be fair to say that if
12 the negative PR aspects, public relation
13 aspects, of this whole motion to change
14 venue could be removed, that the company
15 would be satisfied with staying in New
16 York?

17 A. If they could be removed?

18 Q. Yes, if they could be undone
19 somehow. I'm not saying that they can.

20 A. You asked me before whether I
21 thought, if the statement in the
22 stipulation said New York instead of
23 Florida, could we successfully reorganize
24 here, and I said yes.

25 So I think the answer to that

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1 APPEL - CROSS

2 is definitely yes, unless I'm
3 misunderstanding the question.

4 Q. The next question is, to a
5 certain extent the negative PR, the
6 negative public relations, is something
7 that cannot be undone, you've already
8 received that?

9 A. Correct, it can't be fully
10 undone.

11 Q. Presumably there are two things
12 the Court can do with this current motion,
13 either grant it, meaning transfer the case
14 to Florida, and would that undo all the
15 negative PR that you've suffered?

16 A. All, no.

17 Q. And the Court could also decide
18 to retain the case, saying that the case
19 is properly venued here?

20 A. Yes.

21 Q. If the Court did find the case
22 was properly venued here, would that go a
23 long way to defuse all this negative
24 publicity?

25 A. Sure. I assume the finding

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1 APPEL - REDIRECT

2 that it was properly venued here, that
3 would mean we as a company complied with
4 the law in choosing venue and never acted
5 in bad faith, that would go a long way
6 towards helping us, undoing the damage
7 that has been done.

8 Q. We hear that loud and clear.

9 A. That is very important to us.

10 MR. DESPINS: Your Honor, if I
11 can just talk to my clients for one
12 minute.

13 THE COURT: Okay.

14 (Pause.)

15 MR. DESPINS: That is all we
16 have, your Honor.

17 THE COURT: Any redirect?

18 MR. RUBIN: Just a couple of
19 questions, if I may, your Honor.

20 REDIRECT EXAMINATION

21 BY MR. RUBIN:

22 Q. Mr. Appel, how many stores of
23 Winn-Dixie Stores, Inc. are located in the
24 State of Florida?

25 A. Somewhere in the low 400's. I

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1 APPEL - REDIRECT

2 don't have the exact number.

3 Q. How many stores are operating
4 today all throughout the southeastern
5 United States?

6 A. Around 920. So call it 45
7 percent, 40, 45 percent, something like
8 that, are in Florida.

9 Q. Do you have an estimate as to
10 how many employees are also in the State
11 of Florida?

12 A. Round numbers, I would say
13 maybe slightly more than the percentage of
14 stores. So call it 50.

15 Q. Approximately 50,000?

16 A. 50 percent of the 80,000. If
17 40 or 45 percent of the stores and then
18 our corporate offices -- I would assume it
19 is slightly more -- a slightly larger
20 percent of our associates are in our
21 stores. So call it half.

22 Q. Would it be fair to say there
23 are approximately 40,000 employees located
24 in the State of Florida in all different
25 capacities?

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1 APPEL - REDIRECT

2 A. Back of the napkin math, yes, I
3 think that is probably pretty close.

4 Q. All right. One other question,
5 then.

6 Based on the questions that
7 Mr. Held asked you in respect to employee
8 participation in the case, the employees
9 by and large are nonunion; is that not
10 correct?

11 A. All of our U.S. employees are
12 nonunion.

13 Q. So they are not organized with
14 union representation in that fashion?

15 A. You are correct.

16 Q. One last question.

17 You have made an investigation
18 as to the hourly rates for your counsel in
19 Florida, and you testified yesterday that
20 in some instances the hourly rates of
21 Florida counsel would be half of those of
22 Skadden; is that correct?

23 A. It is close to half, yes.

24 MR. RUBIN: That is all, Judge.
25 Thank you.

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1 APPEL - REDIRECT

2 MR. MARTIN: Your Honor, Warren

3 Martin, attorney for Riverdale Farms.

4 REDIRECT EXAMINATION

5 BY MR. MARTIN:

6 Q. Mr. Appel, you attended the
7 organizational meeting up here in New York
8 for creditors, to form the Creditors
9 Committee?

10 A. Yes, I did.

11 Q. The next day, Winn-Dixie held a
12 meeting in Jacksonville for creditors; is
13 that correct? On or about the next day,
14 the next couple of days?

15 A. The day after the meeting for
16 the formation of the Creditors Committee,
17 we held a meeting for creditors in
18 Jacksonville?

19 Q. Yes. Are you aware of that?

20 A. I don't think so. Shortly
21 after -- either shortly before or shortly
22 after the formation meeting, there was a
23 meeting in Orlando that was prescheduled
24 and we do sort of every quarter or every
25 six months at the request of a vendor

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1 APPEL - REDIRECT

2 trade group. I think it is mostly health
3 and beauty, but whoever they are, that
4 many of our major vendors are in that
5 trade group. We meet with them on a
6 regular basis.

7 We did have a meeting with them
8 at that time, but it wasn't timed to be
9 coincident with that Creditors Committee
10 meeting. In fact, it had been scheduled
11 for earlier and we delayed it for a week
12 and a half if I remember correctly.

13 Q. And you were at that meeting in
14 Orlando?

15 A. No, I was not.

16 Q. Are you aware as to how many
17 creditors attended that meeting?

18 A. I had heard that it was a
19 relatively small number from what the
20 normal attendance was, but I'm not
21 certain.

22 Q. If I said 100, would that sound
23 about right?

24 A. No. I thought it was a much,
25 much smaller number. But I really don't

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1 APPEL - REDIRECT

2 know. I wasn't there. I thought it was
3 less than 20.

4 The recollection I got from our
5 CFO who went was it was much smaller than
6 previous times. I had been there once
7 before and there were about two dozen
8 people in the room. But I don't know how
9 many people were there.

10 Q. One other question.

11 Did I or any representative of
12 Riverdale Farms tell you that if we were
13 on the Creditors Committee we would
14 withdraw our joinder in the motion?

15 A. Absolutely not.

16 MR. MARTIN: Thank you. No
17 further questions.

18 MR. McFARLIN: I have a couple
19 of questions.

20 REDIRECT EXAMINATION

21 BY MR. McFARLIN:

22 Q. Mr. Appel, are you familiar
23 with avoidance actions in Chapter 11's or
24 bankruptcy in general?

25 A. I'm sorry, I'm not.

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1 APPEL - REDIRECT

2 Q. Are you familiar with
3 preference actions?

4 A. Generally I'm aware of the
5 preference concept.

6 Q. Correct me if I am wrong, it
7 was hard to hear, I believe your testimony
8 was you did participate in the preparation
9 of the Debtors' schedules and statement of
10 affairs?

11 A. Yes, that's correct.

12 Q. With respect to payments to
13 creditors that is referred to in paragraph
14 3 of the statement of affairs, are you
15 familiar with the number of payments that
16 were actually made and the number of pages
17 as referred to in the statement of
18 affairs?

19 A. I don't have that in front of
20 me. I don't have it memorized.

21 Q. The statement of affairs sets
22 forth the list of payments as voluminous
23 in nature, consisting of approximately
24 76,000 entries on 2,000 pages. It would
25 be too burdensome to attach everything,

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1 APPEL - REDIRECT

2 etc.

3 A. That is in a three-month period
4 prior to filing?

5 Q. Yes.

6 A. I'm generally aware of that.

7 Q. With respect to these payments
8 and with respect to preferences, wouldn't
9 it also be true that the payments within
10 90 days may trigger certain preference
11 litigation?

12 A. We believe we were solvent in
13 that time period.

14 Q. You acknowledge solvency during
15 that time period?

16 A. I'm sorry?

17 MR. DUNNE: Your Honor, I
18 object to trying to get any testimony out
19 as to solvency within the 90 days prior.

20 MR. McFARLIN: I haven't asked
21 for solvency.

22 THE COURT: Do you want to
23 reask your question?

24 MR. McFARLIN: I will rephrase
25 it.

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1 APPEL - REDIRECT

2 Q. With respect to a situation
3 where the Debtors are insolvent and there
4 are approximately 76,000 payments made,
5 wouldn't you agree that the number of
6 preference-type actions either in the way
7 of demands or actual adversary proceedings
8 or lawsuits would be numerous?

9 MR. ZIMMERMAN: Objection. A,
10 this calls for a legal conclusion. B, we
11 don't know the facts or nature of these
12 cases. C, you don't need testimony about
13 preference. I don't see what the
14 relevance of any of this is.

15 THE COURT: Are you just really
16 pointing out that there are listed
17 potentially 76,000 claims?

18 MR. McFARLIN: I was leading up
19 to that the witness' books and records --

20 THE COURT: I will take
21 judicial notice of that.

22 MR. McFARLIN: I have no
23 further questions.

24 MR. DESPINS: Just a very quick
25 question.

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1 APPEL - RECROSS

2 RECROSS-EXAMINATION

3 BY MR. DESPINS:

4 Q. You've done no solvency or
5 insolvency analysis on this company, have
6 you?

7 A. No, I haven't.

8 Q. Sort of back of the napkin
9 analysis, do you know what the full fare
10 coach airfare is from New York to
11 Jacksonville?

12 A. It depends on when you book it,
13 but it is anywhere --

14 Q. I'm talking full fare, no
15 restrictions.

16 A. It is slightly more than
17 \$1,000, I believe.

18 Q. What about a hotel in
19 Jacksonville, ballpark?

20 A. They are a lot less expensive
21 than here. It is less than \$100.

22 Q. Let me make it easier for you.
23 The hotel where Skadden is staying.

24 A. The nicest hotel -- no, I won't
25 make a joke at Skadden's expense. It is

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2 probably \$100, in all seriousness.

3 MR. DESPINS: Thank you.

4 THE COURT: You could step

5 down.

6 Are there other witnesses that
7 are anticipated to be called?

8 MR. ZIMMERMAN: None for the
9 Debtor.

10 MR. RUBIN: None, your Honor.

11 THE COURT: It is 10 to 2. I
12 think we could use a lunch break, at least
13 I could. Why don't we return about 20 of
14 3.

15 (Luncheon recess from 1:50 p.m.
16 through 2:43 p.m.)

17 THE COURT: We are back on the
18 record in Winn-Dixie. We will proceed
19 with oral argument.

20 MR. ZIMMERMAN: I'm the culprit
21 for the scheduling conflict, so Mr. Rubin
22 has been kind enough to let me go first.
23 To make something clear, there was some
24 cross-examination before about Debtor no
25 longer opposing Buffalo Rock's motion.

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2 That is true, but it is beyond that. The
3 Debtors are affirmatively seeking a
4 transfer to Jacksonville.

5 If I may, I would like to
6 briefly address two topics. First, the
7 propriety of New York ab initio, and,
8 second, what led the Debtors to now seek
9 to go to Jacksonville. The fact record
10 now is closed. The evidence is undisputed
11 that there wasn't a scintilla of bad faith
12 here. There was never an intention to
13 somehow evade or run away from
14 Jacksonville. In fact, it is directly to
15 the contrary. This is a well-reputed
16 company. Terrific goodwill, philanthropic
17 founders. The last thing they would need
18 to do is escape Jacksonville.

19 Nor is there evidence that
20 there was an effort to pick a forum that
21 would inconvenience creditors. The
22 un rebutted evidence is directly to the
23 contrary. There was a careful business
24 judgment analysis by management weighing
25 the same types of factors the Court does.

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2 On balance, there is one thing that is
3 indisputable, there is not a forum in the
4 country that every creditor group and
5 every constituency is going to agree to.
6 That is off the table. The issue is which
7 forum can maximize the conveniences of as
8 many critical players as you can and
9 facilitate the successful reorganization
10 of the company. The record is what it is.
11 There are creditors in the southeast.
12 There are substantial participants in this
13 process in New York and the tristate area.

