

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

Case No. 09-11233-reg

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In the Matter of:

CHEMTURA CORPORATION,

Debtor.

- - - - -x

United States Bankruptcy Court  
One Bowling Green  
New York, New York

May 15, 2009

9:50 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

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HEARING re Debtors' Motion for entry of an Order Approving  
Procedures for the Sale, transfer or Abandonment of Non-Core  
Assets.

HEARING re Debtors' Application for Entry of an Order  
Authorizing the Employment and Retention of Duane Morris LLP to  
Provide Conflicts and Other counsel to the Debtors, Nunc Pro  
Tunc to April 13, 2009.

HEARING re Application of the Debtors for an Order Authorizing  
the Employment and Retention of Deloitte Tax LLP as Tax  
Services Provider for the Debtors and Debtors in Possession  
Nunc Pro Tunc to the Petition Date.

HEARING re Debtors' Application for an Order Authorizing the  
Employment and Retention of Ogilvy Renault LLP as Special  
Counsel for the Debtors and Debtors in Possession Nunc Pro tunc  
to the Petition Date.

Transcribed by: Penina Wolicki

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

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ALSO PRESENT:

STUART KOVENSKY, Onex Credit Partners (TELEPHONICALLY)

DOUGLAS MOORHEAD, Commonwealth of Pennsylvania

(TELEPHONICALLY)

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

1  
2 THE COURT: Okay. We're here on Chemtura. I think I  
3 would prefer to deal with the uncontested matters first and  
4 then the issue between American Refining Group and the debtors  
5 vis a vis the Bradford property. When we get to that, I'll  
6 have some questions that I'll want you folks to address as part  
7 of your presentations. Mr. Bruens, are you going to take the  
8 lead on the undisputed stuff?

9 MR. BRUENS: Yes, I will, Your Honor.

10 THE COURT: Sure, come on up, please.

11 MR. BRUENS: Good morning, Your Honor. Craig Bruens  
12 from Kirkland & Ellis on behalf of the debtors. There are  
13 three undisputed retention applications before the Court today.  
14 The first that we have listed on the agenda is the application  
15 of the debtors to retain Duane Morris as special litigation  
16 counsel. If Your Honor recalls, at the last hearing the  
17 retention of Duane Morris was bifurcated because Duane Morris  
18 is also conflicts counsel to the debtors, and prepetition they  
19 had been working on special litigation matters under a  
20 contingency fee arrangement.

21 The committee had requested additional time to review  
22 the contingency arrangement and the debtors had adjourned that  
23 portion of the application to today's hearing. It's my  
24 understanding that the committee does not object now to the  
25 retention under the contingency agreement and that there are no

1 other objections to the retention of Duane Morris to proceed  
2 with that litigation.

3 THE COURT: Okay. Normally, would there be no  
4 objection, I would just approve it on the spot, but if anybody  
5 wants to be heard? Mr. Golden, do you want to be heard in any  
6 way?

7 MR. GOLDEN: Thank you, Your Honor. David Golden,  
8 Akin, Gump, Strauss, Hauer & Feld, counsel for the official  
9 creditors' committee. Mr. Bruens is right. We did request an  
10 additional time to review the reasonableness of the contingent  
11 fee arrangement. We have reviewed it. We've spoken to the  
12 debtors. We've taken into account the experience that Duane  
13 Morris has had in connection with this litigation prepetition,  
14 and have made a determination that we think the proposed  
15 retention, on the basis of the contingent fee arrangement is  
16 reasonable, is appropriate. And as indicated, we have no  
17 further objection to it.

18 THE COURT: Okay. Fair enough. That's approved,  
19 Mr. Bruens. What else you got?

20 MR. BRUENS: Thank you, Your Honor. Second retention  
21 application, is the retention application for Deloitte Tax LLP  
22 as tax service providers. Your Honor, the debtors have already  
23 retained the Genetelli Group as tax service providers, but  
24 Deloitte Tax LLP would provide different services on a more  
25 national level, and with tax services related to the bankruptcy

1 in particular. There were no objections filed to this  
2 application, and we would request the Court approve the  
3 retention of Deloitte Tax, as well.

4 THE COURT: Okay. Any comment? Hearing none, that's  
5 approved as well, Mr. Bruens.

6 MR. BRUENS: Thank you, Your Honor. And I assume,  
7 Your Honor, it would be all right if we hand up orders at the  
8 end of the hearing?

9 THE COURT: It will be all right if you take them  
10 across the hall.

11 MR. BRUENS: Thank you, Your Honor.

12 THE COURT: Okay.

13 MR. BRUENS: The last retention application is the  
14 retention application for Ogilvy Renault, which is a law firm  
15 that is prosecuting a litigation on behalf of the debtors,  
16 which the debtors believe is a significant asset of the estate.  
17 It's litigation against the government of Canada. Prepetition,  
18 the debtors had a retention agreement with Ogilvy where there  
19 was a fee cap and a contingency fee component. The debtors  
20 negotiated a different agreement postpetition where it would be  
21 a straight hourly retention which the debtors believe is  
22 beneficial. Once again, there are no objections to the  
23 retention application. The debtors would request the approval  
24 of the retention of Ogilvy as well.

25 THE COURT: Comment by anybody? None. Granted,

1 Mr. Bruens.

2 MR. BRUENS: Thank you. Your Honor, that brings us to  
3 the contested matter --

4 THE COURT: Okay.

5 MR. BRUENS: -- and we'll proceed at your direction.

6 THE COURT: Fair enough. Is that going to be you,  
7 Mr. Catalanello?

8 MR. BRUENS: No, it's going to be me, Your Honor.

9 THE COURT: Oh, it's going to be you. Forgive me,  
10 Mr. Bruens.

11 MR. BRUENS: That's okay.

12 THE COURT: Okay. And I see Ms. Holleman. Welcome  
13 back.

14 MS. HOLLEMAN: Good morning, Your Honor.

15 THE COURT: I think after my review of the papers, I'm  
16 going to want to hear from you first, Ms. Holleman, and then  
17 I'll hear from Mr. Bruens. I'm going to give you a chance to  
18 reply. Have a seat. Make yourself comfortable. And I'm going  
19 to give him a chance to surreply.

20 When you make your presentations, I want you to focus  
21 on a few questions in particular that I have that seemed to me  
22 to be potentially relevant, either now or down the road, when I  
23 was reading your papers. I would like both sides to focus on  
24 what exactly, with respect to the Bradford property is now  
25 being abandoned, and what property of the debtors or any one of

1 the debtors is still there. I got a sense from reading the  
2 papers that the real estate itself is owned by American  
3 Refining Group, but that there's personal property on the  
4 premises that's owned by one or more of the debtors. But that  
5 seems to me to be potentially pretty important, and I want you  
6 guys to tell me if I'm right or wrong on that. And obviously,  
7 you don't have to be diplomatic.

8 If that is the case, and if, by way of example, there  
9 is personal property that the debtors are keeping, then I need  
10 to know what, if anything, is actually being abandoned, or is  
11 this all about not property at all, but about the debtors  
12 performing an obligation to either the State of Pennsylvania,  
13 to the American Refining Group or both; which, subject to your  
14 rights to be heard, would seem to me to be a matter that I  
15 obviously need to pay attention to, but not necessarily on an  
16 abandonment motion.

17 I was surprised that both sides -- well, in one side,  
18 I think, you, Ms. Holleman, you mentioned the Midlantic case,  
19 but you didn't talk about it in a lot, and I don't think the  
20 debtors talked about it at all. I assume that would be  
21 relevant to the future of this property in some way, but I  
22 don't know if it's relevant now. And that might be why the  
23 debtors didn't talk about it, but I want you guys to tell me  
24 how you see Midlantic bearing on the issue or any matters of  
25 dispute between you, both now and in the future.

