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<p>THE COUNTY OF DAUPHIN and JOSEPH and JACALYN LAHR, Plaintiffs</p> <p style="text-align: center;">v.</p> <p>THE HARRISBURG AUTHORITY, CITY OF HARRISBURG, MAYOR LINDA D. THOMPSON, PAUL P. WAMBACH, TREASURER, DANIEL C. MILLER, CONTROLLER, GLORIA MARTIN ROBERTS, PRESIDENT, CITY COUNCIL, KELLY SUMMERFORD, SUSAN BROWN WILSON, BRAD KOPLINSKI, WANDA WILLIAMS, PATTY KIM, and EUGENIA SMITH, CITY COUNCIL MEMBERS, Defendants</p>	<p>: IN THE COURT OF COMMON PLEAS : OF DAUPHIN COUNTY, : PENNSYLVANIA : : : NO. 2009-CV-9271-EQ : : CIVIL ACTION - EQUITY : : : : : : : SENIOR JUDGE : CHARLES C. BROWN, JR.</p>
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**BRIEF OF PLAINTIFFS JOSEPH AND JACALYN LAHR IN OPPOSITION TO THE
 MOTION OF THE CITY OF HARRISBURG AND PAUL P. WAMBACH FOR A STAY**

I. INTRODUCTION

Plaintiffs, Joseph and Jacalyn Lahr (the “Lahrs”), residents of the City of Harrisburg, seek an order of mandamus pursuant to 53 Pa. C.S. §8261 (identified and addressed further, *infra*) directing the Harrisburg City Treasurer to “pay into the sinking fund for each series of bonds or notes then outstanding, or for each guaranty or lease rental payment, the first tax moneys or other available revenues or moneys thereafter received in the fiscal year by the treasurer” Amended Complaint Count VI. Section 8261 provides that a Court “shall” enter the relief requested upon a showing that the statutory predicates are met.

Defendants, the City of Harrisburg (the “City”) and City Treasurer Paul P. Wambach, seek a stay based on a purported conflict between the City’s application for “financially distressed” status under the Municipalities Financial Recovery Act, 53 Pa. C.S. §11701.101, *et seq.* (“Act 47”) and the statutory remedies provided under §8261. For the reasons discussed below, Defendants’ Motion should be denied because it is based upon a misreading of the terms of the statutes at issue, it is contrary to the well established precedents for statutory construction in the Commonwealth of Pennsylvania, and it represents an unwarranted (and ultimately unsustainable) extension of the provisions of Act 47.

II. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their First Amended Complaint on March 17, 2010. Count VI of the First Amended Complaint seeks an order of mandamus against City Treasurer Paul P. Wambach pursuant to §8261 as a result of the City’s breach of its obligations pursuant to the 2003 City Guaranty and 2003 City Swap Guaranty. Defendants filed preliminary objections to the First Amended Complaint. By Order entered August 9, 2010, the Court dismissed the claims asserted in the First Amended Complaint except the claim asserted by the Lahrs against Treasurer

Wambach in Count VI. After several continuances, that claim is now scheduled for trial beginning December 15, 2010.

On November 10, 2010, Defendants filed a Motion to Stay. Pursuant to a briefing schedule agreed upon by counsel and the Court, Defendants filed their Brief in Support of Motion to Stay on November 17, 2010.¹ This Brief in Opposition to Motion to Stay is being filed pursuant to the agreed-upon briefing schedule.

III. ARGUMENT

A. Overview of the Statutory Provisions Relating To Municipal Debts

When viewed in the context of the entire statutory scheme applicable to municipal debts, it is immediately apparent that Defendants' Motion for Stay has no merit. As a threshold matter, the Pennsylvania Constitution protects the interests of creditors of local government units and requires that such units must pay their debts in full. *Pa. Const. Art. 9, §10*. Article 9, §10 provides:

Any unit of local government, including municipalities and school districts, incurring any indebtedness, shall at or before the time of so doing adopt a covenant, which shall be binding upon it so long as any such indebtedness shall remain unpaid, to make payments out of its sinking fund or any other of its revenues or funds at such time and in such annual amounts specified in such covenant as shall be sufficient for the payment of the interest thereon and the principal thereof when due.

