

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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CENTER CAPITAL CORPORATION,)	Case No. 09-61021-CIV-WJZ
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PLAINTIFF,)	
)	
-v-)	
)	
GULFSTREAM CRANE, LLC,)	
)	
DEFENDANT.)	Fort Lauderdale, Florida
)	August 19, 2009
)	

TRANSCRIPT OF MOTION PROCEEDINGS
 BEFORE THE HONORABLE ROBIN S. ROSENBAUM
 U.S. MAGISTRATE JUDGE

Appearances:

FOR THE PLAINTIFF	Kenneth D. Peters, ESQ., and Eric B. Zwiebel, ESQ.
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FOR THE DEFENDANT	Fred O. Goldberg, ESQ.
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Reporter (561)514-3768	Stephen W. Franklin, RMR, CRR, CPE Official Court Reporter 701 Clematis Street, Suite 417 West Palm Beach, Florida 33401
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1 (Call to the order of the Court.)

2 THE COURT: Good morning. It will take just a
3 moment here to get the computer up and going, and then we can
4 get started.

5 All right. Calling case number 09-61021. Would
6 counsel please state their appearances for the record.

7 MR. PETERS: Good morning, Your Honor. My name is
8 Ken Peters. I'm here on behalf of Plaintiff, Center Capital
9 Corporation.

10 THE COURT: Good morning.

11 MR. ZWIEBEL: Good morning, Your Honor, Eric
12 Zwiebel on behalf of Plaintiff, Center Capital Corporation.

13 THE COURT: Good morning.

14 MR. GOLDBERG: Good morning, Your Honor. Fred
15 Goldberg of Berger Singerman on behalf of Gulfstream Crane,
16 LLC. With me today is in-house counsel Joe Riker of
17 Gulfstream Crane and Jim Robertson, who is a principal of the
18 company.

19 THE COURT: All right. Thank you very much.

20 All right. Welcome, and we're here today on the
21 Plaintiff's motion for the issuance of a replevin order to
22 show cause pursuant to Florida Statute 78.065. Also filed
23 was the Defendant's motion to dismiss, although that's not
24 really set for a hearing today, because it addresses subject
25 matter jurisdiction. Obviously it's something that I'll need

1 to consider and address before I can determine whether a
2 replevin writ can be issued.

3 So we'll go on to address some of those same
4 issues, along with addressing the Plaintiff's motion for the
5 issuance of the replevin order.

6 Why don't we go ahead. I will turn it over to
7 Mr. Zwiebel and Mr. Peters, and let me begin by asking you,
8 Mr. Zwiebel and Mr. Peters, whoever it will be who will be
9 responding, the Defendant in this matter, Gulfstream Crane,
10 has suggested that there is no jurisdiction. I have reviewed
11 the filings. I think there was one last night or this
12 morning, I'm not sure when it was.

13 But I have reviewed it, and I see that you suggest
14 there are two alternatives -- two alternative ways in which
15 the Court may get jurisdiction over the Defendant here and
16 the property specifically in question.

17 The first way would be under the Florida Statute,
18 the replevin statute, actual or constructive control. And
19 the second way I guess would be just pursuant to the terms of
20 the contract without even respect to the replevin statute.

21 Am I understanding that argument correctly, first
22 of all?

23 MR. PETERS: Essentially correct, Your Honor.

24 If I may expand?

25 THE COURT: Certainly.

1 MR. PETERS: Your Honor, as to Count 1, we were
2 asking for orders directed against Defendants personally.
3 Separate and distinct from that, we're asking for this court
4 to issue a writ of replevin.

5 Very briefly as an overview, the prejudgment
6 replevin -- regarding the prejudgment replevin issue --

7 THE COURT: I'm sorry to interrupt. If anyone has
8 a telephone, a cellphone that's within about 5 feet of those
9 microphones, that's what that little beeping sound is.
10 Sorry. They happen to be quite sensitive in that regard. So
11 if you could just maybe put it behind the desk, that would
12 probably be the best way to handle that. Thank you.

13 MR. PETERS: Regarding our request for prejudgment
14 replevin as to the issue of in rem jurisdiction, we accept
15 and do not dispute the holdings that are actually set forth
16 in the cases cited by Defendant. None of them disputed the
17 existence and liberal application of constructive possession
18 to satisfy in rem jurisdiction requirements.

19 And if you would like, I can cite and quote from
20 some Florida case authorities indicating that in rem
21 jurisdiction through constructive possession is perfectly
22 adequate.

23 Also, I would note that each loan schedule states
24 that the equipment will be located, or in the case of
25 over-the-road vehicles, based in Broward County. Obviously

1 we should not have to run all over the country as each piece
2 of equipment is moved from state to state to seek prejudgment
3 replevin on suits that we might file.

4 I can expand and go further, Your Honor, but I
5 think that's a brief overview of the answer to your question.

6 THE COURT: All right. Let me ask you. You refer
7 to some Florida cases. To the extent that they're not
8 already cited in anybody's beliefs, if you wish to add some
9 case citations, then I'll be pleased to hear those at this
10 time. Otherwise, if they're already in the briefs, we have
11 them, and I've likely already reviewed them; and if for some
12 reason I haven't gotten to them, I most certainly will before
13 I render my ruling.

14 MR. PETERS: Certainly, Your Honor. Let me just
15 double check. Yes, Burchell versus Southeast Bank of Perry
16 appears to be in our brief, and let me check if Bush v.
17 Belenke is in our brief. Yes, it is, Your Honor. Those were
18 two that I was going to cite. And the others are already in
19 the brief, yes, Your Honor.

20 THE COURT: All right. Very good.

21 Now, there is one issue that appears to me to be
22 something that's raised by the Defendant. I think it's
23 raised by the Defendant both in response to the Florida
24 Statute replevin argument and the contractual argument, and,
25 that is, the contention that the Plaintiffs have not met a

1 condition precedent that must be satisfied prior to being
2 able to seek replevin or invoke any other aspect of the
3 contract. And, more specifically, I think they were talking
4 about paragraph 10 in the 30-day notice with a cure period.

5 So let me ask you to address that, if you would,
6 please.

7 MR. PETERS: Yes, Your Honor. There are 11
8 different bases for default set forth in paragraph 10. As to
9 one of them, there is the involvement of a 30-day cure
10 period. We're simply relying upon, among others, not that
11 one, but rather the failure to pay, which is at 10(1) that
12 states: Borrower fails to pay any payments or other amount
13 owing under any equipment note within ten days of this -- of
14 the due date.

15 So we're not relying upon that particular
16 subparagraph of paragraph 10.

17 THE COURT: All right. Along those same lines, I
18 do have a copy of the master agreement, as well as the other
19 agreements, attached to the complaint. But the copy I have
20 is of a very poor quality. Do you have a better quality
21 copy? This one looks like it's been faxed about 18 times and
22 now just looks like a big bunch of blur to me, and I can't
23 read it well enough to be able to really ascertain what it
24 says.

25 MR. PETERS: That's certainly as a practical matter

1 an extremely valid concern, and before the end of the day I
2 will get a clean copy of that to you, Your Honor.

3 THE COURT: All right. I would appreciate that.

4 All right. Before we get into any of the actual
5 evidentiary matters, let me turn to Mr. Goldberg to address
6 some of these issues. And once we've -- once we've gotten
7 the argument -- once we've gotten through the argument on
8 these matters, then we can get to the evidentiary issues, and
9 I will ultimately process all of this and figure out what
10 we're going to do about it. But I just want to make sure
11 that I've heard the argument and that I've heard all of the
12 evidence that's necessary to decide all the questions
13 pending.

14 So, Mr. Goldberg, let me ask you to address a few
15 things. First, it sounds as though the Plaintiff has
16 asserted two different bases upon which it seeks what is
17 effectively a replevin of four cranes at issue, the first one
18 being the Florida Statute, the second one being the terms of
19 the contract itself.

20 Let me ask you, if you would, to please address
21 each of those separately. First, with respect to the Florida
22 replevin statute, the main argument there from the Plaintiff
23 is that you constructively -- or your client constructively
24 controls the equipment at issue, and therefore the Court has
25 constructive control over the equipment at issue and can

1 engage in -- and can -- and has jurisdiction, effectively.

2 So let me ask you to begin by addressing that
3 argument, if you would. And then if you want to get back to
4 the paragraph 10 issue and anything else you might like to
5 address with respect to both bases upon which the Plaintiff
6 attempts to proceed.

7 MR. GOLDBERG: Gladly, Your Honor.

8 As an initial matter -- and I apologize for taking
9 matters out of order.

10 THE COURT: That's all right.

11 MR. GOLDBERG: The second basis for jurisdiction,
12 if you want to call it that, as I understand it, is the
13 Plaintiff's claim that they are entitled to a mandatory
14 injunction to bring the property back into the state of
15 Florida. We first heard of that last night at 5:30, when we
16 received a copy of their memorandum. I will gladly brief
17 that issue.

18 I can tell Your Honor off the cuff that I believe
19 they are not entitled to such injunctive relief because they
20 have failed to establish that they lack any adequate remedy
21 at law. They are here suing for damages.

22 Even if Your Honor were to determine that replevin
23 is not appropriate in this jurisdiction, they have the right
24 to seek replevin in the jurisdictions where the property is
25 located. So I think that on that basis, they are not

1 entitled to injunctive relief of that nature.

2 As to the constructive possession issue, I am
3 pleased that counsel concedes that as a matter of Florida
4 law, a replevin action is an action in rem. They seem to
5 contest it in their filing yesterday, but I understand from
6 counsel that he now concedes the issue.

7 Under Rule 64, this court is to apply Florida law
8 with respect to a claim for replevin. And with respect to
9 the cases from Michigan, and Illinois and Nebraska cited by
10 Plaintiff in their memorandum yesterday, I would respectfully
11 suggest that those are based upon the individual statutes of
12 those jurisdictions and are not strictly applicable to our
13 situation here.

14 THE COURT: I'm sorry to interrupt, but wasn't
15 Zalke in federal court, and didn't it talk about the fact
16 that in Michigan, under the Michigan law, the property would
17 have had to have been in Michigan, except that the Court in
18 Zalke I thought said, you know, we're a federal court, and on
19 issues of venue we're not bound by the state statute?

20 So even though the state statute is indicating and
21 suggesting that the property needs to be in the state, in
22 Michigan, even though that's the case, we're finding that it
23 doesn't have to be, it's okay that it's in Chicago, or
24 wherever it is, because we're applying the federal venue, and
25 under federal venue it's sufficient that there's constructive

1 possession by the Defendant? Isn't that basically what Zalke
2 said, or would you disagree?

3 MR. GOLDBERG: Your Honor, Zalke is an interesting
4 case. It reflects a minority position within the federal
5 courts that a local action, an in rem action is a matter of
6 venue as opposed to jurisdiction. That is not the way the
7 Eleventh Circuit interprets it.

8 With respect to the Eleventh Circuit, there are
9 several cases out of the Fifth Circuit pre-1981, which, as
10 Your Honor knows, are, in fact, binding upon this Court. And
11 if I could locate them quickly. And I apologize, Your Honor.

12 THE COURT: That's all right. They're cited in
13 your brief, are they not?

14 MR. GOLDBERG: Those are not cited in our brief.

15 THE COURT: All right.

16 MR. GOLDBERG: I did not know until last night,
17 Your Honor, that the Plaintiff was going to take the position
18 that they have taken, so I had to rush around and find a few
19 cases.

20 Your Honor, the 1959 case Iselin versus Meng, 269
21 F.2d 345, out of the Fifth Circuit, stands for the
22 proposition that an action affecting property located outside
23 of the state is a jurisdictional matter, not a matter of
24 venue. Similarly, Shell Oil Corp. versus Moore, which is a
25 1931 case out of the Fifth Circuit, says substantially the

1 same thing. That's 46 F.2d 959. Both of these cases stand
2 for the general proposition that the local action rule is
3 jurisdictional in nature rather than a matter of venue, as
4 the Zalke court interpreted it.

