1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT NEW YORK
3 Case No. 12-11076-shl
4 Chapter 11
5 - x
6 In the Matter of:
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8 ARCAPITA BANK B.S.C.(C), et al.
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10 Debtor.
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12 - x
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14 United States Bankruptcy Court
15 One Bowling Green
16 New York, NY 10004
17 July 30, 2013 - 10:17 AM
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22 B E F O R E:
23 HON. SEAN H. LANE
24 U.S. BANKRUPTCY JUDGE
25 ECRO: KAREN

1 HEARING re: Docket number #1197 Motion to Authorize / Motion
2 of Official Committee of Unsecured Creditors for Entry of Order
3 Under 11 U.S.C. 1103(c) and 1109(b) Granting Leave, Standing
4 and Authority to Prosecute Turnover and Avoidance Claims
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25 Transcribed by: Mary Zajaczkowski

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

2 THE COURT: Good morning, please be seated. All

3 right. We're here for a continued hearing on Arcapita Bank,

4 the Committee's motion to authorize standing to pursue certain

5 actions. And I have read the additional pleadings that were

6 filed by both the Committee and the response filed by Bank of

7 New York Mellon on behalf of Arksicook (phonetic). So we did

8 go quite a bit around the bend in terms of discussing all these

9 issues last time so I don't need argument to cover everything,

10 I just really want to talk about the additional information

11 that was submitted.

12 And I guess first thing is first is the information I

13 guess is an email that's supposed to, that is evidencing

14 consent, if that term I guess is used exactly how folks

15 construe consent, but the email, what I'd like to do is see a

16 copy of that. I'd like to see an unredacted copy of it frankly

17 just because I want to see what the scope of the communications

18 are so that I have a fulsome understanding of it. And to the

19 extent things are irrelevant, I will not pay any attention to

20 the rest of it.

21 MR. FLECK: Your Honor, may I approach?

22 THE COURT: Sure. Thank you. All right. And has

23 this been shared with the other side?

24 MR. FLECK: Your Honor, we shared the redacted

25 version.

1 THE COURT: All right. I can say after looking at
2 this I don't think the redactions have any relevance which I
3 know is what you said, but just in terms of making that
4 statement for my purposes on the record. I just figured that
5 should be a quicker read if you'd let me read the whole thing
6 rather than try to guess what's in the redacted parts. All
7 right. Thank you for that. And I'm just going to identify it
8 for the record unless there's any objection just by date so
9 that we have it sort of in the situation here. And it's an
10 email from Michael Rosenthal to Evan Fleck Tuesday, May 21st,
11 2013, and the subject is re Arcapita avoidance claims.
12 All right. So I have that, I think that's the last
13 bit of things that I had that I want to make sure I got. So
14 let me hear argument or comments from either side, again I read
15 the pleading, and I think I have a pretty good sense of where
16 everybody is coming from.
17 MR. FLECK: Thank you, Your Honor, Evan Fleck of
18 Milbank Tweed Hadley and McCloy on behalf of the Official
19 Committee of Unsecured Creditors. Your Honor, I'm joined today
20 by my litigation partner, Andrew LeBlanc. I thought it was
21 important that Mr. LeBlanc join me particularly with respect to
22 the fee estimate aspect of the, of Your Honor's request and
23 what we included in the supplement, that that was the subject
24 of part of Bank of New York's arguments. At the time we had
25 the hearing I think it was June 26th when we were before Your

1 Honor, the committee had not yet made a decision as to who
2 would represent the committee if Your Honor grants standing for
3 these actions. I had not yet requested an estimate, we went
4 back to the committee without Bank of New York present as is
5 appropriate, reported back as to what Your Honor had requested.
6 The committee did ask that Milbank handle the litigations on
7 behalf of the committee, and that FTI Consulting work on the
8 financial side. Mr. LeBlanc will lead those litigations should
9 Your Honor grant the relief that's requested with respect to
10 the committee's request for standing.
11 Your Honor, I did want to touch briefly though on a
12 couple of other points, and I will limit it to the subject
13 that, the two topics that Your Honor requested that we address.
14 And those were first how did we evidence the debtors'
15 nonobjection to the committee's standing with respect totally
16 to the preference claim, that's the $1.2 million claim under
17 547(b) of the Bankruptcy Code to avoid a payment that was made
18 within the 90 day period to the Arksicook trustee. The second
19 is with respect to putting some more flesh on the bones with
20 respect to the fee estimate. And it's those two points that I
21 want to address for the Court.
22 Your Honor, on the first point with respect to
23 evidence, we've just had a discussion and I've handed up a copy
24 of the email exchange. And I think it's significant, Your
25 Honor, that first of all no creditor other than the Bank of New

1 York has objected the relief, but secondly, the Bank of New
2 York doesn't take issue with the substance of the email, as I
3 indicated we did provide them promptly after the filing of the
4 supplement with a copy of the email, they don't take issue with
5 the substance of it, they don't take issue with the fact that
6 the evidence is the debtors' nonobjection to the relief
7 requested with respect to the preference claim, they don't at
8 all deal with the placement banks. What they seem to be saying
9 in their filing is that there's an additional element to the
10 Commodore standard that frankly does not exist, that there
11 needs to be some kind of a public disclosure of the debtors'
12 position and that you need to have that in addition to debtor
13 saying that they don't object; otherwise, you're in the world
14 where the debtor is just passively not weighing in at all, and
15 that was the concern that Judge Gerber raised in Adelphia.
16 Your Honor, the committee disagrees, we don't think
17 that there's any requirement to have public disclosure with
18 respect to the debtors' position to not object, that's nowhere
19 in Commodore. In fact, the Eighth Circuit has spoken to this
20 issue specifically. We address the case PW Enterprises v.
21 North Dakota Racing Commission, the Eighth Circuit case. In
22 our supplement there was no response to the argument from Bank
23 of New York. And specifically, the Eighth Circuit dealt with
24 the form over substance issue, and they said that it's
25 irrelevant when and in what manner the debtors reflect their

1 nonobjection to the standing motion. They said that they
2 caution that the form should not be elevated over the
3 substance. In fact, it was noted in that case that it doesn't
4 even need to have occurred before the hearing on standing, the
5 debtors could actually have done it at the hearing, could
6 evidence their position here. It occurred long before that.
7 As Your Honor noted there was a May 21st email, and I think it
8 may be useful just to provide some context for the Court as to
9 how this came about.
10 Obviously, this is a complicated case and there were
11 a lot of discussions, a lot of documentation taking place
12 leading up to the disclosure statement filing and then up to
13 the plan. And as is actually reflected in the email exchange,
14 when the committee and its financial advisors were discussing
15 with the debtor and its financial advisors the various claims
16 that made up the bucket that was discussed in the disclosure
17 statement on page 105 and the following pages with respect to
18 the avoidance actions, it occurred to the parties that the
19 claim with respect to the Arsicook trustee, the preference
20 claim had not been identified as being within one of the URIA,
21 U-R-I-A accounts. That's specifically discussed in the
22 disclosure statement page 106 and 107 how the debtors talk
23 about in the disclosure statement that certain claims with
24 respect to URIA accounts would have special defenses that would
25 attach to those claims.

