

# **EXHIBIT D**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: Chapter 11  
Case No. 05-17923 (ASH)  
DELTA AIR LINES, INC., et al, (Jointly Administered)  
Reorganized Debtors. White Plains, New York  
Monday, August 20, 2007  
2:23 p.m.

TRANSCRIPT OF MOTIONS  
BEFORE THE HONORABLE ADLAI S. HARDIN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Reorganized Debtors: Damian S. Schaible, Esq.  
DAVIS, POLK & WARDWELL  
450 Lexington Avenue  
New York, New York 10017  
Michael E. Wiles, Esq.  
DEBEVOISE & PLIMPTON, LLP  
919 Third Avenue  
New York, New York 10022  
For the Post-Effective Date Committee: David H. Botter, Esq.  
AKIN, GUMP, STRAUSS, HAUER & FELD, LLP  
590 Madison Avenue  
New York, New York 10022  
Audio Operator: Electronically Recorded  
by Court Personnel  
Transcription Company: Rand Reporting & Transcription, LLC  
80 Broad Street, Fifth Floor  
New York, New York 10004  
(212) 504-2919  
www.randreporting.com

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1 APPEARANCES: (Continued)

2 For the DFO Partners: Richard G. Smolev, Esq.  
3 KAYE SCHOLER, LLP  
4 425 Park Avenue  
5 New York, New York 10022

6 David Rosenzweig, Esq.  
7 FULBRIGHT & JAWORSKI, LLP  
8 666 Fifth Avenue  
9 New York, New York 10103

10 For Various Aircraft  
11 Financers: Michael J. Edelman, Esq.  
12 VEDDER, PRICE, KAUFMAN  
13 & KAMMHOLZ, P.C.  
14 805 Third Avenue  
15 New York, New York 10022

16 For Northwestern Mutual,  
17 Disney, et al: Lisa Hill Fenning, Esq.  
18 DEWEY BALLANTINE, LLP  
19 333 South Grand Avenue  
20 Suite 2600  
21 Los Angeles, California 90071

22 For Wilmington Trust  
23 Company and Cargill: Julia Frost-Davies, Esq.  
24 BINGHAM MC CUTCHEN, LLP  
25 150 Federal Street  
Boston, Massachusetts 02110

Mark M. Elliott, Esq.  
BINGHAM MC CUTCHEN, LLP  
399 Park Avenue  
New York, New York 10022

19 For Bank of New York  
20 as Indenture Trustee: Leo T. Crowley, Esq.  
21 Margot P. Erlich, Esq.  
22 PILLSBURY, WINTHROP, SHAW  
23 & PITTMAN, LLP  
24 1540 Broadway  
25 New York, New York 10036

1 APPEARANCES: (Continued)

2 For Fifth Third Bank: Amish Doshi, Esq.  
3 DAY PITNEY, LLP  
4 Fifth Third Bank  
7 Times Square  
New York, New York 10036

5 For Marriott  
6 International: Vincent J. Roldan, Esq.  
7 DLA PIPER  
1251 Avenue of the Americas  
New York, New York 10020

8 TELEPHONIC APPEARANCES:

9 Pro Se: Dana Mehen  
10 Pro Se: Laverne Lusk  
11 Pro Se: J. Anthony Guajardo  
12  
13  
14  
15  
16  
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1 you're giving it to them.

2 THE COURT: Okay. Never mind them.

3 MR. GUAJARDO: And I don't perceive that's a fair  
4 thing or an equitable thing or a good-faith act, and I think  
5 that you have acted in behalf of them, and not us, because we  
6 were the victims. We didn't do anything to anybody. We're not  
7 experts; they're the experts, and they're the ones that did  
8 wrong.

9 THE COURT: Mr. Guajardo, I'm sorry, but I cannot hear  
10 any more argument from you. I have ruled on your claim, right  
11 or wrong. I'm sorry for your loss.

12 MR. GUAJARDO: I'm now -- I'm going to make an appeal.

13 THE COURT: You may make an appeal.

14 MR. GUAJARDO: So put it down that I'm appealing your  
15 decision.

16 THE COURT: If you want to appeal, do whatever you  
17 have to do to appeal.

18 MR. GUAJARDO: All right.

19 THE COURT: Thank you, sir.

20 MR. GUAJARDO: Thank you.

21 MR. SCHAIBLE: Thank you, Your Honor.

22 MR. SMOLEV: Your Honor, my name is Richard Smolev,  
23 I'm with Kaye Scholer, and I'm representing DFO Partnership,  
24 which is the party bringing forth the motion for  
25 reconsideration, which is Item 4 on the agenda.

1 THE COURT: Right.

2 MR. SMOLEV: And if I could, I'd like to just make a  
3 one- or two-minute statement to reorient the Court, so if you  
4 would tell me when it's -- when I can proceed.

5 THE COURT: I'm hearing things in the phone, and I'm  
6 about to cut it off. I don't know who's on the phone, but ...

7 Go ahead, Mr. Smolev.

8 MR. SMOLEV: Thank you.

9 Your Honor, this is one of the tax indemnity claims.

10 THE COURT: Right.

11 MR. SMOLEV: It was part of TIA/SLV Test Objection No.  
12 1.

13 THE COURT: Uh-huh.

14 MR. SMOLEV: And I think I want to go back, and I  
15 really don't want to take more than a couple of minutes.

16 In the objection, the committee and Delta said that  
17 the reason that the claim had to be denied was that the  
18 indenture trustee has demanded payment of SLV under Section  
19 15(e) of the lease. And we had pleadings that were filed by  
20 both the indenture trustee; Wilmington Trust filed them,  
21 Cargill filed them, and I think it's instructive what they  
22 said.

23 And in the Cargill papers, in Paragraph 14 of their  
24 papers, they wrote:

25 "The indenture trustee may demand outstanding rent

1 plus SLV; and, upon payment of SLV, may proceed to  
2 sell the aircraft and to pay the proceeds over to  
3 Delta."