1 I assume, subject to your rights to be heard, that if  
2 the Pennsylvania authorities want to obligate the debtors to  
3 continue to perform an ongoing remedial obligation to them,  
4 Pennsylvania may well have that right. But I don't know if  
5 that's relevant today. Also, I am not sure on what the nature  
6 of the obligations going in each direction are between the  
7 debtors and American Refining Group. I can't tell whether the  
8 obligations are solely on the debtors' side, and therefore that  
9 it isn't an executory contract or whether there are some  
10 obligations going back and forth that would make it an  
11 executory contract which might bear on American Refining  
12 Group's rights against the debtor on some other motion or some  
13 other controversy. But I need help in understanding why the  
14 controversy now affects a motion to abandon, when we don't have  
15 an objection from the Pennsylvania Department of Environmental  
16 Protection.

17 And I have one last question. It overlaps with what I  
18 said before. To what extent is the debtor present on the  
19 premises now, or in possession of any part of the premises; the  
20 premises being Bradford or the Bradford vicinity? By the time  
21 you're done, folks, help me with the answers to my questions on  
22 those things.

23 Ms. Holleman, subject to your rights to be heard, it  
24 seems to me that you may have some rights down the road that  
25 you'd be entitled to be heard on, but I'm not sure -- I need

1 your help in understanding why it's relevant to an abandonment  
2 motion now. So come on up. Use the main lectern, please.

3 MS. HOLLEMAN: Thank you, Your Honor. You've raised  
4 very good questions, and I think that -- I'd like to put the  
5 thing in perspective just by explaining what it is that we're  
6 talking about in terms of this particular piece of property.  
7 What we're talking about, essentially, is 4- to 500 acres of  
8 property located in Bradford in the northeastern corner of  
9 Pennsylvania. The fee is owned by my client, American  
10 Refining. It was purchased from a predecessor of Chemtura back  
11 in 1997.

12 It is the oldest continuously operating refinery in  
13 the country. It's been running for about 125 years. It has  
14 been owned by a predecessor of Chemtura since at least as far  
15 back as 1966. I'm not sure before that. It was owned by Whitco  
16 and then by Crompton and then by Chemtura, which I guess was a  
17 name change from Crompton.

18 THE COURT: Whitco and Crompton both being Chemtura  
19 predecessors?

20 MS. HOLLEMAN: Correct. And again, my client acquired  
21 the fee from then I believe it was Whitco, in 1997. Currently  
22 there is a refinery operating on the property that is operated  
23 by my client. My client also has a waste-water treatment plant  
24 located on the property which is for the purpose of treating  
25 anything that comes out of the refinery. So we have a permit

1 to discharge from that waste-water treatment plant any  
2 byproducts that come out of the refining process. So that is  
3 our treatment facility for anything that we're generating  
4 currently. The debtor --

5 THE COURT: Ms. Holleman, you're talking pretty fast.  
6 I want to make sure I'm keeping up with you. Are you saying  
7 that in addition to whatever mess Chemtura may have created  
8 before and which it may have an obligation to clean up, your  
9 guys have to take your own steps to protect against any mess  
10 that your guys are creating?

11 MS. HOLLEMAN: We do. And we are currently, on an  
12 ongoing basis, remediating anything that comes out of our  
13 facility. As far as I know, we are currently in compliance.  
14 There have been, as with any refinery, some minor spills over  
15 the time that we've operated the property. I understand that  
16 they've been in connection with seven isolated storage tanks.  
17 Those issues are being remediated.

18 The issues that the debtor has been dealing with are  
19 issues that relate to contamination of the entire property,  
20 which predates the purchase by our client. It also involves  
21 offsite properties where there's currently remediation ongoing.  
22 And this is -- where we find ourselves today is that even  
23 though my client owns the fee, there is a second waste-water  
24 treatment plant that is located on the facility which is  
25 owned -- the building is owned by Chemtura. And Chemtura is

1 presently in possession of that building which was built around  
2 about, I believe, 2002.

3 The reason that building was constructed was, there  
4 were ongoing obligations of Chemtura growing out of the  
5 purchase whereby they had to remediate what they had left on  
6 the property in the first place. And they were attempting to  
7 do that. However, the existing waste-water treatment plant,  
8 which is owned by my client, was not sufficient to handle that  
9 remediation for a couple of reasons. Partly because that's the  
10 treatment plant for what's coming out of the refinery today, so  
11 it's pretty well maxed out. And the other reason why it was  
12 not sufficient was that our plant does not treat iron  
13 precipitate, because that's not currently generated by our  
14 process.

15 THE COURT: Pause, please. The obligation by Chemtura  
16 to clean up, remediate, as a consequence of Chemtura's  
17 ownership before the sale, was that written into the purchase  
18 agreement around 1997?

19 MS. HOLLEMAN: It's written into an ancillary  
20 agreement that was entered into around about the same time as  
21 the purchase agreement. There is a couple of agreements that  
22 involve these parties, and that might be the source of what  
23 appears to be some confusion, perhaps, in the papers. There is  
24 an environmental agreement that was entered into about the end  
25 of 1996, which is roughly contemporaneous with the purchase, in

1 anticipation of the purchase.

2 THE COURT: Is that the ancillary agreement you were  
3 just talking about?

4 MS. HOLLEMAN: Yes, Your Honor.

5 THE COURT: Go on, please.

6 MS. HOLLEMAN: There was also a service agreement  
7 which was entered into, I believe in 2002, which was entered  
8 into in contemplation of a consent order that was in  
9 negotiation with the State of Pennsylvania. And the services  
10 agreement is probably fairly defined as an executory contract  
11 between the parties, which speaks to various aspects where it  
12 confirms license rights that Chemtura has to be on American  
13 Refining's land. It talks about some payments that American  
14 Refining will receive from Chemtura for use of its utilities.  
15 So there are some standard provisions that involve ongoing debt  
16 that's owed by the debtor to American Refining. So that is a  
17 second agreement between the parties.

18 THE COURT: What obligations are there on the part of  
19 American Refining back in the direction of Chemtura other than  
20 a license that allows Chemtura guys to be on the land to do the  
21 remediation that's necessary?

22 MS. HOLLEMAN: Making available certain facilities,  
23 utilities.

24 THE COURT: Um-hum. Okay. Continue, please.

25 MS. HOLLEMAN: I think most germane for our purposes

1 today, Your Honor, is the consent order and agreement that was  
2 entered into in 2004. And I notice, I didn't have a chance to  
3 read the debtors' reply until this morning. It was sent to me  
4 after hours last night and I was at our annual bench meets bar  
5 event. But looking at it this morning, I see that the debtors'  
6 reply doesn't talk about that. We do mention it in our papers.  
7 And this is really what's germane to the point.

8           The State of Pennsylvania, after an investigation,  
9 essentially came to terms, made findings that were accepted by  
10 both Chemtura and American Refining, and entered into a consent  
11 order and agreement pursuant to, I understand, it's Act II of  
12 the Pennsylvania Voluntary Cleanup Program laws, that obligated  
13 Chemtura and American Refining to do certain things. There are  
14 monetary provisions in that consent order but -- for example,  
15 if there are discharges, unpermitted discharges, or if there  
16 are failures to comply with the order, there are certain fines  
17 that can be assessed by the state. But that is by no means the  
18 end of the story. And payment of any such fines or penalties  
19 does not in any way discharge any obligations that the parties  
20 have under the consent order.