5 This is further confirmed by the 1987 case out of
6 the Fifth Circuit, Hayes versus Gulf Oil Corp, which
7 specifically addresses the issue and cites both Shell Oil and
8 Iselin for standing for the proposition that the local action
9 rule is jurisdictional in nature and not a question of venue.

10 So on that basis, the Zalke decision can easily be
11 distinguished from our present circumstance.

12 THE COURT: All right.

13 MR. GOLDBERG: It's a matter of this circuit
14 interpreting the issue differently. And perhaps someday the
15 Supreme Court will decide the issue, but hopefully not in
16 this case.

17 THE COURT: All right. Well, you never know. It
18 could be fun to go up there.

19 MR. GOLDBERG: That's true, Your Honor.

20 THE COURT: All right. Sorry. Go ahead.

21 MR. GOLDBERG: Okay. As to the issue of
22 constructive possession, counsel misconstrues the case law,
23 the Florida case law. And it's a fairly limited body of case
24 law which addresses the issue.

25 In rem jurisdiction as a matter of federal law is

1 determined by the question of whether the property is within
2 the actual or constructive jurisdiction of the Court. It's
3 not an issue of possession by a defendant or party.

4 And if Your Honor looks at the case law, *Bush*
5 versus *Belenke*, which counsel cites, states: In addition, in
6 a replevin action, although possession by the Defendant of
7 the subject property is essential, actual manual possession
8 is not necessary. It is sufficient if a defendant has
9 constructive possession that it has such control over the
10 property that he may deliver possession of it if he so
11 desires, as, for example, where an agent holds property for
12 the principal.

13 Now, *Bush versus Belenke* cites an earlier case,
14 *Miller versus Townhouse Development Corp.*, which sort of
15 clarifies the matter -- this matter. It cites specifically
16 to the Florida Statute, Section 78.08, which has since been
17 slightly modified. And according to that case, Section 78.08
18 Florida Statutes provides that the writ shall, quote, command
19 the officer to whom it may be directed to replevy the goods
20 and chattels in possession of the defendants.

21 And if Your Honor looks at the present version of
22 78.08, that statute says the writ shall command the sheriff
23 to replevy the described personal property in the possession
24 of the defendant.

25 What this case law means is that in order for a

1 writ of replevin to be returned, the property must be in the
2 possession of the Defendant. This is an additional and
3 separate requirement from the in rem case law, which is cited
4 in my memorandum, which addresses the fact that the property
5 itself must lie within the jurisdiction, must lie within the
6 state of Florida in order to be subject to an action for
7 replevin.

8 Now, with --

9 THE COURT: Well, let me ask you a question. When
10 does it have to be in the jurisdiction? Does it have to be
11 in the jurisdiction at the time of the filing of the
12 complaint? Does it have to be in the jurisdiction at the
13 time that the motion for replevin is made? Does it need to
14 be there the entire time? When does it need to be in the
15 jurisdiction?

16 MR. GOLDBERG: That's actually an interesting
17 question, Your Honor. It's a little bit unclear from the
18 statutes and the case law. For example, Section 78.11
19 addresses the question of what happens when a writ of
20 possession is issued but before it is executed upon, the
21 property's transferred to a third party.

22 78.12 addresses the question of what the effect is
23 if the property's removed from one county to another county
24 after the writ of possession -- writ of replevin is issued
25 but before it is executed upon.

1 In this case, it really doesn't matter. The
2 property, in fact, has never been in the state of Florida.

3 THE COURT: All right.

4 MR. GOLDBERG: If I may continue on?

5 THE COURT: You may. I'm sorry for interrupting.

6 MR. GOLDBERG: With respect to the condition
7 precedent issue, and I agree that the copy of the contract
8 which is attached to the complaint is extremely difficult to
9 read. I've read it from another version.

10 But paragraph 10 which deals with defaults,
11 subsection 3, states that if borrower fails to perform or
12 comply with any other covenant or obligation under any
13 equipment note or related agreement, and if curable, such
14 failure continues for 30 days after written notice thereof by
15 lender to borrower.

16 Okay. That is very unambiguous, Your Honor. The
17 fact that Plaintiff now claims to be proceeding under another
18 subsection of Section 10 of the contract is irrelevant.
19 Failure to pay is a curable default, and the Plaintiff's
20 failure to provide 30 days' written notice of default and
21 right to cure is fatal to not only the replevin claim but
22 also to their contract claim.

23 THE COURT: All right. Anything further?

24 MR. GOLDBERG: I believe everything else, Your
25 Honor, would be evidentiary, if Your Honor believes that it's

1 necessary to go beyond the face of the declarations which
2 were filed in support of our motion to dismiss and the
3 memorandum of law in opposition that we filed yesterday.

4 THE COURT: All right. I do, but primarily because
5 it does not specify in there the time frame of when the
6 cranes were outside of the state of Florida.

7 MR. GOLDBERG: Yes.

8 THE COURT: Let me return to Mr. Peters and
9 Mr. Zwiebel.

10 Mr. Goldberg has suggested that it does not matter
11 that the Plaintiffs are invoking a different -- are invoking
12 10(1), borrower fails to pay any equipment or other amount as
13 a default basis; that 10(3) still applies because failure to
14 pay is a curable default.

15 Now, I'm not saying that I have decided that to be
16 the case, but let's just assume for the sake of argument,
17 because I won't have the luxury of calling you back here
18 again if I do decide that, that I decide that -- that
19 paragraph 10(1) still -- I'm sorry, that paragraph 10(3)
20 still applies; that is, that failure to pay is a curable
21 default applies here, and that I adopt Mr. Goldberg's
22 position.

23 What response would the Plaintiff have under that
24 circumstance as to why it is that the conditions precedent
25 have been met or that it doesn't matter that they haven't

1 been?

2 MR. PETERS: Well, a few things, Your Honor.

3 First of all, again, what Mr. Goldberg cited was
4 only one of several distinct and separate bases for events of
5 default.

6 THE COURT: I understand, and I will review that,
7 but because of the copy that I have right now, I can't see it
8 well enough to be able to make that determination on the
9 spot.

10 So as I said, I'd like to be armed with all
11 contingencies in case I need to reach a separate --

12 MR. PETERS: Sure.

13 First of all, we did send a demand letter. It's
14 attached to Mr. Goldberg's response. There have been
15 numerous telephone conversations and discussions with
16 Gulfstream before it was even referred out it to legal.
17 They're next due for March 5, so they're overdue by more than
18 five months. There's also other bases for default that are
19 separate and distinct from what Mr. Goldberg discussed.

20 And should Your Honor wish to consider that
21 further, I'd be happy to brief that issue.

22 THE COURT: Well, let me ask you this. Are you --
23 as a factual matter, are you suggesting that you've complied
24 with the 30-day notice and cure period?

25 MR. PETERS: I would suggest that we've complied

1 with it any way through the letter and also through the
2 numerous communications between Gulfstream and Center Capital
3 before it was referred to legal.

4 I'd have to investigate whether -- how many of
5 those were in writing.

6 THE COURT: All right. And if I were to find --
7 and, again, I don't know. We'll get to the evidentiary
8 matters in a moment. But if I were to find that -- that that
9 condition precedent has not, as a factual matter, been met,
10 as far as any legal arguments you have, you would like some
11 time to go ahead and brief that issue; am I understanding you
12 correctly?

13 MR. PETERS: If Your Honor concluded that one --
14 that -- excuse me. If Your Honor concludes that, then, yes,
15 I would want time to brief that and respond. But I don't
16 think that that's -- I'm positive that that's not necessary,
17 Your Honor.

18 MR. ZWIEBEL: There's one point I'd like to make,
19 Your Honor.

20 THE COURT: All right.

21 MR. ZWIEBEL: That subparagraph 3 of paragraph 10
22 says that if borrower fails to perform or comply with any
23 other covenant or obligation under the equipment note and
24 related agreement. So we're talking about other covenants of
25 the note, not the payment obligation, which is a separate

1 default provision.

2 And paragraph 10 starts off by saying that default,
3 each of the following, and in parenthesis, default, shall,
4 with giving of any notice or passage of time, period,
5 specified constitute an event of default hereunder, and under
6 all equipment notes. And number 1, in parenthesis, borrower
7 fails to pay any payments or other amounts owing under any
8 equipment note within ten days of its due date.

9 We sued for breach for failure to pay, and it's
10 specifically covered under 10, subsection 1, of the default
11 provision of this contract. And the clause that Mr. Goldberg
12 is referring to speaks to other provisions, other covenants
13 of the contract.

14 THE COURT: All right.

15 MR. ZWIEBEL: Not the payment clause.

16 THE COURT: All right. Let me do this. I don't
17 know how I'm going to decide. I want to take a very close
18 look at the contract, which I will do after I receive a copy
19 that I can read. But I'll leave it to you as to whether you
20 wish to provide a brief regarding -- as opposed to the
21 factual issue, I guess -- the legal issue, if I were to find
22 that the condition precedent has not been satisfied. Legally
23 why that doesn't matter. It's up to you. If you want to go
24 ahead and provide it, then by all means I will allow you to
25 do that.

1 Today is Wednesday. If you want to get it to me by
2 next Wednesday will that be sufficient time, do you think, to
3 do that, Mr. Peters or Mr. Zwiebel?

4 MR. PETERS: Yes, Your Honor.

5 THE COURT: All right. And I'll provide
6 Mr. Goldberg with an opportunity to respond to that, as well.
7 It's only fair probably to give you a week, as well, so the
8 Wednesday following.

9 You don't have to do that. It's up to you, but,
10 you know, obviously as I'm sitting here working on this, if I
11 come to that conclusion, I'd rather not have to keep issuing
12 series of orders requesting additional briefing.

13 So if you think it's necessary, if it's something
14 you want me to consider if I reach that determination, I'll
15 be happy to do that. But I leave that in your -- within your
16 discretion.

17 Let me ask Mr. Goldberg before we turn to the
18 evidence if you have any response as to any of the legal
19 points that have been raised by Mr. --

20 MR. PETERS: May I make one -- I apologize.

21 THE COURT: That's all right, Mr. Peters.

22 MR. PETERS: Mr. Goldberg said we're conceding the
23 issue of in rem. We're not conceding it. What I said is we
24 don't disagree with the holdings of the cases, not the
25 summaries by Mr. Goldberg or the holdings or the argument of

1 Mr. Goldberg. In other words, to the extent that in rem
2 jurisdiction is required, there is in rem jurisdiction.

3 That's all, Your Honor, thank you.

4 THE COURT: All right.

5 MR. GOLDBERG: If I may, Your Honor?

6 THE COURT: You may.

7 MR. GOLDBERG: Thank you, Judge.

8 With respect to counsel's last argument, Center
9 Capital has failed to cite any case out of the state of
10 Florida that states or holds that an action for replevin is
11 not an in rem proceeding. I have cited several such cases.
12 I can cite additional cases if necessary.

13 I concede that the Florida Supreme Court has never
14 ruled on the issue. But given the uniformity of the
15 decisions of the lower appellate courts, I believe this Court
16 is quite capable of making an eerie guess as to what the
17 Florida Supreme Court would say on that issue.

18 With respect to Section 10 of this contract, I
19 would respectfully disagree with counsel's argument. As Your
20 Honor's well aware, provisions of the contract must be read
21 in pari passu. You must consider the entire agreement. You
22 can't just look at one line.

23 And subsection 1 of that provision, borrower fails
24 to pay any payments or other amounts owing under the
25 equipment notes within ten days of this date, merely says

1 that if there's a failure to pay within ten days after the
2 time it's due, at that point after ten days there is an event
3 of default.