4 And, Your Honor, we don't dispute that. There is no  
5 question that the indenture trustees had the absolute right, if  
6 they chose to, to proceed under Section 15(e) of the lease, to  
7 sell the aircraft, the engines, and the associated interests;  
8 and then they would have an obligation to run the proceeds  
9 through the waterfall, pay any excess over to Delta. That's  
10 not being disputed. What is being disputed, though, is --

11 THE COURT: Pay the excess over to?

12 MR. SMOLEV: Well, in this case, it's Delta. Various  
13 leases say various things on disposition of those proceeds.

14 But what is being disputed is that Delta and the  
15 committee in their objections seem to argue that Paragraph 15  
16 of the lease is self-executing. It's almost as though,  
17 whenever there is a lease event of default, you immediately  
18 fall into Section 15(e) of the lease, and that's not the case.  
19 Your Honor has -- somewhere in front of you -- you've got too  
20 many notebooks to find it at the moment.

21 THE COURT: I do.

22 MR. SMOLEV: But Paragraph 15 of these leases --

23 THE COURT: I have that in front of me.

24 MR. SMOLEV: I understand. Which is the remedies  
25 section of the lease.

1 THE COURT: Right.

2 MR. SMOLEV: It does give the lessor the option to  
3 take any number of steps upon default.

4 And the operative language -- I think it's important  
5 that we have it in the record. The operative language says,  
6 quote:

7 Lessor may, at its option" --

8 And then I'm going to paraphrase -- do --

9 "-- and lessee shall comply with one or more of the  
10 following, with respect to any part of the airframe  
11 and engines, as the lessor in its sole discretion  
12 shall elect."

13 So the question is: Did the lessor elect to proceed  
14 under Section 15(e) of the lease; and if not, what are the  
15 consequences to the tax indemnity claim.

16 At the time we argued this on March 30th, we did not  
17 have the benefit of the restructuring agreements that Delta has  
18 now entered into with respect to all of the DFO tails. I  
19 didn't learn about them until April 13th, when I got a letter  
20 from Debevoise.

21 THE COURT: Uh-huh.

22 MR. SMOLEV: And then they publicly filed them right  
23 on the eve of plan confirmation.

24 Your Honor has a notebook -- one of these notebooks or  
25 maybe two of these notebooks are all of the restructuring

1 agreements. But then we also filed redacted versions of the  
2 restructuring agreements.

3 And then we also filed last week, when Delta filed its  
4 papers in opposition to the next matter, the payment of the  
5 claim dispute, there was a Power Point presentation that  
6 Debevoise made or that Delta made, using this Power Point, to  
7 demonstrate to the indenture trustees what kind of deal was  
8 going to be struck.

9 Now I go back to what Section 15(e) says. 15(e) says  
10 Delta pays SLV, and the airplane gets sold. What happens here  
11 was the parties -- the indenture trustee and Delta, but  
12 certainly not the owner-participants -- went outside the lease,  
13 entered into an agreement; some of the arrows that you saw on  
14 the Debevoise Power Point relates to those arrows --

15 THE COURT: Did I see that Power Point?

16 MR. SMOLEV: It was filed Monday by Delta; it was  
17 Exhibit H to Pleading -- I can give you the number, but it was  
18 -- 6584, Exhibit H. It was the pleading that Delta filed last  
19 Monday in response to the BNY motion to allow their claims to  
20 be paid, which is going to be argued in a bit.

21 THE COURT: Uh-huh.

22 MR. SMOLEV: But take away from that filing, as well  
23 as from the reading of the restructuring agreements that Your  
24 Honor now has; you have a complete set of all of them in  
25 chambers, is that the parties are not acting under Section

1 15(e) of the lease, because what the indenture trustee is --

2 THE COURT: Just a moment.

3 MR. SMOLEV: I'm sorry.

4 (Court and court personnel confer.)

5 THE COURT: All right. Go ahead.

6 MR. SMOLEV: May I proceed?

7 THE COURT: Yeah, go ahead.

8 MR. SMOLEV: The operative language in my tax  
9 indemnity agreements is: Is Delta required to pay SLV? Delta  
10 is required to pay what --

11 THE COURT: What is that, Section 7(c)?

12 MR. SMOLEV: Yes.

13 THE COURT: All right.

14 MR. SMOLEV: But more to the point, Your Honor, Delta  
15 is required to pay what these restructuring agreements require  
16 it to pay.

17 In each of the restructuring agreements, they are not  
18 paying SLV; they are paying off of the Bingham termsheet  
19 formula, which Your Honor already found in your May ruling  
20 obligates Delta to make a payment that is far less than SLV.

21 THE COURT: Well, just a moment. In my May 16 ruling  
22 -- and we covered this before --

23 MR. SMOLEV: Yes.

24 THE COURT: -- I think I acknowledged that I was  
25 mistaken in what I said with regard to Tail 182, is that what

1 it was, with regard to the Bingham termsheet.

2 MR. SMOLEV: If I might?

3 THE COURT: Yeah.

4 MR. SMOLEV: Your Honor, the difference between the  
5 182DN and the DFO tails is that in 182DN, there was a -- the  
6 operative language in the tax indemnity agreement was "a  
7 payment by reference to SLV." I do not have "by reference to"  
8 language. I have required to pay. And I'm not talking  
9 about --

10 THE COURT: So required to pay. Okay. On 7(c) of the  
11 TIA, it's "required to pay."

12 MR. SMOLEV: My language is "required to pay." And,  
13 Your Honor --

14 THE COURT: As opposed to 6(c), which was an amount  
15 determined by reference to?

16 MR. SMOLEV: That's correct.

17 THE COURT: Okay.

18 MR. SMOLEV: I do not have "by reference to" language,  
19 and I'm not going to get into whether that reconsideration  
20 ruling with respect to Test Case 2 was right or wrong. That's  
21 not my issue.

22 THE COURT: Okay.

23 MR. SMOLEV: But, it is not disputed that SLV is a  
24 defined term under the lease. Your Honor found that Delta  
25 acknowledges that the amount calculated under the termsheet

1 formula is far lower --

2 THE COURT: Are you now reading from my May 16 --

3 MR. SMOLEV: I'm reading from the opinion. From Page  
4 15 of the opinion, quote:

5 "Indeed, Delta acknowledges that the amount calculated  
6 under the termsheet formula is far lower than the SLV  
7 amount would be under the lease."

