

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 12-11076-shl

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7 In the Matter of:

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9 ARCAPITA BANK B.S.C.(C), et al.,

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11 Debtors.

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14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 July 9, 2012

19 2:05 p.m.

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21 B E F O R E :

22 HON SEAN H. LANE

23 U.S. BANKRUPTCY JUDGE

24

25

1 Application to Employ Rothschild, Inc. and N.M. Rothschild &
2 Sons, Limited as Financial Advisors and Investment Bankers;
3 Debtors' Application for an Order Approving the Employment
4 and Retention of Rothschild, Inc. and N.M. Rothschild &
5 Sons, Limited as Financial Advisors and Investment Bankers
6 for the Debtors Nunc Pro Tunc to the Petition Date.

7

8 Motion to Approve -- Supplement to Debtors' Application For
9 An Order Approving the Employment and Retention of
10 Rothschild, Inc. and N.M. Rothschild & Sons, Limited as
11 Financial Advisors and Investment Bankers For The Debtors
12 Nunc Pro Tunc to the Petition Date.

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25 Transcribed by: Sherri L. Breach, CERT*D-397

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

2 Gibson, Dunn & Crutcher, LLP

3 Attorneys for Debtors

4 200 Park Avenue

5 New York, New York 10166

6

7 BY: MICHAEL A. ROSENTHAL, ESQ.

8

9 MILBANK, TWEED, HADLEY & MCCLOY

10 Attorneys for Official Committee of Unsecured Creditors

11 1 Chase Manhattan Plaza

12 New York, New York 10005

13

14 BY: EVAN R. FLECK, ESQ.

15

16 DEBEVOISE & PLIMPTON, LLP

17 Attorneys for Rothschild, Inc. & NM Rothschild & Sons

18 919 Third Avenue

19 New York, New York 10022

20

21 BY: DEREK P. ALEXANDER, ESQ.

22

23

24

25

1 U.S. DEPARTMENT OF JUSTICE
2 Attorneys for the U.S. Trustee
3 33 Whitehall Street
4 21st Floor
5 New York, New York 10004

7 BY: RICHARD MORRISSEY, ESQ.

8
9 APPEARING TELEPHONICALLY:

10 Jason G. Cohen

11 Aaron Rosen

12 March Schwartz

13 Oliver Sigalow

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P R O C E E D I N G S

THE COURT: Good afternoon. Please be seated.

We're here this afternoon for Arcapita Bank,
B.S.C.

MR. ROSENTHAL: Good afternoon, Your Honor.
Michael Rosenthal on behalf of the Arcapita debtors. And
also here today are Todd Snyder (ph) and Homer Parkhill (ph)
from Rothschild.

THE COURT: Pleasure to have them here.

MR. FLECK: Good afternoon, Your Honor. Evan
Fleck of Milbank Tweed on behalf of the official committee.

MR. MORRISSEY: And Richard Morrissey for the U.S.
Trustee.

MR. ROSENTHAL: Well, Your Honor, after three
months of discussion and negotiation about the Rothschild
retention I'm happy to report that the parties were able to
reach an agreement on an agreed order related to the
Rothschild retention. It has been approved by the joint
provisional liquidators, by Rothschild, by the debtors, by
the committee and by the U.S. Trustee's Office.

And it is the -- it's the product, as I said, of
numerous hours of negotiation and discussion. We think the
result is -- is favorable for the debtors and we thank
everyone for participating in the process so we could get to
a resolution that would not require court intervention, but

1 we think it's -- it's -- it's the right result for this --
2 for this estate.

3 I can walk the Court through the changes if you
4 want or --

5 THE COURT: That would be helpful.

6 MR. ROSENTHAL: Okay.

7 THE COURT: Just briefly.

8 MR. ROSENTHAL: Okay.

9 So, Your Honor, if you look at -- we had filed a
10 supplement on Thursday of -- of last week that was supposed
11 to be the start of any litigation we had. And if you look
12 at Page 4 of that supplement it has a comparison of the key
13 economic terms versus the new proposed terms.

14 When the application was originally filed there
15 was a contemplation that there would be a transaction -- a
16 transaction fee of \$12 million, and there would be the
17 possibility of a capital raise fee, but that was left as
18 something to be negotiated in the future if -- if the
19 debtors needed that.

20 As a result of discussions among all the parties,
21 that transaction fee has been separated into a smaller
22 transaction fee -- and if you look at the -- at the chart, a
23 \$6 million transaction fee -- and the possibility of new
24 capital -- a new capital fee that would range anywhere from
25 75 basis points for the first \$500 million of new capital to

1 150 basis points for anything over the first \$500 million of
2 new capital.

3 And there is a -- an M&A fee which would kick in
4 if we did a sale of substantially all the assets, whether
5 pursuant to a plan or pursuant to a Section 363 sale, which
6 would be measured as one percent of the -- of the
7 consideration received.