1 At the time the disclosure statement was filed, we
2 were not aware and the debtors upon information and belief,
3 were not aware that the payment with respect to the Arksicook
4 trustee, the $1.2 million preference amount, fell into that
5 bucket. That's relevant, Your Honor, because the debtors go on
6 in the disclosure statement to talk about the defenses that may
7 apply with respect to certain avoidance actions. And they say
8 that after considering the merits, this is on page 107 of the
9 disclosure statement, the debtors say that after considering
10 the merits of the defenses that would be asserted by potential
11 preference defendants and the relevant strengths thereof, that
12 they've decided not to pursue the actions themselves. But
13 specifically, Your Honor, again on page 107, the debtors say
14 that with respect to the avoidance actions that there are
15 certain entities first whose cooperation will be necessary to
16 maximize the value of investment portfolios for the benefit of
17 the creditors. That's one reason why the debtors have elected
18 not to pursue certain avoidance actions.
19 And the second, they say the cost to pursue avoidance
20 actions being released pursuant to the plan against defendants
21 who reside in foreign jurisdictions that may not fully respect
22 decisions of the bankruptcy court, and then they go on to say
23 it's more beneficial to release rather than pursue avoidance
24 claims against certain parties.
25 Your Honor, we submit that neither of those

1 justifications applies to the Arksicook trustee on account of
2 the preference claim, their cooperation is not necessary to
3 maximize the value of the investment portfolios. They also, we
4 don’t expect that they will not, in fact affirmatively we
5 expect they will fully respect decisions of the Bankruptcy
6 Court and therefore the basis that the debtors have stated
7 there for not pursuing certain claims just doesn’t apply to
8 them. I bring us back to the context because this was all in
9 the disclosure statement. We later realized that that language
10 could apply or could be read to apply fairly to the Arksicook
11 preference plan for $1.2 million. As I said, we later had the
12 discussions that led to the email exchange when we noticed some
13 claims that would otherwise fall into that bucket fairly red
14 should not be treated as those types of claims. That’s when we
15 had a discussion with the debtors, the plan was changed so that
16 those claims were not released and then it was also decided as
17 reflected in the email exchange that the debtors would not
18 object to the committee’s standing to pursue the claims. There
19 was no backroom deal eve of confirmation agreement as is
20 suggested in Bank of New York’s papers. It was simply that the
21 parties didn't realize at the time the disclosure statement
22 came out where this claim sat. And as I said, the defenses
23 that apply or at least the defenses that the debtors believe
24 apply and the rationale for them not pursuing simply do not
25 apply to the particular claim here, the preference claim, the

1 $1.2 million claim.
2 I want to turn now for a moment, Your Honor, to the
3 cost benefit analysis. As the, as I noted and I believe Your
4 Honor recognized at the June 26th hearing, I think it's
5 important to state at the outset that Bank of New York's
6 arguments with respect to standing must be taken with a grain
7 of salt, that's the language that Judge Gerber used in
8 Adelphia. This is the only party that's objecting to the
9 committee's standing is the defendant in the action that may be
10 pursued if Your Honor grants standing. Obviously they have a
11 motivation to try to cut off this litigation before it even
12 begins, and certainly they've set out a bunch of arguments for
13 why they think it shouldn't proceed. They would certainly like
14 for us to have laid out in great detail our litigation strategy
15 and that would certainly come out if we had put a more detailed
16 explanation of each element of the fee estimate. We did our
17 best and the committee required that of us to set out as best
18 we could an estimate of the fees based upon our understanding
19 of the case. Obviously, we haven't seen defenses that the
20 defendants will raise, and the course of litigation is
21 obviously uncertain. But it certainly can't be the standard,
22 Your Honor, we don't believe it is, that a party in the
23 committee's position at this time needs to lay out in detail
24 its litigation strategy, each phase of the litigation, how much
25 it expects to spend on certain tasks in order to represent its

1 client. And I remind the Court, Your Honor, that the committee
2 has been keenly focused on costs and it would still certainly
3 be the client in this matter. As I mentioned, Mr. LeBlanc is
4 here should the Court want to inquire further with respect to
5 the specific litigation estimate.
6 But I want to touch on one or two other points. The
7 first, Your Honor, is that the Bank of New York appears again
8 to be taking the position that it can't be a benefit to the
9 estate, can't be part of the fair and efficient resolution of a
10 case for the committee to pursue an action where we move
11 recoveries from one creditor class to another. And that is not
12 the case, Your Honor, we disagree with that position, we
13 simply, we believe that cannot be the law. It cannot be the
14 law that a committee should not be permitted to pursue the
15 maximization of recoveries to parties that have allowed claims
16 against the estate. In our view, the Arksicook trustee should
17 not have an allowed claim against AIHL. That claim should be
18 avoided as a fraudulent transfer. If we're correct, they would
19 not have a claim against AIHL and should not receive a recovery
20 on account of a $100 million claim.
21 It is certainly in, clearly within the scope of the
22 committee's mandate to pursue actions to maximize recoveries,
23 to actual allowed claimants against the estate. We believe the
24 other claimants of AIHL are owed that duty by the committee.
25 And Bank of New York is seeking to interfere with that action

1 even before the action has begun.
2 The other point, Your Honor, is that Bank of New York
3 in its papers appears to misunderstand how this reorganization
4 is actually going to play out. They make the point that this
5 is inefficient, at one point they say the syndicated creditors,
6 the creditors of the syndicated facility should pursue the
7 action, at another point they say the board of directors should
8 pursue it. But they appear to misunderstand how the
9 reorganization will actually look after the effective date. I
10 don't fault them for that, it's a complicated case, even though
11 Bank of New York sits on the creditors committee, it's not
12 apparent from its face.
13 They say that the debtors' professionals will need to
14 be involved every step of the way. So what we're doing here is
15 seeking to pursue an action where the committee has advisors
16 and the debtors have advisors, you're duplicating expenses.
17 That is simply incorrect. As of the effective date AIM
18 (phonetic) will be hired by the reorganized, by RA holdings
19 which is the top co, it came in top co of the debtors, that's
20 the reorganized debtors. The people that will be called upon
21 perhaps to assist with our work in the Arksicook litigation on
22 the guarantee in particular will be employees of AIM. AIM has
23 a management services agreement, and under that agreement, they
24 have committed to provide assistance to the UCC in pursuing the
25 litigation. There will be no advisors to the debtors that need