21           The consent order was entered into by and with the  
22 State of Pennsylvania by authority of the DEP's authority under  
23 Pennsylvania law. Among other things, the Clean Water Act and  
24 other various Pennsylvania Clean Air and Clean Water statutes.  
25 And that consent order essentially is Pennsylvania law.

1           THE COURT: Pause, please. If the consent order is in  
2 the package, I missed it. I didn't see it. But I've seen  
3 other types of environmental consent orders and they provide  
4 that you've got to do stuff and that if you don't do stuff, in  
5 addition to whatever injunctive rights the environmental agency  
6 might have, you may have to pay fines or penalties. Is that  
7 essentially what this consent order provides?

8           MS. HOLLEMAN: Yes, Your Honor.

9           THE COURT: All right. Continue, please.

10          MS. HOLLEMAN: Those remedies are cumulative under the  
11 consent order and neither precludes the other for the State of  
12 Pennsylvania. The property itself today, I mentioned it's -- I  
13 don't know the exact acreage, but it's between 4- and 500  
14 acres. It is essentially an oil-soaked sponge sitting along  
15 the Tunungant Creek, called Tuna Creek. Tuna Creek is  
16 currently classified as being in condition to be potable  
17 drinking water. It's for recreation, warm water fish. In  
18 other words, this creek today is in good shape. The oil is in  
19 the land adjacent to the creek.

20                 What the debtor possesses on the property, going back  
21 to one of your questions, Your Honor, is not only do they own  
22 one of the buildings that sitting on our fee, but they also own  
23 a series of call it a hundred wells that are sitting on the  
24 property which are interlinked with a series of piping and have  
25 pumps with each well. Some of the wells are typical vertical

1 types of wells. Others are very large horizontal wells that  
2 run under the ground. And the wells, every day, are in the  
3 process of collecting the oil that's in the ground. The wells  
4 have to be pumped on a daily basis. What happens then is when  
5 the oil is pumped out of the ground it goes through the series  
6 of pipes and it is routed into Chemtura's waste-water treatment  
7 plan. Chemtura has a permit from the State of Pennsylvania to  
8 discharge from that plant into Tuna Creek.

9 THE COURT: What is Chemtura's waste treatment  
10 facility? Is that like a separate building or is it machinery,  
11 or what?

12 MS. HOLLEMAN: It is a separate building. And it  
13 is --

14 THE COURT: So that's a second building that Chemtura  
15 owns?

16 MS. HOLLEMAN: Yes, Your Honor. Chemtura owns the  
17 building and they have license rights to come onto American  
18 Refining's property --

19 THE COURT: And the underlying idea is that the wells  
20 suck up oil out of the ground so it doesn't get to be like a  
21 damper sponge, and that prevents the oil in the ground from  
22 getting into the stream or the brook or whatever you called  
23 that thing next to it?

24 MS. HOLLEMAN: If the wells were to stop being pumped  
25 for a day or two, there would -- as I understand it from our

1 environmental folks, would be a sheen of oil on Tuna Creek. So  
2 currently, the land is contaminated but the land is not. If  
3 there is any cessation of remediation activities at the site,  
4 there will be oil in the water.

5 American Refining's plant cannot deal with treating  
6 this contaminant. They could make some remedial efforts.  
7 That's what was done prior to 2002, before this new plant was  
8 built. But the very reason the plant was built was that  
9 American Refining's equipment wasn't sufficient to cope with  
10 it, in particular, again, because it can't remove the iron  
11 precipitate, which is one of the contaminants in the water, and  
12 also simply because it's maxed out dealing with what it has  
13 already.

14 We are currently in a situation where we do not have a  
15 license to discharge from the Chemtura plant into Tuna Creek.  
16 So that even if the debtors were to walk offsite and say Merry  
17 Christmas; this is yours; walk in, it's magically not a stay  
18 violation; do whatever you want, American Refining; we do not  
19 have authority to operate that plant and discharge water into  
20 the creek.

21 THE COURT: Pause again, please, Ms. Holleman. If I  
22 read their reply right, they said they said -- Chemtura's  
23 saying, they'd be happy to work with you to give you the rights  
24 to either transfer the license or operate under their license  
25 and to make some deal with you that recognizes that by you

1 using their equipment, it isn't a violation of the stay. That  
2 may have only been in their reply, which you didn't have much  
3 of an opportunity to see. But I would have thought that that  
4 dialogue had taken place before they filed their reply.

5 MS. HOLLEMAN: The difficulty, Your Honor, in part is,  
6 that they can promise anything they want, but they can't force  
7 the State of Pennsylvania to go along with the deal. And the  
8 State of Pennsylvania blessed this arrangement in the first  
9 place for the consent order, as we understand it, with the  
10 understanding that Chemtura was essentially the 300-pound  
11 gorilla who was going to be counted on to perform; and that but  
12 for Chemtura's involvement, the state wouldn't have signed off.

13 The state is not happy with Chemtura walking away.  
14 I'm a bit surprised to see the debtors, in their reply papers,  
15 attempting to apparently make quite a point of saying that  
16 well, why should anyone be troubled, because obviously the  
17 state is not. Well, I'm aware of a bit of the history of this  
18 discussion, Your Honor, from having been involved in one end of  
19 it myself. And I know that when discussions were ongoing with  
20 regards to revising this form of order, the State of  
21 Pennsylvania did not understand that what the debtors really  
22 meant by negotiating this so-called procedures order for  
23 abandonment was well, of course, this is not going to govern  
24 our physical abandonment of the site, it's only going to apply  
25 if somehow we don't claim title to the property anymore.

1           The state did not understand that. When the state was  
2 made aware of it, they became very unhappy. And we know that  
3 they had follow-on communications with the debtor subsequent to  
4 which the debtor announced that it was willing to stay for an  
5 additional thirty days.

6           I also notice in the papers that the debtors, as they  
7 have done before, have made quite a point of asserting that  
8 they have given notice as early as April 16th, and that why are  
9 people complaining. Well, I suppose I'd have two responses to  
10 that. First of all, I'm not sure what we got notice of. What  
11 they said in their original notice was that they would cease  
12 performance unless and until they decided whether or not it was  
13 beneficial to the estate to continue to do that. When the  
14 State of Pennsylvania saw that letter, they sent a response  
15 back, and they said we don't know what you mean by that, but we  
16 don't want you to walk away. We will go into Pennsylvania  
17 court and stop you if you try. And we want a meeting with you.

18           The debtors ignored that letter. Perhaps they've  
19 responded to it last night. But I have not seen that. And as  
20 far as I know, when last I had contact with the state, they had  
21 not seen it either. So the State of Pennsylvania was going  
22 under the assumption that when they were negotiating  
23 abandonment procedures, that walking away and leaving property  
24 never again to return, property that was owned by the debtors  
25 and that has been continuously operated by the debtors, the new

1 plants too, but the remainder of the property, for upwards of a  
2 dozen years or more; they were not expecting that the response  
3 was going to be, well, this is not a technical abandonment, so  
4 this doesn't count.

5 There will be a very nontechnical sheen in the water  
6 if they simply choose to walk away. And I think that given the  
7 implications to public health and safety, given that American  
8 Refining can't fix it, that this is something that requires  
9 more consideration, Your Honor, than a procedures motion  
10 warrants. And we agree with the debtors that there is no such  
11 thing as an informal abandonment. But that's why this whole  
12 thing is so problematic. If they intend to keep the property,  
13 if they really haven't made a decision that this is burdensome  
14 and inconsequential and of no value to the estate, if they  
15 don't know yet, then they have to operate the way a debtor  
16 operates its property under 959(b). They have to operate it in  
17 accordance with law.