14 Based on their own judgment,
15 their analysis of the issues, the advice
16 of their expert advisors, based on actual
17 experience and contacts with prospective
18 creditors and prospective participants,
19 the conclusion was reached New York was
20 the appropriate forum. Did they solicit
21 trade creditors' views? Of course not. A
22 debtor is not going to go to their trade
23 creditors and say "We are going to file
24 for bankruptcy, where would you like us to
25 file?" Some things are best left to

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2 managerial discretion.

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4 The only thing that is left on
5 the argument by Buffalo Rock that this was
6 improperly selected for a bad purpose is
7 rhetoric. There is no evidence. They had
8 ample opportunity yesterday to
9 cross-examine and they established nothing
10 in that. They had ample opportunity to
11 today. There is not a shred of evidence
12 supporting that allegation. Nor do they
13 dispute nor can they dispute that venue
14 was absolutely appropriate under the four
15 corners of this statute. That is not an
16 issue. The only way they get out of that
17 is to ask this court, somehow using its
18 equitable powers under Section 105, to
19 find not only that despite the fact that
20 venue is undeniably within the four
21 corners of this statute and despite the
22 fact that the evidence is uncontroverted
23 that it was a good-faith decision, you
24 should bend over backwards to transfer it
25 and find bad faith on those grounds. That
makes absolutely no sense. It would be a

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2 perversion of Section 105. 105 leads
3 inescapably to a different conclusion.
4 This was a good-faith finding.

5 The one case I would cite on
6 this proposition, Judge, because it is a
7 Second Circuit Court of Appeals case, is
8 Capitol Motor against LeBlanc, 201 F.2d
9 356, where a company transferred its stock
10 to another company for the sole purpose of
11 becoming a subsidiary so it can then latch
12 on to the other company's bankruptcy
13 filing. That was done on the eve of
14 filing, and then both companies, within
15 minutes of each other, filed for
16 bankruptcy.

17 The Second Circuit rejected a
18 bad-faith argument because they said it
19 fit within the technical requirements of
20 the statute. The subsidiary can file
21 where its parent does. There was a
22 legitimate potential reorganization.
23 There was no effort to frustrate
24 creditors. That was the bad faith, if
25 there was going to be one, frustrating

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2 creditors. On those grounds, they found
3 no bad faith. In fact, the stock transfer
4 in that case was unlawful because it
5 violated a stock transfer restriction,
6 and, nevertheless, the Second Circuit said
7 it is not bad faith.

8 Here it is the opposite, there
9 is no unlawful activity whatsoever. Under
10 the Second Circuit law, clearly this is an
11 appropriate venue, no bad faith. So why
12 are we joining, then, in the motion? And
13 this was clearly a long, careful decision,
14 and with all due respect, you can take
15 judicial notice of the fact that after
16 everything that has gone on to date, the
17 last thing the Debtors wanted to do is
18 join in a motion with Buffalo Rock.

19 But here are the facts.
20 Buffalo Rock filed its papers. The
21 bad-faith allegation, the escaping
22 Jacksonville, frustrating creditors, was
23 all over the papers. As undoubtedly could
24 not have been a surprise to them, it was
25 picked up by the press. The creditors, I

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2 believe the Committee, in their
3 opposition, says that since the Debtors
4 selected New York and since the Debtors
5 now want to move, we have the burden of
6 showing some change that occurred
7 post-filing. Without debating whether
8 that is the right standard or not, let's
9 apply that standard. The testimony is
10 clear, there was a substantial and
11 dramatic change. That was Buffalo Rock's
12 filing. For better or worse, because you
13 don't have to plead evidence, you can
14 basically say whatever you want, and that
15 is apparently what they did. Without any
16 evidence, it is all over the press.

17 The fact is the testimony is,
18 again, undisputed, that caused real
19 serious, tangible harm to this company.
20 People in the field are getting constant
21 feedback from associates, employees. They
22 are being deluged with these problems.
23 And people are wondering just what the
24 heck went on here, why did this company do
25 this, are these charges true? And can the

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2 Debtors engage in a press campaign? Sure.
3 Can they benefit from a finding by this
4 court that they acted totally appropriate
5 at all times? Absolutely. I think the
6 testimony was clear, that would go, quote,
7 a long way. But the problem is that
8 doesn't take us where they need to go.

9 I think Mr. Appel made it
10 clear, his words were eloquent, actions
11 speak louder than words. Do the Debtors
12 believe they can have a successful
13 reorganization in New York? Absolutely.
14 They filed here. Do they believe they can
15 have a successful reorganization in
16 Florida? Absolutely. The problem is once
17 the courtroom process is over and there is
18 hopefully a successful reorganization,
19 life goes on. That is the period of time,
20 that is the event that we have to plan for
21 now. And the Debtors, who know their
22 constituencies and know their community
23 better than anybody else in this
24 courtroom, in their business judgment have
25 made a conclusion they need not only to

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2 take the stand here and swear under oath
3 to disavow those baseless charges of bad
4 faith, they need to do everything they can
5 proactively to show that they are
6 perfectly happy to go to Jacksonville.
7 They were happy to commence in
8 Jacksonville, but on balance determined it
9 would be better for all involved to go to
10 New York.

11 But they need to show their
12 constituencies that not only can they
13 swear to the truth, but they can act on
14 it, and they affirmatively are joining and
15 requesting that this court, for all the
16 reasons that I discussed and for the
17 testimony, the un rebutted sworn testimony,
18 that the best interests of this estate
19 would be to move this case to
20 Jacksonville.

21 Thank you.

22 MR. RUBIN: Would you like for
23 us to go next, your Honor?

24 THE COURT: Yes.

25 MR. RUBIN: Your Honor, we

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2 appreciate the opportunity to be heard
3 this afternoon and a bit of this morning.

4 We stand by the motion which we
5 filed, the cases which we've cited and the
6 facts which we have articulated in that
7 motion, and the response which we filed.

8 But, more importantly, we stand by the
9 stipulation of facts which we filed

10 earlier today with the Court. And

11 although we appreciate the fact that the

12 Debtor consents and we think that is

13 extremely important that the Debtors'

14 wishes be adhered to in respect to moving

15 the case to Jacksonville, we also believe

16 that the facts as alleged in the

17 stipulation point out the motion papers

18 that we filed were absolutely correct, as

19 well as the response, that venue was

20 manufactured here in the Southern District

21 of New York by the actions taken by the

22 Debtor in respect to the filing of these

23 cases. However you want to characterize

24 them, that is up to the Court to

25 characterize it. The facts are pretty

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2 clear, they are pretty salient.
3 First of all, on February the
4 21st these cases were filed. There are 24
5 cases in all. 19 of those cases are
6 Florida corporations. What was the nexus
7 between New York and these debtors? That
8 nexus was created on February the 9th,
9 2005, some 12 days before the filing of
10 the petition, by the incorporation of a
11 company known as Dixie Stores, Inc., a New
12 York corporation which came into existence
13 on the 9th and did not exist prior to that
14 date. It is clear also from the
15 stipulation that Dixie Stores has no
16 prepetition creditors. Dixie Stores has
17 no assets except for a \$100,000 bank
18 account which is at the Wachovia Bank here
19 in New York. How did that bank account
20 come into existence? That money was
21 either wire-transferred or deposited by
22 Winn-Dixie Stores itself to that bank
23 account. That happened on or about
24 February 12th. So there was absolutely no
25 nexus between these debtors and the State

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2 of New York.

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There is no physical presence

4 of Dixie Stores in the State of New York

5 other than the bank account. Paragraph 6

6 of the stipulation is clear. The Debtor

7 and the movant stipulate that DSI, Dixie

8 Stores, Inc., was formed solely to

9 establish venue in the New York Bankruptcy

10 Court. The testimony was clear, and

11 substantially clear from the witness this

12 morning, that there are approximately

13 80,000 employees, over 40,000 of them are

14 located in the State of Florida, that 40

15 percent of the stores of the Debtor are

16 located in the State of Florida, that all

17 of the management of the Debtor is located

18 in the State of Florida, that all of the

19 substantial assets of the Debtor are

20 located in the southeastern United States,

21 Alabama, Mississippi, Georgia, Florida,

22 North and South Carolina, etc., Louisiana.

23 The second hook for venue, on

24 or about February 12th, 2005, Table

25 Supply, a Florida corporation, not

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2 qualified to do business in the State of
3 New York, established a bank account at
4 Wachovia Bank here in New York City.
5 Where did that money come from? That
6 money came from Winn-Dixie Stores, Inc.
7 So what is the nexus, then,
8 after the establishment of that bank
9 account, between New York and this debtor?
10 The nexus is approximately \$200,000 in
11 assets as opposed to the total amount of
12 assets of the Debtor in accordance with
13 its summary of schedules of an amount of
14 \$1,724,693,681.28. My math has always
15 been paltry and poor, but we have tried to
16 calculate that, and we believe that the
17 \$200,000 worth of deposits in the State of
18 New York represent 1/100 of 1 percent of
19 the total assets of this debtor.

20 It is telling in paragraph 10
21 of the stipulation that the Table Supply
22 bank account was created solely to sustain
23 venue in the New York Bankruptcy Court.
24 Substantially all of the Debtors' assets
25 other than the DSI bank account and this

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2 Table Supply bank account are located in
3 the southeastern United States. That is
4 paragraph 11.

5 Paragraph 12, all of the
6 Debtors' employees are employed in the
7 southeastern United States. The Debtors'
8 books and records, including those of
9 Table Supply and Dixie Stores, are located
10 in Jacksonville, Florida, paragraph 13 of
11 the stipulation. All of the Debtors'
12 officers and directors and management are
13 located in the southeastern United States,
14 paragraph 14. 15, all of the Debtors'
15 corporate decision-making occurs in
16 Jacksonville, Florida. The Debtors
17 consent in paragraph 17. In paragraph 18,
18 the Debtors believe they could achieve a
19 successful reorganization in the Florida
20 Bankruptcy Court. In paragraph 19, the
21 Debtors believe it may be less expensive
22 to administer the case.

23 Your Honor, this is clearly a
24 case that is governed by 28 USC Section
25 1408, subparagraph 1. Venue was

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2 manufactured. This is blatant forum
3 shopping by this debtor in the filing of
4 these cases in the Southern District of
5 New York. We believe that if you take
6 those facts as you see them, then both the
7 Table Supply and the Dixie Stores cases
8 are subject to dismissal. There is no
9 possibility of a reorganization of Dixie
10 Stores. It has no business. There is no
11 possibility of a reorganization of Table
12 Supply. It hasn't operated, in accordance
13 with the papers here, at least since 2002.

14 We believe that the Court
15 should transfer these cases to the
16 Bankruptcy Court for the Middle District
17 of Florida located in the Jacksonville
18 Division because they should have never
19 been filed here in the first place. They
20 are not properly filed here. They are
21 subject to 1408, subparagraph 1. This was
22 a bad-faith filing and it should be moved.

23 Thank you.

24 THE COURT: When you say 1408,
25 subparagraph 1, what, in effect, are you

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2 referring to that fits into that section?

3 MR. RUBIN: That the assets
4 were not here in a greater portion of the
5 last 180 days prior to the filing of the
6 bankruptcy. There is no connection
7 whatsoever --

8 THE COURT: Doesn't the statute
9 actually say "or such lesser amount"?

10 MR. RUBIN: Yes. These were
11 fabricated situations where these cases
12 should be transferred, your Honor. This
13 was manufactured venue.

14 THE COURT: I'm just trying to
15 focus on the statute.

16 MR. RUBIN: And the second
17 basis for transfer of course is 1412,
18 convenience of the parties, and justice
19 requires that the cases be transferred.
20 We have gone through the litany of those
21 items with employees, creditors, etc. I
22 think in either basis the Court can
23 transfer this case.

24 THE COURT: Do any of the other
25 people who joined in the motion want to

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2 speak?