Id.

The Legislature gave effect to this Constitutionally protected obligation in the Local Government Unit Debt Act, 53 Pa. C.S. §8001, *et seq.* (the "Debt Act"), by requiring municipalities to:

¹ In Defendants' Motion to Stay, they raise the issue of the Secretary of Community and Economic Development being an indispensable party because of the City's pending Act 47 application. This issue appears to be abandoned by Defendants in their Brief. Of course, Act 47 status has not even yet been granted in any event.

Duly and punctually pay or cause to be paid from its sinking fund or any other of its revenues or funds the principal of and interest on every bond or note or, to the extent of its obligation, the amount payable in respect of the guaranty, at the dates and places and in the manner stated in the bonds and in the coupons thereto appertaining or in the guaranty, according to the true intent and meaning thereof.

53 Pa. C.S. §8104(a)(3). The Debt Act further requires that the municipality “shall pledge its full faith, credit and taxing power” to its debt obligations. 53 Pa C.S. §8104(b). It is significant that the Debt Act expressly states that it “provides an *exclusive* and uniform system on the parts covered in [the Debt Act].” 53 Pa. C.S. §8001(d) (emphasis added).

The Debt Act provides judicial remedies that are **mandatory** when a municipality breaches its municipal debt obligations. Section 8261, which provides the basis for the relief sought by Plaintiffs, provides:

If a local government unit . . . fails or refuses to make adequate provision in its budget for any fiscal year for the sums payable in respect of the bonds or notes, lease rental or guaranty . . . then at the suit of the holder of any . . . guaranty . . . or of any taxpayer of the local government unit, *the court of common pleas shall*, after a hearing held upon such notice to the local government unit as the court may direct and upon a finding of such failure or neglect, *by order of mandamus require the treasurer of the local government unit to pay . . .* for each series of bonds or notes then outstanding, or for each guaranty . . . the first tax moneys or other available revenues or moneys thereafter received in the fiscal year by the treasurer, equally and ratably for each series for which provision has not been made in proportion to the debt service for the year on each series then outstanding, or the amounts due upon guaranties or as payments with respect to lease rental debt, as the case may be.

53 Pa. C.S. §8261 (emphasis supplied).

Contrary to Defendants’ arguments, Act 47 complements, rather than conflicts with, the provisions of the Constitution and Debt Act regarding municipal debt. The purposes of Act 47, as enumerated in the Act itself, are to foster the fiscal integrity of municipalities, ensure that municipalities pay principal and interest payments on their debt obligations when due and meet their obligations to employees, vendors and suppliers, and to provide for proper accounting,

budgeting and taxing practices. 53 Pa. C.S. §11702.102. Act 47 provides a framework for a process of voluntary resolution of payment issues by “[e]nact[ing] procedures for the adjustment of municipal debt *by negotiated agreement with creditors.*” 53 Pa. C.S. §11701.102(b)(1)(ii) (emphasis added.) No provision of Act 47, however, limits the obligation of a court to enforce the mandatory provisions of the Debt Act or authorizes a court to grant a stay of the type requested by Defendants. Indeed, Defendant’s Brief **fails** to identify a **single** statutory provision that actually conflicts with the Debt Act. Similarly, Defendant’s Brief is noticeable for its **failure** to identify a **single** statutory provision that would empower this Court to forego awarding the relief that is mandatory under the provisions of the Debt Act.

Viewed in the light of this well-conceived and comprehensive constitutional and statutory structure, it is clear that Defendants’ Motion should be denied.

B. An Order Under Section 8261 is a Statutory Mandate

Defendants, relying on a plethora of decisions dating back to 1859, incorrectly assert that §8261 does nothing more than enact “a common law remedy” and then bootstrap to that assumption an argument that the Court may apply its “discretion” not to afford the relief that the Debt Act requires. Defendants’ Brief at pp. 2-5. Defendants’ arguments ignore the plain language of §8261 (which Defendants notably fail to quote anywhere in their Brief). As quoted above, §8261 explicitly provides that if the statutory elements are met, the Court “shall” enter an order of the type Plaintiffs seek herein.