18 If they really haven't decided, and they need more  
19 time to make up their minds, they need to keep on doing what  
20 they're doing. And then when the time comes that they've  
21 decided that it's burdensome to the estate, then fine, let them  
22 make their motion to abandon, and let them bear the burden of  
23 having to prove why this is not an immediate risk of public  
24 harm that will arise from them walking away.

25 THE COURT: Ms. Holleman, you answered a lot of my

1 questions, but you didn't deal with your perception. This is a  
2 question that maybe Mr. Bruens would answer better. But I need  
3 to know your perception, because you're objecting. What is it  
4 that you understand the debtors are abandoning now or would if  
5 I approved it, as relevant to the Bradford property.

6 MS. HOLLEMAN: What I understand them to mean is that  
7 they intend to keep title to everything, and so properly  
8 speaking, it is not an abandonment. However, come -- now I  
9 guess it's not Monday morning, but come thirty days from Monday  
10 morning, no one will show up at the facility. No one will  
11 operate the wells. There will be pipes that are hooked up to a  
12 waste-water treatment plant that is dead, and they will not  
13 operate it.

14 THE COURT: Okay. Now, we're all citizens of the  
15 United States, and nobody wants to pollute anything. But if we  
16 talk about your particular needs and concerns, if I hear you  
17 right, you're not really talking so much about abandonment as  
18 you're talking about the failure to comply with -- is it 929?  
19 I forgot the number -- the section that isn't in the Bankruptcy  
20 Code, but is in, I think, the Judicial Code or somewhere?

21 MS. HOLLEMAN: Yes, Your Honor.

22 THE COURT: That says you've got to comply with  
23 existing law when you're a debtor. And also, whatever rights  
24 you have under one or more of your agreements. Am I right?

25 MS. HOLLEMAN: Well, Your Honor, I'm not speaking to

1 any executory contract issues today. We may well have claims.  
2 I'm not here talking about that. What I'm talking about is the  
3 untenable legal position that we're going to be put in if they  
4 somehow to manage to achieve the effect of an abandonment  
5 without having to comply with the requirements to abandon. If  
6 they don't want to abandon, they need to continue to operate.  
7 And the section is 28 U.S.C. 959(b).

8 THE COURT: 959(b), excuse me.

9 MS. HOLLEMAN: 959(b), which provides that: "The  
10 debtor shall manage and operate the property in its possession  
11 according to the requirements of the valid laws of the state in  
12 which the property is situated."

13 THE COURT: I understand. But my job is to figure out  
14 the issues that are before me in the narrowest sense, and then  
15 in the broader sense to try to anticipate problems down the  
16 road so I'm managing the cases on my watch in a sensible way.  
17 I'm listening to what you're saying and I certainly understand  
18 why you think there either is now or more likely shortly would  
19 be a 959 violation. And I think I hear you saying that you got  
20 contractual rights that give you the standing to be here in  
21 court to complain about a breach of contract, leaving for  
22 another day whether it's an executory contract that gives you  
23 admin entitlements or a prepetition obligation that gives you a  
24 prepetition claim. But I need you to come back and help me tie  
25 your concerns, which I certainly regard as reasonable concerns,

1 to the issue before me today.

2           Whether or not they're allowed to abandon, if I find  
3 something that's being abandoned, and I'm still not sure  
4 whether anything's being abandoned today vis a vis Bradford.  
5 So that's where I -- I think you said a moment ago that it is  
6 not now an abandonment. So I guess the question that I'm  
7 asking is, is it appropriate for me to consider that the  
8 Bradford situation doesn't impair the motion and give you a  
9 full reservation of rights on 959 issues, executory contract  
10 issues, and perhaps most importantly, give a reservation of  
11 rights to the entity that isn't here, which is the Pennsylvania  
12 DEP?

13           MS. HOLLEMAN: I think, Your Honor, that when a debtor  
14 proposes to walk away from its property never to return, and we  
15 know that they're not, that that is, for all intents and  
16 purposes, an abandonment. It's the same as an abandonment.  
17 And yet they have -- if they try to define abandonment for  
18 purposes of this motion as if to say well, before -- the Court  
19 may hear this before parties in interest are entitled to notice  
20 that is specific to what the debtor intends to do, that it's  
21 definitive, and gives us the right to a hearing. If they can  
22 bypass that by defining abandonment in a narrow way, then  
23 they've essentially gutted the provision.

24           They're never coming back to this property once  
25 they're gone. They are simply walking away. I don't

1 understand, Your Honor, why, if that's their intention, they  
2 don't lay their cards on the table and say this is burdensome  
3 and of no value to the estate, unless it is simply that they  
4 don't want to have the burden of showing why they have a right  
5 to abandon this property.

6 THE COURT: Are you saying, in substance, that they're  
7 de facto abandoning the two buildings and the pipes and the  
8 wells, but they're not really -- but they're not facing up to  
9 that, and that if they didn't, it would create a Midlantic  
10 problem?

11 MS. HOLLEMAN: Yes, Your Honor. Under Midlantic, the  
12 underlying rationale for Midlantic, I submit, is as follows,  
13 apart from the statutory construction issue. The Court said:  
14 "Congress has repeatedly expressed its legislative  
15 determination that the trustee is not to have carte blanche to  
16 ignore nonbankruptcy law." The debtors here are attempting to  
17 treat the issue of abandonment as if it were merely a matter of  
18 reservation of title. We know, in any other context in which  
19 we look at law, from the standpoint of legal and equitable  
20 concerns, that mere title is the least of our concerns  
21 ,generally.

22 I just finished teaching a course in Article II, Your  
23 Honor, and one of the first things I explained to my class was  
24 how Carl Wellon (ph.) felt about the mechanics of title alone  
25 being the determinant about key issues between business people.

1 These debtors are saying that because they have not technically  
2 made a determination that they will "abandon", within the  
3 meaning of 554, even though everything they have said in their  
4 papers is carefully couched to avoid the word abandon or to  
5 avoid the word burdensome, that's what they're saying. They're  
6 saying this property is burdensome and it's of no value to the  
7 estate. We are walking away and we will never come back.

8 It walks like a duck. It quacks like a duck. But by  
9 not describing it as a duck, they avoid -- they cleverly shift  
10 the burden to the other side to have to somehow come forward  
11 and be the moving party to somehow compel them to perform the  
12 obligations that they are statutorily required to perform in  
13 the first place.

14 THE COURT: I understand. Now, the question I have  
15 is, is the argument you're talking about a matter as to which  
16 your argument should be made by the DEP, or is there case law  
17 or basis in logic for me to determine that you have standing on  
18 that issue as well?

19 MS. HOLLEMAN: With regards to the standing issue,  
20 Your Honor, I believe that as a party-in-interest in the case,  
21 that we are entitled to speak on a contested matter that  
22 relates to abandonment.

23 THE COURT: Yes, but that's a play on words,  
24 Ms. Holleman. The problem is, I have this all the time when  
25 unsecured creditors sue banks and they need to get an STN order

1 in the banks who, as you can expect, don't want to be sued, say  
2 that they've got 1109 rights on the STN motion when their --  
3 1109 is to protect the folks who have a stake in the  
4 controversy or in the estate's assets, in the estate's race,  
5 from being prejudiced by the debtor's poor management of it; or  
6 to have a say in the discretionary calls that affect people's  
7 recoveries. 1109 doesn't distinguish between people who are  
8 acting adversely to everybody else in the estate and people who  
9 have the interest I just described.

10 But you're like one of the banks who doesn't want to  
11 be sued under an STN order and comes in with your 1109 status.  
12 Technically, you have 1109 status, but the question that I've  
13 got to ask is the same one that I put in a footnote when I  
14 dealt with an STN or a house graft -- I think it was a house  
15 graft decision, which is: When somebody who doesn't want to be  
16 sued says I have a right to be arguing that you shouldn't sue  
17 me, you've got to take the invocation of the 1109 status with a  
18 grain of salt.