3 MR. McFARLIN: Yes, your Honor.

4 Your Honor, I'm David McFarlin.

5 I think everyone agrees that we
6 have a perception problem here with the
7 filing of this case. I guess what
8 happened here is we disagree on who
9 created the problem. The Committee would
10 argue that Buffalo Rock has created this
11 perception problem by objecting and
12 seeking to transfer venue, and we would
13 join with Buffalo Rock in suggesting that
14 the problem was created by the Debtor in
15 filing this bankruptcy case in a distant
16 forum with no meaningful connection to its
17 base of operation.

18 My clients are represented by
19 the key managers, executives, and retirees
20 of Winn-Dixie that participated in these
21 nonqualified deferred compensation plans.
22 With all due respect to the very talented
23 professionals in this room today, I think
24 that those managers and executives are
25 going to be the people that are most

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2 important in deciding whether or not
3 Winn-Dixie reorganizes. I think herein
4 lies the rub. Although these managers and
5 executives that participate in these plans
6 in the aggregate have very large claims,
7 individually they don't have enough that
8 would permit them to participate in this
9 case in a distant forum. The economics
10 simply won't justify that.

11 THE COURT: Since the major
12 reason, if not the only reason, that the
13 Debtor has changed its position on venue
14 is to deal with perception, and since
15 obviously perception is important here, I
16 will ask you some questions about that.

17 What do you mean by your
18 clients participating?

19 MR. McFARLIN: These employees,
20 these executives and retirees, want to be
21 able to participate in this bankruptcy
22 case in the sense of coming to a hearing.

23 THE COURT: Do you practice
24 bankruptcy law, sir?

25 MR. McFARLIN: Yes, sir.

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2 THE COURT: How often in your
3 experience have you seen employees come
4 and actively speak and participate in
5 hearings?

6 MR. McFARLIN: The point is
7 well-taken. I think I probably overstated
8 the case. What I meant to say, your
9 Honor, is that I think we have gotten to a
10 point now where a working stiff with a
11 million-dollar claim can no longer
12 economically afford to retain a New York
13 lawyer to represent them in a Chapter 11
14 case in bankruptcy. Were this case in
15 Jacksonville, I think that these employees
16 could participate through legal counsel in
17 the bankruptcy case in a meaningful way.

18 But your point is well-taken.
19 I don't expect that these employees are
20 going to show up at hearings and give the
21 court recommendations or advice or
22 argument about the way the case ought to
23 move.

24 THE COURT: Do you think 1114
25 is applicable here for your clients?

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MR. McFARLIN: I can talk

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around that a little bit. I think

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arguably that our clients could separately

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be represented through a committee. For

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example, I think that their interests are

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somewhat different from the current

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Creditors Committee. And that may solve

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some of their problems, because under the

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current setup here, they are not on the

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Committee. Their interests are certainly

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divergent from what the current Committee

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representatives would have the Court do.

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And I guess the third point is,

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and it goes back to the perception, I

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think it is one thing to be permitted to

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participate through a committee, but I

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think it is another matter to be forced to

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participate through a committee simply

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because the Debtor elected to file its

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case in a distant forum.

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I think that perception is

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going to be very important because I

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happen to think that these managers and

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executives are important to what happens

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2 in this reorganization. If they feel that
3 they have been disenfranchised, then I
4 don't think that they are going to be
5 putting in the blood, sweat, and tears
6 that is necessary for a reorganization,
7 and I don't think that bodes well for
8 reorganization.

9 THE COURT: They are very
10 important obviously. I just wonder
11 whether -- well, frankly, I wonder if they
12 are being misinformed about what the
13 process is like. Did you represent all
14 the people that sent the letters to court?

15 MR. McFARLIN: No, sir. I
16 would not encourage them to send letters
17 to court. But we have spoken to a
18 significant number of the participants in
19 this plan. I subsequently became aware
20 that they had sent letters, and it is
21 certainly not a recommendation that we
22 made.

23 THE COURT: I'm perfectly happy
24 to get letters. That is not the issue. I
25 just worry about people being given the

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2 wrong impression about what it takes to be
3 active in a bankruptcy case and what their
4 rights are, which are substantial and real
5 in any bankruptcy case. Seeing your
6 retirement nest egg in jeopardy is
7 frightening enough as it is.

8 I would hope that in any future
9 issue about venue people not be stirred up
10 needlessly about what normally happens in
11 a bankruptcy case and what people's rights
12 are. If it is a difference between a \$400
13 lawyer and a \$200 lawyer, I can understand
14 that for some people. But if people are
15 being told that you actually have to come
16 in person and attend every bankruptcy
17 hearing, then they are just being lied to,
18 and that is not right.

19 MR. McFARLIN: Agreed. Thank
20 you, Judge.

21 THE COURT: Congress
22 specifically set up a section because they
23 were concerned about retirees that gave
24 them rights that are unique. The right to
25 a committee under the proper circumstances

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2 paid for by the estate, no one else has
3 that.

4 MR. McFARLIN: Yes, sir.

5 MR. MARTIN: Good afternoon,
6 your Honor, Warren Martin, Porzio,
7 Bromberg & Newman, attorneys for Riverdale
8 Farms.

9 Your Honor, before I begin, I
10 intend to say I have one war story to
11 answer the question that you asked the
12 gentleman before me. I had a bankruptcy
13 case where I represented the committee and
14 it was a hospital that was the debtor.
15 The committee was going forward and
16 objecting to a WARN Act severance claim
17 that would affect employees. The hospital
18 was in the district where the case was
19 pending, which happened to be Newark, New
20 Jersey. Much to my frustration, about 150
21 employees showed up at that hearing, and I
22 was the bad guy trying to sever their
23 claims, but, nonetheless, because of the
24 location of the case, they had the
25 opportunity to do that. We can't foresee

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2 every possible motion or issue that might
3 come up, but those types of things I think
4 are the reasons why Congress enacted the
5 venue provision that it did enact in 1408.

6 Your Honor, I think it is hard
7 for all of us to say bye to a nice case,
8 both the Court and counsel, including
9 myself. I'm up here to work myself out of
10 a job.

11 THE COURT: Well, I don't get
12 paid by the case.

13 MR. MARTIN: But none of us
14 ever think we are going to get another
15 case, but somehow we do.

16 The problem that I have with
17 this, and my analysis, Judge, kind of
18 started and ended with 1408. That is what
19 I'm here to talk about. 1408 gives three
20 options, principal place of business,
21 principal assets, domicile, which
22 essentially is state of incorporation for
23 a corporation. It doesn't also say "or
24 any one of the other 50 states where you
25 form a company 12 days before the filing."

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2 Dixie Stores clearly, as is in
3 the stipulation, paragraph 6, had no
4 purpose for filing a bankruptcy and no
5 purpose for its formation, in fact, other
6 than to establish venue. In my view,
7 because of that, it is not a proper
8 debtor. Dixie Stores is the only entity,
9 I submit, that technically meets 1408.

10 With respect to Table Supply,
11 Inc., I do not believe that that meets
12 1408's requirements because its principal
13 assets were not in this district for the
14 greater portion of the 180 days prior to
15 the petition. Now, its principal assets
16 might have been its name and an empty bank
17 account for 178 days, but those were its
18 principal assets, and its asset of
19 \$100,000 cash was only there for 12 days.
20 So I believe that Table Supply does not at
21 all comply with 1408. The only company
22 that can comply with 1408 is Dixie Stores.
23 Again, we have the admission that that was
24 formed solely to establish venue.

25 Frankly, I thought about

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2 whether or not I would do this as a
3 bankruptcy attorney to get venue, would I
4 set up a corporation like that. I would
5 ask the Court to reflect upon that as
6 well, whether this would be an
7 inappropriate use of the bankruptcy code.
8 Good lawyering is great, and we all try to
9 be creative and do the best thing for our
10 client, but some lawyering, I think, is so
11 clever that we do an injustice to the
12 language and the intent of the statute.

13 I think the venue statute in
14 1408 was intended by Congress that there
15 be some meaningful nexus to a debtor.
16 What we have here, from what I heard from
17 the testimony, was a large bank creditor
18 and some bondholder creditors who felt it
19 would be better to be in New York and some
20 herculean efforts by the Debtor to make
21 that happen. I submit, like was stated in
22 the Committee's brief, that Congress means
23 what it says and says what it means.
24 Unless we want to entirely gut 1408, this
25 case must move to Florida.

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2 Thank you, your Honor.

3 MR. AUGUST: Good afternoon,

4 your Honor, John August of Herrick

5 Feinstein on behalf of Ernst Properties.

6 I will be very brief.

7 We had filed a joinder in which

8 we joined in all of Mr. Rubin's arguments

9 for a transfer and suggested that if your

10 Honor is going to transfer, that the more

11 convenient and the most central location

12 would be the Eastern District of

13 Louisiana. I just wanted to basically

14 summarize that the Debtors are present in

15 Louisiana. They have significant

16 operations there and in states to the

17 west. The Eastern District of Louisiana

18 is centrally located and we think provides

19 the most convenient location for all the

20 employees and all the local creditors.

21 Also, there was a case, Jitney

22 Jungle, that was still pending in the

23 Eastern District of Louisiana, and the

24 court there presided over a significant

25 sale of assets to the debtors in that

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2 case. So we think that court already has
3 some familiarity with the issues that
4 would arise in this case, your Honor.

5 THE COURT: Anyone else who
6 joined?

7 MS. MARTINI: Good afternoon,
8 your Honor. For the record, Deidre
9 Martini, United States Trustee for Region
10 2.

11 Your Honor, my remarks this
12 afternoon are postured more in the nature
13 of a venue statement than they are a venue
14 position, because I believe that my role
15 in this dispute, after all, I was one of
16 the first on the scene, if you will, is to
17 assist the Court in applying the
18 appropriate standard to determine the
19 merits of this motion.

20 As a party in interest, but not
21 a true stakeholder in this case, it is
22 inappropriate for me to opine on the
23 ultimate resolution of this issue, but
24 rather give the Court some background on
25 the U.S. Trustee's views on venue. To do

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2 that I would like to take a minute to tell
3 you factually how we got involved in the
4 case originally.

5 As the Court is aware, and most
6 of the parties are, in the prefiling stage
7 we are given an enormous amount of
8 information to review to get the debtor
9 prepared to enter into bankruptcy and to
10 seek protection under Title 11. As part
11 of that review, we inquire of every debtor
12 to explain to us their connections to New
13 York and to give us nexus to venue in the
14 Southern District of New York. That
15 information was communicated to us. And
16 when I say "us," I was involved in almost
17 every conversation, conference call, and
18 negotiation in the prefiling stage, as was
19 Richard Morrissey, who is present here in
20 court.

21 The Debtor answered our
22 questions as to venue, and the information
23 that was communicated prior to the filing
24 was sufficient then and now factually to
25 support venue in the Southern District of

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2 New York. I was unaware that there was an
3 affiliate that was created 12 days before
4 the filing. However, I have to state that
5 in all of the communications and
6 conferences that were held, that question
7 was not directed at the Debtor, any of its
8 representatives, or counsel.

9 Your Honor, it is
10 understandable that the creation of DSI
11 could be perceived as enhancing or
12 bolstering the Debtors' connections to New
13 York. But there are two debtors here with
14 assets in New York, and in our view, at
15 the time of the filing there was nothing
16 present that violated Title 28.

17 As the U.S. Trustee, I have an
18 obligation to this court to alert the
19 Court of any violations of bankruptcy
20 code, and federal law for that matter,
21 chime in on issues of appearance, and
22 probably most importantly issues relating
23 to integrity of the system. It is not my
24 intention to alter any of the current
25 procedures that we now employ within the

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2 U.S. Trustee's Office. However, upon
3 reflection, I may in the future probe a
4 little deeper so that these types of facts
5 come to light a lot sooner in the case
6 than later.