4 And then we go to Section 3, which says that you
5 must give notice.

6 With respect to the argument that they have
7 complied with the notice provision attached to
8 Mr. Robertson's declaration filed yesterday, exhibit 1, is an
9 April 27, 2009, letter from Center Capital Corporation to
10 Gulfstream Crane which simply says: The borrowers and/or
11 guarantors are currently in default by reason of their
12 failure to pay the monthly installments due March 5, 2009,
13 through April 5, 2009, and accrued late fees as provided for
14 in the agreement. Accordingly, CCC is accelerating the
15 indebtedness pursuant to the terms of the agreement. CCC
16 hereby demands payment of such accelerated balance, together
17 with any and all applicable sales taxes and late fees due
18 from borrowers and/or guarantors.

19 The next paragraph demands payment of the full
20 accelerated amount May 8, 2009, ten days later.

21 This letter does not provide 30 days' notice of
22 default with a right to cure. This letter says, you are in
23 default now, the loan is accelerated now, and you better pay
24 the accelerated amount in ten days or we're going to sue you.
25 That is not what is called for under the master loan and --

1 the master loan agreement.

2 THE COURT: Let me ask you, does it matter that
3 five months have now elapsed since payment, and there has
4 been no repayment by Gulfstream? Does that matter at all?

5 MR. GOLDBERG: Not at all, Your Honor. The
6 Plaintiff still must comply with the condition precedent to
7 suit.

8 THE COURT: All right. You had previously
9 requested some time to brief the issue of the mandatory
10 injunction.

11 MR. GOLDBERG: Yes.

12 THE COURT: And I apologize for bringing it up
13 today, since I recognize that it was raised for the first
14 time last night, but I do want to resolve all of the issues
15 so that you can move ahead with this litigation, or conclude
16 it if that's appropriate, without having to call you back
17 here unnecessarily. So let's do this.

18 Will a week be enough time for you to address that
19 issue, Mr. Goldberg?

20 MR. GOLDBERG: I'd respectfully request ten days.

21 THE COURT: All right. So you're talking about
22 next Friday; is that right?

23 MR. GOLDBERG: Yes, Your Honor.

24 THE COURT: All right. So we'll make that brief
25 due next Friday, and --

1 MR. GOLDBERG: Your Honor, I apologize.

2 THE COURT: That's all right.

3 MR. GOLDBERG: But it strikes me that the replevin
4 motion and the motion to dismiss have specifically been
5 referred to Your Honor for decision by Judge Zloch, and I
6 would question whether this should be directed to Judge Zloch
7 or to Your Honor.

8 THE COURT: I understand what you're saying, and
9 that is a valid issue that you're raising. I'll go ahead and
10 confer with Judge Zloch to be sure that this is, in fact,
11 also being referred to me. But as it's being raised in the
12 context of the replevin action, I believe it is, but I will
13 confirm that before I proceed.

14 And if for some reason it's not, then I will notify
15 you of that, and you can go ahead and proceed according to
16 whatever Judge Zloch directs. But I am interpreting it at
17 least at this point -- and, you know, I haven't spoken with
18 Judge Zloch's chambers about this, so I -- I'm not a hundred
19 percent certain, but I am interpreting it right now as part
20 of what's been referred. I will just confirm that.

21 MR. GOLDBERG: That's fine, Your Honor. I have one
22 last thing. I apologize.

23 THE COURT: That's all right.

24 MR. GOLDBERG: The cases cited by Plaintiff in
25 their brief filed yesterday addressing Florida's requirement

1 that the property be in possession of the -- of the
2 Defendant -- in re Burchell, Bush versus Belenke, and I have
3 added Miller versus Townhouse Development Corp., 178 So2d 730
4 -- in my argument today, I would just like to point out very
5 quickly that none of those cases address the issue of
6 jurisdiction; they simply address the issue of whether a
7 plaintiff is entitled to replevin relief under those
8 circumstances. None of them talk about in rem jurisdiction;
9 none of them talk about whether the property is or is not
10 within the jurisdiction of the Court.

11 THE COURT: All right. You know what, let me do
12 this. With respect to your prior point, let's hold off on
13 the briefing of the mandatory injunction. I'll go ahead and
14 just confirm that that is also something that Judge Zloch
15 would like for me to handle. If it is, I'll issue an order
16 asking you to go ahead and file that brief, and I'll give you
17 ten calendar days from whenever it is that I issue the order.

18 If not, then I won't issue an order, and I'm sure
19 you'll hear next from -- well, actually I shouldn't say I'm
20 sure you'll hear next. Under those circumstances, then it
21 may be appropriate for the Plaintiff to file a motion seeking
22 the mandatory injunction, if that's how it wishes to proceed.

23 But I don't know off the top of my head how Judge
24 Zloch would like this handled, so we'll go ahead, we'll
25 proceed that way. But we are going to keep the other

1 briefing schedule in play which had pertains clearly to the
2 issues that have been referred.

3 All right. Any questions about that before we
4 proceed?

5 MR. GOLDBERG: No, Your Honor.

6 I do have one last procedural point.

7 THE COURT: Sure.

8 MR. GOLDBERG: Florida law requires the posting of
9 a bond by a plaintiff prior to a prejudgment replevin. It is
10 addressed in our response yesterday, and the amount of the
11 bond is addressed in the response.

12 If Your Honor rejects our argument and elects to
13 issue such a writ, would that be subject to a future hearing,
14 the amount of the bond?

15 THE COURT: Actually, I think what we can do is we
16 can address that today, and that way I can have all of the
17 information at my fingertips in case we need to proceed that
18 way. I'd like not to delay the process any more than I
19 really need to. So unless there are some objections to that,
20 that's how I would intend to proceed today.

21 Any objections?

22 MR. GOLDBERG: No objection, Your Honor.

23 MR. ZWIEBEL: No objection to that, but may I
24 respond to that?

25 THE COURT: You may respond.

1 MR. ZWIEBEL: Thank you, Your Honor.

2 Under Florida law, there are two distinct and
3 separate methods for seeking prejudgment replevin. What
4 Mr. Goldberg is referring to is a method of replevin without
5 notice and hearing, where the Plaintiff comes in with a
6 verified complaint.

7 THE COURT: The ex parte.

8 MR. ZWIEBEL: The ex parte. 78.068 is the Florida
9 Statute in question. And based upon the verified allegations
10 of that complaint, the judge would consider it and order the
11 plaintiff to put up a bond, and the sheriff would go out
12 immediately and levy upon the property.

13 However, we're not proceeding under 78.068; we are
14 proceeding --

15 THE COURT: Under the contract. I understand.

16 MR. ZWIEBEL: Under the contract, but also under
17 78.065 and 78.067, where there is no requirement under those
18 statutes because of the -- there is notice, there is a
19 hearing, a replevin order show cause is issued, and at the
20 hearing on the replevin order to show cause, if Your Honor
21 determines that the Plaintiff is entitled to possession based
22 upon the statutory guidelines, then it is the Defendant that
23 may retain possession upon its placement of a bond at the
24 value of the property.

25 So we are not proceeding under 78.068, which is a

1 prejudgment writ of replevin which require the Plaintiffs to
2 put up a bond. We are providing notice and an opportunity to
3 be heard under the separate and distinct second method in
4 Florida proceeding for replevin.

5 THE COURT: All right. You're saying that under
6 those methods, that no bond is required?

7 MR. ZWIEBEL: By the Plaintiff. However, if, at
8 the order to show cause hearing the Court determines that the
9 Plaintiff -- and the statute says the Court at the hearing on
10 the order to show cause can consider the affidavits and other
11 showings made by the parties appearing and make a
12 determination of which party with reasonable probability is
13 entitled to the possession of the claimed property pending
14 final adjudication of the claims of the parties. This
15 determination shall be based upon a finding as to the
16 probable validity of the underlying claim alleged against the
17 Defendant.

18 And if the Court determines the Plaintiff is
19 entitled to take possession of the claimed property, it shall
20 issue an order directing the Clerk of the Court to issue a
21 writ of replevin. However, it also says, the order shall be
22 stayed pending final adjudication of the claims of the
23 parties if the Defendant files with the Court a written
24 undertaking executed by a surety approved by the Court in an
25 amount equal to the value of the property.

1 That is the method that we are proceeding under.
2 We're not -- we didn't come into court -- we didn't initially
3 ask the Court to issue a prejudgment writ of replevin. We
4 didn't follow that other statutory remedy. We followed this
5 statutory remedy, which provides for replevin order to show
6 cause to be issued and then a hearing and then a
7 determination as to probable validity.

8 THE COURT: All right. Mr. Goldberg?

9 MR. GOLDBERG: Your Honor, I respectfully disagree
10 with counsel's argument. The case cited in my memorandum in
11 opposition filed yesterday, Future Tech International, Inc.,
12 versus Tae Il Media, Ltd. expressly holds that the posting of
13 a bond is a necessary condition of relief, regardless of
14 whether the proceeding is ex parte. The bond requirement
15 applies whether or not it's an ex parte writ of replevin or
16 not.

17 THE COURT: All right. Well, here's what we'll do.
18 We will have testimony on the value of the property and the
19 value of the amount outstanding, and I will sort this out
20 when I get back to my chambers. And that way at least we'll
21 have the information.

22 MR. PETERS: Could I make one final comment, Your
23 Honor?

24 THE COURT: Yes.

25 MR. PETERS: If I might.

1 I'd like to point out that the Defendant is being a
2 little bit inconsistent in general in the arguments he's
3 making. First there's reference to Zalke in his own brief,
4 and there's distinguishment of Zalke is not being applicable
5 for the proposition that it stands for. Then his own cases
6 refer to constructive possession -- or the issue of
7 constructive possession, and he refers to the word
8 "constructive" in his brief in a couple places, and now he's
9 backtracking from that.

10 And, finally, I'd note separately and distinctly,
11 Article 9 of the Uniform Commercial Code provides that,
12 quote, after default, the secured party may take possession
13 of the collateral, end quote. Those are -- thank you, Your
14 Honor.

15 THE COURT: All right. I think I have enough at
16 this point.

17 Let's -- why don't we do this. Let's go to the
18 evidentiary aspect of this hearing. There are certain things
19 that I'll need to have some evidence regarding.

20 While I understand the Plaintiff's position that I
21 don't need evidence of a default because there is no response
22 to Count 2 of the complaint, I think for purposes of dotting
23 the I's and crossing the T's, that I would like to hear
24 evidence regarding the default.

25 So I'll turn to the Plaintiff first to put on its

1 evidence demonstrating entitlement to replevin.

2 MR. PETERS: Your Honor, I'd like to present two
3 forms of evidence. First, the verification to the complaint.

4 THE COURT: All right.

5 MR. PETERS: Stating that there has been a default
6 as a result of a failure to pay.

7 And next I'd like to, on the issue of default, may
8 I call Mr. Robertson to the stand?

9 THE COURT: All right.

10 MR. GOLDBERG: Your Honor, for the record, I object
11 to the use of the verified complaint as evidence on the basis
12 that it's hearsay.

13 THE COURT: All right. It is hearsay.

14 Let's hear from Mr. Robertson, and then we can see
15 whether it's a moot point.

16 THE COURTROOM DEPUTY: Raise your right hand,
17 please.

18 (The witness is sworn.)