19 MS. HOLLEMAN: Well, I suppose I'd respond in two ways  
20 to that, Your Honor. First of all, is that the Pennsylvania  
21 DEP is not likely to be here, because the debtors persuaded  
22 them not to file anything for thirty days, with the assurance  
23 that they would remain on the property for thirty days.

24 THE COURT: And I can assume that the debtors are  
25 continuing to remediate for those thirty days?

1 MS. HOLLEMAN: That's my understanding, Your Honor. I  
2 haven't heard that they've left. But the DEP is not under the  
3 impression that it is a sure thing that the debtors are walking  
4 away after thirty days. That's --

5 THE COURT: And you fear that it is a sure thing that  
6 they're going to walk away. Otherwise, you'd be happy to let  
7 the DEP carry the water for both of you?

8 MS. HOLLEMAN: I suspect, Your Honor, that the thirty  
9 days will be put to good use in preparing a brief that will be  
10 ultimately filed in Pennsylvania. But I think that --

11 THE COURT: By both sides, presumably?

12 MS. HOLLEMAN: I don't think that currently, although  
13 I can't speak for them, but I doubt that the Department of  
14 Environmental Protection in Pennsylvania is briefing. I  
15 suspect they are preparing for a meeting that they are hoping  
16 will produce a good result and that the debtors will agree to  
17 continue to remediate at the site, because the debtors have  
18 continuously given them to believe that they are going to be  
19 cooperative and they are going to talk to them.

20 And so, by having given them those assurances without  
21 having given them any clear notice that they are walking away  
22 on a date certain, they have induced the state not to file  
23 anything. Then the debtors can turn around and say well, the  
24 party who ought to be speaking is not here and so obviously  
25 there is no one to be heard. We are in the situation where we

1 are not simply saying we do not want to be sued. But we are  
2 saying that it is our property and our land, and we are sitting  
3 next to that creek. And we do not have the capacity nor are we  
4 allowed to use their property without the state's sign-off, in  
5 order to fix this problem. So we are being put in an untenable  
6 legal position that involves our land and our obligations going  
7 forward. I'm not talking about damages or claims.

8 THE COURT: All right. Continue, please.

9 MS. HOLLEMAN: Well, that's essentially, I believe,  
10 the gist of my presentation, Your Honor. I'm just looking to  
11 see whether I responded to all of your questions.

12 Again, Your Honor, I guess all that I can say is, we  
13 are dealing with a situation now where there is contamination,  
14 but it is contained. If the debtors are allowed to walk off  
15 the property, which looks for all the world like an  
16 abandonment, they ought to have to conform to the legal  
17 standards of an abandonment. By not doing so, they are  
18 essentially trying to set up a two-step process whereby they're  
19 eventually going to be able to walk away and say now they have  
20 no possession or control of the site.

21 Perhaps they think that all American Refining is doing  
22 is trying to agitate for an administrative expense claim. I  
23 won't deny that we might not consider an expense claim going  
24 forward. I don't know what's going to happen in the future.  
25 But we're sitting here with a problem today or a problem that

1 will happen thirty days from now, since they've agreed that  
2 they're going to stay for another thirty days, where there's  
3 going to be oil in the water. And we aren't in a position to  
4 be able to be a corrective to that problem. And we know that  
5 because a new treatment plant that we don't own was built in  
6 2002 specifically for that purpose.

7 So we're in a quandary, Your Honor. And by allowing  
8 them to walk around the normal procedures for a true Section  
9 554 abandonment, they are depriving Your Honor of the  
10 opportunity and us of the opportunity to fully brief this  
11 matter and put it before the Court before they do something  
12 that can't be fixed.

13 THE COURT: Okay.

14 MS. HOLLEMAN: Thank you.

15 THE COURT: Thank you. Mr. Bruens, I'll hear from  
16 you. Mr. Bruens, I want your responses to the same questions  
17 that I asked. And I'm sure you were listening to the questions  
18 I was asking of Ms. Holleman. I'm not sure if what we have now  
19 is the proper mechanism for addressing the underlying concerns.  
20 And there's an issue of ripeness. And there are issues as to  
21 who appropriately should take responsibility for things. But  
22 I'll be damned if I'll permit oil to get into the water on my  
23 watch. So if we're not going to deal with it today, you'd  
24 better tell me what your game plan is for ensuring that that  
25 doesn't happen.

1 MR. BRUENS: Yes, Your Honor.

2 THE COURT: Go ahead.

3 MR. BRUENS: The first thing I would like to say is we  
4 believe that there is a distinct difference between the motion  
5 that's on the table today, which is to approve procedures for  
6 the disposition of non-core assets and ARG's objection to the  
7 motion which is really interpretive of those procedures,  
8 because we have made clear through the request of ARG and  
9 Pennsylvania, among others, that abandonment -- that the  
10 procedures that we're proposing apply to abandonment.

11 So the question really is, what is abandonment? And  
12 ARG has requested that we define abandonment to constitute  
13 something other than what the law defines abandonment as, and  
14 that is that they believe that conduct constitutes abandonment  
15 right now with regard to our decision to cease remediation at a  
16 site. We don't believe that's correct. As Your Honor had  
17 noted, what exactly now is being abandoned, under the motion,  
18 nothing is being abandoned right now. And right now, even  
19 through the letters that were happening outside of the context  
20 of the motion, the decision to cease remediation at a site,  
21 discontinue use of certain property of the estate, does not  
22 constitute abandonment.

23 It is the debtors' position that we would still own  
24 that property and we could dispose of that property for value,  
25 possibly to ARG as well. So we don't believe simple

1 discontinued use of property, the same as if we'd discontinued  
2 use of equipment, would mean that we'd no longer have the  
3 ability to dispose of that equipment or property -- personal  
4 property for value.

5 So you are correct -- it was stated already what  
6 property is there still there. There is a building, we  
7 understand, and there is personal property at the site --

8 THE COURT: I gather there are two buildings?

9 MR. BRUENS: I'm a little unclear --

10 THE COURT: There is a remediation building and a  
11 separate building?

12 MR. BRUENS: I was unclear as to whether that was one  
13 and the same, to tell you the truth.

14 THE COURT: Okay. So there are one or two buildings  
15 and there are wells and there are pipes. And to that extent,  
16 you agree with her?

17 MR. BRUENS: Your Honor, to tell you the truth, we're  
18 not in a position to argue the specific facts of what is or  
19 isn't there, because we don't believe a full evidentiary record  
20 has been set forth. And in the context of the procedural  
21 motion, we didn't think it appropriate to address the specific  
22 application of the procedures in the sort of a sideways fashion  
23 that they're coming up. But one of the things that we're doing  
24 is we're meeting with Pennsylvania and the United States  
25 government on behalf of the EPA in the next several weeks to

1 engage in a strategy overall to determine how best to  
2 transition what the debtors believe are prepetition obligations  
3 under consent orders or other executory contracts, so that  
4 there is no harm to the environment. And we're trying to  
5 minimize the potential that that can happen.

6 We believe that it's appropriate to engage in this  
7 constructive process with the government authorities, and  
8 that's why through negotiations with PA-DEP earlier this week,  
9 when there was a dispute as to whether the debtors would  
10 continue remediation and if ARG was in position to take over or  
11 whether there would be oil in the creek, the debtors agreed to  
12 continue for thirty days, the status quo, so that we could meet  
13 with PA-DEP and discuss the nature of the continuing  
14 obligation, if any.