7 I would like to note, on
8 timing, this is -- a venue challenge to me
9 is a challenge that should be viewed
10 almost as a first-day type of issue. The
11 motion should be made immediately upon
12 discovery of the facts which would form
13 the basis for the request to transfer
14 venue. The motion should be brought prior
15 to major milestones in the case. In this
16 case, we have approval of DIP financing.
17 There is certain procedures, reclamation
18 procedures, that have been employed, a
19 huge number of interim and final orders.
20 I haven't checked PACER, but there must be
21 50 or 60 orders that have been entered in
22 this case. When there is a venue
23 challenge well into the case, such as this
24 one, I think the Court should look at the
25 timing of the motion to evaluate whether

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2 or not there is more strategic-like
3 factors that are present and why other
4 creditors, notably the Committee, have a
5 vastly different view of venue.

6 In turning to the venue issue,
7 absent evidence that the filing was in bad
8 faith, which I don't think, as I listened
9 to the testimony today, that there was any
10 evidence whatsoever proffered in that
11 regard, coupled with compliance with
12 Section 1408, I think the Court has to
13 look at the interests of justice and the
14 convenience of the parties.

15 The U.S. Trustee and the Office
16 of the U.S. Trustee is in a very, very
17 unique position because we are not
18 creditors, we are not stakeholders in the
19 outcome. We are truly unique in that we
20 are disinterested. We are a national
21 program, and this case will be
22 administered and monitored by me if it
23 stays in New York, or by Felicia Turner if
24 it is transferred to Florida. So we truly
25 don't have an interest at all in where the

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2 case is ultimately postured.

3 My position today is that the
4 Court should undertake a convenience
5 analysis and hear from the parties that
6 are most affected even when there is the
7 Debtors' acquiescence to this transfer.
8 This acquiescence, as stated by the Court,
9 is due to its perception that there is
10 negative ramifications and that the
11 disruption that this venue dispute has
12 created will derail the reorganization
13 process. Movants have the burden of proof
14 on this issue. The Debtors' support of
15 the transfer may not be dispositive since
16 the Committee and what I have calculated
17 to be almost \$600 million of debt have
18 objected to the transfer.

19 So the U.S. Trustee encourages
20 the Court to apply the standard under 1412
21 to allow the true stakeholders in this
22 case to be heard.

23 THE COURT: Thank you.

24 MS. MARTINI: Your Honor, I
25 have a flight to Washington D.C. that I'm

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2 trying to get on.

3 THE COURT: So you can be
4 excused.

5 MS. MARTINI: Richard Morrissey
6 is also here in court.

7 THE COURT: Okay, thank you.

8 MR. DUNNE: Your Honor, Dennis
9 Dunne of Milbank, Tweed, Hadley & McCloy
10 on behalf of the Official Committee of
11 Unsecured Creditors in these cases.

12 At the outset, I want to make
13 clear that the Creditors Committee is
14 merely dealing with the cards that they
15 were dealt, and given those cards,
16 weighing all the options and trying to do
17 what is consistent with their fiduciary
18 duties to maximize recovery to the
19 unsecured creditors. The Creditors
20 Committee obviously did not exist and had
21 no input on any of the pre-bankruptcy
22 planning.

23 We would also like to contrast
24 that with Buffalo Rock, who we submit has
25 unclean hands. The testimony was

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2 un rebutted that the primary reason for
3 their filing of the motion when they did
4 was that they were upset they weren't
5 appointed to the Official Creditors
6 Committee. They knew that they couldn't
7 make a motion to compel the Court or to
8 have the Court compel the U.S. Trustee to
9 appoint them, so they tried to make an end
10 run around that process and use the venue
11 motion as the lever for trying to extract
12 appointment to the Creditors Committee.

13 What is amazing about that,
14 your Honor, is that it seems to have been
15 successful to one degree, which is that
16 the Debtors' position changed as a result
17 of the consequences of that motion. The
18 Debtors are saying "Look, there was no bad
19 faith, we acted in good faith, the venue
20 is appropriate under 1408 here." And,
21 indeed, under a 1412 analysis, that may
22 lead to staying in New York, but because
23 of the PR, the press, which is already --
24 you know, the genie is out of the bottle,
25 your Honor, on the articles that have been

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2 written in the Florida newspapers. But
3 because of the press that they have
4 received, they changed their position, and
5 I submit, your Honor, that one factor that
6 is not present in any case law under 1412
7 is the opinion of journalists in other
8 forums.

9 The reasons that the Committee
10 is opposing the motion can be distilled to
11 two, which is that we believe it is more
12 convenient for most creditors, and, this
13 may be more important, more convenient for
14 those creditors who are likely to have
15 meaningful disputes with the estate, who
16 have appeared to date on disputes that
17 aren't resolved yet, and I will come back
18 to that in a few minutes.

19 The Committee is also convinced
20 that Florida will be more expensive than
21 New York. I know we heard Mr. Appel's
22 testimony where he went out of his way to
23 say it may be that Florida could be
24 cheaper, but that is back of the envelope,
25 it is really just a Debtors' side analysis

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2 if they could shift a sufficient amount of
3 the work from Skadden to local counsel.

4 I could tell you the Committee
5 members have been in a number of cases,
6 some with local counsel, some without, and
7 they understand -- they believe that that
8 leads to incremental costs in terms of
9 travel of New York counsel to another
10 jurisdiction, having local counsel at all
11 the hearings, and having them on the
12 conference calls. It also doesn't
13 address, and I think Mr. Appel admitted as
14 much, that there will be incremental costs
15 for the Piper Rudnick firm and the trade
16 creditors they represent will have to go
17 out and get Florida counsel, and Kelley
18 Drye and the landlords they represent will
19 have to go out and get local counsel. As
20 fiduciaries who are charged with
21 minimizing liabilities, maximizing returns
22 to unsecureds, the Committee has come out
23 on balance as believing that Florida will
24 be more expensive.

25 Before I turn to the statute,

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2 your Honor, I did want to address the
3 burden, which is we cited cases, and I
4 don't believe anybody has cited contrary
5 authority, that the burden remains with
6 the movant. The Debtors' change of
7 position does not change that burden. I
8 heard the phrase "business judgment"
9 several times. The analysis under 1412 or
10 1408 does not revolve around a business
11 judgment test. In fact, the cases we cite
12 are undisputed that the best evidence,
13 even when the Debtors have changed their
14 mind on their preference, the best
15 evidence of the Debtors' preference is
16 what did they actually do under the
17 petition date. In this case, they filed
18 in New York. Once we are at Section 1412,
19 that creates a presumption that it stays
20 here, unless rebutted.

21 The last point is that
22 Mr. Zimmerman talked about there being a
23 change since the petition date. Again,
24 the change is the number of journalists
25 who have written articles that have picked

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2 up on some of the adjectives used by
3 Buffalo Rock in their pleadings. I submit
4 anybody to read those cases. Those aren't
5 the changes they are talking about. They
6 are talking about the changes related to
7 venue, i.e., did your headquarters move
8 across the country, did you move your
9 assets from Oregon to Wisconsin, things
10 that would directly justify a change of
11 position with respect to venue. Your
12 Honor, nothing of that sort has occurred
13 here.

14 That being said, as kind of a
15 preface, your Honor, let's start with
16 1408, because I don't think anybody has
17 really parsed through this. I think the
18 Supreme Court, under Ron Pair and the
19 litany of those cases, has made it clear
20 the analysis should begin and end with a
21 literal reading. What I think the other
22 parties have missed is that 1408 only
23 deals with Dixie Stores and Table Supply.
24 The balance of the Winn-Dixie entities are
25 not here under 1408-1. They are here

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2 under 1408-2, which is a completely
3 different analysis. Let me come back to
4 that in a moment.

5 If Dixie Stores were the only
6 entity to file, do they really argue that
7 it is improper in New York when they were
8 clearly domiciled in New York by state of
9 incorporation? There is nothing in 1408-1
10 that says one individual corporation that
11 has only existed for 12 days cannot file a
12 Chapter 11 case. In fact, they couldn't
13 file anywhere else. It had to file in New
14 York given the evidence that we've heard.

15 Then we get to important
16 qualifiers that Congress clearly thought
17 about, crafted, and put in, which was
18 okay, but it had to have been the domicile
19 for 180 days prior to the petition date.
20 That doesn't apply to Dixie Stores because
21 they didn't exist for 180 days. We are in
22 the second prong, which says okay, if they
23 haven't existed for 180 days, you could
24 still file. That is important. They
25 could have said that you can't file if you

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2 only existed for 60 days. What they have
3 said is that no other district can claim
4 that they housed your domiciled residence,
5 principal assets, or place of business for
6 a longer period than the place where you
7 filed. That is also true of Dixie Stores.
8 No district has a greater claim that they
9 were in their district for longer than the
10 12 days that they were in New York.

11 So under 1408-1, in the
12 literal, plain meaning of it, Dixie Stores
13 was a proper debtor venued here in New
14 York.

15 THE COURT: What they are
16 saying is there is no reason for Dixie
17 Stores to be in bankruptcy.

18 MR. DUNNE: What I understand
19 that to mean is they would like to dismiss
20 it as a bad-faith filing because there is
21 no basis for a reorganization proceeding.
22 That, I submit, is not 1408-1 analysis.
23 That would be to dismiss Dixie Stores as a
24 debtor. That is not their request. We
25 can deal with that.

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2 What they are getting to is
3 whether a dismissed case can be the
4 predicate hook under 1408-2. They are not
5 a creditor of Dixie Stores. They don't
6 have standing if only Dixie Stores was
7 here. What they are saying is, by using
8 Dixie Stores under 1408-2, we can't bring
9 everyone else in. I believe there are
10 cases out there talking about your
11 creditor hook being dismissed, and at the
12 time of analysis for 1408-2 is the
13 petition date. Simply, was there an
14 affiliate in that location, yes or no?

15 Congress has considered on many
16 occasions putting some heft on this. This
17 is why the 180-day qualifiers that are in
18 1408-1 are so important. They didn't put
19 them in 1408-2. They could have said the
20 first to file that you are using as the
21 predicate for all your affiliates, they
22 had to have been in that district for 180
23 days or they had to have been in existence
24 for 180 days. They know how to draft
25 this. They just drafted it in 1408-1. If

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2 you go back through the legislation that
3 has been considered by Congress over the
4 past several sessions, they talked about
5 amending this section to do exactly that,
6 put some qualifications on it. They have
7 not done it.

8 What does the Supreme Court say
9 about that? We have to take the statute
10 as it is. If your Honor feels like it
11 would be wise or preferable to put those
12 qualifiers in there, that is the province
13 of Congress, not the Court. So I don't
14 believe that we are in 1408 at all. Just
15 for the record, there was no dispute that
16 if Dixie Stores was proper here under
17 1408-1, that they were affiliated with the
18 rest of the Winn-Dixie entities for 1408-2
19 purposes.

20 Moving to 1412, your Honor,
21 which is important, because that is where
22 I think the analysis should be done, is
23 that Congress didn't leave the Court or
24 the parties without a remedy for those
25 situations which scream out for a transfer

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2 because all the parties would be more
3 convenienced by moving it or in the
4 interests of justice it would favor it.
5 We suggest that both of those strongly
6 militate in favor of retaining the cases
7 in New York.

8 Let's talk about the interests
9 of justice prong first, which principally
10 refers to judicial economy, costs of
11 administration, and related issues. While
12 we believe that the Florida bench clearly
13 could handle the cases as competently as
14 this court, there is no doubt that this
15 court has more knowledge about these cases
16 and about its own rulings. This court has
17 overseen numerous hearings and ruled on
18 many motions since the petition date. As
19 a result, it has listened to testimony and
20 become familiar with the company's
21 financial condition, its structure, and
22 the legal issues facing it.

23 I want to give a couple of
24 examples of that. On some of the
25 first-day orders, your Honor directed the

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2 Committee to work with the Debtors on the
3 consignment order to make sure it is not a
4 disguised critical vendor payment. To the
5 extent we have disputes on that, it is
6 helpful to come back to the court that had
7 those oral overlays on written orders.