8 I agree with that.

9 THE COURT: Well, I'm not sure that I still agree with  
10 it because on rehearing, it was pointed out to me that there's  
11 language in the termsheet that confounds what at least was in  
12 my mind when I wrote that. Mr. Wiles, is this your accord with  
13 your recollection of the rehearing?

14 MR. WILES: Yes, that's correct.

15 MR. SMOLEV: Your Honor, may I address that?

16 THE COURT: Yeah.

17 MR. SMOLEV: SLV, and we filed -- when we filed papers  
18 in support of our opposition, remember the colored charts that  
19 we all worked off of on the hearing on the 30th -- SLV is a  
20 number, a specific number that is determined by reference to  
21 the lease. You look at the lessor's cost, you look at the date  
22 that the SLV payment is being made, and --

23 THE COURT: Should we look at the restructuring  
24 agreements that you actually rely on?

25 MR. SMOLEV: Yes. They're all up there, Your Honor.

1 And the --

2 THE COURT: Okay. Well, let's -- why don't we --

3 MR. SMOLEV: In each of those restructuring  
4 agreements.

5 THE COURT: Why don't we look at them?

6 MR. SMOLEV: Each restructuring agreement --

7 THE COURT: Can I know what I should be looking at --

8 MR. SMOLEV: Sure, sure.

9 THE COURT: -- so I don't make the same mistake I did  
10 the first time around on Tail 182?

11 MR. SMOLEV: Absolutely.

12 THE COURT: What do you want me to look at?

13 MR. SMOLEV: There is a -- with respect to three of  
14 the tails, there is a reference to the Bingham termsheet. With  
15 respect to five of the tails, there is a page marked "interim  
16 arrangements," which sets out the formula under which the  
17 payments are being made, and that formula -- and I will tell  
18 Your Honor --

19 THE COURT: Let me ask Mr. Wiles, if I could. What  
20 would you have me look at, Mr. Wiles, to persuade me that the  
21 restructuring agreements that Mr. Smolev is talking about  
22 require a payment of SLV, or based on SLV?

23 MR. WILES: Section 15 of the lease, Your Honor.

24 THE COURT: I'm familiar with that, but what he's  
25 saying that -- he's saying that a deal was made under the

1 restructuring agreements. Now what language of the  
2 restructuring agreements?

3 MR. WILES: Okay. Every restructuring agreement that  
4 relates to one of Mr. -- one of the DFO aircraft, has language  
5 somewhat similar to the Bingham termsheet language in that it  
6 says that the claim that the -- that the party gets is equal to  
7 first SLV, minus -- and then there's an adjustment, and the  
8 adjustment is based on the value of the new lease and the  
9 discounted value of the residual value of the aircraft at the  
10 end of the new lease.

11 THE COURT: Is that right?

12 MR. SMOLEV: Yes.

13 THE COURT: Okay. So I don't have to look at the  
14 language. You all agree on what the language says.

15 MR. WILES: Right.

16 MR. SMOLEV: Basically --

17 THE COURT: Basically -- it basically speaks either in  
18 identical or substantially the same language as the so-called  
19 Bingham termsheet.

20 MR. SMOLEV: That's correct. And my point is very  
21 simple, and I made this point in the exhibits, in the colored  
22 exhibits.

23 THE COURT: I ask you that because, as I went back and  
24 looked at the last rehearing when I was asked to reconsider  
25 what I said about Tail 182 in my -- whatever it was -- May 16

1 typewritten decision, and then I had before me on the rehearing  
2 the actual Bingham termsheet, it seemed to me that what the  
3 Bingham termsheet provided for was substantially, if not  
4 completely identical, or substantially the same -- materially  
5 the same as the SLV relief provided for under Section 15 of the  
6 lease.

7 MR. SMOLEV: I have two responses, if I might.

8 THE COURT: Yeah.

9 MR. SMOLEV: The first is, it's not. That's not how  
10 the math works. SLV is a specific number. It is a defined  
11 term. I have a TIA claim unless they pay SLV. That's my  
12 operative language. If they don't pay that number -- they can  
13 pay it in bankruptcy dollars, but if they don't pay that  
14 number, then I am entitled to a tax indemnity claim.

15 Now, you contrast that number, which is the SLV  
16 number, which is determined by taking the lessor cost times a  
17 percentage at the amount of -- at the date of payment, that  
18 comes out with a specific number. When you contrast that to  
19 the number that is being paid under the Bingham termsheet or  
20 under the restructuring agreements, that is not SLV as it is  
21 not SLV, because of the adjustments that Mr. Wiles talked  
22 about. Then, because Delta is not obligated to perform under  
23 Section 15(e) of the lease, but is obligated to perform under  
24 the restructuring agreements, Delta is not paying, nor is it  
25 required to pay SLV.

1           Because I have required the pay language, Your Honor  
2 has to find, in order to deny the motion for reconsideration,  
3 that the payment under the Bingham formula or the payment under  
4 the restructured termsheets is exactly the same amount as the  
5 SLV payment would be under the lease, because my exception is  
6 not triggered by materially close, substantially or anything of  
7 that sort. My agreement and the deal that the parties struck  
8 is unless Delta pays SLV, I am entitled to a tax indemnity  
9 claim.

10           THE COURT: All right. What's the answer to that?

11           MR. WILES: Your Honor, just before I lose track of  
12 it, that is not actually the argument made on the motion for  
13 reconsideration, but I will answer the question you asked, and  
14 it's the same answer I gave you on March 30th, when this issue  
15 came up. There's two components to it.

16           The first is that the gist of Mr. Smolev's argument is  
17 that anytime SLV, the starting number is reduced, you  
18 supposedly are not required to pay SLV. That's not what the  
19 lease says. And if I could ask you to just take a look at the  
20 lease again --

21           THE COURT: Yes, I will.

22           MR. WILES: You can find it in the -- I'm sorry  
23 there's so many binders.

24           THE COURT: I have fifteen of the lease --

25           MR. WILES: If you have a binder --

1 THE COURT: -- right in front of me.

2 MR. WILES: Oh, good. That's great.

3 THE COURT: Remedies.

4 MR. WILES: Yes. If you look in -- this is the  
5 provision I cited to you on March 30th. The example I gave was  
6 from Section 15(c), and it's Pages 34 to 36 of the transcript  
7 on March 30th. What it actually says is 15(c) makes very clear  
8 that you pay. What you actually pay is the excess of  
9 stipulated loss value over the fair market value of the  
10 aircraft, okay?