19 THE COURTROOM DEPUTY: Thank you.

20 Once you're seated, please state your name and
21 spell your name for the record.

22 THE WITNESS: My name is James A. Robertson.

23 J-a-m-e-s A. R-o-b-e-r-t-s-o-n.

24 James A. Robertson, Plaintiff's witness, sworn.

25 Direct Examination

1 BY MR. PETERS:

2 Q Good morning.

3 Could you please state your employer.

4 A General Crane USA, Gulfstream Crane, d/b/a General Crane
5 USA.

6 Q How long have you been with Gulfstream Crane?

7 A That's 2002. General Crane since 1986.

8 Q And what are your responsibilities at Gulfstream Crane?

9 A Managing member.

10 Q Does that involve making decisions on contracts to sign
11 and things of that nature?

12 A Yes, sir.

13 Q Are you familiar with the contracts at issue in this
14 case?

15 A Yes, sir.

16 Q What's your familiarity with them, sir?

17 A I executed them.

18 MR. PETERS: May I approach the witness, Your
19 Honor?

20 THE COURT: You may.

21 But, if you would please, show Mr. Goldberg what it
22 is that you're showing Mr. Robertson first.

23 MR. PETERS: Thank you.

24 Should I hand them to him directly, Your Honor?

25 THE COURT: You may.

1 BY MR. PETERS:

2 Q Could you identify that exhibit marked exhibit A?

3 THE COURT: Let me ask you, for purposes of keeping
4 the record clear, you're talking about exhibit A to the
5 complaint?

6 MR. PETERS: Yes, Your Honor.

7 THE COURT: All right.

8 MR. PETERS: I intend to have him identify the
9 documents that are attached to the verified complaint.

10 THE COURT: All right. Thank you.

11 THE WITNESS: This is a master loan security
12 agreement with Bank of America and Gulfstream Crane.

13 BY MR. PETERS:

14 Q And did you sign it, sir?

15 A Yes, sir.

16 Q Is that a true and correct copy to the best of your
17 knowledge?

18 A I'm -- I assume so. I don't -- it's very difficult to
19 read, but it appears to be the -- a copy of the security
20 agreement.

21 Q And could you refer to the paragraph 10.

22 A Yes.

23 Q Could you read into the record the paragraph 10 through
24 paragraph 10(1).

25 MR. GOLDBERG: Objection. Document speaks for

1 itself.

2 THE COURT: It does.

3 I'm going to allow him to do it, though, because I
4 don't have a legible copy, so . . .

5 MR. GOLDBERG: That assumes that the witness can
6 read it.

7 THE WITNESS: Do you have another copy? I mean, I
8 can try.

9 MR. PETERS: I have a more legible copy, if I might
10 approach.

11 THE COURT: All right. You may.

12 And, Mr. Robertson, if you would please do so
13 slowly.

14 Mr. Peters, I'm going to need you to provide not
15 only me with a copy of the contract, but also the court
16 reporter. All right?

17 MR. PETERS: Yes, Your Honor.

18 THE COURT: Thank you.

19 MR. PETERS: I'm sorry that I had given you a
20 copy --

21 THE COURT: That's all right.

22 THE WITNESS: Section 10?

23 BY MR. PETERS:

24 Q Yes, sir.

25 A Section 10, Default. Each of the following:

1 Default. Shall, with the giving of by notice or
2 passage of any time period specified, constitute an event of
3 default hereunder and under all equipment notes. Borrower
4 fails to pay any payments or other amount owing under any
5 equipment note within ten days of its due date.

6 Is that the only section?

7 Q Yes.

8 And has there been such a failure on the part of
9 Gulfstream Crane?

10 A With Bank of America, yes.

11 Q What about with Center Capital?

12 A Yes.

13 Q Is it true and correct that the next payments due are
14 due for March 5, 2009?

15 MR. GOLDBERG: Objection as to form.

16 THE WITNESS: I'm not sure of the due date.

17 BY MR. PETERS:

18 Q How far overdue are the payments, if you know?

19 A I don't recall.

20 Q Are they more than three or four months overdue?

21 A More than three.

22 Q Sir, I'm going to hand you what's a part of exhibit A to
23 the verified complaint labeled Equipment Security Note
24 Number 7006. Would you identify that, sir.

25 A Bank of America Leasing Capital Equipment Security Note

1 7006.

2 Q And is that a true and correct copy of the Equipment
3 Security Note Number 7006?

4 A I'm assuming so.

5 Q And what does it say regarding equipment location, if
6 you know?

7 A Location of equipment?

8 Q Yes, sir.

9 A It says address: 1360 Northwest 33rd Street, Pompano.

10 Q What does it say right above that?

11 A The equipment will be located or in case of the
12 over-the-road vehicles based on the following locations.

13 Q Okay. Is this -- to your knowledge, how long has the
14 equipment been located in Broward County?

15 A It never was.

16 Q And why is that?

17 A It was shipped directly one unit to the Port of
18 Charleston and three units to the Port of Houston, which Bank
19 of America knew full and well before shipping.

20 Q Do you have control over --

21 MR. PETERS: Excuse me, Your Honor, do you strictly
22 want evidence on the issue of default?

23 THE COURT: Well, I'll tell you what, as long as --
24 I think maybe to do this more efficiently, why don't you go
25 ahead and provide evidence of whatever evidence you're going

1 to need from Mr. Robertson so I don't need to make him keep
2 coming up here.

3 MR. PETERS: Okay. Thank you.

4 BY MR. PETERS:

5 Q What ability do you have to control the equipment? In
6 other words, do you have -- does Gulfstream have the ability
7 to direct where the equipment is located?

8 MR. GOLDBERG: Objection, legal conclusion.

9 THE COURT: Overruled.

10 THE WITNESS: I'm not sure I understand the
11 question.

12 BY MR. PETERS:

13 Q Does Gulfstream have the ability to send the equipment
14 to particular locations?

15 A With all of our lenders, we have the ability to
16 distribute the equipment, obviously based on customer needs,
17 throughout the lower whatever states in the continental U.S.
18 We do not have the ability to send them out of the country
19 with any and all of our lenders.

20 Q Do you have the ability to bring that equipment back to
21 Broward County?

22 MR. GOLDBERG: Objection. Which equipment?

23 MR. PETERS: The equipment --

24 THE COURT: Sustained.

25 MR. PETERS: Thank you.

1 BY MR. PETERS:

2 Q The equipment referenced in Equipment Security Note
3 Number 70006.

4 A Do we have the ability? I suppose if there was a reason
5 to, if there was work. Obviously that's not the case. The
6 work is elsewhere, and we wouldn't -- the ability would only
7 be based on the affordability and need.

8 Q If you were asked, for example, by a court, to bring the
9 equipment back here, would you be able to do so?

10 A At great cost.

11 Q Is that a "yes"?

12 A Yes, at great cost, correct.

13 Q I'm going to hand you what's referenced as Equipment
14 Security note number 70007 and ask you to please identify it.

15 A Bank of America Leasing and Capital, LLC, Equipment
16 Security Equipment Note 70007.

17 Q And where is that equipment referenced in Equipment
18 Security Note 70007 located currently?

19 A Where is this specific serial numbers?

20 Q Yes, sir.

21 A I'd have to get to my records. There's two serial
22 numbers on this equipment, exhibit A. I can't tell you the
23 serial numbers' locations. Three of them are located in --
24 two of them are located in Texas, one is in Georgia, one is
25 in Nevada. I can't specifically tell you the serial numbers

1 of these two.

2 Q As to the equipment in Security Note Number 10007 that
3 you identified, if a court ordered you or requested you to
4 bring the equipment to Broward County, would you be able to
5 do so?

6 MR. GOLDBERG: Objection as to form, legal
7 conclusion.

8 THE COURT: Overruled.

9 THE WITNESS: I need to check what serial number is
10 where. Obviously at great expense. All four units are very
11 far away from here. The answer is yes, to the extent of
12 which serial number. One of them I do not have access to
13 currently.

14 BY MR. PETERS:

15 Q Which one don't you have access to currently?

16 A I'd have to refer to my equipment list.

17 Q As to Equipment Security Note Number 70006 and Equipment
18 Security Note Number 70007, are you current in your payments?

19 A No, sir.

20 Q Are you more than three or four months behind, to your
21 knowledge?

22 A More than three.

23 Q Could you identify the other documents that accompanied
24 Equipment Security Note Number 70006 and Equipment Security
25 Note Number 70007?

1 MR. GOLDBERG: Objection, compound.

2 THE WITNESS: I don't understand --

3 THE COURT: Sustained.

4 THE WITNESS: I don't understand the question.

5 MR. PETERS: I'll rephrase. Thank you, Your Honor.

6 Good point.

7 BY MR. PETERS:

8 Q As to Equipment Security Note Number 70006, is there an
9 exhibit A to that?

10 A Yes, sir.

11 Q And is that a true and correct copy?

12 A I assume so.

13 Q And is there an acceptance notice pay proceeds
14 authorization attached to that, as well?

15 A Yes.

16 Q As to Equipment Security Note Number 70007, is there
17 exhibit A?

18 A Yes, sir.

19 Q Is that a true and correct copy?

20 A I'm assuming it is.

21 Q Is there an acceptance notice pay proceeds authorization
22 attached to Equipment Security Note Number 70007?

23 A Yes, sir.

24 Q Is it a true and correct copy?

25 A I assume so.

1 Q What is the reason that payments are behind by three or
2 more months on Equipment Security Note Number 70006?

3 A I had no idea. My organization, we had no idea that
4 this economy was going to fall completely off the bottom of
5 the planet globally. We had no reason to believe that, and I
6 don't think I'm alone.

7 We have relocated previous to engaging in this
8 agreement, along with our partner, Bank of America, knowing
9 and willingly to other marketplaces to try to secure work
10 beyond Florida. We've been in Florida since 1972, and we
11 were only a Florida-based company until a little over 24
12 months ago.

13 We relocated into new marketplaces as a goal to
14 obtain work for the equipment that we had received when this
15 bottom fell out and get to work.

16 In that short order, we have made great strides in
17 the whole southeast and Texas, and those markets have
18 obviously been affected also, and that's why we were able to
19 obtain portionant (phonetic) work for a portion of our fleet.

20 Q If I may, would your answer be the same as to Equipment
21 Security Note Number 70007?

22 A Yes, sir.

23 MR. GOLDBERG: Your Honor, for the record, I'll
24 stipulate to equipment note 70008, I believe, and its
25 attachments as being authentic.

1 THE COURT: All right. Thank you.

2 BY MR. PETERS:

3 Q I'm handing you Equipment Security Note Number 70008.

4 Could you state what the location of equipment term provision
5 is?

6 A I'm sorry, you turned around. I didn't hear you.

7 Q I apologize.

8 Regarding the location of equipment, could you
9 state what the note says.

10 A They're all the same. It says equipment located as our
11 prime headquarters, 1360 Northwest 33rd Street, Pompano
12 Beach, Florida.

13 Q Do you have offices in any other states?

14 A Yes, sir.

15 Q Where are those offices?

16 A Fairburn, Georgia; Houston, Texas.

17 Q Anywhere else?

18 A No, sir.

19 Q When were you -- when did you first discuss with Center
20 Capital the late payments on the notes, on the three notes at
21 issue that are in front of you?

22 MR. GOLDBERG: Objection. Assumes facts not in
23 evidence.

24 MR. PETERS: I'm sorry, what was the objection?

25 MR. GOLDBERG: Assumes facts not in evidence.

1 THE COURT: Sustained.

2 THE WITNESS: I have no idea. I don't --

3 Sorry.

4 BY MR. PETERS:

5 Q As to the equipment note number 70008, are payments
6 current on that one?

7 A No, sir.

8 Q How far behind are they?

9 A Three months or more.

10 Q As to each of the three, or any the three -- strike
11 that.

12 As to the equipment note ending with the numeral 6,
13 what conversations, if any, have you had with Center Capital
14 about catching up on payments?

15 A Several. They've had discussions with our people in an
16 effort to try to -- we've offered methods that we've done
17 with other lenders to work out our deal.

18 MR. GOLDBERG: I instruct the witness not to
19 discuss settlement negotiations in open court.

20 BY MR. PETERS:

21 Q Let me rephrase the question.

22 Without telling me the substance of your
23 conversation with Center Capital at this time, when did you
24 first start talking with Center Capital about the payments
25 that are late?