1 to weigh in on the litigation, there's not a whole layer of
2 financial advisors that will also be participating in the
3 process. Perhaps that would be the case if the action were
4 pursued during the pendency of the chapter 11 cases. That's
5 not what we're proposing. In fact we're on the eve of the
6 effective date, only weeks away, and the committee having
7 considered Your Honor's arguments and having consulted in fact
8 with the board members to be, continues to believe that it's in
9 the best interest of the estate and the best interest of the
10 fair and efficient resolution of these cases for the committee
11 to be granted standing to pursue each of the actions both the
12 placement actions for which there was no objection as well as
13 the two actions against the Arksicook trustee. Again, Mr.
14 LeBlanc is here should the Court have any questions with
15 respect to the fee estimate.
16 THE COURT: I don't have any questions at this time.
17 Thank you.
18 MR. FLECK: Thank you.
19 MR. VENDITTO: Good morning, Your Honor.
20 THE COURT: Good morning.
21 MR. VENDITTO: Michael Venditto from Reed Smith on
22 behalf of BNY Mellon Corporate Trustee Services.
23 Your Honor, as you're area, you heard extensive oral
24 argument that the hearing on June the 26th, so I'm going to
25 limit my remarks this morning to two additional points that you

1 indicated at the end of that hearing still needed to be
2 addressed. And I'll begin with the reference to whether or not
3 the preference claims had been, that had been disclosed as to
4 the debtors' position on consent, etc. I note that the
5 evidence that was presented in response to your request to the
6 committee consists of the May 21st email. And then there's
7 reference to the subsequent modifications that were made to the
8 plan which took place three weeks later on the eve of
9 confirmation. And specifically in looking at the language that
10 was chosen, again the words have been parsed very, very
11 carefully presumably the result of negotiations between the
12 debtors and the committee as exactly what does this plan
13 modification say. And the blackline that was filed with the
14 Court on June the 11th on page 34, basically I would say you'd
15 have to be a lawyer to understand the significance of what's
16 said there, but I had to read it seven times to figure out
17 exactly what it was saying. But it basically says that all of
18 the causes of action are being transferred pursuant to the plan
19 in the reorganized Arcapita or AIHL shall be transferred to the
20 new Arcapita Hold Co, provided however that the committee may
21 enforce, and then the language was added, any causes of action
22 that the committee has standing to prosecute pursuant to a
23 final order. So to suggest that the plan disclosed that the
24 fact that the preference claims were to be --
25 THE COURT: Well why is it a disclosure issue? I

1 think it's a consent issue. Right? So, I mean for purposes of
2 disclosure in any event, I have the pleadings, there was a
3 hearing, there was another hearing, I think the public and the
4 interested parties are certainly on notice what we're fighting
5 about and anybody is free to weigh in, they didn't before and
6 they haven't now. I'm starting really with the language in the
7 email which just says generally as you know we not have an
8 objection with the UCC pursuing claims against the placement
9 banks in Arksicook. So that's not particularly lawyerly
10 language, it's fairly general. So what's your comment on that?
11 MR. VENDITTO: Well, Your Honor, the standard under
12 STN Commodore in the Second Circuit is whether or not the
13 debtor has consented. The debtor has carefully chosen not to
14 use the word consent. The committee reads nonobjection in a
15 different way. And I guess the question is is the failure to
16 object equivalent to consent.
17 THE COURT: Well but would you agree that this
18 language then places that particular claim in the same bucket
19 with the other claims that are included in the disclosure
20 statement saying that essentially the debtors are not, are not
21 objecting and aren't going to stand in the way, but they don't
22 use the word consent?
23 MR. VENDITTO: Yes, Your Honor.
24 THE COURT: All right. Because my question
25 originally if you remember was whether they're in a different

1 posture than the others. So it sounds like we all agree that
2 they should be dealt with separately, and your concern is that
3 really it's sort of a magic language analysis meaning there
4 should be, when it says consent, it should say consent. And if
5 it doesn't consent, then it's not consent.
6 MR. VENDITTO: Well I wanted to be clear that there
7 was nothing that was added to the plan that it in any way
8 changed the status of the preference claim that was different
9 then the other avoidance.
10 THE COURT: Right.
11 MR. VENDITTO: And you're exactly right, the question
12 is consent not object, where does that fit in the STN Commodore
13 standard. And that reminds me of the famous line from Through
14 The Looking Glass by Louis Carol where Humpty Dumpty says when
15 I use a word that means precisely what I intend it to mean
16 neither more nor less. There's apparently a very specific
17 decision to avoid the use of the word consent by the debtor,
18 and the debtor has chosen to instead take the position that
19 it's not objecting. You will have to make --
20 THE COURT: Well, let me ask for your view then about
21 the Eighth Circuit's decision and just the legal principal,
22 generally that you can construe consent by circumstances. So,
23 for example, there's lots of cases about Stern vs. Marshal and
24 how you're supposed to understand consent, and they're not all,
25 they don't all hinge on the fact whether somebody's used the

1 word consent, but rather under circumstances, and that's a
2 crude analogy I grant you. But so for example, Judge Glenn had
3 an opinion where he talked about whether there was consent
4 where someone had defaulted in an adversary and how do you
5 understand that in terms of looking at consent for purposes of
6 that. I don't think those cases are directly on point, but I
7 do think that their case is talking about how do you understand
8 consent and how exacting are you in the requirement of the
9 magic word consent.
10 MR. VENDITTO: I suppose we could argue until the
11 next millennium on definitions and actions, estoppel, etc., but
12 I think that we have to look at the chosen words that were
13 selected here in the context of what the second circuit says
14 the rationale for having the two slightly different standards
15 are. I think the case law is clear that it's the duty of the
16 debtor to prosecute claims and causes of action, that's their
17 responsibility, it's not the committee's responsibility. The
18 debtor in the disclosure statement has gone through a lengthy
19 analysis of the claims and causes of action, it said it
20 evaluated them and reached certain legal conclusions. There's
21 a shorter discussion with respect to the fraudulent conveyance
22 claim, but then there follows with a two page discussion of
23 case law, etc. with respect to the preference claim in the
24 disclosure statement followed by the statement that the debtor
25 doesn't believe that the claims are particularly viable.