11 THE COURT: Right.

12 MR. WILES: But then read on to the end of the  
13 sentence -- to the end of the paragraph, because what it then  
14 says:

15 "And together with such excess interest, to the extent  
16 permitted by applicable law, that the past-due rate on  
17 the amount of such stipulated loss value from the date  
18 as of which such stipulated loss value is computed to  
19 the date of actual payment of such amount."

20 THE COURT: Right.

21 MR. WILES: Now, the only actual payment -- the only  
22 such amount that's actually called for to be paid there is the  
23 difference between the stipulated loss value and the fair  
24 market value --

25 THE COURT: Right.

1           MR. WILES: -- which that provision, for purposes of  
2 interest calculation, equates to a payment of stipulated loss  
3 value. In other words, if you pay the offset amount, the lease  
4 itself treats that as a payment of stipulated loss value. That  
5 was the Argument No. 1.

6           So the fundamental argument that Mr. Smolev has made,  
7 which is that you aren't paying stipulated loss value unless  
8 you have no offset whatsoever, is contrary to what the lease  
9 itself says, and that makes perfect sense. Stipulated loss  
10 value, what it is, is a guaranteed minimum recovery. As long  
11 as you have the fair market value of the aircraft and the  
12 differences paid for, you have recovered and been paid  
13 stipulated loss value. That's how the lease works.

14           So fundamentally, the argument that he's made is  
15 flatly wrong in terms of 15(c), and it's wrong for another  
16 reason. The tax indemnity agreement says that there is no tax  
17 indemnity payment in any situation where we are required to pay  
18 stipulated loss value or termination value. Now, Mr. Smolev's  
19 argument was -- it's not really his motion for reconsideration,  
20 his original motion was that if there's any offset, you are not  
21 required to pay stipulated loss value or termination value.

22           The problem is that every, single, without exception  
23 provision of the lease that addresses stipulated loss value and  
24 termination value provides for an offset. Termination value is  
25 the easiest. There's one place where termination value is used

1 in the lease. Only one. And in that case, you pay the  
2 difference between termination value and the fair market sale  
3 value of the equipment. Yet, the tax indemnity agreement  
4 specifically says that there is no claim if you are required to  
5 pay termination value.

6           If Mr. Smolev was right, and if that provision meant  
7 that you only had an exclusion if there was a payment of  
8 termination value with no offset, then it would be completely  
9 superfluous. It would have no possible meaning because there  
10 is never a circumstance under the lease where you do anything  
11 but have a subtraction from termination value. And the same  
12 thing is true of stipulated loss value. Every subparagraph of  
13 Section 15 has a recognition that stipulated loss value,  
14 termination value, whatever you call these minimum recoveries,  
15 are partially obtained through the value of the aircraft  
16 itself. Even if there's a casualty loss of the aircraft, the  
17 lease says that you treat the insurance proceeds as a reduction  
18 of the stipulated loss value. So in every, single situation  
19 there is such an offset, so it can't mean what he says it  
20 means.

21           The third point I want to make, Mr. Smolev has  
22 stressed Section 15(e) of the document. Well, he's ignoring a  
23 bit of the history of what happened here. The initial  
24 objection cited to Section 15(e), in his response, Mr. Smolev  
25 argued the argument that I just talked about, about how there

1 is a reduction to stipulated loss value, and he asked for  
2 copies of the other restructuring agreements. I told him prior  
3 to the March 30th argument that for purposes of that argument,  
4 while those restructuring agreements hadn't been signed yet, he  
5 could assume that they would have similar offset provisions.  
6 This is not -- not something new. This is the way the argument  
7 on March 30th proceeded. I never argued -- you can search in  
8 vain in our responsive papers, in the argument that I made to  
9 you on March 30th, I never argued that straight, stipulated  
10 loss value was being paid without any offsets. Instead, I made  
11 the arguments that I've made here today, number one, that the  
12 lease treats payment of the offset amount as a payment of full  
13 stipulated loss value and number two, that Mr. Smolev's  
14 argument can't mean what he says because it would deprive the  
15 TIA of any meaning.

16 Now, the actual motion for reconsideration that's in  
17 front of you is not on those points. The actual motion for  
18 reconsideration is based on your ruling with respect to the one  
19 Bingham termsheet claim that was in the Northwestern group, and  
20 your ruling with respect to that aircraft that stipulated loss  
21 value wasn't being paid because, in your original ruling, you  
22 said that there was no reference to stipulated loss value.  
23 That's the actual basis for the motion for reconsideration.

24 THE COURT: I thought it was.

25 MR. WILES: And you've already turned that around in

1 your revised ruling on the Northwestern situation.

2 THE COURT: All right.

3 MR. SMOLEV: Your Honor, may I be heard?

4 THE COURT: Yes, please, Mr. Smolev. I think what Mr.  
5 Wiles has said has been helpful to my understanding of your  
6 argument. Are you saying that stipulation loss value is only  
7 paid when the so-called calculated stipulation loss value is  
8 paid without regard to the offset to stipulated loss value that  
9 is provided in every paragraph of fifteen words referred to?

10 MR. SMOLEV: Of course. I'm saying for purposes of  
11 the tax indemnity agreement, that's exactly the benefit that  
12 the parties struck --

13 THE COURT: All right.

14 MR. SMOLEV: -- because the language -- Your Honor,  
15 listen, please. The language of the tax indemnity agreement is  
16 that I am not entitled to a tax indemnity claim where the  
17 lessee -- the lessee was the debtor --

18 THE COURT: Right.

19 MR. SMOLEV: -- where the lessee is required to pay  
20 SLV. If you look at the termsheet, the lessee is not required  
21 to pay SLV. Because what's happening is the indenture  
22 trustee --

23 THE COURT: But on the -- excuse me. Excuse me.  
24 Under your theory, the lessee is never -- is never obligated to  
25 pay SLV under any provisions of Section 15 of the lease because

1 under your definition of paying SLV, it's payment of SLV, but  
2 without the offsets that are provided in the very provisions  
3 that provide for SLV.