1 A Immediately when we were in a possession not to be able
2 to pay.

3 Q And when was that?

4 A I don't recall. Three months or more.

5 Q And would that be true as to it all three notes that
6 I've -- that you've identified?

7 A Yes, sir.

8 Q And what did -- if you recall, did Center Capital ask of
9 you?

10 A I believe -- and I don't recall fully because I'm not
11 the one that handled it -- was to, you know, offer a plan
12 that would solve it, and we put together a plan.

13 MR. PETERS: I'm going to hand the witness what was
14 marked in the verified complaint as exhibit P.

15 BY MR. PETERS:

16 Q Have you had a chance to look at them?

17 A Yes, sir.

18 Q Could you identify the documents that are exhibit P?

19 A It's an assignment and specifications of the signed
20 contract between Bank of America Leasing and Center Capital
21 on the 5th day of February.

22 Q And can you tell me whether or not those are true and
23 correct documents?

24 MR. GOLDBERG: Objection. I'd like to voir dire
25 the witness, because there's no showing that --

1 THE COURT: All right. I'll allow voir dire.

2 Voir Dire Examination

3 BY MR. GOLDBERG:

4 Q Mr. Robertson, with respect to exhibit B, are these
5 documents part of your company's business records?

6 A I don't have that answer. I don't know. The other ones
7 that have my signature, this does not. I don't think so. I
8 don't know. This is between the -- Bank of America and the
9 syndicated partner of theirs, which is Center Capital.

10 Q So these are agreements between Bank of America and
11 Center Capital?

12 A Yes, sir.

13 Q Do you have any -- strike that.

14 MR. GOLDBERG: I'm going to object on the basis
15 that these are unauthenticated and hearsay.

16 THE COURT: All right. Well, they haven't been
17 offered for admission at this point.

18 Direct Examination (Cont.'d)

19 BY MR. PETERS:

20 Q Sir, I'm handing you what's been marked as exhibit C.
21 Is that -- could you identify that, please.

22 A It's a Notice and Acknowledgment of Assignment from Bank
23 of America.

24 Q And is that your signature?

25 A It says Assignment to Center Capital Corporation. And,

1 yes, it is my signature on a copy.

2 Q And what is your understanding of what that document is?

3 MR. GOLDBERG: Objection; calls for legal
4 conclusion.

5 THE COURT: Overruled.

6 THE WITNESS: That Bank of America, using their
7 terms, syndicated this particular agreement to Center Capital
8 Corporation on February 5th, as the assignee.

9 BY MR. PETERS:

10 Q And just to clarify, that's a true and correct copy, is
11 it not?

12 A I believe it is.

13 Q Have you read the verified petition for writ of replevin
14 and complaint for damages in this case that Center Capital
15 filed against Gulfstream?

16 A Yes, I believe so.

17 Q Do you dispute the amount of monies claimed to be due
18 and owing?

19 A I don't have the exact knowledge, but I'm assuming that
20 it's accurate.

21 Q I'd like to refer to your declaration of James
22 Robertson, in particular, the exhibit A attached to
23 Defendant's memorandum of law in opposition to Plaintiff's
24 motion for the issuance of a replevin order to show cause
25 pursuant to Florida Statutes Annotated 78.065.

1 MR. PETERS: Your Honor, I apologize if the
2 exhibits are not organized in a manner that I would like to
3 have them to have been organized, please.

4 THE COURT: That's all right. I can find them.
5 But thank you.

6 BY MR. PETERS:

7 Q If I could hand that to you.

8 MR. GOLDBERG: Since there's two declarations, can
9 I see that, please?

10 MR. PETERS: Certainly.

11 MR. GOLDBERG: They are different.

12 If you could just tell me the date, that would be
13 fine, I'll know which one it is.

14 MR. PETERS: It was the one that was attached to
15 the brief filed yesterday.

16 MR. GOLDBERG: Okay.

17 BY MR. PETERS:

18 Q Does that -- in that declaration, is each paragraph true
19 and correct?

20 A Yes.

21 Q Does that declaration deny that amounts are due and
22 owing to Center Capital Corporation?

23 A Absolutely not.

24 Q Do you deny that amounts are due and owing, that monies
25 are due and owing to Center Capital Corporation?

1 A Absolutely.

2 Q You do deny that --

3 A No, I absolutely know that I owe the money. Sorry.

4 Q So Gulfstream does owe money to Center Capital
5 Corporation; is that correct?

6 A Yes, sir.

7 Q And you do not disagree with the amounts in the verified
8 petition for writ of replevin and complaint for damages; is
9 that correct?

10 A I believe what that -- that is the purchase price of the
11 cranes. There were payments made, so what's owed, these are
12 listed as purchase price, original.

13 Q Just to clarify, regarding the petition for writ of
14 replevin and complaint for damages filed by Center Capital,
15 are you denying the monies that are claimed to be due and
16 owing by Gulfstream to Center Capital?

17 MR. GOLDBERG: Objection, asked and answered. He
18 testified that without his records, he could not
19 specifically --

20 MR. PETERS: The --

21 THE COURT: Overruled.

22 THE WITNESS: I don't know the exact amount that
23 you're suggesting we owe. We definitely owe money. This is
24 the purchase price. There were payments made. So I do not
25 know without records the existing balance that's due.

1 BY MR. PETERS:

2 Q Is it over a million dollars? If you know.

3 A I don't know. I'm assuming it is.

4 Q As to the cranes referenced in the declaration before
5 you, as to each of those four cranes, is it within your
6 control to order each of those four cranes to be transported
7 to Broward County?

8 MR. GOLDBERG: Objection, leading.

9 THE COURT: Overruled.

10 THE WITNESS: Is it in my control to order that to
11 happen?

12 BY MR. PETERS:

13 Q Yes, sir.

14 A I guess it's in my control if it was affordable, if it
15 was a need.

16 Q As to the cranes that you reference in the declaration
17 that were leased, did you receive approval from Center
18 Capital to lease those cranes?

19 A That's not required, to my knowledge, to get approval to
20 lease the cranes, to rent the cranes, no, sir.

21 Q Do you know whether or not the contract requires
22 Gulfstream to prevent any liens or encumbrances except for
23 the liens or encumbrances of Center Capital to be placed on
24 to any of its cranes?

25 MR. GOLDBERG: Objection. Which contract?

1 THE COURT: Sustained.

2 BY MR. PETERS:

3 Q Does the Master Loan and Security Agreement and the
4 three equipment loan agreement -- three equipment loan notes
5 that have been -- that you have examined today provide that
6 no encumbrances shall be placed on any of the collateral
7 except for Center Capital's liens?

8 A Well, I would assume so. All of my lenders require
9 that. There's only one UCC filing per equipment. You can't
10 have two.

11 MR. PETERS: Your Honor, I would ask that all of
12 the exhibits that I've handed to Mr. Robertson be admitted
13 into evidence with the exception of the contract that he
14 testified to that was simply a document -- documents between
15 Center Capital and Bank of America.

16 THE COURT: So everything except for exhibit B?

17 MR. PETERS: Correct.

18 THE COURT: Any objection?

19 MR. GOLDBERG: No objection to everything except
20 for exhibit B.

21 THE COURT: All right. They will then be entered
22 into evidence.

23 (Plaintiff's Exhibit Letters. A, P and C entered into
24 evidence.)

25 BY MR. PETERS:

1 Q Regarding the declaration and the references to an
2 excession (phonetic), could you describe to me, referring to
3 your declaration, what the excession attachments or
4 accessories are that you're referring to?

5 A Under H? Is that where you're seeing this?

6 Q Yes, sir.

7 A I'm missing where you're seeing accessories.

8 MR. PETERS: If I may approach?

9 BY MR. PETERS:

10 Q To be more specific, you referred to commingled
11 equipment. Could you describe what that commingled equipment
12 consists of.

13 A These tower cranes are a modular series, meaning that
14 the serial number is based on the machine deck, the cat head
15 and the cab, the operator's cab.

16 The jib components, the horizontal part of a tower
17 crane, and the vertical mast and the tie-ins that hold it to
18 a building are all uniform, they're all modular, and they can
19 be used with many different series of cranes.

20 Q Can these commingled items of equipment that you refer
21 to be separated from one another?

22 A Yes, sir.

23 Q What would be involved in that as to the items of
24 equipment referred to in the declaration that's before you?

25 A Well, for example, if this crane was purchased -- let's

1 just use the first one, serial number 14.413 consists of 171
2 foot of tower and 262 foot of jib, which is, again, the
3 horizontal, that crane could be on a job that requires
4 several more hundred foot of elevation to achieve the
5 complete vertical structure of the building we were building.

6 So you would take components of these modular
7 towers and add them to this particular serial number to make
8 it taller, and that it could be less or it could be a lot
9 more; it could be four times that.

10 Q Turning now to the value of each crane. What is the
11 value of the Linden Comansa tower crane model 550 ATT, serial
12 number 14.413?

13 A At the time and purchase price -- and, of course, we
14 purchased a lot of them, was 565,000 undelivered.

15 Q Do you have an opinion as to the current value?

16 A I do.

17 Q What is your opinion?

18 A Well, zero. There's no buyers. That's the problem
19 we've run into. Your partner, Bank of America, did a
20 full-scale third party appraisal. They came in I think
21 several hundred thousand last year at that time. Today we're
22 trying to sell these cranes all over the world to help with
23 this problem, and they're not being sold anywhere. So I --
24 to me, it's zero until that market changes.

25 Q What about as to the two Linden Comansa tower cranes,

1 one model 210, serial number 14.422, and one model 21LC400,
2 serial number 14.423?

3 A To what the purchase price was or today's value?

4 Q What the current fair market value is?

5 A It's the same. They're all the same.

6 Q They're all zero?

7 A They're all -- it's just horrible. We can't sell them
8 anywhere.

9 Q What about the one Linden Comansa tower crane model 290,
10 serial number 14.426?

11 A It's all tower cranes. It's all tower cranes, all
12 manufacturers, all sizes.

13 Q As to the two cranes that are being leased, where are
14 they located right now, and to whom are they leased?

15 A One's located at MD Anderson Cancer Center, Houston,
16 Texas, leased to McCarthy Constructors, out of Dallas, Texas.
17 One crane is located at the Fontainebleau Resorts, Las Vegas,
18 Nevada, and, as I say, it's being leased. We haven't
19 received payment for several months.

20 Q When are the lease terms up as to each of those two
21 cranes?

22 A The MD Anderson, Houston, Texas lease is up I believe in
23 60 days, plus or minus. The Fontainebleau Resorts would have
24 been finished. The job is shut down, and, you know, we're
25 not -- the cranes are just standing there.

1 Q And as to the other two cranes that are not leased,
2 where are they located specifically?

3 A Specifically, one is located in Fairburn, Georgia, and
4 one's located in Houston, Texas.

5 Q Could you identify them by serial number?

6 A I can if I see my records in the back.

7 Q Do you have any reason to contest that Center Capital
8 has a perfected security interest in the four cranes that
9 we've talked about?

10 MR. GOLDBERG: Objection, legal conclusions.

11 THE COURT: Overruled.

12 THE WITNESS: Do I -- repeat the question, please.

13 BY MR. PETERS:

14 Q Do you have any reason to contest that Plaintiff, Center
15 Capital, has a perfected security interest in the collateral,
16 as evidenced by the UCC financing statements?

17 THE COURT: If you know the answer.

18 THE WITNESS: Well, I'm not sure --

19 MR. PETERS: I'll rephrase the question.

20 BY MR. PETERS:

21 Q Do you have any reason within your knowledge to contest
22 that Center Capital has a perfected security interest to the
23 best of your knowledge in the four cranes we've talked about?

24 MR. GOLDBERG: Objection. Where?

25 THE COURT: I don't understand the objection. I'm

1 sorry.