8 Now to make sure that all of those fees are
9 properly credited and -- credited and don't add up to too
10 much, there is an overall cap so that the overall cap is \$12
11 million. It cannot exceed the original \$12 million
12 transaction fee, might be less. Hopefully, we'll raise a
13 lot of money and it will be at least \$12 million. But that
14 would be directly as a result of realizing value for the
15 estate.

16 The monthly fee, Your Honor, has gone up from
17 \$150,000 a month. It's gone up slightly to \$175,000 a
18 month, but as originally drafted, the monthly fee was to be
19 credited 50 percent against the transaction fee. And now
20 the monthly fee is not credited for any period before the
21 beginning of next year, so through December there's no
22 credit. But after December, if this case were to linger on
23 for a while, there would be 100 percent credit against --
24 against the fee. So the consequence of the full credit is
25 that everyone is hopefully motivated to get the case

1 confirmed and out of Chapter 11 as quickly as possible.

2 Your Honor, there are some -- there are some --
3 some other changes. In the event that there is a
4 liquidating plan, for example, there will be no M&A fee or
5 new capital fee payable, and that was something that -- that
6 was important to the committee and to the joint provisional
7 liquidators. And then we wanted to make sure that if we did
8 a transaction pre-Chapter 11 plan, whether it was 363, for
9 example, we wanted to make sure that Rothschild was still
10 around to help the debtors in connection with any -- any
11 subsequent plan. And I have no doubt that they would be and
12 I have Mr. Snyder and Mr. Parkhill's assurance that they
13 would be.

14 But what we did is we wrote into the agreement a
15 slight change to the termination provision which provides
16 that contractually they would have -- Rothschild would be
17 around to help us through any subsequent plan process.

18 THE COURT: All right.

19 MR. ROSENTHAL: Your Honor, there are some other
20 points that they will draw down on their escrow retainer
21 before seeking payment, but that is by and large -- those
22 are the main changes. There were some changes made at the
23 request of the U.S. Trustee's Office that dealt with making
24 sure that the indemnity provisions were consistent with what
25 is -- what's required in this district.

1 You saw -- we sent you on Thursday a draft -- a
2 draft of the order that had virtually all of the changes --

3 THE COURT: That's the cumulative blackline order?

4 MR. ROSENTHAL: That's correct.

5 THE COURT: Right. That's -- that's what I have
6 in front of me.

7 MR. ROSENTHAL: Yes. There was -- let's see. So
8 subsequent to what we filed on Thursday, Your Honor, there
9 were -- there were some additional discussions and if I may
10 -- may I approach the Court?

11 THE COURT: Absolutely.

12 That is a challenge in this courtroom. Thank you.

13 We had to -- as originally contemplated, once they
14 did the construction, they had the tables even closer to the
15 podium and I said, you're -- you're a reasonably svelt
16 individual, but there are members of the bankruptcy bar who
17 simply would never be able to approach --

18 MR. ROSENTHAL: Yeah.

19 THE COURT: -- the bench, so.

20 MR. ROSENTHAL: That was -- that was a tough one.

21 Your Honor --

22 THE COURT: All right.

23 MR. ROSENTHAL: -- this has -- this has the final
24 negotiated changes. If you look at paragraph 4 --

25 THE COURT: Right.

1 MR. ROSENTHAL: -- you'll see that there's a --
2 there's a limitation on the participation hearings and the
3 relevant testimony, and on their -- you know, the extent to
4 which they can advise the directors.

5 Page -- paragraph 7 was -- was a result of
6 discussions with the committee regarding the availability of
7 any new capital. As you see, this is in the new capital fee
8 provision and the committee wanted to make sure that when
9 the money was committed that it was actually money committed
10 and -- and available, thus the inner-lineation of the
11 language without unreasonable restrictions.

12 THE COURT: Right.

13 MR. ROSENTHAL: And the language on paragraph 11
14 represents the result of -- of discussions with the U.S.
15 Trustee's Office.

16 THE COURT: All right.

17 Anyone want to be heard in connection with the
18 application to employee and retain Rothschild?

19 MR. MORRISSEY: Your Honor, again, for the record,
20 Richard Morrissey for the U.S. Trustee.

21 After much discussion with Gibson Dunn and, also,
22 Mr. Alexander who is sitting in the bank, the attorney for
23 Rothschild itself, we have, in fact, come to a resolution.
24 The only thing I -- I wanted to say today, unless the Court
25 has any questions about what the issues were, is by way of

1 explanation, because I needed one, as to what the term
2 "transaction fee" meant in this case. Usually, in -- in my
3 experience, "transaction" refers to a sale of the company,
4 something like that, and there's an M&A fee which is a
5 separate category.

6 The transaction fee in this case, as I understand
7 it, is more akin to a completion fee or a success fee,
8 something like that where the plan is confirmed and the case
9 goes forward as a -- as a -- hopefully as a going concern.

10 So I was a little confused by that terminology.
11 It's still in place and I have -- I understand it has
12 something to do with the way such terminology is used in
13 England where this retention first began prepetition.