4 MR. SMOLEV: I'm not in the lease, Your Honor. I'm in  
5 the tax indemnity agreement, and it's important to draw a  
6 distinction --

7 THE COURT: Okay.

8 MR. SMOLEV: -- because Mr. Wiles is saying SLV will  
9 be paid. It will be paid from a combination of sources. It  
10 will be paid by the lease rejection claim from the lessee, who  
11 was the lessee under the lease. It will be paid by rent from  
12 the reorganized entity, who is a new entity, who is not the  
13 lessee, and it will be recovered from the residual value of the  
14 aircraft.

15 But the tax indemnity claim doesn't say that I lose my  
16 claim when SLV is cobbled together from any number of sources.  
17 The bargain that the parties struck, and this is at the very  
18 core of where we part company with Mr. Wiles on this point, the  
19 bargain that the parties struck in the tax indemnity agreement  
20 is that in order for the exclusion to trigger, it is the lessee  
21 who must pay SLV, not -- it does not say, and you cannot read,  
22 and Mr. Wiles and Mr. Botter, in their opening papers, said  
23 that the tax indemnity agreement is unambiguous and must be  
24 enforced as written. It says I am entitled to a claim unless  
25 the lessee is required to pay SLV. And, Your Honor, because of

1 the offsets, the lessee is not required to pay SLV.

2 THE COURT: On your point --

3 MR. SMOLEV: Other parties are contributing.

4 THE COURT: You're talking about Section 7?

5 MR. SMOLEV: Yes. And other parties are contributing.

6 My payment is preserved.

7 THE COURT: Excuse me.

8 MR. SMOLEV: Sorry.

9 THE COURT: I can't get a word in edgewise here.

10 Read the actual language of Section 7(c) that you rely

11 on.

12 MR. SMOLEV: I'm sorry?

13 THE COURT: Would you read the actual language of

14 Section 7(c) that you rely on?

15 MR. SMOLEV: I believe the actual language says that

16 I'm not entitled to a claim in a situation where the lessee is

17 required to pay. Any event whereby a party to any of the

18 operative documents is required --

19 THE COURT: Ah. A party to any of the operative

20 documents.

21 MR. SMOLEV: Yes, but the reorganized debtor --

22 THE COURT: You've been saying where the lessee, the

23 debtor is required to pay.

24 MR. SMOLEV: Yes, and that's my point. If you look at

25 their -- what Mr. Wiles is saying, SLV is being recovered from

1 three sources: the lessee, who is a party to the operative  
2 documents; the reorganized debtor, who is paying rent, who is  
3 not a party to the operative documents; and the residual value  
4 of the aircraft, which now belongs to the indenture trustee  
5 following the foreclosure.

6 Two of the parties who are contributing to this pot  
7 that's making up SLV, if they get to that point, are not  
8 parties to the operative documents. So the fundamental deal  
9 that the parties struck and the fundamental basis of the tax  
10 indemnity agreement is that unless it's the lessee, without  
11 help from other parties, makes that SLV payment, then my tax  
12 indemnity agreement survives. That's the fundamental  
13 difference, Judge. It is not whether, under Section 15, there  
14 could be situations where there could be credits. There  
15 absolutely could be, but the parties here are ignoring the  
16 lease.

17 The whole point of filing the restructuring agreement  
18 was to show you that Delta went outside the lease with its  
19 indenture trustee, made extra contractual arrangements. And  
20 because of those extra contractual arrangements, there are  
21 different parties, different entities who were not parties to  
22 the operative documents, who are contributing cash, which  
23 allows the SLV to act as though it is coming close enough to  
24 SLV to make the deal that it made with Delta. That's all well  
25 and good. It violates the equity squeeze provisions of the

1 documents because -- but I'm ignoring that.

2 But frankly, the question that Your Honor has to face  
3 in the reconsideration motion is in the literal language of the  
4 tax indemnity agreement, without reading anything into it. If  
5 it's not the lessee who makes the payment, then when the lessee  
6 has an extra contractual arrangement, is the lessee required to  
7 pay SLV, and under these facts, it's not.

8 THE COURT: Final reply, Mr. Wiles? He says that some  
9 people, not some parties, not parties to the operative  
10 documents, are actually contributing by offset to the SLV.

11 MR. WILES: Well, it's true that in, as 15(c) of the  
12 lease requires, you calculate fair market value as an offset,  
13 and it is true that in these cases, fair market value is  
14 calculated by considering the value to the indenture trustee,  
15 who is not outside the documents, by the way --

16 THE COURT: Right.

17 MR. WILES: -- of the rents that Delta will pay.  
18 Delta's not outside the documents, either, and the expected  
19 residual fair market value of the aircraft, and who knows who  
20 will buy it at the end of the term, whether that's somebody  
21 outside the documents or not. I don't know.

22 But I just come back to what 15(c) says. After  
23 describing that offset, it says --

24 THE COURT: Who's entitled to the residual value?

25 MR. WILES: I'm sorry?

1 THE COURT: Who is entitled to the --

2 MR. WILES: The indenture trustee.

3 THE COURT: That's the party of the operative  
4 documents.

5 MR. WILES: Exactly. It says:

6 "Interest, to the extent permitted by applicable law,  
7 on the amount of such stipulated loss value from the  
8 date as of which such stipulated loss value is  
9 computed, to the date of actual payment of such  
10 amount."

11 It refers -- it considers the payment in 15(c) to be  
12 actual payment of SLV, even though 15(c) is very clear that  
13 what you pay is that offset -- offset amount.

14 So, since the TIA refers to the operative documents,  
15 and says whenever anybody is required, under the operative  
16 documents, including the lease, to pay SLV, the lease considers  
17 this situation to be a payment of SLV. It couldn't be clearer  
18 in Section 15(c) of the lease.

19 THE COURT: All right. Is there anything else?

20 MR. SMOLEV: No, but I -- so the record is clear, I  
21 just want to make the point. The reorganized debtor, who was  
22 paying rent under the restructuring agreements is not a party  
23 to the operative documents.