2 MR. GOLDBERG: Your Honor, a security interest must
3 be perfected in an individual jurisdiction by appropriate
4 filing with whatever authority that particular state
5 designates. So I'm asking where.

6 MR. PETERS: Your Honor, that's absolutely
7 incorrect law.

8 THE COURT: All right. Let's not have an argument
9 on this. This is a factual question.

10 Anywhere, if you know the answer. If you don't
11 understand the question or don't know the answer, then
12 indicate it. But if you understand the question and you know
13 the answer, then provide the answer.

14 THE WITNESS: I don't know what "perfected" means
15 on this as it relates to this, but Center Capital has a
16 security interest in these four cranes by UCC filing,
17 absolutely.

18 BY MR. PETERS:

19 Q Without -- strike that.

20 If you know, what is the reason that Gulfstream has
21 not returned any of the four cranes to Center Capital?

22 A First of all, we haven't been requested to, to my
23 knowledge, at all, ever. Second, we've been trying to work
24 out a payment plan that has been offered to Center Capital
25 and continue. The last thing we do want to do is not pay our

1 bills. We pay our bills, and our full intent is to pay
2 Center Capital.

3 Q Has any of the four cranes been taken for any tax
4 assessment or fine levied under any law or seized under any
5 execution or attachment against the goods and chattels of
6 Gulfstream, or, if you know, of Center Capital?

7 A No, sir, not to my knowledge.

8 MR. PETERS: Excuse me a moment.

9 BY MR. PETERS:

10 Q Where is your principal place of business?

11 A Our headquarters is located at 1360 Northwest 33rd
12 Street, in Pompano Beach.

13 Q Who works there?

14 A I do. That's my base. My partner, my CFO, my
15 engineering department and that existing operation that
16 exists of different employees that do different things here
17 locally.

18 Q And do you take orders here in Broward County?

19 A Yes, sir.

20 Q And what type of decision-making goes on in other
21 jurisdictions that -- let me rephrase that.

22 Is Broward County the primary place for making
23 decisions regarding your business?

24 A Well, ultimately I would say absolutely, because of our
25 physical presence here for the majority of the time. But we

1 have a senior vice president and two nationwide salesmen out
2 of Houston and Atlanta, that make decisions on where we do
3 business and who we do business for that execute contracts,
4 that make decisions every day and all day.

5 MR. PETERS: I have no further questions at this
6 time. Thank you.

7 THE COURT: All right. Cross-examination?

8 Cross-examination

9 BY MR. GOLDBERG:

10 Q Mr. Robertson, do you still have all of the exhibits
11 with you?

12 A Yes, sir.

13 Q Mr. Robertson, I'd like you to take a look at what was
14 marked as exhibit A to the Plaintiff's complaint, the Master
15 Loan and Security Agreement, if you can find a copy up there.

16 A I have it.

17 Q Could you please look at paragraph 4 of that agreement.

18 A This is the one I have two copies of, correct?

19 Q Yes.

20 A Okay. I have four.

21 Q And to the extent you're able to read it, would you
22 please publish to the Court subsection D of paragraph 4?

23 A Maybe I can get the right one.

24 Q Okay.

25 A 4D, correct?

1 Q Yes.

2 A Does it start with "maintained"? Because the D is --

3 Q Yes.

4 A I'm assuming it's CD, and it's not a D.

5 Q Yes.

6 A Okay. Maintain comprehensive books and records
7 regarding the use, operation, maintenance and repair of the
8 equipment.

9 Q Okay. And please read the following sentence.

10 A The equipment shall be used only within the 48
11 contiguous -- is that what it says -- united States, solely
12 for business purposes and not for consumer, personal, home or
13 family purpose.

14 Q Are the four cranes in question within the 48 contiguous
15 United States?

16 A Yes, sir.

17 Q With respect to the locations of the cranes, you stated
18 earlier that Bank of America knew their location. How did
19 Bank of America know their location?

20 A Well, Bank of America has all the documentation that
21 dealt with the manufacturer because of all the transferring
22 of documentation of the equipment and the loan. All of them
23 are attached to the loans. They knew what port they were
24 going to before they were even here in the United States.
25 They knew it was going to Port Charleston. They knew three

1 of them were going -- and there were other ones, to the Port
2 of Houston.

3 MR. PETERS: Objection as to what Bank of America
4 knew.

5 THE COURT: All right. Sustained. If you could
6 rephrase your answer as to what you informed Bank of America
7 regarding.

8 THE WITNESS: Okay. There's several e-mails and
9 documentation that I have with Bank of America and the
10 manufacturer has with Bank of America proving where the
11 cranes would go. Bank of America obviously wanted to know
12 that, and they did.

13 BY MR. GOLDBERG:

14 Q Did Bank of America make physical examination of the
15 cranes where they were located?

16 A Yeah.

17 And, furthermore, let me add to it, the shipper's
18 documentations, Bank of America had a part of that. They
19 also had direct communication with all the shipping documents
20 to secure what equipment and what serial number was going
21 where.

22 Later, they did a third party appraisal of where
23 the equipment was physically.

24 Q Okay. So Bank of America, the successor in interest to
25 Center Capital, knew where the cranes were?

1 A Yes, and I believe Center Capital knew also.

2 MR. PETERS: Objection, it's a legal question.

3 THE COURT: I'm sorry, what is the objection?

4 MR. PETERS: I'm going to withdraw the objection,
5 excuse me.

6 THE COURT: All right. That's all right.

7 BY MR. GOLDBERG:

8 Q Now, with respect to the two cranes that are on lease,
9 one is in Nevada and one is in Texas. Could you repeat who
10 they're on lease to?

11 A The one in Texas is on lease to McCarthy Constructors.
12 The one in Las Vegas is on lease to Turnberry Construction,
13 LTD, or Turnberry LTD.

14 Q And the crane that's on lease to Turnberry, is that
15 designated to a particular project?

16 A Fontainebleau Hotel Casino I think is the full name.
17 Fontainebleau Resorts Hotel Casino.

18 Q Is that project in Chapter 11?

19 A Yes.

20 Q Is it under lockdown by the United States marshals?

21 A It's under lockdown. I'm not sure about the marshals,
22 but we haven't been paid for several months. The claim's
23 huge.

24 Q You can't get the crane back?

25 A I have no ability to do it unless the Court allows me.

1 And the building's not even finished.

2 Q The crane that's on lease to McCarthy, McCarthy is the
3 lessee of that crane?

4 A Yes, sir.

5 Q It's in possession of McCarthy?

6 A Yes, sir.

7 Q It's not in your possession at this time?

8 A No, sir.

9 Q So really you have no ability to bring those two cranes
10 back to the state of Florida at this time?

11 A No, sir.

12 Q Looking at your declaration, sir, which was filed as
13 exhibit A to our memorandum in opposition to Plaintiff's
14 motion that's being heard today, if you look at paragraph 4
15 of that declaration, does this refresh your recollection
16 regarding which cranes are located where?

17 A Other than -- well, yes, it does, because the 400 is the
18 one -- 14423 is at McCarthy. I can tell by the crane size.

19 Q That is the Linden Comansa tower crane model 21LC400,
20 serial number 14423?

21 A Yes, sir, that's at McCarthy, in Houston.

22 Q Okay. And which one is in the possession of Turnberry
23 in Nevada?

24 A And that's clearly Linden Comansa tower crane model 550,
25 18-ton, serial number 14.413, located in Nevada. That is at

1 Fontainebleau. And obviously the 422 in Texas is on the
2 ground, and 426 in Georgia is on the ground.

3 Q Has additional equipment been added to the crane that is
4 in Nevada?

5 A Oh, yeah, extensively.

6 Q I'm going to draw your attention -- do you happen to
7 know the current height of that crane?

8 A Yeah, it's -- it is 800 and change above hook, which is
9 height under hook in tower crane world. And so it's plus
10 800 feet.

11 Q And when purchased, do you recall how tall that crane
12 was?

13 A It's here somewhere. It's 171 feet, I think.

14 Q So the additional 630-odd feet of crane are all
15 additional material not part of the original equipment that
16 was financed?

17 A Correct, along with a jacking frame, along with -- I
18 can't tell you how many tie-ins, you know, to hold it to the
19 structure.

20 Q Would a sheriff or marshal executing upon a writ of
21 replevin be able to determine which parts of the crane were
22 which?

23 A Well, the only way that he could tell is -- to know
24 exactly this one is to climb up to the top and see the serial
25 number on the machine deck is the only piece, and the cab,

1 and then the turntable, the part that swings. That is it as
2 far as identifying this unit. And obviously that's where it
3 is, that's it. The tower sections are, like I said, uniform.

4 Q The tower sections are modular, correct?

5 A I didn't hear you.

6 Q The tower sections are modular?

7 A Right.

8 Q There's no way to determine which of the tower sections
9 are, in fact, identifiable to the serial number; is that
10 correct?

11 A Correct, other than 171 feet of it.

12 Q Okay. And the same applies to the crane that's on---
13 that is leased to McCarthy, correct?

14 A Yeah, well, that crane is 400 and -- that's all the way
15 down through the middle of the cancer center. That's
16 450-plus feet under hook. And I don't recall what we
17 purchased that crane with. 261 of the 450.

18 Q And your comments with respect to the Nevada crane would
19 be the same as to the crane under lease to McCarthy?

20 A Identical.

21 Q Okay. There's no way to identify what portions of tower
22 were, in fact, part of the original financed package?

23 MR. PETERS: Objection. That's not what he
24 testified to.

25 THE COURT: Overruled, but let's get some

1 clarification on that.

2 THE WITNESS: Ask me the question again, please.

3 BY MR. GOLDBERG:

4 Q Okay. I'll rephrase.

5 With respect to the crane that's on lease to
6 McCarthy, again, there's additional equipment not part of the
7 original financed equipment, correct?

8 A Correct.

9 Q And can you describe that equipment.

10 A Well, it's the difference in the tower, and it's the
11 tie-ins, and, of course, the jibs. You know, different jibs
12 could be used in different places. It's probable but
13 probable that the upper is the right crane, because I believe
14 it went from the port to the job, and it's probable that the
15 tower could be all over. But there is more tower and there
16 is more tie-backs, and there is a jacking frame in addition
17 to the original crane.

18 Q And, again, all these pieces are modular and could be
19 added or subtracted at will?

20 A The horizontal and the vertical, correct.

21 Q So there's no real way to identify which tower segments
22 were part of the original finance package?

23 MR. PETERS: Objection, leading.

24 THE COURT: This is cross-examination. Overruled.

25 THE WITNESS: No, there isn't. Again, there's

1 three components that can be identified forever, and that is
2 the machine deck, the turntable and the operator's cab, and
3 they're meant to be that way so you have the flexibility to
4 make cranes taller and shorter and longer this way or
5 shorter.

6 BY MR. GOLDBERG:

7 Q As you sit here today, sir, do you have any
8 understanding as to whether Center Capital possesses any
9 security interest in anything other than the identifiable
10 serial numbered pieces of equipment?

11 A That's correct, just what I can identify by serial
12 number.

13 Q And that would consist of only the cab and the turntable
14 and what else?

15 A The machine deck.

16 Q Machine deck.

17 A Where all the machinery is.

18 Q Now, again, turning to your declaration, which was dated
19 August 18, 2009, I would ask you to take a look at exhibit 1
20 to that declaration.

21 A Yes, sir.

22 Q Can you identify this document for the Court?

23 A Identify what? I'm sorry.

24 Q Exhibit 1 to your declaration, sir.

25 A It's a Center Capital Corporation to me and my partner,

1 Gulfstream Crane, regarding the assignment specification of a
2 signed contract dated February 5th between Bank of America
3 leasing and Center Capital Corp. regarding Equipment Security
4 Note 678.