1 THE COURT: Well I understand that, I just want to
2 stick with consent. I understand what debtor said about their
3 views about pursuing an action, I think we, that ground was
4 pretty well plowed the last hearing with I think my comment
5 being that, you know, if that's the standard, nobody is ever
6 going to have the ability to pursue claims under Commodore or
7 STN because essentially if the debtor then takes a pass and
8 explains why then no one will ever have standing if that
9 explanation is facially reasonable. So I'm not persuaded by
10 that. But I just want to get into the consent issue. So let
11 me ask again what your view is about the Eighth Circuit
12 decision and the language cited in that. Do you just think
13 that's incorrect? It's certainly not the law of the circuit I
14 know.
15 MR. VENDITTO: I think that it goes a little bit
16 further than the Second Circuit would go based on what the
17 Second Circuit has said in the Commodore STN cases. And it
18 fails to account for the fact that it's the debtors' obligation
19 in the first instance to make the analysis, prosecute the
20 claims. And the reason that the courts have developed this
21 derivative standing for the committee which emanates from STN
22 was because of concern that there could be circumstances where
23 the debtor decides not to prosecute a claim either because
24 they're not fulfilling their fiduciary duty or there's a
25 conflict of interest, etc., so there had to be some type of

1 equitable remedy of the situation where the debtor chooses not
2 to prosecute a claim. And therefore the Second Circuit
3 developed the standard beginning with STN that said if you make
4 a demonstration that the debtor has wrongfully decided not to
5 prosecute the claim, then the committee in certain
6 circumstances can be given the derivative responsibility for
7 prosecuting the claim. But we have to take account to the fact
8 that the committee itself because if it has different sets of
9 fiduciary duties, should not just be willy nilly granted that
10 standing which is why the Court has to have this supervisory
11 role.
12 In that context, when the debtor says I have made a
13 reasoned determination, it's not because of a conflict, it's
14 not because I'm being reined in by my client, but their
15 professionals say we've made the analysis, we've concluded for
16 these reasons that the claim should not be prosecuted. And
17 then they said the committee disagrees with our position, and
18 they don't say we consent to grant our standing over to the
19 committee, they basically throw up their hands and say, we'll
20 do whatever the Judge tells us to do. So does that remove it
21 from the STN standard where you have to show that the decision
22 was wrongful?
23 THE COURT: Well I don't know that that's a fair and
24 accurate statement. Certainly the debtors could say that they
25 take no position, and there's lots of shades of gray here and

1 I'm certainly not going to even try to identify the universe of
2 things that creative lawyers might say in addressing but not
3 addressing the various tests here. But I don't know if the
4 language here, we don't have an objection, is the same as some
5 of the, the way you just characterized it. I don't know where
6 exactly the lines are which is why we're having this
7 conversation, but I don't know that it's making an affirmative
8 statement that we don't have an objection to the committee
9 pursuing claims is I guess even in your world view a lot closer
10 to consent than some other things that might be said where a
11 debtor says we're agnostic and we're not, we're not enthused
12 but we're you know again, I think there are different shades of
13 gray that can be communicated to a court on this. But again, I
14 think we had a discussion, a lengthy discussion about consent
15 last time so I don't need to repeat all of that, I just was
16 trying to get your view about the Eighth Circuit case because
17 it's, I don't think we discussed it in the last hearing.
18 MR. VENDITTO: Well I think what the Court has to do
19 is instead of just parsing just the words not object and
20 consent is to look at the totality of the circumstances, look
21 at the statements that the committee has made or that the
22 debtor has made in their filings in the disclosure statement,
23 the terminology used in the plan itself to determine whether or
24 not the debtor has if not affirmatively consented has consented
25 through silence. And I think that's why you get the big bucks,

1 Your Honor.

2 THE COURT: All right. I'm unfamiliar with that last

3 part of your story. Everything else I followed. All right.

4 So what else would you like to tell me as far as the

5 committee's presentation?

6 MR. VENDITTO: I think then the next issues obviously

7 is the one of the cost benefit analysis. When the Second

8 Circuit developed the STN standard it said that the Court must

9 also examine on affidavits and by other submissions by

10 evidentiary hearing or otherwise whether an action asserting

11 such claims is likely to benefit the reorganization of the

12 estate. Now here in response to your request that the

13 committee put some meat on the bones of their cost benefit

14 analysis, they provided an overall blanket estimate of cost of

15 four and a half million dollars to prosecute the litigation

16 which is substantially different than the position they took at

17 the June 26th hearing when they said the case was trial ready

18 and the cost would be minimum. But even that four and a half

19 million dollar estimate doesn't really give the Court much to

20 go on. As we pointed out in our case, the essence of the

21 fraudulent conveyance claim challenging the standing of the

22 [indiscernible] of guarantee would require a demonstration that

23 at the time that the guarantee was issued, AIHL was insolvent

24 or rendered insolvent by raising of the issuance of that

25 guarantee.

1 As you're aware, AIHL was essentially the debtors'
2 primary investment vehicle, that rule requires a determination
3 to look at its various assets and liabilities, and the
4 portfolio of assets is approximately according to the schedules
5 what I was able to pull out 68 different investments. And
6 according to the schedules, those investments are in entities
7 located throughout Europe, the United States, Singapore and the
8 Middle East. The concept I understand that as Mr. Flex said
9 that FTI would be performing the economic analysis in this
10 litigation. FTI is of course is a very well known economic
11 consultant advisor expert witnesses, that they will be able to
12 conduct an evaluation of those 68, that portfolio of 68
13 investments on the two specific dates that will be required in
14 order to come up with a meaningful cause of action against the
15 guarantee, and do all of that for an amount that's less than
16 the four and a half million dollars before accounting for
17 counsel fees, seems it me that it's there's something lacking
18 there in terms of specificity. Assuming --
19 THE COURT: But let me ask, and this is one of the
20 things I was wondering about was who is going to come back to
21 be identified as committee counsel. There are, I know Judge
22 Glenn had a decision talking about some to be done, the
23 contingency fee basis. But certainly FTI has done an analysis
24 of these assets, had to do an analysis of these assets for this
25 case. So do you have any comment on that in terms of its