14 But other than that, Your Honor, we -- we do
15 appreciate the cooperation of the debtor and Rothschild
16 itself, and a lot of input from the committee on this to
17 make it more economically friendly to the estate. And,
18 also, as Mr. Rosenthal was just saying, I think it gives
19 incentives to Rothschild as well as the debtors themselves
20 to hurry up the process a little bit and hopefully have
21 success in this case sooner rather than later.

22 The U.S. Trustee has no objection.

23 THE COURT: All right. Thank you.

24 MR. FLECK: Your Honor, good afternoon once again.
25 Evan Fleck on behalf of Milbank Tweed for the committee.

1 The committee is satisfied with the order. We're
2 pleased to have reached an agreement among the parties to
3 avoid court intervention today for the evidentiary hearing
4 that we had planned and talked about with Your Honor last
5 week.

6 It did take quite a bit of time and effort of the
7 parties, but people were committed to getting this resolved.
8 And the committee is fully looking forward to now moving to
9 the substantive work that Rothschild will be doing on behalf
10 of the estates and working with them to reach a successful
11 outcome.

12 Thank you, Your Honor.

13 THE COURT: All right. Thank you.

14 Just three thoughts, one of which is the only
15 question I had, I think Mr. Morrissey addressed, which is
16 the use of the term "transaction fee" in connection with the
17 other fees. But I -- I sort of parsed that out and
18 suspected that was the case based on what I had seen and --
19 but it's helpful to hear that another party has the same
20 view.

21 Secondly, I'm very happy that the parties have
22 worked together to reach this result. You obviously know
23 the case very well and the parties have worked together to
24 resolve many issues in this case thus far, which is a
25 testament to the professionals involved. So it's -- it's a

1 much better result than an evidentiary hearing.

2 And, three, is the reason I wanted to have a
3 hearing is just because this issue and some other issues
4 relating to experts had -- had percolated for quite a while.
5 And since it was set for a hearing, I always wanted to make
6 sure, in case someone did have a desire to be heard, I like
7 to usually -- if we have scheduled a hearing to keep those
8 hearing dates just in the abundance of caution. And I
9 thought the last thing anyone wanted was a -- a full start
10 here in the event that something did crop up and someone
11 showed up for a hearing.

12 So -- so with that I'm -- I'm happy to -- very
13 happy to be able to approve the Rothschild retention.

14 MR. ROSENTHAL: Thank you, Your Honor.

15 Do you have a copy of it? We have -- I have a
16 disc for you or -- or I have a copy for you.

17 THE COURT: You know what? I'll take -- I'll take
18 the disc because at the end of the day that's -- that's what
19 we need to get the order entered. So --

20 MR. ROSENTHAL: May I approach?

21 THE COURT: Yes. Yeah. That's a more hospitable
22 side of the podium. Thank you very much.

23 MR. ROSENTHAL: Now, Your Honor, before we break
24 can I raise two other points with you?

25 THE COURT: Sure.

1 MR. ROSENTHAL: It will not take long.

2 We -- as you recall, we had a motion to set a bar
3 date and we're trying to get that notice out. So I'm not --
4 I don't -- I don't want to rush the Court, but -- but we're
5 trying to -- we need to get the notice out, and so hopefully
6 if the Court has some time you can look at that order so we
7 can put the date of the order in.

8 THE COURT: All right.

9 MR. ROSENTHAL: We're looking for that.

10 Just an update on the KPMG order, there -- there
11 -- the Court approved the employment of KPMG. We submitted
12 an order, but we asked that that not be given to you yet
13 because there are some further revisions that the parties
14 are discussing. I just -- we're still discussing them. We
15 hope to get it to you as soon as possible. That order --

16 THE COURT: All right.

17 MR. ROSENTHAL: -- is important for all evaluation
18 work.

19 THE COURT: All right. I believe I have the bar
20 date order in my stack. I think I got three -- three
21 quarters of the way through that at the end of last week,
22 but I will endeavor to get that out very, very shortly.

23 MR. ROSENTHAL: Thank you, Your Honor. Thanks --

24 THE COURT: Thank you.

25 MR. ROSENTHAL: -- for your time this afternoon.

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THE COURT: Absolutely. Thank you.

Anything else before we adjourn?

(No verbal response)

THE COURT: All right. Have a good day.

(Whereupon these proceedings were concluded at 2:19

p.m.)

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RULINGS

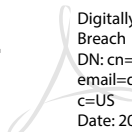
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C E R T I F I C A T I O N

I, Sherri L. Breach, CERT*D-397, certified that the foregoing transcript is a true and accurate record of the proceedings.

**Sherri L
Breach**



Digitally signed by Sherri L Breach
DN: cn=Sherri L Breach, o, ou,
email=digital1@veritext.com,
c=US
Date: 2012.07.10 15:55:27 -04'00'

SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber

CERT*D -397

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: June 10, 2012