The Pennsylvania Statutory Construction Act confirms that “[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” 1 Pa. C.S. §1921(b). Applying this principle, Pennsylvania courts have consistently held that the word “shall” in a statute gives rise to a mandatory obligation that

cannot be avoided in the exercise of a court's discretion. See, e.g., *Light of Life Ministries, Inc. v. Cross Creek Twp.*, 746 A.2d 571, 573 (Pa. 2000) (reversing a decision of the Pennsylvania Commonwealth Court because it "disregarded the mandatory application of the word 'shall'" in a statute); *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa.1997) ("By definition, 'shall' is mandatory. Accordingly, there is no room to overlook the statute's plain language to reach a different result.") (citation omitted), *Commonwealth v. Burns*, 988 A.2d 684, 690-91 (Pa. Super. 2009) ("We will presume that the legislature intended 'shall' to be mandatory in the statute at hand."); *Taterka v. Bureau of Prof'l & Occupational Affairs*, 882 A.2d 1040, 1043 (Pa. Commw. 2005) ("It is axiomatic under our statutory construction precedents that, by definition, the word 'shall' is mandatory and accordingly entertains no room to overlook a statute's plain language to reach a different result.")

Accordingly, as a matter of well-established law, there is no merit to Defendant's request that the Court exercise its discretion to fail to give effect to the mandatory provisions of the Debt Act.

C. An Order Pursuant to Section 8261 Does Not Conflict With Act 47

Defendants have also argued that the provisions of section 8261 "conflict with the requirements of Act 47." Defendants' Brief at p. 5. As discussed above, Defendants misconstrue both the intent of Act 47 and the public policy of this Commonwealth. The Constitutional protection of the interests of municipal creditors, the express statutory remedies afforded to such creditors and Act 47 are all intended to achieve the same objective, *i.e.*, to ensure that municipalities take the necessary and proper actions to pay their debts.

As a matter of statutory construction, the provisions of the Debt Act and Act 47 should be construed to give effect to both. 1 Pa. C.S. §1933. As noted above, it is the well-established

law in Pennsylvania that the Court must give effect to the provisions of the Debt Act that explicitly mandate the relief requested by Plaintiffs. In contrast, Act 47 does not confer any jurisdiction or authority on the Court to refashion existing debts or to preclude parties from exercising their statutory rights against municipalities.² Nor did the Legislature provide any authority for a court to stay any proceedings against a municipality during the pendency of an Act 47 process.

In construing the two statutes, therefore, the Court must conclude that the Legislature did not intend that municipalities that were subject to Act 47 proceedings would be entitled to a stay of proceedings in actions to invoke the specific remedies explicitly mandated under the Debt Act. Clearly, if the Legislature had intended to empower courts to grant a stay of the type requested by Defendants, it would have explicitly done so as it has done in other comparable statutory schemes. See, e.g., 40 Pa. C.S. §221.26 (power granted to the Commonwealth Court to enjoin litigation against insolvent insurance companies). In the absence of such an express grant of authority, there is no basis for the Defendants' argument that the Court has the implied power to stay proceedings under the Debt Act. Indeed, the only circumstance in which the two statutes would conflict would be if the Court accepted the Defendants' invitation to treat Act 47 as having some implied primacy over the express provisions of the Debt Act.

D. Defendants' Seek An Unwarranted Expansion of Act 47

Defendants' position, simply put, is that a court is empowered to stay any litigation against a municipality if that municipality is proceeding under Act 47. This argument, if accepted, would be applicable to any suit, brought by any creditor or injured party, against a

² Act 47 does contain a provision that grants limited jurisdiction to the courts of common pleas. However, that section, 53 Pa. C.S. §11701.141, only grants jurisdiction to hear petitions to increase taxes by municipalities and for the enforcement of tax obligations by the courts through the authorization of sheriff sales for delinquent taxpayers.

municipality. Cities are often sued on a broad range of issues from collective bargaining agreement disputes, breaches of contract, unpaid debts, failure to provide services, personal injury and many other causes of action. If Defendants were to prevail here, then they would be permitted to seek a stay in any action brought against them solely because of the Act 47 proceedings. There is simply no legal basis under Act 47 or otherwise for such a result.