1 ability to do things efficiently, do you have any understanding
2 one way or the other?
3 MR. VENDITTO: Well, I want to be careful what I say
4 here because I disagree with that. I mean FTI has provided an
5 analysis of certain things to the committee, I'm aware of that.
6 But the committee also had retained Houlihan Lokey to do its
7 investment banking work, so between the two firms and the
8 allocation of responsibilities, I wouldn't be so quick to jump
9 to the conclusion that FTI is substantially ahead of the game
10 in terms of the work.
11 THE COURT: Well actually I think I'll hear from the
12 committee, but I think it came up at a hearing when they were
13 retained as to who was doing what. And if my memory serves me
14 and maybe I'm incorrect and someone can straighten me out, is
15 that FTI was doing essentially standalone analysis of entities,
16 and that's what the line was, it wasn't trying to do sort of
17 the bigger picture stuff, but rather the valuing of the
18 particular assets which is I think you're saying would have to
19 be done in these litigations, albeit for a different time
20 period. But I guess my point goes, I'm going to ask the
21 committee, but I imagine you want to respond, so I wanted to
22 get that view now, if you have any particular insight into the
23 efficiency or inefficiency of them handing that analysis given
24 what they've already done in the case?
25 MR. VENDITTO: Well all I can say at this point is

1 that I don't think there's a sufficient evidentiary record
2 that's been presented to you to make the determination that the
3 Second Circuit says you'd have to make in terms of the cost
4 benefit analysis.
5 THE COURT: Well do you have any cases that support
6 that? The cases that I've read on this aspect, the decisions
7 tend to be fairly general, and I looked at them because I was
8 trying to figure out exactly how detailed my analysis needed to
9 be. And this seems to be squarely within the level of analysis
10 done and certainly more than some courts have done in just
11 saying no one has been hired yet, so essentially we don't know
12 what it's going to look like. So, do you have any particular
13 case law to support a more exacting analysis?
14 MR. VENDITTO: Well, I would point the Court in two
15 places, one of which is the statement in STN on page 905 that
16 it's your responsibility to examine by evidentiary hearing or
17 otherwise make a determination whether an action asserting such
18 claims is likely to benefit. And then a decision out of the
19 Fourth Circuit, Scott vs. National Century in which the Circuit
20 Court says a bankruptcy court must therefore ensure that would
21 be derivative suit would not simply advance the interest of a
22 particular plaintiff at the expense of other parties to the
23 bankruptcy proceeding. The court's approval acts as a critical
24 check upon creditor actions that might for example prejudice
25 the estate and rival creditors or would recover only enough to

1 pay the lawyers. So I think it lays out obviously you have a
2 board mission and you have to exercise your discretion in the
3 context of the facts of the cases that are presented to you.
4 But I think it makes clear that your role is a role of a
5 gatekeeper as I said at the first hearing.
6 THE COURT: Right.
7 MR. VENDITTO: Now assuming arguendo that the four
8 and a half million dollars was an accurate assessment, then I
9 think we have to move on to the next stage of the analysis is
10 that's the cost, what is the benefit and how do you weigh the
11 two against each other. Now there are two claims here. Only
12 one of which will produce an affirmative economic recovery for
13 the estate assuming that it's viable, and that's the preference
14 claim, where the alleged claim is approximately a million
15 dollars or so. That means that if they succeed in recovering
16 on both of those claims that they will recover economically
17 into the estate only about 25 percent of the amount that they
18 expect to spend to get that money into the estate. The other
19 benefit is a non-economic benefit to the estate itself which is
20 to remove the Arksicook claims out of class 4B and leave them
21 in class 4A, so it reduces the recovery to the Arksicook trust
22 while benefiting the other creditors in class 4B and
23 disadvantaging the creditors in class 4A. If that is a benefit
24 to the estate and as I heard Mr. Fleck, he says because it's
25 appropriate it's the duty of a committee to ensure that only

1 proper claims received treatment under the plan that there's a
2 duty that's a non-economic duty to the system and to their role
3 and function as the committee. I can appreciate that, I
4 understand that they have a statutory duty, that they're
5 entrusted with certain responsibilities to ensure the claims
6 are treated appropriately. However, that does beg the question
7 of economic benefit to the estate and why the costs for the
8 litigation are being foisted upon the estate and other
9 creditors rather than upon the parties who are going to benefit
10 from the cost of that litigation. The consequence of which is
11 to remove economic incentives that normally prevail in
12 litigation. To ensure that there's sort of a check and
13 balance, the parties will not throw resources at a potential
14 litigation that's beyond all reasonable expectation of recovery
15 or benefit.
16 Because here that check has been removed, there is no
17 such responsibility, there's no provision being made in the
18 plan for any check on the committee's expenditure of funds, how
19 far they'll pursue it, how much money they will spend to
20 accomplish this end to benefit one group of creditors to the
21 disadvantage of other creditors.
22 THE COURT: Well won't the committee be spending
23 money that would otherwise go to the unsecureds and therefore
24 it'll have a certain, I mean the money has got to come from
25 somewhere, right, so and don't I have to give some weight to

1 the committee's decision as a committee that this is beneficial
2 to the unsecured creditor committee as a whole.
3 MR. VENDITTO: I'm not exactly sure where the funding
4 for the litigation will come from. Either I don't see it in
5 the plan or I'm not smart enough to find it as the funding for
6 this particular litigation claim. But I am fairly confident
7 that the plan does not provide for an allocation of that cost
8 amongst particular classes of creditors. It's being shared by
9 the entire creditor body of [indiscernible] some of whom I
10 guess would be represented by the creditors committee.
11 THE COURT: But it has to be done in the order of --
12 I'm sorry, I hate to interrupt you. But wouldn't that be done
13 in terms of the order of priority, right, so it has to be
14 understood in the context of the waterfall in bankruptcy? So
15 when you say shared by all the creditors, I mean I guess this
16 case is a bit unique that way so maybe you can safely make that
17 statement here because of the way this case is. But as a
18 practical matter, that's going to be the unsecured creditors,
19 right?
20 MR. VENDITTO: Ultimately money drops through the
21 waterfall so it gets down to the creditors in classes 4A and
22 4B. But there are of course other concerns about how money is
23 spent, administration, propping up the investments, etc. So
24 while at the end of the day it may all come out in the wash, I
25 think the expenditure of money over the course of the

1 administration of the estate, by the time we get to a point
2 where there are distributions to be made, could conceivably
3 have an impact on the value of the assets to the
4 administration, etc.
5 THE COURT: All right.
6 MR. VENDITTO: So as I said, there may be some
7 mechanics in there for funding this, but I haven't seen them.
8 So I think the concern is that when you give the committee
9 carte blanche to move forward with the litigation and tell them
10 that you know they can spend as much as the committee thinks is
11 appropriate, they're not suggesting that their fees be capped
12 at any number, where is the benefit to the estate and other
13 creditors. Once you issue this order, the case is confirmed
14 and they have moved forward with the litigation, there is no
15 one that can supervise the process, rein it in or make a
16 decision that you know you spent too much money and you're not
17 going to get the benefit you're looking for.
18 THE COURT: But is your client really the best party
19 to argue that right? I mean there's an obvious problem which
20 Judge Gerber identified in Adelphia, is if you start from your
21 client is the potential target of this suit dictating what the
22 budget is in the suit against your client, that is an obvious
23 problem from my point of view in terms of taking this argument
24 as seriously as I might otherwise if it came from another
25 creditor who didn't have a dog in that fight.