24 THE COURT: The reorganized debtor is --

25 MR. SMOLEV: It is not a party to the operative

1 documents. It is a new entity, as Your Honor well knows.  
2 Therefore, the -- this notion that credits can accumulate so  
3 that SLV is realized under the lease -- there's no question the  
4 lease is --

5 THE COURT: This is yet another interesting gloss on  
6 your argument. You're saying that whenever you have a  
7 reorganized debtor, it's a new entity and, therefore, there's  
8 never a payment of stipulated loss value.

9 MR. SMOLEV: Oh, no. I'm not saying that at all.  
10 There could be situations where there are. I had one plane  
11 here where there was a termination event and there was a full  
12 stip loss payment, so no, I'm not saying that at all. I'm  
13 saying that the benefit that -- that the bargain that the  
14 parties struck was that the TIA claim is preserved unless the  
15 lessee, as that term is defined under the lease, makes the SLV  
16 payment, and that's not being done here and, therefore, my  
17 claim should survive. It's not a question of is the indenture  
18 trustee coming materially close to SLV.

19 THE COURT: And it's not because you're saying that I  
20 must, for purposes of this, treat the reorganized debtor as a  
21 different entity from the pre-petition debtor?

22 MR. SMOLEV: Well, I think that's true as a matter of  
23 law, but I think the -- but all I'm saying is what is the deal  
24 that the parties cut as evidenced by the tax indemnity  
25 agreement, and it is clear that regardless of what credit

1 structure might exist under the lease, regardless of what  
2 remedies are available to the indenture trustee under the  
3 lease, that as between the lessee, on the one hand, and the  
4 owner/participant on the other hand, the tax indemnity claim  
5 was preserved unless, in my language, the lessee was the party  
6 that's required to a stip loss value, and it has not because of  
7 the restructuring agreements.

8 THE COURT: And since there is no more lessee,  
9 according to your lights, it can't possibly -- Section 7(c)  
10 can't possibly apply?

11 MR. SMOLEV: No, it could have. It absolutely could  
12 have, because the indenture trustee, going back to what Cargill  
13 said in its papers, the indenture trustee could have invoked  
14 Section 15(e), demanded SLV. Delta could have paid SLV in  
15 bankruptcy dollars. This isn't a bankruptcy dollars versus  
16 dollars question. Delta could have paid SLV and the aircraft  
17 would have been sold.

18 I'm saying under that scenario, then that might have  
19 been deemed a full SLV payment, but here, we're not in that  
20 scenario. We are in the portion of the tax indemnity agreement  
21 where the owner/participant on the one hand, and Delta on the  
22 other hand, said unless I, Delta, the lessee, makes a full SLV  
23 payment, then your tax indemnity agreements survive.

24 Had Delta wanted to cobble together a pot, as Mr.  
25 Wiles now suggests, well, we have this 15(c) you can accumulate

1 from various sources. Had they wanted to extinguish the tax  
2 indemnity agreement upon that event, then it was incumbent upon  
3 them to negotiate it in, draft it into the agreement. They  
4 didn't do it.

5           The exclusion that Your Honor is determining is  
6 whether Delta is required to pay SLV. Going back to the  
7 Bingham termsheet, Delta is paying an amount less than SLV. It  
8 may be close, it may be materially close. That was Your Honor.  
9 But Your Honor found, in the May 16th ruling, that they were  
10 paying an amount far lower than SLV. The residual value of the  
11 plane and the lease rentals coming from the reorganized entity  
12 may be bringing it close to SLV, so that the indenture trustee  
13 was induced to make a deal with Delta, and that's fine as  
14 between the indenture trustee, on the one hand, and Delta on  
15 the other hand, but my tax indemnity claim is preserved under  
16 those circumstances because Delta, at the end of the day, is  
17 not required to pay SLV. Thank you.

18           MR. WILES: Your Honor, I believe Mr. Smolev has  
19 fundamentally confused the argument about Section 15(c). He is  
20 focusing on who pays the offset amounts. Now, 15(c) of the  
21 lease makes clear that you deduct fair market value. It does  
22 not require the lessee to buy the aircraft. It doesn't even  
23 require anybody to. You just take fair market value, whatever  
24 it is. Or the aircraft can be sold to anybody, any third  
25 party, and that gets reduced from stipulated loss value.

1           The important thing in determining whether a party to  
2 the operative documents has paid stipulated loss value is what  
3 do the operative documents say it means to pay stipulated loss  
4 value? When the operative documents talk about the lessee  
5 paying stipulated loss value, what are they talking about? In  
6 Section 15(c), what it's talking about is paying the difference  
7 between that specified SLV minimum and the fair market value.  
8 That's the only amount that Delta has to be required to pay in  
9 order to invoke that TIA exclusion. And if there were any  
10 question about it, Section 15(c), the interest computation,  
11 which equates, explicitly equates the actual payment of that  
12 difference with the payment of stipulated loss value --

13           THE COURT: Let me ask --

14           MR. WILES: -- it's clear that we are required to pay  
15 stipulated loss value.

16           THE COURT: Mr. Smolev, you've never articulated this,  
17 so I assume you are not arguing that the offsets here do not  
18 equate to fair market value.

19           MR. SMOLEV: Yes, I did.

20           THE COURT: You're not making that argument.

21           MR. SMOLEV: Oh, no, I did. I did argue that. In  
22 fact, if --

23           THE COURT: You did.

24           MR. SMOLEV: -- you look at the color charts that I  
25 handed -- the Glenn affidavit, which Your Honor had in front of

1 you at the March 30th hearing, I could bring them out, but I  
2 don't know how long you want to prolong this, because you have  
3 them in chambers. But I absolutely -- I had a slide that  
4 showed that SLV was calculated by reference to -- and I go back  
5 and I'll repeat myself, the lessor cost times a percentage at  
6 the date that SLV was paid, and then I actually showed and  
7 highlighted the Bingham termsheet, and I showed, because of  
8 these deductions, they are not paying SLV. So this was  
9 absolutely in front of Your Honor, and Your Honor ruled with  
10 respect to 182DN, that they weren't paying them.