8 Perhaps a better example of it
9 is the DIP hearing. Your Honor heard
10 hours of testimony and oral argument. A
11 lot of it telescoped around the issue of
12 what is the effect of the assignment of
13 the prepetition secured lenders to the DIP
14 lenders on the allowability of reclamation
15 claims. Your Honor crafted again an oral
16 reservation of rights dealing with the
17 need to, perhaps if we don't settle it, to
18 talk about the scope, the extent of that
19 assignment.

20 What your Honor had in mind by
21 those words may very well be at issue in
22 this case, and I believe --

23 THE COURT: I'm sorry, isn't
24 that a reservation of rights in the order
25 now?

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MR. DUNNE: I think it

references the oral argument in the

transcript, your Honor. You are right, we

added language expressly reserving the

rights, but on the terms set forth on the

record.

I think the point is made, your

Honor, that both parties -- I think it is

important to note that the reclamation

creditors themselves are here supporting

retention in New York. Both parties would

prefer to have the judge who actually

heard the testimony and the arguments and

made that reservation of rights statement

interpret it, if need be.

The other point is the location

of the assets. We cite cases that I think

make it clear that the location of a

debtor's assets, while it is a factor, has

negligible weight unless you are in a

liquidation or you think a liquidation is

a likely prospect. You can understand why

it is necessary in a liquidation process

to be near the assets. Even then I would

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2 submit we have all been in liquidating
3 Chapter 11's and selling assets under
4 Section 363 all over the country without
5 the need to be near them. But in any
6 event, the cases are clear that is a very
7 minor factor.

8 The Committee believes that the
9 cost of the cases increases. I keep
10 coming back to that because that is the
11 touchstone. If you look at all the
12 parties here, clearly New York would be
13 more convenient. That is not just
14 convenience for the professionals. That
15 convenience translates into less travel
16 time, less airfare, less time spent in
17 transit. That is dollars that will be
18 borne by the estate. We believe we are
19 the residual economic stakeholders here
20 and every incremental dollar comes out of
21 the unsecureds' pockets.

22 What is in the interests of
23 justice in this case? I think we have
24 shown that judicial economy militates in
25 favor of keeping it here. We believe that

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2 the cost of administration does as well.
3 Virtually every professional on an
4 estate-retained party is in New York or
5 has offices. Skadden, New York;
6 Crossroads, New York; Blackstone, New
7 York; Houlihan, New York; Alvarez &
8 Marsal, New York. Milbank as well.

9 Lastly, there will be
10 inevitably a learning curve for the new
11 judge in Jacksonville. There will be
12 incremental time explaining what has
13 transpired to date, what has gone on in
14 each of these rulings, and generally
15 duplicating what we have done in a
16 truncated fashion, but duplicating what
17 has gone on to date here.

18 Your Honor, on the convenience
19 of the parties, I think I've spoken about
20 where some of the key professionals are.
21 But let's talk about the other side of the
22 aisle. The principal movant here is
23 Buffalo Rock. They have a \$2 million or
24 so claim. They do not have a contract
25 with the company. There are no assumption

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2 or rejection issues on the horizon. We
3 don't know whether or not they would be
4 involved in a material dispute with the
5 company. But as evidenced by today, I
6 think that we can clearly conclude that
7 they can represent themselves effectively
8 in New York, and, again, I don't think it
9 was about venue with them, it was about a
10 vendetta for being upset by not being
11 appointed to the Creditors Committee.

12 The employees, your Honor, I'm
13 just going to make a few points. First of
14 all, the Creditors Committee is solicitous
15 of employees. We want them to be happy,
16 well-paid, and working hard. We will take
17 steps to ensure their participation,
18 whether that is by conference call or
19 otherwise. But I just want to point out
20 there has been an employee order entered.
21 All their prepetition wage claims and
22 benefit claims will be paid in the
23 ordinary course. Their vacation time,
24 etc., will be dealt with in the ordinary
25 course. To the extent there is an issue

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2 with a retirement plan under 1114, we all
3 know how many times that arises in a
4 bankruptcy case, they are likely to have a
5 representative or we will all go out of
6 our way to craft a procedure so they can
7 participate meaningfully.

8 Some Florida utilities have
9 also joined in in the venue transfer
10 motion. It is not surprising that they
11 do. No doubt being in Jacksonville would
12 cut down their travel time. The utility
13 disputes, there is a pending order that
14 deals with them. Most of them had
15 deposits for their prepetition claims.
16 Cases aren't reorganized on the backs,
17 maybe except for telecom companies, with
18 utilities.

19 At the end of the analysis,
20 your Honor, Buffalo Rock is arguing that
21 the mere creation of Dixie Stores and the
22 transfer of assets to Table Supply
23 constitutes such bad faith and
24 manipulation of the system that this court
25 per se has no choice but to move it to

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2 Jacksonville. I think a closer look at
3 the facts, the unrebutted testimony, and
4 the law shows that they are wrong. I
5 didn't hear any evidence that went to the
6 bad faith of the Debtors. I don't think
7 Buffalo Rock really argued that point.

8 On the law, look at the cases
9 they cite where there is a gloss in some
10 of these cases about bad faith and abuse
11 of the bankruptcy process. In those
12 cases, the debtors were filing in a remote
13 jurisdiction to gain a distinct legal
14 advantage over the creditors. That is not
15 the case here. In those cases, it is the
16 creditors committee and large creditors
17 who are seeking to get it back to another
18 jurisdiction to avoid the debtors getting
19 the advantage of some unique law in the
20 Second or Ninth District that favors them
21 in a two-party dispute with a landlord.
22 We don't have any of those facts here.

23 So what we are saying on
24 balance is that this court should not
25 expand that minimal gloss on the statute.

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2 Justice Scalia and the balance of the
3 Supreme Court have made it clear you
4 interpret the statute as it is written,
5 and there is a very small exception for
6 egregious bad faith of the debtors, which
7 is not present here, and there is no
8 evidence of it, and the Court should not
9 expand that exception.

10 THE COURT: The phrase
11 "interests of justice" is a pretty broad
12 phrase. I can certainly understand the
13 point that it is not just that in a
14 federal system a company be permitted to
15 so clearly create a basis for venue. What
16 is your response to that argument? I
17 mean, I've never seen this done before
18 where it has been brought to light, I've
19 never seen it before when it wasn't
20 brought to light.

21 If I rule as you want, what is
22 to keep any debtor in the future from
23 doing this and basically loading down one
24 or two corporations with every case?

25 MR. DUNNE: It comes back to

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2 the balancing of the factors, the
3 interests of justice and the convenience
4 of the parties. Are they doing it for an
5 improper purpose or bad faith? Let's
6 assume every creditor, and here we have
7 some small creditors, in terms of number
8 of dollars, arguing otherwise, but the
9 vast majority of the creditors argue that
10 yes, this will result in a more efficient
11 administration of justice so that more
12 funds are available for distribution to
13 the unsecured creditors. It depends
14 whether your Honor is going to make a per
15 se ruling that if you do this, you are
16 gone, because of macro concerns about the
17 bankruptcy system.

18 I submit, and particularly as
19 fiduciaries for unsecureds, we have to do
20 what is right and best for all the
21 constituents in this case. If there was
22 evidence of bad faith or trying to get a
23 leg up in a particular dispute, then we
24 start segueing and sliding towards those
25 cases. But clearly they are asking your

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2 Honor to expand those cases. As I said,
3 Congress could have addressed this in the
4 affiliate hook or elsewhere in 1408, and
5 they didn't.

6 One last point, because this
7 came up in some of the cross I think of
8 Mr. Appel, the trade members of the
9 Committee did not support the opposition
10 of the Committee to the venue motion. I
11 would like to point out that Piper
12 represents a majority of the large
13 creditors. I will read them off for a
14 second. It includes members of the
15 Committee. It is Clorox, Conagra,
16 Conopco, Frito-Lay, which is on the
17 Committee, General Mills, Kraft Foods,
18 which is on the Committee, Masterfoods,
19 Mars, Nestle, Pepsi, Procter & Gamble,
20 Quaker Foods, Sara Lee, and SC Johnson.

21 In sum, your Honor, there is no
22 dispute that DSI can file here properly
23 under a strict reading of 1408-1. There
24 is no dispute that the languages of the
25 relevant statutes authorize the filing in

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2 New York. There is similarly no dispute
3 that Congress has been considering
4 legislation and hasn't adopted it to
5 address these issues. We have to deal,
6 again, with the statute and the plain
7 meaning, and the Court should narrowly
8 construe any exceptions to it. The
9 Debtors have tried to stake out a path to
10 a cost-effective and convenient case.
11 Virtually all of the large creditors
12 agree, the Committee agrees, the Court
13 should retain the case in New York.

14 THE COURT: Anyone else?

15 MS. MAZER-MARINO: Jil
16 Mazer-Marino, Scarcella Rosen & Slome, for
17 Florida Power & Light, Progress Energy
18 Florida, Progress Energy Carolina. Just a
19 few words to address what the Creditors
20 Committee has said.

21 I think, although you shouldn't
22 address macro concerns in this case with
23 respect to the Bankruptcy Code, this is
24 one instance where the concerns of policy
25 in general and the interests of this case

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2 walk hand in hand. If you ignore the
3 policy, then you are inviting every
4 case -- there is going to be an issue,
5 people are deciding what is in the best
6 interests of the Debtor, whether it should
7 be venued where somebody has a sub or a
8 venue with a real nexus to a jurisdiction.
9 To try to predict what issues are going to
10 come up and what creditors will be
11 interested in attending the hearings, we
12 certainly, although I should have
13 cross-examined the Debtors' witness, but
14 we didn't ask any questions of the
15 Creditors Committee. It is too early to
16 say what creditors will want to be part of
17 the issues.

18 As far as bad faith, I don't
19 think you have to deny Buffalo Rock's
20 motion because of bad faith. I think that
21 whatever their issues are, there are
22 plenty of creditors interested in seeing
23 this case in Florida who don't have those
24 issues. I think we should focus on what
25 the parties have said before, that you

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2 have a debtor who wants to move, the
3 majority of creditors who want to move,
4 and a Creditors Committee, who although
5 they didn't put on evidence, are saying it
6 is going to be cheaper down there.

7 THE COURT: You said the
8 majority of the creditors. Where is that
9 on the record?

10 MS. MAZER-MARINO: I'm sorry, I
11 didn't mean to say that. We don't know
12 what creditors will be involved. We don't
13 know what the costs are going to be. So
14 to take those kind of issues into account
15 now just seems inappropriate. Thank you.

16 MR. CHEBOT: Good afternoon,
17 your Honor. My name is Jeffrey Chebot of
18 Whiteman, Bankes & Chebot, representing
19 Sunkist Growers, Inc. as well as some PACA
20 customers, approximately \$7 million worth
21 of PACA trust creditors. We did not
22 submit a filing here today, but we have
23 entered our appearance in the case.

24 What prompted our position here
25 today was the most recent filing by

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2 Buffalo Rock, and I respectfully request
3 permission to briefly address it.

4 THE COURT: Okay.

5 MR. CHEBOT: Your Honor, we are
6 here today to join with Wachovia, the
7 debtor-in-possession lending agent, and
8 also with the Creditors Committee in
9 opposing the motion of Buffalo Rock.

10 THE COURT: I don't think
11 Wachovia has said anything on this. Their
12 counsel is here, though.

13 MR. CHEBOT: They have taken a
14 position in the papers, your Honor, I
15 believe, and certainly the Creditors
16 Committee has, and we join in and we
17 support the reasoning in the papers that
18 were filed by the Creditors Committee.

19 From the standpoint of PACA, in
20 addition, there is also the concern of the
21 promise of PACA, which is full payment
22 promptly to the unpaid produce suppliers
23 of the Debtor, Winn-Dixie. That is
24 contained in 7 USC Section 499(B)(4),
25 prompt payment. And, also, in the context

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2 of certain of today's PACA trust
3 enforcement cases, any delays attendant
4 upon a change of venue to any jurisdiction
5 other than New York will thwart a
6 Congressional premise of prompt payment to
7 the unpaid PACA trust creditors.