1 MR. VENDITTO: Just because the Bank of New York is
2 an interested party, it doesn't mean it's wrong, Your Honor.
3 THE COURT: No, but I'd say interested party may be a
4 slight understatement in terms of your involvement and your
5 interest in the result of this motion. So I understand and
6 I've heard you out on that, and so I certainly take your
7 comments --
8 MR. VENDITTO: Well in response to that, I'll point
9 out one thing, Your Honor, which should be obvious which is
10 this is not the Bank of New York's money we're talking about.
11 The Bank of New York is a statutory stand in for the trustee,
12 it's protecting the interest of the investors in the
13 [indiscernible] of trust. So while I'm advancing this argument
14 on behalf of those investors who are creditors essentially,
15 it's not the Bank of New York has no economic interest in the
16 outcome of this litigation.
17 THE COURT: No, I'm hearing you out, I didn't shut
18 you down, you're entitled to be heard on the issue. I'm just
19 saying that certainly cases recognize that it's, that the
20 context for that particular argument is a bit more problematic
21 for your clients than it would be for somebody else.
22 MR. VENDITTO: Well, Your Honor, you can take my
23 arguments with a grain of salt, but as my wife will tell you,
24 salt is the spice of life. It makes things a little bit easier
25 to digest.

1 THE COURT: Well, you also have a motivation to come
2 in and raise a number of issues which you have done very well,
3 and I certainly appreciate your participation in the process.
4 MR. VENDITTO: Your Honor, unless you have any
5 questions, I think it's our position that the committee has
6 failed to carry its burden under STN.
7 THE COURT: All right. Thank you.
8 MR. FLECK: Your Honor, again Evan Fleck on behalf of
9 the committee, and I'll do this briefly. Your Honor
10 specifically mentioned one point that you wanted me to address,
11 and I wanted to address a couple of others. I'm concerned by
12 Bank of New York's reference to willy nilly and carte blanche,
13 that's certainly not the way the committee has purported itself
14 throughout the case. I think Your Honor has recognized that
15 and it takes very seriously its responsibility to come before
16 this Court with the firm view that this is in the best
17 interests of the estate.
18 There's a lot, there's some rhetorical flourish to
19 Mr. Venditto's statement that we want to spend four plus
20 million dollars to recover $1.2 million. That's obviously not
21 what we're seeking to do. We put forward an estimate of the
22 total cost with respect to the Arksicook that includes the
23 financial advisor's work. And Your Honor is correct that FTI
24 is well along the way in doing work on this matter. In fact,
25 to get to the point of making a presentation to the committee

1 that this was in the committee's best interest and the estate's
2 best interest to even be here today, FTI had to do certain work
3 to get themselves there, and their working the cases generally
4 also greatly benefit what they would need to do in order to
5 support the efforts in this litigation.
6 I did not come before this Court on June 26th and say
7 that all of the claims could be filed tomorrow, nor did I say
8 that they would be free of charge, there is a cost involved, it
9 is a complicated case, and the causes of action in order to
10 support them, require significant amount of both legal and
11 financial work. But there is significant efficiency in having
12 the committee do it given that we've been living with this case
13 both on the legal side and on the financial side for well more
14 than a year.
15 Mr. Venditto also suggested that our, what we're
16 seeking to do is something that's not economically beneficial
17 to the estate. I take issue with that, it's entirely economic.
18 We are seeking to provide materially greater recoveries to
19 parties that actually are creditors of the estates. And we
20 went through this in some detail in the supplement paragraph 11
21 and said that even if the committee succeeds in avoiding only
22 $25 million of the guarantee claim, the recoveries to allow the
23 claimants at AIHL would it be increased by between 14 and 20
24 million dollars, that's based upon the level of modernizations
25 either being 1.3 billion on the low end or approximately 2

1 billion on the high end.
2 Lastly on that point, Your Honor, this Court in the
3 Dewey and LeBoeuf case as well as in Adelphia, was careful with
4 respect to the standard in rearticulating the Commodore
5 standard. The courts in those cases said that the court must
6 decide first whether the committee presents colorable claims or
7 claims for relief that on appropriate proof would support a
8 recovery, I don't think there's any dispute on that point. And
9 second, whether an action is: a) in the best interest of the
10 bankruptcy estate; and b) necessary and beneficial to the fair
11 and efficient resolution of the bankruptcy proceedings.
12 So while I submit, Your Honor, that it clearly is an
13 economic benefit to creditors to pursue this action, the
14 standard that was set out at least in the Dewey court and also
15 in Adelphia with respect to the cost benefit is that the action
16 needs to be necessary and beneficial to the fair and efficient
17 resolution of the bankruptcy proceedings. Your Honor, we
18 believe that the, all of the actions that seeking standings
19 satisfy that standard.
20 And lastly, moving to the STN standard, I think Your
21 Honor identified this that there's a reason why we have STN,
22 Mr. Venditto recognized this as well, there are certain types
23 of actions that are inherently difficult for a debtor to
24 pursue. That doesn't mean that in the disclosure statement
25 they say that they just kind of throw their hands up, they do

1 what a debtor does and they set forth some information about
2 the claim. But these are the types of actions that are
3 inherently difficult for this debtor to pursue. It is our
4 understanding that the holder of the Arksicook claim is a Saudi
5 family in the Middle East, had been an investor with the
6 debtors, the AIM organization will be continuing to do work,
7 investment for Sharia compliant investors. I think this
8 clearly falls within the type of action where courts have
9 recognized that it just makes more sense for an independent
10 party other than the debtor to pursue the action. And with
11 that, Your Honor, I rest unless Your Honor has any questions.
12 THE COURT: Just one quick question. There is some
13 discussion about where the money is coming from, and if you
14 want to weigh in on that topic.
15 MR. FLECK: Your Honor, again, Your Honor, I believe
16 you're correct. The money will come from the exit facility,
17 the debtor will have funds either from the exit facility or
18 from modernization of assets to run the estate. The RA
19 Holdings board will be in control of dispersing funds. The
20 client, the committee would still remain in place to be the
21 client and to monitor expenses. But ultimately, the expenses
22 would be borne by the creditors of the estate.
23 THE COURT: All right.
24 MR. FLECK: Thank you, Your Honor.
25 THE COURT: All right. Anything else? All right.