E. Defendants Have Failed To Establish Any Factual Basis For A Stay

Defendants also argue, without any supporting facts, that the payment of debt service that an order of mandamus would require “would divert funds essential to the operating budget of the City [and] ...immediately threaten public, health, safety and welfare...” Defendants’ Brief at p. 7. This argument is belied by the recent payment by the City of over \$300,000 in debt service obligations. See *Romy Varghese, Harrisburg, Pa., Makes Debt Payments, Wall Street Journal*, November 16, 2010, attached as Exhibit ‘A’ hereto. Defendants cannot claim an imminent threat to the public welfare if they have to make debt service payments on one set of bond obligations, while simultaneously making payments to other similarly situated bond and note holders. Indeed, in light of Defendants’ actions, which are a matter of public record, Defendants’ pending Motion is fairly characterized as an effort to enable Defendants to make preferential payments to certain creditors at the expense of payments to other similarly situated creditors.

Other than the conclusory statement contained in the motion, Defendants provide no explanation as to how the relief requested by Plaintiffs would threaten the public, health, safety and welfare. Indeed, it is a matter of public record that plans have been contemplated involving either leasing or refinancing the Parking Authority, transactions that would provide the City with tens, if not hundreds, of millions of dollars to pay its obligations. See *Michelle Kaske,*

Harrisburg Parking Deal Could Put \$60M in City's Coffers, The Bond Buyer, October 21, 2010;
and *Charles Thompson, Harrisburg Mayor Still Spurns Developer's Lease Offer, Harrisburg Patriot-News, October 14, 2010*, both attached as Exhibit 'B' hereto.

Moreover, the City's situation is of its own making. As alleged in detail in the First Amended Complaint (see paragraphs 97-110), the City has failed to provide for its admitted debt service obligations in its 2010 budget. Both former Mayor Reed and current Mayor Thompson submitted proposed budgets to City Council that acknowledged the City's debt service obligations, and suggested, in provisions lacking significant detail, that the City would undertake steps to lease or sell City assets to fund the City's debt obligations. City Council, however, rejected Mayor Thompson's proposals and adopted an Amended Budget which simply excluded all debt service payments which are the subject of this lawsuit. Having failed to budget (in violation of its legal obligations), the City now seeks a stay because of alleged consequences to other City services. The City cannot be allowed to benefit from the consequences of its own deliberate, improper decisions in an attempt to avoid the remedy provided by statute to address this precise situation.

Thus, even if there were a legal basis for a stay, which there is not, Defendants have failed to establish any entitlement to a stay as a factual matter.

CONCLUSION

For the foregoing reasons, Plaintiffs request the Court to deny Plaintiffs motion for a stay.

Respectfully submitted,

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Date: November 24, 2010

CERTIFICATE OF SERVICE


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EXHIBIT:

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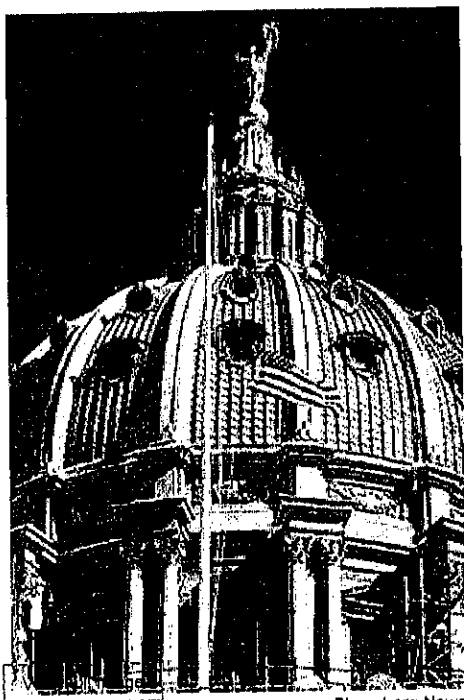
WSJ.com

MARKETS | NOVEMBER 16, 2010

Harrisburg, Pa., Makes Debt Payments

By ROMY VARGHESE

HARRISBURG, Pa.—The cash-strapped capital of Pennsylvania made two debt payments due Monday, but is scrambling again to drum up funds for payroll next week.



Bloomberg News

Next up for Harrisburg: meeting payroll. Here, the capitol building.