8 We have no doubt that the court
9 in the Middle District of Florida,
10 probably even in the Eastern District of
11 Louisiana, could render a competent
12 decision regarding issues regarding PACA.
13 But the fact is this particular court
14 already has been exposed to the PACA issue
15 through the objections that were filed to
16 the initial motions for approval of both
17 the cash collateral order and also the
18 interim PACA trust claims procedure order.
19 Through these oppositions, the Court has
20 already gained an appreciation of the
21 primacy and immediacy of the issues
22 regarding PACA trust claims.

23 During the two and a half weeks
24 after the initial motions were filed
25 regarding PACA trust claims, PACA trust

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2 counsel, representing approximately \$27
3 million worth of claims, engaged in
4 substantial negotiations with Wachovia,
5 the Creditors Committee, and with the
6 Debtor to craft an order that was
7 satisfactory to the PACA trust creditors
8 both with respect to the PACA trust claims
9 procedure and also with respect to the
10 financing order.

11 By retaining venue in this
12 jurisdiction, your Honor, with the same
13 set of players, that would best protect
14 the PACA trust creditors, because an order
15 such as the PACA trust claims procedure
16 order which could potentially be viewed as
17 interlocutory and possibly subject to
18 attack if, as we heard some of the
19 testimony today, the Debtor engages new
20 professionals in Florida, that would
21 certainly be harmful to the interests of
22 the PACA trust creditors.

23 So, therefore, we respectfully
24 ask both from the standpoint of economies
25 and the familiarity of the Court, and also

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2 with respect to the question of potential
3 additional costs involved and delays in
4 payment to the PACA trust creditors, that
5 venue be retained in this jurisdiction,
6 and we respectfully join in the opposition
7 of the Creditors Committee to change venue
8 by Buffalo Rock.

9 Thank you, your Honor.

10 THE COURT: The 546 order and
11 the DIP order and cash collateral order
12 are all final orders.

13 MR. CHEBOT: That's correct.
14 But it could be ordered that the PACA
15 trust claim procedure -- we don't believe
16 it is. We believe the PACA trust claims
17 procedure is a final order. It states
18 final order, but it could possibly be open
19 to an attack in another forum. We want to
20 avoid any possibility of collateral
21 attack.

22 THE COURT: Thank you.

23 MR. LEHANE: Good afternoon,
24 your Honor. Robert Lehane from Kelley
25 Drye & Warren on behalf of six landlords

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2 holding 25 leases.

3 We represent Edens & Avent,
4 Weingarten Realty Investors, Palm Springs
5 Mile Associates, Villa Rica Retail
6 Properties, ALG Limited Partnership, and
7 Curry Ford LP, and we also join in the
8 Committee's objection to Buffalo Rock's
9 motion to transfer venue.

10 We are here primarily in
11 support of the convenience analysis and
12 would like to point out that 11 of our 25
13 leases are in fact located in Florida.
14 The remainder are in Alabama, Mississippi,
15 Georgia, North Carolina, South Carolina,
16 and Louisiana. Those leases are not in
17 New York. Also, our landlords' primary
18 principal places of residence are in
19 Florida, Georgia, South Carolina, and
20 Texas, not New York. Nevertheless, our
21 landlords believe that venue is
22 appropriate in New York and request that
23 the court deny Buffalo Rock's motion to
24 transfer venue.

25 This court has already invested

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2 substantial time and energy in this case,
3 and the landlords with these 25 leases
4 hold some unsecured claims at this point
5 for rejection damages, but may perhaps
6 amount to millions of dollars in unsecured
7 claims, but will also have continued
8 involvement in this case with respect to
9 motions to extend the time to assume or
10 reject potential disposition of the leases
11 and/or other asset sales and the plan
12 disclosure statement.

13 The landlords' ongoing
14 involvement in this case we believe is a
15 matter that should be taken into
16 consideration when the Court considers the
17 convenience analysis. Leases are a
18 significant asset of this estate. We
19 recognize with 25 leases we are only a
20 small voice in the total of 920 leases,
21 but nevertheless we think it is important
22 to point out that our clients do believe
23 that this court, with significant retail
24 experience, the case is properly venued in
25 this court.

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2 Thank you very much, your
3 Honor.

4 MR. CARRIGAN: Good afternoon,
5 your Honor. Daniel Carrigan, DLA Piper
6 Rudnick Gray Cary US LLP.

7 My motion to appear pro hac
8 vice is before the Court. I don't know if
9 it has been approved or not at this stage.
10 I thought I would disclose that.

11 THE COURT: It probably has
12 been approved. Anyway, you can speak.

13 MR. CARRIGAN: Thank you, your
14 Honor.

15 Mr. Dunne has stolen most of
16 our story. However, we do represent 14 of
17 the larger vendors in the case. According
18 to the Debtors' schedules, in the list of
19 the top 50 unsecured creditors, we
20 represent more than \$50 million of claims,
21 approximately half of which we think are
22 entitled to some claim of reclamation.

23 We are pleased to see in one of
24 the exhibits today that one of the
25 first-day affidavits by Mr. Nussbaum

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2 suggests that they may be valid. We were
3 also pleased to hear that someone at the
4 Debtor thinks they are solvent 90 days
5 before the bankruptcy case.

6 THE COURT: I think later he
7 said he didn't know what he was talking
8 about.

9 MR. CARRIGAN: Your Honor, two
10 things, two observations perhaps that
11 haven't really been addressed yet.

12 One is there has been a lot of
13 discussion about the negative impact of
14 the motion and the attendant publicity and
15 what the effect of a court's ruling would
16 be that the case either should or should
17 not stay here. One thing that hasn't been
18 discussed is that if the Court were to
19 rule that the case should not stay here,
20 is that publicity going to be any better
21 than the publicity they already have? It
22 will merely confirm, perhaps, the notion
23 that it was filed in bad faith or in some
24 inappropriate manner. That is somewhat
25 jesuitical in analysis, but it is

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2 nonetheless talking about practical
3 effects and perceptions.

4 The other observation is if the
5 change of venue is to be some sort of
6 prophylactic against the encouragement of
7 others to structure transactions to create
8 venue, your Honor, the interests of
9 justice is a pretty broad standard and it
10 brings in a number of different factors
11 that can be brought to the analysis and
12 brought to the reasoning to conclude that
13 notwithstanding what the circumstances
14 might be, it yet may be in the interests
15 of justice because of the interests of
16 creditors and the interests of other
17 parties to the case that it is better for
18 it to be in one location versus another
19 regardless of how it got there, as long as
20 we are not talking about, for example, the
21 bad-faith filing, which goes more to the
22 jurisdictional aspects of the case than to
23 the venue.

24 For those reasons, your Honor,
25 we struggled with this as to whether to

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2 support the motion or to take our own
3 position on it, and it occurred to us --
4 and I understood the allusion that we may
5 be one of the parties with whom there is a
6 substantial dispute with the company down
7 the road here, and it may be that in light
8 of some of the case law that is present
9 here in this jurisdiction that there was a
10 reaction by reclamation creditors that
11 ought to be anticipated anywhere but here
12 and Ohio. In our view, if we are going to
13 have that litigation about a substantial
14 amount of money in a protracted state, it
15 would be more conducive to having it
16 fought out on a level playing field than
17 perhaps anywhere else that we have a
18 choice.

19 For those reasons, your Honor,
20 we would ask the Court to take our
21 interests into consideration and to find
22 that the case should stay here. Thank
23 you, your Honor.

24 MR. RUBIN: Judge, could we
25 just respond?

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2 THE COURT: I think there may
3 be one or two more people to speak. Are
4 we done with all of the people who have
5 said their first piece and hopefully don't
6 want to say a second piece?

7 MR. RUBIN: May I respond now?

8 THE COURT: That is fine.

9 MR. RUBIN: Just a couple of
10 quick points.

11 First of all, the venue motion
12 was filed on March 14th, which was within
13 three weeks of the filing of the case. It
14 was not a late filing. It wasn't filed
15 deep into the case. It was filed early in
16 the case.

17 Second of all, it was mentioned
18 that what we were doing was attempting to
19 derail the organization process. That is
20 totally untrue. The Debtor itself
21 testified today through its witness as
22 well as through its stipulation that the
23 reorganization process can be successful
24 in Florida as well. We are not trying to
25 extract an appointment to the Committee.

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2 The Court is aware of the fact under 1102
3 and 1103 of the Code that in 1994 Congress
4 took away from the court the ability to
5 basically add members to the committee.
6 That is up to the U.S. Trustee. We are
7 here to see to it that these cases are in
8 the appropriate and proper venue.

9 Next, the courts universally
10 have held that an entrenchment of counsel
11 is not a reason to keep a case in the New
12 York venue. Of course there are New York
13 lawyers involved. The case was filed in
14 New York.

15 We take the position, Judge,
16 that the interests of justice require that
17 the Court not reward such an effort to
18 manufacture venue which has been done in
19 this case. That is what has happened
20 here. That is an opinion of the United
21 States Bankruptcy Court for the Southern
22 District of New York, cited as 255 BR 121,
23 which is the Eclair Bakery case.

24 THE COURT: You read that case,
25 I assume. That involves a gentleman who

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2 filed about 14 times in the Eastern
3 District of New York and thought he would
4 get a better break if he came over across
5 the river.

6 MR. RUBIN: It is clear both in
7 the Second Circuit and in the Eleventh
8 Circuit that the Dixie Stores case,
9 wherein there is no business, no
10 creditors, no assets, would have been a
11 case which would have been considered to
12 have been filed in bad faith under the
13 Albany Partners case in the Eleventh
14 Circuit as well as the Second Circuit
15 case, CFTC.

16 And there is no prospect of any
17 reorganization of Dixie Stores, and the
18 same holds true for the second company,
19 which was dormant as well and had no
20 business, the second to file.

21 THE COURT: What about
22 Mr. Dunne's point? Frankly, I'm not sure
23 of the answer, but he contends that once
24 venue is established, the predicate for
25 venues having its case dismissed doesn't

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2 matter, venue is established at that
3 point.

4 MR. RUBIN: Venue cannot be
5 established through fraud or bad faith or
6 bad conduct.

7 THE COURT: Let's assume for
8 the moment that that is not on the record.

9 MR. RUBIN: Well, I don't know
10 that I know the answer to that either,
11 Judge, other than the fact that I did read
12 from the same opinion that you did in
13 respect to the interests of justice, and
14 it seems to me that for the Court to
15 condone venue in the Southern District of
16 New York based on a filing of a
17 corporation 12 days before the filing of
18 the case is not in the interests of
19 justice, and these cases should be moved.

20 THE COURT: Do you have any
21 comment on the Capitol Motors versus
22 LeBlanc case that the Debtor cited, the
23 Second Circuit case?

24 MR. RUBIN: No, sir.

25 MR. MARTIN: Thank you, your

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2 Honor. Just briefly, Warren Martin again,
3 attorney for Riverdale Farms.

4 I think a lot of the arguments
5 before your Honor invoke an improper
6 statutory analysis. A lot of what we have
7 heard is essentially a 1412 analysis, that
8 convenience of the parties, interests of
9 justice, where is it better, let's count
10 heads, these five creditors would like it
11 here and these ten creditors would like it
12 there. Frankly, we don't have enough
13 fingers and toes to count all the heads.
14 There has been no systematic polling of
15 creditors. I'm not even suggesting that
16 there should be.

17 What appears to me happened
18 here, from the testimony of Mr. Appel, as
19 best I heard it, was that the Debtor had
20 essentially decided to file in Florida and
21 it heard through its advisors and whatnot
22 that there were certain creditor
23 constituencies that would have preferred
24 the case in New York. That was
25 essentially a 1412 type of analysis done

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2 prepetition. But the problem with that is
3 you've got to have 1408 first. You've got
4 to have jurisdiction and you've got to
5 have venue before you can consider a
6 motion as to whether or not you are in the
7 right place.