5 Q Okay. And is this document part of your company's
6 records kept in normal course of business?

7 A Yes.

8 Q Okay. To your knowledge, is this the only notice,
9 written notice, provided to Gulfstream Crane by Center
10 Capital Corporation regarding the alleged defaults here?

11 A To my knowledge, yes.

12 Q Was Gulfstream Crane ever provided with a written notice
13 of default giving 30 days right to cure?

14 A No, sir.

15 Q Okay. Again, looking at exhibit 1, in the first
16 paragraph it is alleged that Gulfstream Crane failed to make
17 a payment on March 5, 2009. If, after March 5, 2009,
18 Gulfstream Crane had been provided with a 30-day notice of
19 default and right to cure, would you have been able to cure
20 that payment?

21 A Well, what we would have been able to do and what we've
22 been doing and -- is we've been paying minimally the
23 interest, and our whole plan was to do that, and in short
24 order, to the best of our ability, be able to restructure
25 those indebtedness, which we have successfully done with

1 others.

2 Q And the April --

3 A We just needed some time.

4 Q Okay. The April 27, 2009, letter in the first paragraph
5 states that the loan is accelerated. Was it your
6 understanding that it was accelerated as of April 27, 2009?

7 A Correct. They wanted us to completely pay off
8 everything, which was obviously impossible.

9 Q And when was that payment demanded to be made by?

10 A Excuse me again?

11 Q If you look at the second paragraph, when was the
12 payment of the entire principal and accelerated interest to
13 be made by Gulfstream, or demanded by --

14 A On or before May 8th.

15 Q Do you know if this correspondence -- this demand
16 complies with the provisions of paragraph 10 of the Master
17 Loan and Security Agreement?

18 MR. PETERS: Objection, calls for a legal
19 conclusion.

20 THE COURT: Overruled. He can answer it if he
21 knows the answer.

22 THE WITNESS: I'm sorry. I don't know the answer.

23 BY MR. GOLDBERG:

24 Q Okay. Do you know if paragraph 10 of the Master Loan
25 and Security Agreement provides that you are to be -- your

1 company is to be given 30 days' notice of default with right
2 to cure curable default?

3 MR. PETERS: Objection, calls for a legal
4 conclusion.

5 THE WITNESS: I do believe it says does.

6 THE COURT: Hang on one second.

7 THE WITNESS: Sorry.

8 THE COURT: What is the relevance of whether he
9 knows it or not?

10 MR. GOLDBERG: I'm just trying to get to his
11 understanding. I will withdraw the question.

12 THE COURT: All right.

13 MR. GOLDBERG: The document stands for itself.

14 BY MR. GOLDBERG:

15 Q Sir, this April 27 demand letter in effect demanded far
16 in excess of \$1 million at that time, correct?

17 A Yes, sir.

18 Q That is not what was actually due so far as payments
19 that were missed by Gulfstream; is that correct?

20 A That's correct.

21 Q It's a far lesser amount?

22 A Far less.

23 Q Yes.

24 Now, the last series of questions regarding the
25 value of the property, these four cranes. And you stated

1 that there currently is no market to sell these cranes. Does
2 that mean that the cranes have no value?

3 A Well, I guess that's arguable. To me, I can't sell the
4 cranes anywhere in the world. We've been trying to do it for
5 months worldwide. Our website clearly says that we have
6 people trying to do it all over the world.

7 Q But the cranes themselves have an inherent value?

8 A They do.

9 Q Okay. For example, looking at your declaration, the
10 crane serial number 14413, which I believe is in Nevada, you
11 paid \$565,000 for it without delivery.

12 A Correct.

13 Q And the delivery cost was in excess of \$75,000?

14 A Correct.

15 And then you have substantial cost in constructing
16 the crane. It's not just 75,000. That's shipping.

17 Q So the cranes do have an inherent value as they sit in
18 the United States?

19 A Correct.

20 Q Okay. And have you ever viewed the verified complaint
21 filed in the instant action by the Plaintiff?

22 A I believe I have, but I'd have to look at it, to recall
23 anything.

24 MR. GOLDBERG: May I approach the witness, Your
25 Honor?

1 THE COURT: You may.

2 BY MR. GOLDBERG:

3 Q If you'll flip back to the first page under that tab,
4 can you identify that document?

5 A Center Capital Corp. versus Gulfstream Crane.

6 Q Is that a copy of the verified complaint in the instant
7 action?

8 A Yes.

9 Q If you will turn to paragraph 2, would you publish it to
10 the Court?

11 A Paragraph 2, Plaintiff, Center Capital, is a Connecticut
12 corporation authorized to do business in the state of
13 Florida.

14 MR. GOLDBERG: I'm sorry, may I approach, Your
15 Honor?

16 THE COURT: You may.

17 BY MR. GOLDBERG:

18 Q And would you publish paragraph 7, I apologize, to the
19 Court.

20 A This is a count to recover property located in Broward
21 County, Florida, which has a reasonable estimated value of
22 \$1,775,000 depending on condition.

23 Q That is Center Capital's estimate of the will value of
24 the property?

25 A Yes.

1 Q And that is in their verified complaint?

2 A Yes.

3 Q With respect to each of those four cranes, can you
4 advise the Court whether they have ever been in the state of
5 Florida?

6 A No. As I stated earlier, one was shipped from Pamplona,
7 Spain -- not Pamplona, the port of wherever it is in Spain,
8 direct to Port Charleston. Three of the units were shipped
9 from the Port of Spain directly to the Port of Houston,
10 Texas.

11 Q Okay. And from there they were transferred to various
12 work sites or storage facilities?

13 A The one in Port Charlotte did a job in Savannah, very
14 short, went to the facility where it's held, and it's been
15 there since.

16 THE COURT: I'm sorry, did you say Port Charlotte
17 or Port Charleston?

18 THE WITNESS: I think it's Port Charlotte. I think
19 I said both.

20 THE COURT: Sorry for the interruption.

21 THE WITNESS: One of them -- and I have records
22 back there -- went to a job that is on the ground staged in
23 Houston. Did one job. The other one went direct from the
24 Port of Houston to the current job, which is the cancer
25 center in Houston. The other one came into Houston, and

1 whatever time frame, went to Las Vegas, Nevada, I'm assuming
2 direct.

3 BY MR. GOLDBERG:

4 Q And that's the Fontainebleau project?

5 A Yes, sir.

6 Q And so from the time of the filing of the complaint in
7 the instant action through the present date, these four
8 cranes have not been removed from the state of Florida; is
9 that correct?

10 A I didn't understand the question. Not removed from the
11 state of Florida?

12 Q They were never in the state of Florida?

13 A They were never in the state of Florida.

14 Q And they were never removed from the state of Florida?

15 A No, they were never removed.

16 MR. GOLDBERG: I have no further questions at this
17 time.

18 THE COURT: All right. I actually, before I have
19 redirect, I do have a clarification. I'm sorry, but Port
20 Charlotte appears to be in Florida. The Port of Charleston
21 appears to be in South Carolina. So unless -- and I guess
22 there could be another Port Charlotte.

23 But to the extent you can recall, it does seem to
24 be an important issue as it to where they came in.

25 THE WITNESS: It has to be South Carolina. I can

1 go check if you'd like.

2 MR. GOLDBERG: Your Honor, if I can show the
3 witness something to refresh his recollection?

4 THE COURT: All right.

5 THE WITNESS: May I?

6 BY MR. GOLDBERG:

7 Q You may.

8 A Serial number 14-426 came in the Port of Charleston, and
9 it went to Spring Hill Suites, in Savannah, Georgia, and then
10 is currently in Atlanta.

11 THE COURT: All right. Thank you for the
12 clarification.

13 Redirect, Mr. Peters.

14 How long do you anticipate?

15 MR. PETERS: About five minutes.

16 THE COURT: Any other evidence today that will be
17 presented by the Plaintiff?

18 MR. PETERS: No.

19 THE COURT: By the defense?

20 MR. GOLDBERG: No, Your Honor.

21 THE COURT: All right. You may proceed. Thank
22 you.

23 Redirect Examination

24 BY MR. PETERS:

25 Q Regarding the identification of Center Capital's

1 collateral, what documents, if any, would be useful to you to
2 help you identify all of Center Capital's collateral?

3 A I don't believe it's documentation. We know that, for
4 example, 171 foot of tower of this size tower section that we
5 bought, we know that. Then we know you have a serial number,
6 so documentation is not the answer.

7 We have several hundreds and hundreds of feet of
8 same type tower. So it's basically you have 171 feet of that
9 tower, and we know it's your serial number for the -- again,
10 the cat head, the machine deck and the cap. We know that.

11 The jib, we know that there's 262 feet this way, if
12 that was the number. We have a lot of those 262. So 262 of
13 hundreds of feet we know is a Center Capital asset.

14 Q Is some of the accessories or excessions fungible? In
15 other words, I don't understand the crane business. Is some
16 of the portions of the crane fungible with other portions of
17 other cranes?

18 A Yeah, and that's what I've tried to make clear in that
19 document. We call it modular. Yeah, in the tower crane
20 business, modular means that this tower -- and it's all
21 manufacturers. All manufacturers have that ability that this
22 tower can go on many different cranes. So you can do higher
23 buildings and lower buildings.

24 The same with the jib. Jib is the horizontal part
25 of the electric tower crane. Now, this isn't the case with a

1 mobile crane, strictly the tower cranes. So they're
2 considered to be modular.

3 Q So as to, for example, the equipment described in loan
4 70006, would some portions of that equipment be fungible with
5 other cranes produced or sent to you by other vendors?

6 A Well, not other vendors. We're only talking about one
7 manufacturer here. But that particular crane, as all four of
8 those cranes, all in combination with other serial numbers
9 from other lenders, but being the same manufacturer, yes,
10 they are. They can work together.

11 Q And so as to, for example, the model 550 ATT tower crane
12 on fixing angles, serial number 14.413, invoice number 2768,
13 would that collateral be able to be returned to Center
14 Capital? Would you be able to identify that entire piece of
15 collateral?

16 A Which model is it?

17 MR. GOLDBERG: Objection, leading.

18 THE COURT: Overruled.

19 BY MR. PETERS:

20 Q Model 550, ATT tower crane on fixing angles, serial
21 number 14.413, invoice 2768.

22 A That's the machine at Turnberry, Fontainebleau, Las
23 Vegas.

24 Okay. Whatever -- where is the amount? Let me see
25 this.

1 This crane, looking at this document, consisted of
2 171 foot of tower and 262 foot of jib. Okay. The crane is
3 currently where we said it was.

4 You would simply take 171 feet of that tower out of
5 800, and 262 feet of that jib. And I don't recall the
6 horizontal that's in it, but 262 feet of that model -- that
7 jib, and you would return it, plus that serial number to the
8 machine deck. Counterweights are counterweights.
9 Counterweight baskets are counterweight baskets. All these
10 other sections, and you would return it.

11 Q And would that be everything encompassed within that
12 invoice number 2768, if you know?

13 A Well, yeah, it would be, A -- I'm not saying it would be
14 the original, because the cranes don't come in that way. The
15 cranes come in cargo containers with various tower sections.
16 Center Capital ultimately, post-Bank of America, paid for X
17 amount of it the way we bought that crane. But they come in
18 in gross.

19 The only thing that came in established was those
20 three components. The rest of it is all a mass of different
21 cranes that we purchased so many of them. If we just did
22 three or four, it would be different, but that's not the
23 case.

24 Q Are you able to, if requested by the Court, return all
25 of the collateral described by Center Capital?

1 A Well, I don't have the ability to return the crane in
2 Las Vegas. I don't have the ability to return the crane at
3 McCarthy until it's completed.

4 If the Court demands that I return the two cranes
5 that are located in storage, that could be done.

6 Q As to the two cranes that you said you cannot return
7 that was -- we talked about those two cranes during my direct
8 and then cross, but to clarify the record, could you explain
9 again why you could not return those two cranes.