1 What I'd like to do is take a short break and then I will come
2 out and give you my ruling. So it's almost ten after, so why
3 don't we say 11:30? Thank you.
4 (Recess 11:07 AM - 11:46 AM)
5 THE CLERK: All rise.
6 THE COURT: Please be seated. Thank you for your
7 patience. Before the Court is the committee of unsecured
8 creditors' motion for grant of leave standing authority to
9 pursue claims of avoidance of a guarantee turnover of payments
10 due and recovery of a preferential transfer.
11 The committee seeks standing as to three claims.
12 First so called placement claims seeking turnover of proceeds
13 of $33 million owed under a prepetition short term investment
14 transaction; two, so called Arksicook claims to avoid a
15 guarantee issued by AIHL where avoiding the guarantee would
16 increase the recovery to other unsecured creditors; and three,
17 so called preference claim regarding transfer of cash from
18 Arcapita to the Arksicook trustee within 90 days of the filing.
19 These are all allegations not facts. Success on this claim,
20 I've been informed by the committee is estimated to result in
21 the judgment on behalf of the estate of some 1.2 to 1.3
22 million.
23 There is no objection to the committee's standing as
24 to the placement claims as claim number one. There's only an
25 objection as to claims two and three, and that objection comes

1 from Bank of New York Mellon Corporate Trustee. And Bank of
2 New York was the payment and servicing agent for bond facility
3 Arksicook to which Arcapita investment Holding Company, AHL
4 acted as a guarantor of various payment obligations of its
5 parent company, Arcapita Bank.
6 The threshold issue in this motion is consent. If
7 consent has been given by the debtors to the committee's
8 request, then standing is measured under the Second Circuit's
9 decision in In Re Commodore International Limited 262 F.3d 96,
10 Second circuit case from 2001. If the debtors have not
11 consented that standing is measured under the more stringent
12 standards set forth in the Second Circuit's decision in STN
13 Enterprises, 779 F.2d 901, a Second Circuit case from 1985.
14 Here the court agrees with the objector that consent should be
15 viewed under the totality of the circumstances, and in that I
16 reject the notion that the magic word consent is a requirement
17 in any and all circumstances for finding that the committee has
18 consented. So under the totality of circumstances here, I do
19 find that the debtors have consented, and that consent is
20 evidenced in three different ways.
21 As to claim one, it's evidenced in the disclosure
22 statement, footnote 39. And as to claim number two, it's
23 evidenced as to footnote 48 in the disclosure statement at page
24 185. And that statement says "the debtors have agreed that
25 they will not oppose any attempt by the committee to obtain

1 standing to pursue such avoidance action against the Arksicook
2 trustee."
3 And at the last hearing there was a question in my
4 mind about the factual basis for consent as to the third claim,
5 and I've been presented with an email dated Tuesday, May 21st,
6 2013 from Michael Rosenthal, counsel for the debtors, to Evan
7 Fleck, counsel for the committee in which says in unredacted
8 part, generally as you know we do not have an objection with
9 the UCC pursuing claims against the placement banks and
10 Arksicook.
11 So in reaching my decision, as I said I rejected
12 construction requirement that always requires the magic word
13 consent in order to satisfy the requirement to get under the
14 Commodore standard, and I'm persuaded by case law in this
15 district that appears to contemplate a similar approach such as
16 Judge Gerber's dicta in footnote 2 in his 2005 decision in
17 Adelphia at 330 Bkr. Rept. 364, and my conclusion is also
18 supported by the Eighth Circuit's decision in Racing Services
19 Inc., 540 F.3d 892, a 2008 case. Even if I share the sentiment
20 that that court's statements may go further than the Second
21 Circuit and may extend consent in these kind of cases, but I
22 don't think this case raises a concern about the gap between
23 where the Eighth circuit would go or the Second Circuit would
24 go under these particular set of facts. And that's because I'm
25 satisfied with the explanation and the overall understanding of

1 the facts in the case and that's provided by the committee here
2 about the circumstances surrounding the debtors' statement of
3 what's being offered to me as consent. And I'm satisfied under
4 the totality of the circumstances that there's nothing more to
5 the careful wording of the debtors' statement than the
6 unsurprising fact that the debtors for what I'll call political
7 reasons are not enthused about using the word consent when
8 discussing lawsuits against parties with whom they otherwise
9 have close relationships.
10 Again, I believe this is a facts and circumstances
11 test that is best made by a judge based on the individual
12 circumstances, so I'm not trying to announce any grand
13 principals here.
14 As to another argument raised, I don't believe that
15 Commodore imposes a requirement that the debtors consent in
16 public by doing it publicly, although I do agree with the
17 sentiment that such a factor may be relevant into the inquiry
18 of consent under certain circumstances. And again I believe
19 it's going to vary from case to case as to what a judge will
20 find relevant under the circumstances.
21 In any event, I am satisfied here that the disclosure
22 statement put the debtors' position on view as to two of those
23 three items, and the remaining item has been publicly discussed
24 at two hearings in open court to permit any interested creditor
25 to weigh in, and no creditor has but Arksicook.

1 I then move on to the standard under Commodore and
2 which has probably most recently been discussed in this
3 district in the Dewey and LeBoeuf case by Judge Glenn, 2012
4 Bankr. LEXIS 5536 from November 29th, 2012. He talks about
5 1109(b) about a committee may raise and be heard on any issue,
6 and that under 1103(c)(2) a committee may investigate the acts,
7 conduct, assets, liabilities, financial condition of the
8 debtor, talking generally about the committee standing, and
9 then goes on to talk about the Second Circuit recognizing a
10 qualified right for a creditors committee to initiate adversary
11 proceedings in the name of the debtor in possession with the
12 approval of the bankruptcy court under Commodore. And he
13 explains the test to be "where a debtor consents to a committee
14 bringing suit, the court must decided: 1) whether the committee
15 presents a colorable claim or claim to relief that on
16 appropriate proof would provide a recovery, second prong,
17 whether an action is a) in the interest, in the best interest
18 of the bankruptcy estate, and b) necessary and beneficial to
19 the fair and efficient resolution of the bankruptcy
20 proceedings, see In Re Commodore International, 262 F.3d at
21 100; see also Adelphia communications Corp. vs. Bank of
22 America, 330 Bkr Repr. 364 at 367.
23 Here, there really hasn't been much of a dispute
24 about these constituting a colorable, all colorable claims.
25 There has been some discussion at length about the debtors'