15 PA-DEP has taken the position that those are  
16 prepetition discharges, or that those are nondischargeable  
17 claims. It's safe to say the debtors disagree with that  
18 position. We think all of those matters are something for  
19 another day, because nothing is being abandoned now, and the  
20 debtors are continuing the status quo at the site.

21 I'm just looking through your other questions, Your  
22 Honor. With regard to the Midlantic case, we agree that it may  
23 be relevant down the road to the extent there is an  
24 abandonment.

25 THE COURT: Twenty-nine days down the road, isn't it?

1 MR. BRUENS: Possibly. But we also don't believe that  
2 it would prohibit the disposition of property that is not  
3 contaminated. The Midlantic case, under the facts of that  
4 case, the debtor was seeking to dispose of, I believe, real  
5 property that was contaminated and oil jugs that were  
6 contaminated. Here, the debtors are simply performing services  
7 at a site. There's -- none of the debtors' property is the  
8 subject of contamination. It's a clean-up, and it's an  
9 obligation. And the question may be one day, I think Your  
10 Honor will probably hear more about this in the future, what is  
11 the nature of that obligation and is it a prepetition claim?  
12 Again, not for purposes of today.

13 I mean, to the extent that ARG has raised the concerns  
14 that it has in its response, we tried to address them. And  
15 we've offered to work constructively to minimize danger to the  
16 environment. It would be our goal to meet with PA-DEP,  
17 possibly negotiating an assignment of the license that's been  
18 referred to, and to try to accomplish an orderly transition.

19 It's our understanding, too, that when we say that the  
20 debtors are on site, the debtors employ a consultant who can  
21 easily be employed by anyone else at the site. It's not the  
22 debtors' own personnel.

23 THE COURT: The consultant operates with debtor  
24 equipment?

25 MR. BRUENS: Operates the debtors' equipment, that's

1 correct.

2 THE COURT: Continue.

3 MR. BRUENS: So, Your Honor, we believe that it's  
4 really two distinct matters, to tell you the truth. That it's  
5 obviously something that we have to be aware of. And we're  
6 working with the appropriate governmental authorities as to the  
7 condition of the property and ongoing obligations. And it may  
8 be before this Court in the future if we need to determine  
9 whether those obligations are dischargeable claims or not. But  
10 in the context of the motion today, which is simply to set up  
11 procedures, which we all agree abandonment will apply to, we  
12 don't believe it's appropriate to define what that abandonment  
13 is on a case-specific instance without a full record. And  
14 therefore we would ask that the procedures motion be granted.

15 I'm happy to try to address additional questions.  
16 With regard to the obligations of the contracts between the  
17 parties, we're still evaluating whether the ARG contracts are  
18 executory or not. To the extent they are executory, we will  
19 file a motion to reject on notice to ARG, in which case we  
20 assume that the standard would be the business judgment. We're  
21 also working with the creditors' committee to make sure that  
22 they understand the debtors' business judgment and the  
23 ramifications that could occur with regard to a rejection of a  
24 contract. We would take that into account.

25 THE COURT: Okay. Anything else?

1 MR. BRUENS: Your Honor, unless you have further  
2 questions for the debtors, we'd rather rest on the papers that  
3 have been filed and the fact that this is simply a procedural  
4 motion to set up procedures for the disposition of non-core  
5 assets. I would note too, I don't know if Your Honor has read  
6 the black-line of the order, at the request of the creditors'  
7 committee, we removed a de minimis procedure that was in place  
8 where actions could have been taken to dispose of assets with  
9 no notice to parties.

10 So the order covers the disposition or abandonment of  
11 assets. And we, at the request of ARG, to the extent that we  
12 decide to abandon property, they are listed as a noticed party.  
13 And the issue once again comes down to whether ceasing to  
14 remediate is abandonment. And we believe that's an issue for  
15 another day.

16 THE COURT: Okay. Ms. Holleman, I'm going to give you  
17 a chance to reply. But before you do, I want to give  
18 Mr. Golden a chance to weigh in if he wants to.

19 MR. GOLDEN: Thank you, Your Honor. Sitting in the  
20 courtroom listening to both counsel for ARG and debtors'  
21 counsel, you have to wonder what's the dispute. Your Honor  
22 came on the bench and asked some very insightful questions to  
23 which I don't think there is really a dispute. I think the  
24 parties have indicated what property at the site belongs to ARG  
25 and what property belongs to the debtors. I don't think

1 anybody's really disputing that at this instance, no property  
2 at the site that is owned by the debtors is being abandoned.

3 I think it's pretty clear that ARG is trying to get a  
4 litigation or strategic advantage in the event it is ultimately  
5 determined by the debtors in their business judgment that they  
6 want to stop remediating at the site as they are currently  
7 required to do under the consent decree. Now that's obviously  
8 a big if. There's going to have to be discussions with the  
9 Pennsylvania EPA, possibly the federal EPA. There will be  
10 negotiations with those parties. There'll be discussions  
11 between the debtors and the creditors' committee as to what  
12 makes the most economic sense for the debtors and the debtors'  
13 estate.

14 The debtors, I believe, are fully aware of its  
15 obligations under both the Bankruptcy Code and the Federal Code  
16 as to how to operate within compliance. And it ultimately --  
17 it's going to come down to a determination whether the  
18 obligations of the debtors under the consent decree are  
19 dischargeable or not. I think what's very clear here, but not  
20 being said is, ARG is frankly concerned, and I think they have  
21 a right to be concerned, that if it is ultimately determined by  
22 the debtors to walk away from their remediation obligations,  
23 that they are going to have to pick up those obligations,  
24 because they are the fee owner at the site. Counsel for ARG  
25 says they can't do that because they don't have the permit from

1 the EPA.

2 THE COURT: Well, that's the kind of thing that can be  
3 resolved in about a fifteen-minute conference, I assume?

4 MR. GOLDEN: Absolutely, Your Honor. So I think this  
5 is an indirect attempt by ARG, in the context of objecting to a  
6 procedures motion, to say we don't want to get stuck with a  
7 monetary obligation going forward with respect to the  
8 mediation. But that dispute is not before you, Your Honor.

9 I think Your Honor recognized that fact when it got on  
10 the bench and asked the question: what is it about this motion  
11 that generates a controversy today. And I think the answer to  
12 that is nothing. The debtors have been very straight with ARG  
13 in saying they are considering discontinuing their remediation  
14 obligations. They haven't done it in the dark of night. And  
15 that's what's generating the anxiety on the part of ARG. But  
16 that doesn't make it a controversy that's ripe in connection  
17 with the motion that's on the table today.

18 Let's not forget, nothing is being sought to be  
19 abandoned today. All that's being asked of this Court is to  
20 approve procedures should the debtors ultimately determine or  
21 subsequently determine to abandon any or all of its assets. So  
22 I think Your Honor kind of understood what was going on right  
23 from the beginning. There is obviously going to have to be  
24 more conversations between the parties. The debtors are  
25 certainly going to have to satisfy the EPA and possibly the

1 federal EPA -- the State of Pennsylvania EPA and possibly the  
2 federal EPA if it wants to discontinue its obligations.

3 It's going to have to convince the committee, frankly,  
4 that it has the ability to stop remediating without incurring  
5 penalties or administrative expenses. But as I said, that's  
6 all for a later date. Now, that later day may come relatively  
7 quickly. It may be three weeks, four weeks, or months away.  
8 But it's not today. So I don't frankly understand why we're  
9 having this dispute other than an attempt by ARG to position  
10 their position in a subsequent controversy. And frankly I  
11 don't think that's an appropriate response. Thank you, Your  
12 Honor.