8 Essentially what happened is
9 that jurisdiction and venue was
10 manufactured through the device that has
11 been described in order to get the case
12 here. We've talked about interests of
13 justice, bad faith, but there is no
14 evidence whatsoever of any evil intent by
15 the Debtor. But I suggest that your Honor
16 can find that bad faith in the fact of
17 creating a corporation solely to establish
18 jurisdiction and venue, contrary to the
19 terms of the statute. The statute is
20 1408.

21 One other point, your Honor.
22 The Committee argued that the Committee
23 didn't exist on the petition date, the
24 Committee wasn't involved, we just took
25 this case as we found it. Prior to the

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2 petition date, there was an informal
3 committee of bondholders represented by
4 Milbank. From what I understand of
5 Mr. Appel's testimony, the bondholders
6 were among the group that supported the
7 New York venue. The bondholders are 4/7
8 of the Committee membership, so they
9 dominate the Committee, and the Committee
10 is represented by Milbank. I also heard
11 the Committee's counsel say that on
12 balance the Committee supports transfer of
13 venue to Florida. On balance, that sounds
14 to me significantly short of unanimity.

15 If your Honor rules that

16 1408 --

17 THE COURT: Maybe I misheard
18 him, but I thought Mr. Dunne referred to
19 Committee trade members who separately
20 joined in the motion.

21 MR. MARTIN: There are some, I
22 guess two Committee trade members, one or
23 two that joined in the motion. Maybe it
24 is one, Pepsi.

25 MR. DUNNE: Are we testifying

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2 now, your Honor? I think virtually
3 everything he said is inaccurate. I don't
4 know if this is relevant or not. I can
5 get into it if the Court wants to.

6 I just referenced the fact that
7 the two trade members had retained Piper
8 Rudnick, which filed the pleading, which
9 represents itself.

10 MR. CARRIGAN: Yes, your Honor,
11 we represent Kraft and Frito-Lay, which
12 are on the Committee.

13 MR. DUNNE: Suffice to say,
14 most of what he said is inaccurate.

15 MR. MARTIN: Finally, your
16 Honor, I hear there is a great bankruptcy
17 judge in Juneau, and if your Honor rules
18 this way, I'm going to consider filing my
19 next case up there. Thank you.

20 THE COURT: I'm going to take
21 about a ten-minute break.

22 (Recess taken.)

23 THE COURT: We are back on the
24 record in Winn-Dixie.

25 I have before me a motion by

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2 Buffalo Rock Company, a creditor of most,
3 if not all of the Debtors, to transfer
4 venue of these Chapter 11 cases to the
5 Middle District of Florida, which has been
6 joined in by several other creditors or
7 groups of creditors, including a number of
8 former employees and certain other
9 creditors holding claims that are for them
10 significant, although not necessarily
11 among the largest claims in the case.

12 Importantly, the Debtors, who
13 originally chose this forum, have, because
14 of the effect of the filing of the venue
15 transfer motion and in particular its
16 characterization in the press and among
17 its employees and various suppliers, have
18 concluded that they at this point favor
19 transfer of venue and affirmatively seek
20 transfer of venue also to the Middle
21 District of Florida. One creditor seeks
22 transfer of venue to Louisiana, but I
23 gather would equally be happy to have a
24 transfer to Florida.

25 The motion is opposed by the

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2 Official Committee of Unsecured Creditors,
3 a group of trade creditors holding
4 substantial claims, a group of landlords
5 holding substantial claims. And what I
6 took away from the U.S. Trustee's remarks
7 is that, generally speaking, although the
8 U.S. Trustee was making more of a policy
9 statement, the U.S. Trustee also would
10 oppose transfer of venue at this stage of
11 the case.

12 We held a hearing and took the
13 testimony of the Debtors' general counsel,
14 Mr. Appel, on the issue of why the Debtors
15 chose venue in New York. That testimony,
16 as well as the agreed facts as agreed to
17 between the Debtors and Buffalo Rock, made
18 it clear that but for actions taken by the
19 Debtors shortly before the Chapter 11
20 filings, there would not be a basis for
21 venue in New York, but that, as set forth
22 in the agreed stipulation of facts, Dixie
23 Stores, Inc., DSI, was formed solely to
24 establish venue in this bank, and a bank
25 account was established for an essentially

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2 defunct corporation, Table Supply Company,
3 also to sustain venue in New York.

4 I approach this issue first and
5 foremost by examining the relevant
6 statutes, as the Supreme Court has
7 instructed us to do. The relevant statute
8 here is 28 USC Section 1408(A), which
9 provides for the venue of a bankruptcy
10 case where a corporation is domiciled or
11 resided, or, in this case,
12 incorporated, in DSI's case, or for other
13 reasons not relevant here, and where its
14 assets existed for, and this is important,
15 for 180 days or for a longer portion of
16 such 180-day period than the domicile
17 residence or principal place of business
18 in the United States or principal assets
19 in the United States of such person were
20 located in any other district. That is,
21 Section 1408(A)(1) does not require that a
22 corporation be domiciled for at least 180
23 days in the district to qualify for proper
24 venue, but, rather, that it be domiciled
25 here for a longer period during that

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2 180-day period than anywhere else.

3 That interpretation was adopted
4 as to the predecessor statute by the
5 Second Circuit Court of Appeals in Capitol
6 Motor versus Leblanc Corp., 201 F.2d 536,
7 Second Circuit Court of Appeals, 1953,
8 cert. denied 345 U.S. 957, also 1953.

9 Therefore, I conclude that on
10 the face of the statute and pursuant to
11 its plain meaning, venue was technically
12 proper for DSI.

13 Venue for the other debtors is
14 obtained through 28 USC Section
15 1408(A)(2), the so-called affiliate rule,
16 that DSI is wholly controlled by the
17 parent debtor and an affiliate of all the
18 other debtors.

19 As the Supreme Court in the
20 Lamie case that came down towards the end
21 of last year noted, and I guess repeatedly
22 noted I guess since Ron Pair, if the
23 statute is not ambiguous, it must be
24 applied according to its plain terms
25 unless an absurd result would apply, an

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2 illogical result would apply by doing so.
3 Based on my reading of the Lamie case,
4 which is at 540 U.S. 526, 2004, and the
5 Court's analysis of the absurd result
6 exception, that exception would not apply
7 here on the theory that Congress says what
8 it means and means what it says.

9 Consequently, we are not left
10 with considering whether 28 USC Section
11 1412 is applicable where venue is
12 improper. Contrast *In Re Sorrels*, 218 BR
13 580, Tenth Circuit, 1998, with *In Re*
14 *Lazaro*, 128 BR 168, Bankruptcy, Western
15 District of Texas, 1991. But, rather,
16 turn immediately to the applicability of
17 28 USC Section 1412 where venue will be
18 transferred if the movant sustains its
19 burden, which is established by a
20 preponderance of the evidence, that such
21 transfer is in the interests of justice or
22 for the convenience of the parties.

23 The standard applying Section
24 1412 is generally well-understood. The
25 court shall weigh a number of factors in

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2 the exercise of its reasonable discretion
3 and in particular in determining whether
4 the transfer is established by a
5 preponderance of the evidence, and should
6 consider the following: These are in no
7 particular order of priority, but simply
8 factors that the court should consider.

9 First, proximity of the court
10 to the assets, the creditors, the debtor,
11 its principals, evidence that may be
12 adduced. Second, the parties' own
13 preferences. Third, the economical and
14 efficient administration of the estate.
15 Fourth, in some instances, the necessity
16 for ancillary administration if
17 liquidation should result, although
18 numerous courts state that that factor
19 should be given little weight unless it
20 appears likely or reasonable to assume
21 that liquidation should result, which none
22 of the evidence suggests. Fifth, a local
23 interest in having localized controversies
24 decided at home and the applicability of
25 state law to the case, and in particular

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2 adversary proceedings. Sixth, the ease of
3 compelling unwilling witnesses to appear.
4 Seventh, the Debtors' original choice of
5 forum, which some courts, including Judge
6 Gonzalez in his first venue ruling in the
7 Enron case, accords significant weight to.
8 I do to some extent as well.

9 Those factors are set forth in
10 a number of cases, including In Re Bent,
11 93 BR 329-331, Bankruptcy Court, District
12 of Vermont, 1988, by Judge Conrad, as well
13 as by Judge Gonzalez in In Re Enron
14 Corporation, including to the Debtors'
15 initial choice of forum, at 284 BR
16 376-386, Bankruptcy, SDNY, 2002.

17 Of course, here the Debtor has
18 changed its mind and there is an issue as
19 to whether the Court should continue to
20 place emphasis on the Debtors' choice of
21 venue when it has changed its mind. Here
22 the parties disagree to some extent. The
23 objectants point out that once the Debtor
24 has chosen venue, it has effectively
25 waived the right to make another decision

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2 on the topic, citing In Re Fishman, 205 BR
3 147-149, Bankruptcy, ED Arkansas, 1997.
4 And ironically the movants have also
5 stated that the Debtors' decision is not
6 as important if there is a significant
7 opposition to the venue change.

8 I believe that the Debtors'
9 views here are important, and in
10 particular are important with respect to
11 the important factor of the economic and
12 efficient administration of the estate,
13 because essentially they have said that
14 they are making a business decision that
15 the adverse impact of the venue transfer
16 motion on their business requires them to
17 take a tangible step through their
18 observable conduct to move the venue to
19 try to correct some, if not all, of the
20 adverse effects of the venue motion. I
21 will consider the Debtors' views in that
22 context.

23 In weighing the following
24 factors, I find this to be a fairly close
25 question, at least the factors as to the

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2 convenience of the parties. In terms of
3 dollar amount, it appears clear to me that
4 the dollar amount of creditors involved in
5 the case prefer to have the case stay
6 here. On the other hand, it is perfectly
7 obvious that the business and the assets
8 and the personnel have very little
9 connection to New York other than through
10 the working out of the bankruptcy case
11 itself. Operationally, the company is
12 clearly centered in Florida and the rest
13 of the southeast.

14 Because, however, I believe the
15 primary focus of the restructuring is
16 centered in New York where the larger
17 creditors are, the issue of convenience to
18 the parties is a fairly close question
19 with regard to travel cost and the like.
20 I note that at this point, however, this
21 court, and I assume also the court in
22 Jacksonville, is fairly adept at handling
23 telephonic hearings and facilitating
24 electronic filing. Of course, that
25 technology was in operation outside of the

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2 court in the business environment long
3 before that.

4 There is, however, somewhat of
5 a disadvantage, in some cases perhaps a
6 significant one, for smaller creditors who
7 are not as actively involved in the case
8 as those larger ones who have already
9 appeared in the case and oppose the
10 transfer of venue. I believe that in
11 particular those parties will be
12 disadvantaged in the context of lease
13 rejections, claim objections, and any sort
14 of preference avoidance actions. Without
15 characterizing whether there are
16 preference claims or not, the petitions or
17 schedules indicate there are potentially a
18 great number of preference avoidance
19 claims.

20 The harm, at least in terms of
21 adversary proceedings and any actual
22 contested matters, to creditors in those
23 contexts could be ameliorated by venue
24 transfer with regard to those types of
25 proceedings in contested matters.

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2 Although, frankly, the law in that area is
3 somewhat against transfer, it would seem
4 to me in a case like this it would be more
5 called for.

6 In a couple of the cases cited
7 by the Committee, the Pick 'N Pay and
8 American Film Technologies cases attached
9 to its pleading, or the transcripts by the
10 Delaware courts were attached to the
11 pleadings, there was a reference of the
12 difficulty of switching the venue.

13 Mechanically, I believe that no longer
14 exists. I believe with the implementation
15 of the electronic filing system, the
16 mechanical switch of these cases would be
17 a matter of a day or two at most. So that
18 is not a factor that I think calls for
19 keeping venue here.