Harrisburg tapped dedicated revenue streams and general revenue funds for the \$99,025 payment for a 2006 Lease Revenue Note and a \$206,927 payment due on a 2005 taxable revenue bond that financed the expansion of the city's minor-league baseball stadium, both issued through the Harrisburg Redevelopment Authority, according to Chuck Ardo, spokesman for Mayor Linda Thompson.

Meanwhile, the city's payroll for its 543 workers isn't fully funded, Mr. Ardo said. City officials have struggled to pay workers in the past several months and have relied on one-time measures and skipping overtime payments to do so. They are hoping that acceptance into Pennsylvania's oversight program for distressed municipalities would allow the city to get short-term funds.

Officials were expected to vote later Monday on a measure that would give the city \$3 million from its water operations, thanks to the proceeds from a terminated interest-rate swap.

Write to Romy Varghese at romy.varghese@dowjones.com

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The Bond Buyer

October 21, 2010 Thursday

SECTION: NEWS; Pg. 4 Vol. 374 No. 33403

LENGTH: 616 words

HEADLINE: Harrisburg Parking Deal Could Put \$60M in City's Coffers

BYLINE: Michelle Kaske

BODY:

Harrisburg could gain \$60 million by the end of the year as the Harrisburg Parking Authority in December plans to restructure all of its \$105 million of outstanding debt and pass new-money proceeds to the city.

Pennsylvania's capital city guarantees about \$86 million of the Parking Authority revenue bonds.

The potential refinancing would remove the city's pledge from the authority debt. Surplus agency revenue flows into Harrisburg's coffers.

While the potential \$30 million to \$60 million from the authority would help the city with its financial problems - including \$282 million of incinerator debt on which Harrisburg has not been making debt-service payments in 2010 - it would not resolve the city's immediate cash-flow issues.

Mayor Linda Thompson is working on how to meet payroll next week. The city faces \$662,331 of debt-service payments Nov. 15 on Harrisburg Redevelopment Authority bonds that the city guarantees.

"We hope to be able to make these payments as required," Thompson spokesman Chuck Ardo wrote via e-mail.

Pennsylvania-based Boenning & Scattergood Inc. will serve as underwriter on the refinancing deal. Pepper Hamilton LLP is bond counsel.

The Parking Authority may hire an outside financial adviser to help work on the sale, according to Tim Anderson, partner at Pepper Hamilton, the agency's solicitor.

Officials anticipate closing the bond deal by Dec. 31. The sale size will range between \$140 million and \$200 million and will include refinancing and new-money issuance in two series, one tax-exempt and one taxable, according to the proposed bond resolution.

The restructuring will push certain maturities out to future years.

Anderson said the bulk of the refunding would involve advance refundings, which could involve negative arbitrage, but "Boenning & Scattergood thinks that they can set this up in a way that works," he said.

The transaction also includes a new-money portion that would take advantage of revenue collected from certain facilities that have less debt attached to them and anticipated parking-rate increases.

On top of the roughly \$105 million of refinancing, the deal will include \$30 million to \$60 million of new-money proceeds that the Parking Authority would hand over to Harrisburg.

Harrisburg Parking Deal Could Put \$60M in City's Coffers The Bond Buyer October 21, 2010 Thursday

"Some of these facilities have been paid down and there's free cash flow," Anderson said. "There will be more cash flow based on rate increases and that will support some additional debt. It's not just paying off the existing indebtedness."

The Parking Authority's debt matures out to 2037, which mirrors the life of the agency. If the city chose to extend the authority's existence, officials could then issue debt beyond 2037. Boenning & Scattergood believes extending the authority and the debt would generate about \$15 million of additional bonding capacity, according to Anderson.

The authority's board gave the refinancing its initial approval Tuesday night. A final vote on the matter would be required before any bonds could come to market.

The transaction does not require approval of the City Council, Thompson, or city Controller Dan Miller, Anderson said.

City and state officials Wednesday evening were set to hold a public hearing on Harrisburg's potential entrance into Pennsylvania's distressed communities program, called Act 47. Ardo said potential funds from the Parking Authority bond deal would help the city get back on track.