10 A Okay. The crane in Las Vegas, the job has been shut
11 down, and I'm going to tell you for over three months. They
12 owe us millions of dollars. That crane is in bankruptcy
13 because the contractor's in bankruptcy, which is Turnberry
14 Development, Turnberry Construction. Okay. You can't even
15 get on the job site, to my knowledge. The last time our
16 people tried to get on, we could not.

17 The crane is sitting in a weather veining at
18 Fontainebleau Las Vegas 800-some feet in the air.

19 The crane at McCarthy, MD Anderson, that is
20 completing the cancer center, I am under contract to finish
21 that building because it is leased to McCarthy at MD Anderson
22 Cancer Center.

23 Q So as to the job in Las Vegas, you're not stating that
24 physically you couldn't do it, you're stating that under the
25 law, as you understand it, you can't do it; is that correct?

1 A Well, physically I can't get on the site, so I guess
2 it's the law and physics. I can't get --

3 Q But you're not making a comment on our ability to file a
4 motion for -- to modify an automatic stay in bankruptcy or
5 anything like that?

6 MR. GOLDBERG: Objection, calls for a legal
7 conclusion.

8 THE COURT: Sustained.

9 BY MR. PETERS:

10 Q As to the McCarthy crane where you're under contract
11 to -- with a lease contract, after that lease contract is
12 over, are you stating that you would be in the position to
13 return the crane?

14 A In Houston, not to Florida.

15 Q Why not to Florida?

16 A Because of the cost. It would be prohibitive to bring
17 it all the way to South Florida.

18 Q Would you be able to, as to each of these four cranes,
19 assuming Center Capital had the legal right to get to them,
20 would you be able to make them available where they're
21 currently located for Center Capital to pick them up?

22 A Yes, if we had access and they were finished with
23 their -- with the situation I'm in, absolutely.

24 MR. PETERS: I have no further questions.

25 THE COURT: All right. Thank you.

1 I just need a little bit of a clarification. I
2 think I understand your testimony, but just to be sure,
3 you're saying that there are serial numbers on the machine
4 deck, the cab and the turntable. So you can identify those.

5 But with respect to the towers and the jibs, that
6 although you know how much of the towers and the jibs were
7 paid for under the finance agreement, there is no serial
8 number attached to it a specific portion of it; is that what
9 you're saying?

10 THE WITNESS: Yes, ma'am.

11 THE COURT: All right. So, for example, if you
12 were ordered to return what it was that was purchased with
13 the monies that were originally lent by Bank of America, then
14 you would be guessing as to which portion of the jib and
15 which portion of the tower comprised the original crane? Is
16 that an accurate understanding of what you're saying?

17 THE WITNESS: Well, I don't think it's fair to say
18 guessing, but what I would do is you have -- those model
19 numbers have X jib size. So whether it be this crane's
20 original, it really isn't an original. We would just provide
21 them that exact measurement of that exact model number and
22 that exact tower length.

23 THE COURT: All right. But that exact measurement
24 might or might not be the original component of that crane?

25 THE WITNESS: Well, and that's where we're

1 disconnect.

2 When they come in, I buy five of these 550's, for
3 example. They come in with five 262-footers. Not one of
4 them was specified for that exact serial number. They're
5 specified for any five, because they're interchangeable.

6 So it didn't, like, come in for one crane 262 and
7 171, all one -- it doesn't get shipped that way, doesn't work
8 that way. We just know that they financed X amount of
9 length. So they would have that crane back to its origin; it
10 just, you know --

11 THE COURT: Right.

12 THE WITNESS: It may not be exact that serial
13 number that it was designed for, because it's not really done
14 that way.

15 THE COURT: All right. But I guess let me see if I
16 can ask this a little bit better.

17 Let's say the 800-foot crane. We know that
18 171 feet of it, or so, were financed by Bank of America; is
19 that correct?

20 THE WITNESS: Yes.

21 THE COURT: All right. The other 629 feet of it,
22 were they built at the same time using the same shipment?

23 THE WITNESS: Correct.

24 THE COURT: Is that what you're saying? I
25 understand now.

1 Thank you.

2 Is there anything further from the Plaintiff?

3 MR. PETERS: I have a question regarding further
4 proceedings, but, no, not regarding presentation of evidence
5 today.

6 THE COURT: All right. Mr. Goldberg?

7 MR. GOLDBERG: Your Honor, I do have one issue
8 which was not clearly briefed which was raised right before
9 Mr. Robertson took the stand by the Plaintiff, which is this
10 question of constructive possession versus constructive
11 jurisdiction.

12 THE COURT: I understand your argument. You're
13 saying they're two separate issues. One is constructive
14 possession after an issue -- an order has already been
15 entered, whether there's -- it's actually in the constructive
16 possession. And that's a different issue from whether the
17 Court has constructive control over the property. I
18 understand the difference.

19 MR. GOLDBERG: Because I do have additional federal
20 case law which --

21 THE COURT: All right. I'll hear it.

22 MR. GOLDBERG: -- clarifies what constructive
23 possession is, because Plaintiff mischaracterized my
24 memorandum, indicating that we discussed constructive
25 possession as opposed to constructive jurisdiction. Our

1 motion does address briefly constructive jurisdiction.

2 Doesn't get into it because it simply doesn't apply here.

3 For in rem jurisdiction to apply in a federal
4 court, the property must actually or constructively be within
5 the jurisdiction of the Court. And, again, that's different
6 from constructive possession.

7 Constructive in rem jurisdiction is a very limited
8 concept applying in only specialized circumstances, such as
9 forfeitures, which is why we cite so many forfeiture cases,
10 bankruptcies, receiverships and admiralties.

11 And, for example, in a receivership in bankruptcy,
12 a court-appointed receiver or trustee takes control of all
13 the property of the debtor, wherever it's located, and all of
14 that property is constructively within the jurisdiction of
15 the Court.

16 And that's Penn General Casualty versus
17 Commonwealth of Pennsylvania, 294 US 189.

18 In the context of bankruptcy -- excuse me,
19 admiralty, a court may issue a warrant of arrest over a
20 wreck, a res based upon artifacts that are brought up and
21 brought within the jurisdiction of the Court, even though the
22 entire rest of the wreck is underwater somewhere. And the
23 Court can then exercise, based upon those artifacts,
24 constructive jurisdiction over -- constructive in rem
25 jurisdiction over the wreck.

1 And that's Great Lakes Exploration Group, LLC
2 versus Unidentified Wrecked and Abandoned Vessel, 522 F.3d
3 682, Sixth Circuit 2008.

4 These are examples of what constructive in rem
5 jurisdiction is, and it simply doesn't apply here.

6 THE COURT: All right. Is there any other
7 evidence?

8 MR. GOLDBERG: No Your Honor.

9 THE COURT: Last point by Mr. Peters.

10 MR. PETERS: Am I allowed to respond to his legal
11 argument?

12 THE COURT: I think you previously have. If we're
13 going to go much longer, I do need to give the court reporter
14 a break. I asked 15 minutes ago how much longer we thought,
15 and we thought it was five minutes. And I don't mind that we
16 go longer, but I'll need to know how much longer we're going
17 so I can be fair to the court reporter here.

18 MR. PETERS: I'd like to have about five minutes to
19 address his issue. I apologize if Your Honor thinks that
20 it's unfair to the court reporter or wants to take a break,
21 I'll do so. If Your Honor wants to cut me off because you
22 think it's unfair, whatever your pleasure.

23 THE COURT: All right. Just one moment, please.

24 All right. Mr. Peters, I want to hear your
25 argument if it's something new, although I think I've heard

1 it previously. But if it's something new, I'll be pleased to
2 hear it, but I have told the court reporter in reliance on
3 your statement that it would be just five minutes. All
4 right? If you need more time than that, that's fine, but you
5 need to let me know so I can give him a break.

6 MR. PETERS: Why don't we take a very short break.

7 THE COURT: How much time are you going to require?

8 MR. PETERS: Absolutely no more than ten minutes.

9 THE COURT: And it will all be new material that's
10 not previously been brought up or briefed? Because we've
11 had -- we did have argument before I heard the evidence. So
12 I'll be happy to hear anything new, but if we're going to be
13 treading the same ground that we've already gone through,
14 then I'd prefer not to do that.

15 MR. PETERS: Well, then let me make just one
16 general comment.

17 THE COURT: All right.

18 MR. PETERS: I was going to go through orally the
19 different cases cited in our brief, but I think that Your
20 Honor already knows what those cases are and can read them
21 Your Honor's self, and so I'm not going to go through them
22 and explain where they fit in.

23 But I will make a general point regarding the issue
24 of jurisdiction and in rem. In doing the research on this
25 case, I learned that historically there was the issue of a

1 local action and a transitory action. And the local action
2 was ordinarily for something like real estate, and the
3 transitory action was -- ended up as a lot of developing in
4 the nature of in personam that graduated into the evidence
5 before Your Honor here regarding what's in rem, where we
6 already have acknowledgment that there's diversity
7 jurisdiction, and we have now acknowledgment that there's in
8 personam jurisdiction. And this in rem jurisdiction for
9 prejudgment replevin only, we deny it's even an issue for
10 Count 1. It may or may not be an issue for prejudgment
11 replevin, and that's what we're primarily arguing about here
12 today, that in rem jurisdiction is based -- it's a little bit
13 of a conglomeration, and it's based on whether or not the
14 individuals have control. So to that extent, it's somewhat
15 in personam, or the res. And here we say that they do.

16 That was just a summary of my thoughts.

17 THE COURT: All right. I appreciate that. Thank
18 you.

19 MR. PETERS: And then I have a question regarding
20 further handling of the case.

21 THE COURT: All right.

22 MR. PETERS: The issue in the briefs, which I did
23 not have a chance to address in the briefs and an argument
24 briefly today as to whether Center Capital must file a
25 financing statement, whether it's in Florida only or whether

1 or not we have to file in each location where the equipment
2 is. We would like an opportunity to brief that issue,
3 because it's our contention that it's black letter law that
4 we only have to file it in Florida and would like to have an
5 opportunity to brief that.

6 THE COURT: Any objection?

7 MR. GOLDBERG: No, Your Honor.

8 THE COURT: All right. Will a week suffice for
9 that, or do you require more time?

10 MR. PETERS: A week would be fine.

11 And then to clarify, Your Honor, on the briefs,
12 we're going to file -- or have the opportunity, excuse me, to
13 file, should we so choose, a brief on the issue of the one
14 condition precedent that is -- was discussed today. And then
15 if we so choose. It's an optional filing, as I understand
16 it.

17 THE COURT: That's correct.

18 MR. PETERS: And we have an opportunity to brief
19 the issue of where we file our financing statement.

20 And how was it left regarding, Your Honor, the
21 mandatory injunction briefing?

22 THE COURT: I'm going to just check in with Judge
23 Zloch's chambers. And assuming that he is considering this
24 to be a part of what he has referred, I will issue an order
25 allowing for the Defendant to file a brief, if it so chooses,

1 within ten days of the issuance of the order, and allow you
2 the opportunity to respond.

3 How much time would you like to respond if I do
4 that?

5 MR. PETERS: Ten days, Your Honor.

6 THE COURT: All right. Anything further?

7 MR. PETERS: Not from me, Your Honor.

8 THE COURT: All right. Thank you very much,
9 gentlemen. And I will carefully review what has been filed
10 and the additional cases that have been cited today, as well
11 as conduct additional research on my own, and I'll get back
12 to you if I am, in fact, going to be considering the
13 mandatory injunction aspect of this.

14 All right. Thank you.

15 We are in recess.

16 (Proceedings concluded.)

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CERTIFICATE

I, Stephen W. Franklin, Registered Merit Reporter, and Certified Realtime Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 23rd day of SEPTEMBER, 2009.

/s/Stephen W. Franklin

Stephen W. Franklin, RMR, CRR

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