20 It has been argued with more
21 force, however, that retaining venue here
22 is appropriate because of this court's
23 familiarity with the case, and in
24 particular with regard to at least a
25 couple of the issues that have already

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2 come up in a meaningful way regarding
3 reclamation claims and PACA claims, and to
4 some extent with regard to the DIP order.

5 I would accord some weight to
6 that point. But note, on the other hand,
7 that I view there having been really only
8 one meaningful hearing in this case at
9 this time. It was a lengthy hearing and a
10 lot was accomplished at it. But I have no
11 doubt that a court sitting in
12 Jacksonville, or, frankly, anywhere else
13 in the country, would be able to come up
14 to speed very quickly on that issue and
15 certainly on any other issue in this case.
16 On that issue in particular, I believe the
17 orders were reasonably clear. Hopefully
18 the transcript is clear as well. So I,
19 again, do not believe that that is a
20 significant reason for either transferring
21 the case or keeping it here.

22 It is noted that many, if not
23 most of the professionals, if not all of
24 the professionals in the case, are based
25 in New York. That will obviously increase

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2 the cost of the case if the case is
3 transferred. However, it is quite
4 possible that with the transfer, the
5 Debtor will be able to, for itself, use
6 local counsel efficiently and may be able
7 to persuade other constituents to use
8 local counsel efficiently to somewhat
9 offset the travel cost for the New York
10 professionals.

11 In addition to that, while I
12 believe that a debtor and a committee and
13 other parties in interest are allowed
14 leeway in choosing the professionals that
15 they do, it is not a significant reason to
16 keep venue in a particular venue that
17 those professionals come from one location
18 or another. I should say from my own
19 personal experience before I went on the
20 bench, I spent so much time on a couple of
21 cases in the Middle District of Florida
22 that my partners accused me of having a
23 second family down there. So I'm
24 convinced that the case could be conducted
25 efficiently in Florida.

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2 That leaves the point of local
3 interest, which I do not want to give
4 short shrift at all. However, it appears
5 to me that the record is clear that local
6 interest was a factor that the Debtor
7 originally considered in favor of the case
8 being in Jacksonville, given the long
9 history of the Debtors there and the long
10 history of good corporate citizenship
11 there. On the other hand, there is no
12 evidence whatsoever of any attempt to
13 avoid any responsibilities or any
14 unfavorable law by the Debtors' initial
15 choice to have venue be here.

16 One could ask, in any event, if
17 a debtor believed that a particular
18 venue's substantive law is more likely to
19 enhance its reorganization prospects,
20 whether in that case it should file in
21 that venue. But that issue is not really
22 germane here based on the record in any
23 event.

24 On that point, I should say as
25 clearly as I can that the evidentiary

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2 record and the record of this hearing
3 shows that the Debtors made their choice
4 of venue entirely in good faith, not to
5 hide anything or to obtain any sort of
6 improper advantage or edge on any
7 particular creditor. Specifically there
8 is no evidence whatsoever that the Debtors
9 filed in New York to obtain a
10 debtor-friendly or a management-friendly
11 forum. In fact, the evidence is to the
12 contrary, that they filed in New York in
13 the belief that that is where the center
14 of their reorganization, their financial
15 reorganization, would be.

16 It is unfortunate that remarks
17 to the contrary that were not proven and
18 not even alleged in the hearing today,
19 with one exception, and I will get to
20 that, or in the papers, has made its way
21 into the press and into the public
22 knowledge to the detriment of the Debtors.
23 It is an unfortunate aspect of the venue
24 debate or venue context that all of the
25 courts operate under. Frankly, I believe

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2 these types of allegations not only by the
3 movants, but by purportedly learned
4 professors and members of Congress, do no
5 good to the bankruptcy system and impugn
6 and malign the courts.

7 Given the foregoing, as I said
8 earlier, and weighing all of the foregoing
9 considerations, I would normally say that
10 this was a close question whether to keep
11 the case here or not, particularly with
12 appropriate safeguards, including not only
13 telephonic access to the court, but, more
14 importantly, greater willingness to
15 transfer venue in contested matters
16 involving creditors in the southeast,
17 particularly smaller creditors. Based on
18 my weighing of all of the factors, I would
19 probably keep the cases.

20 However, there is one factor
21 that I have not discussed because I do not
22 view it as falling within the convenience
23 of the parties element of Section 1412.
24 It is clear that that statute is phrased
25 in the disjunctive and that the interests

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2 of justice prong of it will not always
3 serve the convenience of the parties, as
4 so found or so stated by Judge Geotz in
5 Port Jeff Corporation, 118 BR 184 at 192,
6 Bankruptcy, EDNY, 1990. Frankly, the
7 interpretation of the phrase "in the
8 interests of justice" as applied by the
9 courts is not particularly helpful here
10 except that it is applied very broadly as
11 the Second Circuit said in Exploration
12 Company versus Manville Forest Products
13 Corp., 894 F.2d 1384-1391, Second Circuit,
14 1990. The interests of justice component
15 is a broad and flexible standard that must
16 be applied on a case-by-case basis and
17 contemplates, among other things,
18 considerations of fairness.

19 Given the circumstances here,
20 first and foremost, and really solely the
21 following factor, that DSI was formed
22 solely to establish venue in New York, I
23 conclude that the transfer of venue here
24 would be in the interests of justice under
25 Section 1412 and therefore will order the

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2 transfer of the cases to the Middle
3 District of Florida.

4 Although the case law itself is
5 not particularly on point when it
6 interprets the interests of justice, I
7 need to say why I believe that is the case
8 here. I do not believe it is an
9 unacceptable judicial intrusion on the
10 statute, on Section 1408, to find that the
11 interests of justice require transfer here
12 and to close a loophole in the statute
13 that would otherwise, according to the
14 statute's plain terms, permit venue to be
15 properly established here on the eve of
16 filing.

17 I do this, again, not because
18 venue was established here in bad faith or
19 wrongfully, but simply because I don't
20 believe it is just to exploit the loophole
21 of the statute to obtain venue here. I do
22 that mindful of the Second Circuit's
23 ruling in Capitol Motors versus LeBlanc,
24 which I cited earlier, where the Second
25 Circuit did not seem to have any problem

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2 in finding a proper basis for jurisdiction
3 at, least, in the Second Circuit, although
4 the corporation that served as the basis
5 for jurisdiction was incorporated just a
6 matter of weeks before the filing.

7 I distinguish that case because
8 it appears to me, based on reading the
9 case, that that corporation, although
10 recently formed, had a separate and valid
11 reason for existing. That is, real
12 buyers, different owners, if you will,
13 purchased the debtor shortly before the
14 filing. They were located in New York and
15 they created the corporation in New York
16 because that is where they were. So I
17 view that as distinguishable.

18 I note that Judge Feinberg in
19 the district court similarly distinguished
20 that case in In Re Popell Company, Inc.,
21 221 F Supp. 534, SDNY, 1963, which was
22 later affirmed by the Second Circuit, when
23 he transferred venue of a case where all
24 of the actions seemed to be outside of New
25 York.

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2 Of course, this raises the
3 issue how close to a Chapter 11 filing is
4 too close for establishing a basis for
5 venue. I will not answer that question
6 except to say under these facts where
7 there appears to be no economic substance
8 to DSI, we are too close.

9 I should note, since there has
10 been a lot of loose talk here as well as
11 in the press about forum shopping, that my
12 decision makes a critical distinction
13 between creating the facts to fit the
14 statute, which I believe is undeniable
15 here, as opposed to applying the statute
16 to fit the facts. Again, in the context
17 of forum shopping, this is a very big
18 distinction.

19 The forum shopping that is
20 properly decried in cases like Eclair
21 Bakery and Abacus Broadcasting
22 Corporation, 154 BR 682, Bankruptcy,
23 Western District of Texas, 1993, and In Re
24 Maruki USA, Inc., 97 BR 166, Bankruptcy,
25 Southern District of New York, 1988, all

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2 involve efforts by debtors who were
3 already in trouble in one forum trying to
4 evade that forum to get a better result
5 somewhere else. In my mind, that is
6 improper forum shopping. I do not believe
7 it is otherwise improper to file within a
8 district that Congress has expressly
9 created for one. In fact, it may well be
10 a duty to do so based on one's analysis of
11 all the facts at hand.

12 On the other hand, I think that
13 the interests of justice require transfer
14 of venue where, again, the facts were
15 created to fit the statute. In that
16 sense, you are building the shop that you
17 choose to act in as opposed to going to
18 it.

19 On that sole basis, and none
20 other, I will grant the motion.

21 Let me just say again, in
22 closing, if it isn't clear already, I
23 believe that it is plain and simple, the
24 case here, that there is no evidence of
25 bad faith and no evidence of the type of

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2 forum shopping that the cases properly
3 punish, and that this is not a punishment
4 of the Debtor. There is no evidence and I
5 believe there could be no evidence that
6 the Debtor is trying to obtain any sort of
7 leg up on any creditor by filing here, and
8 that any suggestions to the contrary,
9 whether made in the papers or in the
10 press, are unfounded. If offered up in a
11 law school course, they would get an F,
12 and if generally offered up in a
13 courtroom, they would be subject to Rule
14 11.

15 On that score, I note that in
16 its response Buffalo Rock attached remarks
17 made by the junior senator from Texas
18 about various bankruptcy cases and what he
19 viewed as incidents of improper forum
20 shopping. I will only comment on the two
21 that I personally know the facts of, in
22 which the senator implied that in Enron
23 and WorldCom managers received lenient
24 treatment and trustees were not appointed
25 notwithstanding the obvious evidence of

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2 fraud.

3 Plain and simple, that is a
4 lie. Anyone who know those cases would
5 understand management did not evade any
6 exposure. Management was replaced in the
7 Enron case by Stephen Cooper (let alone to
8 examiners) and in the WorldCom case not
9 only by Michael Capellas, but also by a
10 court-appointed monitor, former chairman
11 of the SEC, Richard Breeden, who proposed
12 what has been described as a gold standard
13 of corporate governance and which WorldCom
14 subsequently adopted.

15 Consequently, those remarks are
16 either woefully misguided or slander on
17 the court, and, more importantly, mislead
18 the public, including employees, who I've
19 already stated should have a right to the
20 best information in these cases, not
21 information that plays upon their worst
22 fears.

23 Mr. Rubin, you can submit an
24 order directing transfer of venue to the
25 Middle District of Florida.

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

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6 I, TODD DeSIMONE, a Registered
7 Professional Reporter and a Notary Public,
8 do hereby certify that the foregoing is a
9 true and accurate transcription of my
10 stenographic notes.

11 I further certify that I am not
12 employed by nor related to any party to
13 this action.

14

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18 TODD DeSIMONE, RPR

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E R R A T A S H E E T

DO NOT WRITE ON TRANSCRIPT - ENTER CHANGES HERE

In re: WINN-DIXIE STORES, INC.

Motion to Transfer Venue of the Debtors'
Bankruptcy Cases to the United States
Bankruptcy Court for the Middle District
Of Florida, Jacksonville Division or Such
Other District Where Venue Would Be
Appropriate filed by Buffalo Rock Company, 4/12/05

PAGE NO.	LINE NO.	CHANGE
8	5	Attorneys for Beaver Street Fisheries, Inc. and Ja-Ru, Inc. (REASON: Ja-Ru, Inc. omitted from original transcript)
43	15	"behalf of Beaver Street Fisheries and Ja-Ru, Inc." (REASON: Ja-Ru, Inc. omitted from original transcript)
70	18	Change "MR. McFARLIN" to "MR. HELD" (REASON: wrong attorney identified)
70	21	Change "MR. McFARLIN" to "MR. HELD" (REASON: wrong attorney identified)

Under penalties of perjury, I declare that I have read the original transcript of the proceedings described herein and that it is true and correct, subject to any changes in form or substance entered here.

April 15, 2005
DATE

Edwin W. Held, Jr.
Edwin W. Held, Jr.