"We hope that this move reassures lending institutions, thus making it possible for the city to borrow money to meet its immediate financial obligations," he said in a phone interview. "And also it will help us develop a long-range plan that addresses both the structural operating deficit and our indebtedness issues."

URL: <http://www.bondbuyer.com/>

LOAD-DATE: October 21, 2010

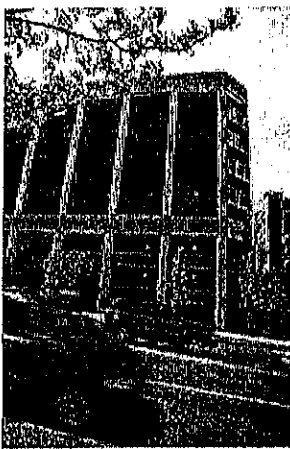


Harrisburg mayor still spurns developer's lease offer

Published: Thursday, October 14, 2010, 11:11 PM Updated: Friday, October 15, 2010, 10:38 AM



CHARLES THOMPSON, The Patriot-News



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Gary Dwight Miller, The Patriot-News, 2008

The Fifth Street Parking Garage, at Market and Fifth streets in downtown Harrisburg.

A New York developer is still interested in paying Harrisburg \$215 million to lease the city's public parking facilities for 75 years, the developer's attorney said Thursday.

But a top aide to Mayor Linda Thompson reaffirmed the mayor will not entertain any parking deal to raise up-front cash for the city without a fresh round of bidding.

"The key element here is that no decision has been made to lease city-owned parking assets," said Chuck Ardo, Thompson's spokesman, "and if and when a decision is made, the mayor intends to seek new bids."

Raising money by leasing the garages was an option first raised by former Mayor Stephen R. Reed as a way for the city to climb a spike in debt service payments tied to upgrades at the Harrisburg Incinerator.

Jacob Frydman and his Lambdastar Infrastructure Partners proposed in 2008 to run the city's garages, surface lots and all metered spaces in downtown

Harrisburg for 75 years in exchange for \$215 million cash.

The city would use \$106 million of that to retire existing bond issues tied to the parking garages, leaving about \$109 million to attack its \$288 million debt burden.

Ever since City Council rejected his offer in 2008, Frydman has continued to say he's willing to work with Harrisburg, and has literally dared city officials to find a better offer.

The debate rekindled when a published report Thursday afternoon suggested Frydman and his partners had set a new deadline of Dec. 15 on their offer.

In a clarification to The Patriot-News last night, Mark Stewart, the group's local attorney, contended

Frydman meant only that Dec. 15 appeared to be "a natural deadline" for the city.

That's because Harrisburg is on the hook for tens of millions of dollars in debt service payments by that date, Stewart said, and the cash infusion from a lease is one of the main reasons privatizing the garages ever came up here.

But, Stewart stressed, "there has been no deadline given [to the city] by the Lambdastar group or Mr. Frydman."

Frydman's latest comments on Harrisburg come as Thompson has set out on a new course that could see the city receiving stronger state guidance as a "distressed municipality."

A hearing on the mayor's petition to enter into the state's main municipal financial recovery program is set for Wednesday.

If so-called Act 47 status is approved, the state would appoint a coordinator to work with city leaders on development of a long-term financial recovery plan. Elected officials must approve the plan and then must enforce it.

Many observers still believe an evaluation of leasing the city's parking facilities to a private operator will be part of the development of any recovery plan here.

But the issue is highly controversial, with many on the council arguing it is unfair to taxpayers' to take existing assets that help fund annual operating budgets to pay for mistakes they had nothing to do with.

Under Lambdastar's current plan, the group would claim all parking fees and would have wide latitude, following a demonstration of "reasonableness," to raise parking rates going forward.

But Frydman has said his group's interest in keeping garages attractive to commuters would virtually guarantee rates that are competitive in the market.

Thompson's position has been any new decision to seek bids for parking facilities would have to be accompanied by a fresh round of bidding.

If that happens, Ardo added, "Mr. Frydman is welcome to bid, and if he chooses to do so that's fine. And if he chooses not to do so, that's fine as well. ... It's his money, and he's welcome to spend it anywhere he likes."

Stewart said he did not believe Lambdastar officials had made any decision on whether they would participate in a new round of bidding.

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