11 THE COURT: See, I'm not sure either that my question  
12 was clear, or if it was, that you're answering it --

13 MR. SMOLEV: I apologize.

14 THE COURT: -- so I ask it again. In effect, Mr.  
15 Wiles says, perhaps with some shorthand, that under 15(c) of  
16 the lease, the payment of stipulated loss value is the payment  
17 of the calculation that's referred to there, less the fair  
18 market value of the aircraft. Is that it, Mr. Wiles, in  
19 substance?

20 MR. WILES: Yes. That's it.

21 THE COURT: Okay. Now I take it you don't really  
22 disagree with that general formulation of what 15(c) --

23 MR. SMOLEV: It's the letter of the lease. It's what  
24 the -- it's what the lease says.

25 THE COURT: Okay. So are you claiming that the amount

1 by which -- amount required to be paid by Delta or reorganized  
2 Delta under the termsheets is something less than the  
3 calculated value, the equation, minus fair market value?

4 MR. SMOLEV: I don't know the --

5 THE COURT: Stated differently, are you disagreeing  
6 with the fair market value portion of the equation?

7 MR. SMOLEV: I don't know the answer to the question  
8 because Your Honor phrased it in terms of Delta or some other  
9 party. And I --

10 THE COURT: Delta, reorganized --

11 MR. SMOLEV: I don't know the math. But I don't know  
12 the math. My --

13 THE COURT: So your point is not predicated on a claim  
14 that the offset that Mr. Wiles is referring to for a fair  
15 market value is, in fact, something much more than fair market  
16 value? You're not saying that?

17 MR. SMOLEV: I think, as Your Honor found initially in  
18 the May 16th ruling, when you work the math --

19 THE COURT: You know, I wish you wouldn't refer to my  
20 May 16 ruling because I've already said that I believe I was  
21 mistaken in that, so just don't do it again.

22 MR. SMOLEV: I apologize, Your Honor. I won't. But  
23 the -- in my view, the amount that is paid after giving effect  
24 to the various pluses and minuses in the formula, does not  
25 result in a payment which is equal to the SLV payment

1 calculated under the lease.

2 THE COURT: You mean SLV minus fair market value?

3 MR. SMOLEV: No, no. Simply SLV.

4 THE COURT: Well, of course it's less than simply SLV,  
5 because Section 15(c) says SLV, the calculation, less  
6 something, i.e., less fair market value.

7 MR. SMOLEV: Yes, absolutely. But now I go to the tax  
8 -- I'm moving from the lease to the tax indemnity issue.

9 THE COURT: You're saying all the tax indemnity  
10 agreement says is SLV, but without taking into account the  
11 deduction from SLV provided for in --

12 MR. SMOLEV: And it makes -- and it makes -- yes.  
13 That's what I'm saying, and it makes perfect sense.

14 THE COURT: Okay, okay. So that helps me, because I  
15 know what you're saying now.

16 MR. SMOLEV: Yes.

17 THE COURT: I disagree with it.

18 MR. SMOLEV: Well, may I --

19 THE COURT: I believe that the concept of payment of  
20 SLV means the concept of payment of the net of SLV, less fair  
21 market value or sale value, i.e., it's not payment of SLV  
22 within the meaning. As I would construe it, of Section 7(c)  
23 cannot mean SLV without the offsets that are provided in every  
24 subdivision of Section 15 that refers to SLV, because in that  
25 case, you would never have an occasion to invoke Section 7(c)

1 of the TIA. It would never exist, because you would never have  
2 a situation where SLV, just the calculation, without the  
3 offsets that are provided in every subdivision, you would never  
4 have that situation.

5 MR. SMOLEV: This is where we respectfully disagree,  
6 Your Honor.

7 THE COURT: Okay. This is helpful that we both  
8 understand where -- at least I understand where I think you  
9 disagree with my ruling.

10 MR. SMOLEV: And I want Your Honor to understand, and  
11 I want to make this statement for purposes of whatever record  
12 I'm creating on appeal, SLV is a defined term. When you look  
13 at the definition of SLV in the operative documents, it is not  
14 the stip loss value minus --

15 THE COURT: Well, let's look at it.

16 MR. SMOLEV: I don't know that you have the --

17 THE COURT: Let's look at it.

18 MR. SMOLEV: I don't know that we have that in front  
19 of you. That's somewhere in the operative documents, which are  
20 somewhere in the record.

21 THE COURT: Where is the definition? How about Page  
22 11 of the lease?

23 MR. SMOLEV: I think the definitions are in -- they're  
24 probably in an appendix to the participation agreement.

25 THE COURT: But I suggest Page 11 of the lease.

1 MR. SMOLEV: But, Your Honor, the --

2 THE COURT: It's says stipulated loss value.

3 MR. SMOLEV: Exhibit B to the lease, the -- Exhibit B  
4 to the lease does say that SLV is a percentage of the lessor's  
5 cost in the aircraft. It makes reference to -- and if you look  
6 -- I'm happy to hand up --

7 THE COURT: Can I just read --

8 MR. SMOLEV: Sure.

9 THE COURT: -- the definition on Page 11?

10 (Court reviews document.)

11 THE COURT: Well, it seems to me that, without trying  
12 to parse the precise words of the definition on Page 11, that  
13 the concept of stipulated loss value is to make the indenture  
14 trustee for the lenders whole with regard to the amount of the  
15 loan, basically, and that requires a netting of the calculation  
16 that's called for against the sale value or fair market value  
17 of the aircraft. Otherwise --

18 MR. SMOLEV: Your Honor, if I could, I --

19 THE COURT: Otherwise, then you end up with an amount,  
20 not only of the calculated value, but also an amount which  
21 includes, and is not net of the value of the aircraft.

22 MR. SMOLEV: I come to that conclusion because that's  
23 exactly the deal that the parties struck, and if I could direct  
24 your attention as follows:

25 Exhibit B to the lease, which is in the record --

1 THE COURT: All right.

2 MR. SMOLEV: -- says:

3 "For purposes of this Exhibit B, stipulated loss value  
4 and termination value, in each case, is the product of  
5 lessor's cost, multiplied by the specific percentage  
6 or percentages."