13 THE COURT: Thank you. Ms. Holleman -- or excuse me?

14 MR. SCHWARTZ: Matthew Schwartz from the U.S.  
15 Attorney's Office. If I could be heard?

16 THE COURT: Oh, okay. I didn't know you were  
17 appearing. I'm sorry. Can I get your name again, please, sir  
18 when you come up to the microphone.

19 MR. SCHWARTZ: Matthew Schwartz from the U.S.  
20 Attorney's Office. Our interest in this case, Your Honor, is  
21 primarily on behalf of environmental regulators, the EPA, the  
22 Interior Department, the Agriculture Department, the Commerce  
23 Department, and the Nuclear Regulatory Commission. If you've  
24 read the debtors' first day papers, you know that they have  
25 significant environmental liabilities and they are responsible

1 for -- and I'll think we'll have a dispute as to what  
2 responsible means -- but they're responsible for remediation at  
3 hundreds of sites throughout the country. With particular  
4 respect to this site, my understanding is that this is a so-  
5 called RCRA site, where the enforcement is state led, but under  
6 federal statutes and under EPA auspices as well.

7 I think that I agree both with all of the things that  
8 you said when you got on the bench, which is that primarily  
9 there is not a dispute here, and also with most of the things  
10 that are in the objections filed by ARG, in particular the  
11 debtors cannot walk away from contaminated property. They  
12 cannot abandon it. They cannot ignore their injunctive  
13 obligations, either under 959(b), which incorporates state  
14 environmental law, or under consent decrees or administrative  
15 orders on consent.

16 But I also agree that this is largely a procedural  
17 motion that speaks to the process for when the debtor chooses  
18 to abandon property. We worked with the debtors on the  
19 language in this motion. You see that my office is now a  
20 noticed party. They have, in the notice that is being provided  
21 to all the noticed parties, now added whether there is a known  
22 contamination on the property. And they inserted, most  
23 importantly, if you look at the red-line, in paragraph 20,  
24 language saying that "environmental authorities would be able  
25 to continue to enforce their police and regulatory powers at

1 contaminated sites and that the debtors were not permitted,  
2 pursuant to Midlantic, to abandon contaminated property."

3 And so the question, I think as we sort of all agree,  
4 is what does it mean in this context to abandon property. And  
5 I think we also all sort of agree in a technical sense, that  
6 turning off equipment that you own without giving up title to  
7 the equipment, doesn't constitute abandonment in the most  
8 literal sense. At the same time, I think there's an argument  
9 to be had that where a debtor is operating under a consent  
10 decree or an administrative order, there are obligations that  
11 are essentially the same thing as ownership obligations that  
12 are associated with continuing remediation obligations.

13 THE COURT: By which the mechanisms to enforce those  
14 would be seeking 959 relief and/or taking advantage of the  
15 governmental rights under 362(b)(4).

16 MR. SCHWARTZ: I think that's largely correct. And  
17 that's why you saw in the papers that Pennsylvania was  
18 preparing to file something. And because of an agreement that  
19 was reached with the debtors that has them continuing to do  
20 work for the next thirty days, Pennsylvania has held off. And  
21 again --

22 THE COURT: Pause, please.

23 MR. SCHWARTZ: Yes.

24 THE COURT: Of course, if you're talking 362(b)(4),  
25 that would be a right that you would have and Pennsylvania

1 would have, but where I'd have more difficulty seeing how a  
2 private litigant would have those?

3 MR. SCHWARTZ: That may be so. That may be so. And  
4 the enforcement powers, particularly with respect to consent  
5 decrees and administrative orders, would be the regulating  
6 authorities. And I can't speak for Pennsylvania, but the  
7 United States government, I think, is not nearly as optimistic  
8 as ARG's counsel paints the authorities in terms of the  
9 debtors' willingness to continue to work.

10 I have no doubt that there will come a day when they  
11 will tell us we are going to stop doing work at certain sites,  
12 and we will have to either resolve that with them or we're  
13 going to have to tee that up for a decision by the appropriate  
14 tribunal. But none of that is here today. All that's here  
15 today is a sales and abandonment procedures motion that doesn't  
16 allow them to abandon property that's contaminated. So if we  
17 can come to some understanding that reserves everyone's rights  
18 on these issues, there's no reason not to grant the relief  
19 that's recorded by the debtor.

20 And so sitting here and listening to all the  
21 arguments, it seems to me pretty clear that if the debtors  
22 would simply provide notice to the environmental authorities  
23 before they shut off the pumps at this site and other sites,  
24 that would take care of all the problems. And from my informal  
25 conversations with the debtors, my understanding is that that's

1 their intention, that they'll tell us before they take any  
2 action, because I think that's in their best interest. They  
3 don't want to subject themselves to all of the unpleasantness  
4 that goes along with unilaterally walking away from your  
5 obligations under the environmental laws and consent decrees  
6 and AOCs.

7 THE COURT: All right. Thank you, Mr. Schwartz.

8 MR. SCHWARTZ: Thank you.

9 THE COURT: Ms. Holleman?

10 MS. HOLLEMAN: Thank you, Your Honor. Just responding  
11 briefly. I think it is interesting that Mr. Golden speaks  
12 about the debtors considering walking away from their  
13 obligations at the same time as the debtors take the position  
14 in their papers that clearly notice has been given that they  
15 intend to walk away from their obligations. And I think that  
16 goes to the issue here.

17 There has never been clear notice given as to what the  
18 debtors intend to do and when they intend to do it by way of an  
19 abandonment. And the concern is that if the procedures motion  
20 goes through and there is no clarification as to what  
21 abandonment means in this context, they will never need to move  
22 to abandon. They will simply walk away. They will get the  
23 benefit of never having to make the legal showing that they're  
24 required to make under Midlantic. There will be no such motion  
25 ever before the Court.

1           We agree with the debtors. There is not a  
2 sufficiently developed evidentiary record for this to be before  
3 you this morning. There should be testimony. You should have  
4 a full and fair opportunity to consider this and hear from both  
5 sides on a full record. But that militates in favor of giving  
6 the appropriate notice and opportunity for hearing that 554  
7 anticipates. Again, if this proceeding goes through as it is,  
8 that will never happen. They will simply walk away and that  
9 will be the end of the story.

10           THE COURT: Okay. Thank you. Has everybody had a  
11 chance to speak their piece? All right. No response. I want  
12 you all to sit in place for a minute, please.

13           (Pause)

14           THE COURT: All right, folks. After my review of the  
15 papers and consideration of oral argument today, I agree most  
16 with Mr. Golden and Mr. Schwartz. The underlying issue, it  
17 seems to me, is where when the debtor is not abandoning  
18 property in the sense of relinquishing its ownership or control  
19 of that property as such, but threatens to cease performance on  
20 obligations that would have adverse consequences that relate to  
21 the property but are distinct from them; whether I should  
22 regard that as an abandonment that would require me to deny  
23 this motion.

24           Upon consideration of the issues and the various  
25 alternatives that the statutory and case law environment

1 provide, and the rules environment provide, I believe that the  
2 debtors' present contemplated action with respect to the  
3 Bradford party is not today an abandonment, and therefore that  
4 this motion can and should be granted. But it does raise  
5 issues that I, as a responsible judge managing assets under my  
6 watch, and implementing the in rem jurisdiction that every  
7 bankruptcy judge exercises, I have to say more than that, and I  
8 have to take reasonable steps to ensure that there's not any  
9 action in the future that would be contrary to the public  
10 interest.