1 statements in the disclosure statements as to why they didn't
2 pursue it which I would agree would be relevant under the STN
3 standard, and I think would pose a considerable hurdle. Here,
4 I believe a showing has been made by the committee that these
5 are colorable claims. And again, I'm not going to adopt a
6 position where the mere fact that the debtors decline to pursue
7 a claim means that no one else can ever have standing to pursue
8 a claim or obviously there would be no such lawsuits which is
9 clearly not the intent of the STN standard or the Commodore
10 standard. So I find that the colorable claim prong has been
11 satisfied.
12 I also find that the second prong has been satisfied
13 as to the best interest to the estate and necessary and
14 beneficial to the estate. As to the second part of the test, a
15 court needs to find that prosecution of the claim by the
16 committee would be in the best interest of the estate necessary
17 and beneficial to the resolution of such claims and should
18 consider the litigation costs when making its determination and
19 be assured that prosecution of the claims represents a sensible
20 expenditure of the estate's resources. The limited merits
21 assessment that I'm to engage in is just that. There's a
22 sufficient likelihood of success to justify the anticipated
23 delay and expense in the bankruptcy estate, that is a fair
24 chance that the benefits to be obtained from litigation will
25 outweigh its costs. See American Hobby Center 223 Bank. Rpt at

1 284. And in STN has some language that talks about attorneys'
2 fees and that the term relative to attorneys' fees in which the
3 suit might be brought be relevant to the evaluation of whether
4 prosecution claims in the best interest. In Dewey notably
5 Judge Glenn found that this second prong was satisfied where he
6 inquired about attorneys' fees during his hearing and was told
7 that "no arrangements had been made at this point about
8 retention of counsel, but because of the lack of cash resources
9 available to the debtor or in any future liquidation in all
10 likelihood counsel undertaking the case would be compensated on
11 contingency or combined contingency time charge basis with
12 oversight of retention of counsel and prosecution of claims by
13 an oversight committee or board." And "based on that, he is
14 satisfied that the cost of prosecuting the claims there did not
15 alter the determination whether the requested relief was in the
16 best interest of the estate." The information I have here I
17 think at the very least makes me reach the same conclusion if
18 not I'd be more comfortable. Here I have been provided with a
19 cost of 3 million for the placement claims and some 4.6 for the
20 Arksicook claims, it's been explained to me what the basis for
21 that is. I'm satisfied that that satisfies the kind of inquiry
22 I'm supposed to engage in here which is not supposed to require
23 necessarily a line item budget, I think that's an uncomfortable
24 exercise in the context of what I have in front of me with an
25 objection from the party that is the target of the lawsuit.

1 I do believe that some of the particular issues
2 raised such as FTI's involvement are not a concern. I've been
3 given substantial information over the course of the case about
4 FTI's work, and I think my memory has proven to be reasonably
5 accurate that FTI has done significant valuation work that will
6 be of use in this case, and thus is more than able to hit the
7 ground running.
8 As to the issue of benefit, probably the single
9 largest legal issue raised was whether the benefit by
10 disallowance is appropriate, that is whether it is always
11 necessary to bring money into the estate. I am not, I'm not
12 troubled by the notion that a disallowance of a claim if
13 appropriate would materially lead to great recovery, that's an
14 appropriate thing to do for purposes of a lawsuit and request
15 for standing. So I decline to impose a general rule that such
16 a thing is inappropriate. Again, I think this is all facts and
17 circumstance assessment to be made by the trial court based on
18 the record in front of him or her, and in this case, I am not
19 troubled by it. I also note that no other creditor has
20 appeared to express any concerns about the spending of the, the
21 contemplated spending here and what it's been used for, and the
22 pursuit of it in light of -- which is relevant because the
23 money is actually going to come out of the creditors of the
24 estate.
25 So for all those reasons I am going to grant the

1 motion for standing by the Committee. If for some reason there
2 was some runaway train on the issue of expenses, certainly
3 there is some precedent out there that committee's standing can
4 be granted and then withdrawn. I think that's an unusual
5 circumstance, but the Second Circuit I believe in Adelphia
6 found that to be an appropriate exercise of discretion by the
7 bankruptcy court. And so if another creditor came forward and
8 expressed great concerns about such an issue and runway
9 spending, that would be an issue I would address in the
10 fullness of time. And by raising that I'm only really
11 addressing the notion that somehow there's carte blanche here,
12 I don't think that that's right given the facts and
13 circumstances and where the money is coming from, but I also
14 think there's enough inherent power of the bankruptcy court if
15 an issue was brought to my attention to address it.
16 That said, the committee in this case has really been
17 outstanding and I see no reason why that would be an issue in
18 pursuit of these claims here, so I'm certainly not casting, you
19 know, intend to cast any aspersions, I'm just thinking out loud
20 about the appropriate role of a court in these circumstances.
21 Again, I don't see any cases that have done something
22 like impose a budget, and I don't think that's really what I
23 should be doing at this point. There's no case support for
24 that, and that's probably for very good reasons.
25 So that's my ruling. I would like to thank all the

1 parties for what I think were very thoughtful presentations and
2 briefs, as well as supplemental briefs on an interesting issue,
3 so and I, while I made a mention of the fact that the objection
4 here was by the party that's a target in the lawsuit, that's
5 something that does not mean the objection is any less
6 appropriate or relevant for my consideration, and I tried to go
7 through each of the considerations and issues raised by the
8 objecting party.
9 So again, I appreciate everyone's briefing and
10 thoughts on the subject. So that's my ruling.
11 MR. FLECK: Thank you, Your Honor. With the Court's
12 permission, we'll send down a form of order to the Court. I
13 don't believe there are any changes that are required from the
14 version that was filed.
15 THE COURT: I don't think so but I haven't looked at
16 that in a little bit.
17 MR. FLECK: Thank you.
18 THE COURT: Anything else we need to discuss here
19 today? All right. Thank you very much.
20 MR. VENDITTO: Thank you, Your Honor.
21 (Proceedings concluded at 12:02 PM)
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25

1 I N D E X

2

3 RULINGS

4 DESCRIPTION PAGE

5 HEARING re: Docket number #1197 Motion to

6 Authorize / Motion of Official Committee of

7 Unsecured Creditors for Entry of Order Under

8 11 U.S.C. 1103(c) and 1109(b) Granting Leave,

9 Standing and Authority to Prosecute Turnover

10 and Avoidance Claims 42

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1 CERTIFICATION

2 I certify that the foregoing is a correct transcript

3 from the electronic sound recording of the proceedings in the

4 above-entitled matter.

5 Mary Zajaczkowski Digitally signed by Mary Zajaczkowski DN: cn=Mary Zajaczkowski, o, ou, email=digital1@veritext.com, c=US Date: 2013.07.31 17:21:04 -04'00'

6 AAERT Certified Electronic Transcriber CET**D-531

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Mary Zajaczkowski

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