7 Exhibit A to the lease, also in the record, says:

8 "Lessor's cost of the delivered aircraft is dollar  
9 sign, blank."

10 In this case, I redacted and Delta actually  
11 inadvertently filed a pleading that showed what the lessor's  
12 cost is.

13 So, for purposes, Your Honor, of the operative  
14 documents and most particularly, for purposes of the  
15 determination of whether the lessee was paying stipulated loss  
16 value, the defined term, stipulated loss value, as I just read  
17 it to Your Honor, has to be given effect, or else you're  
18 reading other words into the tax indemnity agreement, and --

19 THE COURT: Well, is there ever an occasion in which  
20 stipulated loss value, as you just defined it, would be paid?

21 MR. SMOLEV: Yes, sir.

22 THE COURT: What would that be?

23 MR. SMOLEV: It could be a casualty event, in which  
24 case termination value would be paid. Absolutely. And there  
25 could be other events. There could be other events that

1 trigger an SLV payment --

2 THE COURT: In other words, is there --

3 MR. SMOLEV: -- when the lease isn't terminated.

4 THE COURT: Let me ask it differently. Is there any  
5 occasion in which SLV would be paid without netting against  
6 that amount any of the amounts to be netted under the various  
7 subdivisions of Section 15?

8 MR. SMOLEV: Yes, yes.

9 THE COURT: When would that be?

10 MR. SMOLEV: Here's an example. And I'm not talking  
11 about early termination of the lease. I'm talking about a  
12 situation, for example -- all of these deals are tax-driven  
13 deals. They are designed to create accelerated depreciation.  
14 One of the rules for accelerated depreciation in an aircraft is  
15 that it must fly within the United States for a minimum period  
16 of time. If the airplane were to fly outside the United  
17 States, so that the OP could not get its accelerated  
18 depreciation, that would be an event that requires the lessee  
19 to make a stipulated loss value.

20 In that circumstance, what happens when the lease is  
21 ongoing is the stip loss value payment is made, and then the  
22 adjustment mechanism that you heard about on the 30th, where  
23 SLV gets adjusted as between the indenture trustee, on the one  
24 hand, and the OP on the other hand, that's where that kicks in.  
25 So yes, absolutely.

1           In circumstances where the stip -- where some event,  
2 and I'm not a tax lawyer, so I'm probably not giving you five  
3 or six other examples, but certainly there are circumstances  
4 where stip loss value could be paid, the lease rolls on with an  
5 adjustment, so that Delta isn't paying twice. That's been  
6 fully briefed in the duplication question. But --

7           THE COURT: Not where stip loss value -- but TIA. I  
8 understand that there are circumstances where TIA payments  
9 could be made.

10          MR. SMOLEV: Well, that's what I mean. That's what I  
11 mean. You make a TIA payment on account and measured --

12          THE COURT: That wasn't my question now. My question  
13 was not -- not when is there ever a circumstance where TIA  
14 could be paid -- payments made under the tax indemnification  
15 agreement. My question is, is there ever an occasion when  
16 stipulated loss value could be paid without an offset, as  
17 provided under every provision of Section 15 that refers to  
18 stipulated loss value?

19          MR. SMOLEV: Yes. Yes. When the indenture trustee  
20 invokes its rights under 15(e) of the lease, demands that stip  
21 loss value gets paid and then sells the aircraft. But I'm  
22 saying on the facts of the restructuring agreements here,  
23 that's not what the parties are doing. They are not exercising  
24 rights under 15(e). They have gone outside the lease, made an  
25 extra contractual deal, and then say, well, this results in a

1 payment of SLV, but it's not SLV, as defined. That's where you  
2 and I are looking at this differently.

3 THE COURT: All right. I think I have it. Anything  
4 final, Mr. Wiles?

5 MR. WILES: No, Your Honor. I'll just note that even  
6 under 15(e), when there's a sale, the proceeds, if there's  
7 already been a payment of SLV, the sale proceeds have to be  
8 paid over to the lessee, so there is an offset, even under  
9 15(e).

10 THE COURT: Yeah. Okay. I understand your argument.  
11 I disagree with it. As I understand the restructuring  
12 agreements, which you say are substantially the same as the  
13 Bingham termsheet, all the restructuring agreements are the  
14 same, substantially, as the Bingham termsheet.

15 As I read the Bingham termsheet, it fundamentally  
16 provides for the payment of stipulated loss value with the  
17 offsets that are not materially different from the offsets that  
18 are provided under every provision, every subdivision of  
19 subsection -- excuse me -- of Section 15 of the lease, that  
20 provides for stipulated loss value under those circumstances,  
21 and I believe that Section 7(c) of the lease agreement here is  
22 applicable. I appreciate your arguments. I may be wrong, but  
23 you'll have to have that resolved on appeal.

24 MR. SMOLEV: Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Smolev.

1           What's next?

2           MR. EDELMAN: Your Honor, Michael Edelman. I'm from  
3 Vedder Price. We represented the SLV claimants on a couple --  
4 on four of the claims under the SLV/TIA Objection No. 1. We  
5 request that a similar order to that entered in with respect to  
6 SLV/TIA Objection No. 2 be entered here. And in particular,  
7 I'm making reference to the prior hearings of the Court, where  
8 this Court expounded upon its reasons why the SLV side of the  
9 claims were not subject to the debtors' objections to those  
10 claims. We suggest that you incorporate into the order the  
11 statements at the hearing -- the hearings on --

12           THE COURT: I'm sorry. I'm just not with you.

13           MR. WILES: I think I know what Mr. Edelman is asking  
14 for, Your Honor, and I will circulate an order and make sure  
15 that the parties sign off on it before we submit it to you.

16           THE COURT: All right. All right.

17           MR. WILES: We have -- the other items on the agenda  
18 today are some motions by the Bank of New York and the ad hoc  
19 committee for immediate allowance and distributions on their  
20 claims, and also our status conference on the TIA issues. You  
21 could toss a coin as to which one of those it makes sense to  
22 take up first. I'll let you decide.

23           THE COURT: Okay. Well, why don't we take up the Bank  
24 of New York motions. Would that be all right?

25           MR. WILES: That would be great.