11 I think it's prudent for all of us in this room, and  
12 especially me, to consider the next move in the chess game, so  
13 to speak. The abandonment that's discussed today is innocuous.  
14 What might not be innocuous would be a change in the debtors'  
15 ongoing performance in its obligations under one or more of its  
16 contracts, and under the consent decree; and what for sure  
17 would not be innocuous, would be the pollution of Tuna Creek.

18 The issue and proposed relief today is benign. But if  
19 there were ever a pollution of Tuna Creek or if the debtor were  
20 proposing the cease activities that would be likely to result  
21 in a pollution of Tuna Creek, that would raise issues not  
22 decided today, not decided on this relatively thin evidentiary  
23 record, but would raise issues in the future, as to compliance  
24 with 28 U.S.C. 959, the Supreme Court's Midlantic decision, and  
25 without deciding the underlying 362(b)(4) issue, would at least

1       invoke consideration of the rights of governmental authorities  
2       to enforce laws with respect to the public health and safety,  
3       which whatever else it entails, certainly includes the  
4       pollution of waterways, especially if they're hoped to provide  
5       potable water.

6               Whether the obligations that the debtor undertook in  
7       1996, 1997, 2002 and 2004 are dischargeable or not, is an issue  
8       of some sophistication which cannot appropriately be decided on  
9       today's record, both because it's not before me and because it  
10      requires both much more briefing, factual development, and  
11      ultimately judicial consideration. Same with the extent, if  
12      any, to which one or more of the underlying contractual  
13      obligations are executory contracts.

14             Everybody's got a reservation of rights as to these  
15      issues. I telegraphed some of my thinking in oral argument.  
16      And it seems to me that there is a way, somebody's going to  
17      have to take the economic hit as a result, most likely, but  
18      there is a way to ensure that Tuna Creek isn't going to get  
19      polluted going forward. Whether that is something that the  
20      debtors, consistent with the entitlements of bankruptcy law  
21      have to bear, or whether American Refining Group should have to  
22      bear is not before me today.

23             I am not particularly impressed by the notion that  
24      American Refinery Group is disabled from taking steps to  
25      mitigate its damages if the debtors default on obligations and

1 are permitted to default on them -- both issues I don't decide  
2 today -- because it doesn't have the necessary license or  
3 permission to use the equipment. I think you could resolve  
4 that in about eight seconds. But the reality going beyond the  
5 legal issues, once those legal issues are articulated, either  
6 the way that I did it or the way anybody might be able to do it  
7 better if they had more time, gives rise to the analogy, which  
8 I've used in other contexts, that the debtors, American  
9 Refinery Group and the two environmental agencies are all  
10 handcuffed to each other like the prisoners in that 1950s  
11 movie. And they got to work out some mechanism to ensure that  
12 Tuna Creek doesn't get polluted and tee up for judicial  
13 determination who takes the economic hit associated with  
14 ensuring that result.

15 For those reasons, and because I believe that the most  
16 important thing, while not a today issue, needs to be focused  
17 on, and because folks, as I think I said in oral argument, I  
18 will not allow pollution of Tuna Creek on my watch or at the  
19 very least, without the parties first coming to me for  
20 permission to take steps or to cease action that would pollute  
21 Tuna Creek, I'm going to provide for a clean grant of this  
22 motion. I am doing so. But I'm also going to enter a  
23 supplemental order to be proposed in the first instance by  
24 Mr. Schwartz, with the ability of everybody to comment on it  
25 and/or if need be to provide a counter order.

1 Under my 105(d) authority, I may have it under 105(a),  
2 but this is the classic exercise of 105(d) authority, before  
3 the debtors cease their ongoing efforts and stop taking any  
4 steps that they're presently taking that protects the Tuna  
5 Creek from pollution, they are to file a notice of intention to  
6 do so before me, giving the two environmental authorities and  
7 ARG, no less than ten business days' notice. That will give  
8 them an opportunity to raise any 959 concerns, any Midlantic  
9 concerns, any 362(b)(4) concerns or anything else; and if  
10 necessary or appropriate, to give them enough time to get a TRO  
11 or preliminary injunction to protect the stream from being  
12 polluted.

13 Inevitably, who takes economic responsibility for  
14 these things is likely to be a zero-sum game that somebody's  
15 not going to like the result on. But we have a collective  
16 responsibility to ensure that Tuna Creek doesn't get polluted  
17 and that we do what's necessary to ensure that we've prevented  
18 that from happening. And at the risk of stating the obvious or  
19 being repetitious, this purely procedural additional  
20 requirement that I'm imposing is without prejudice to  
21 everyone's substantive rights on any of the issues I mentioned  
22 or any of the more numerous issues that I'm sure you folks  
23 would want me to address if you had the opportunity to do so.

24 And that's the way it's going to be, folks. Today's  
25 motion is granted, granted in full. Not by way of reargument,

1 are there any questions or open issues? Mr. Schwartz?

2 MR. SCHWARTZ: With the Court's permission, I'd like  
3 to draft the supplemental order to require notice not just at  
4 the Tuna Creek site but at all of the debtors' sites. I mean  
5 really the issue is not unique to this site. It's just the  
6 only one on which we've had an objection.

7 THE COURT: That isn't necessarily wrong, but it's not  
8 the kind of thing that I'm going to grant on the spot without  
9 giving people a chance to respond. Mr. Bruens, do you want to  
10 respond now, or do you think that that's something that is  
11 something that you want to have a more extensive opportunity to  
12 address?

13 MR. BRUENS: Your Honor, I think we would appreciate a  
14 more extensive opportunity to address. Although the one thing  
15 I would like to indicate is that the process that the debtors  
16 have been going through in reviewing all of their sites,  
17 they've been in contact and providing notice to all of the  
18 respective parties in interest and government entities, as have  
19 been mentioned, you know, the thirty-day letter that had  
20 already been sent.

21 THE COURT: Can I get your representation and  
22 commitment that while you're taking the opportunity to think  
23 about it more, you're not going to do anything of the type that  
24 Mr. Schwartz wants to protect himself against?

25 MR. BRUENS: That's correct. We are working with

1 Mr. Schwartz.

2 MR. SCHWARTZ: And I didn't mean to imply to the  
3 contrary. As I said in my comments at the podium, I believe  
4 that the notice procedures that you've outlined are things that  
5 the debtors have already been doing.

6 THE COURT: Okay. I've given a lot of thought to Tuna  
7 Creek and Bradford, Mr. Schwartz. I haven't had the  
8 opportunity to think about the implications of a broader order.  
9 You may be entitled to it. Mr. Bruens may have the desire to  
10 comment on it. He's plainly entitled to the right to comment  
11 on something of the type you're talking about. If it's not  
12 already apparent, these are issues of some sophistication and  
13 some difficulty, even for those who deal with bankruptcy issues  
14 a lot, and including environmental issues within bankruptcy, a  
15 fair amount. And I don't want anybody prejudiced by reason of  
16 an inability to have enough time to think about it and to  
17 respond.

18 MR. SCHWARTZ: Well, I'm certainly happy to discuss it  
19 with Mr. Bruens, and I'm sure there's a sort of compromise --

20 THE COURT: Well, if you can work out a stip with the  
21 debtor that has a no object by the creditors' committee -- and  
22 we got secured lenders in this case too, don't we?

23 MR. BRUENS: That's correct.

24 THE COURT: They need to be consulted as well. You  
25 work out a stip or consent order on that and the chances of me

1 disapproving it are very small.

2 MR. GOLDEN: Thank you, Your Honor.

3 THE COURT: Okay. Anything else, anybody? All right  
4 folks, have a good day, we're adjourned.

5 IN UNISON: Thank you, Your Honor.

6 (Proceedings concluded at 11:10 a.m.)

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

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

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Penina Wolicki

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Date: May 18, 2009