

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 12-11076-shl

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5 In the Matter of:

6

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

8

9 Debtor.

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12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15

16 September 19, 2012

17 2:16 PM

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19 B E F O R E :

20 HON SEAN H. LANE

21 U.S. BANKRUPTCY JUDGE

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25 ECR OPERATOR: Kathy

1 Hearing re: Motion to Approve/Debtors Motion for an Order  
2 Approving Expense Reimbursement in Connection with  
3 Prospective Post-Petition Financing.

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5 Motion to Authorize/Motion for an Order Confirming the  
6 Debtor's Authority to Fund Non-Debtor Affiliate District  
7 Cooling Holding Company Limited

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25 Transcribed by: Nicole Yawn

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

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15 BY: EVAN R. FLECK, ESQ.

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P R O C E E D I N G S

THE COURT: Please be seated.

We're here this afternoon for Arcapita Bank.

MR. ROSENTHAL: Good afternoon, Your Honor.

Michael Rosenthal and Craig Millet, from Gibson, Dunn &  
Crutcher, on behalf of the Arcapita debtors.

MR. DUNNE: Good afternoon, Your Honor. Dennis  
Dunne, from Milbank, Tweed, Hadley & McCloy, on behalf of  
the official creditors' committee. I'm here with my  
partner, Evan Fleck.

THE COURT: All right.

Good afternoon to you all.

MR. ROSENTHAL: Pretty soon, you're going to have  
your courtroom back, I assume?

THE COURT: Supposedly, at the end of the week,  
and it'll have the latest technology, for -- for what that's  
worth. I'm not -- I'm not sure. It may be like handing a  
bazooka to a small child, but it's -- certainly, we'll be  
capable of doing lots of amazing things, I've been told.

MR. ROSENTHAL: Good.

Your Honor, let me -- let me start by -- I want to  
give you just a brief, brief update. We had a hearing not  
-- not two weeks ago, but there have been a couple small  
developments since then. One of the most important is that  
-- I'm going to embarrass two people in the room today.

1 Prominent in our case have been the joint provisional  
2 liquidators. They happen to be in the courtroom with us  
3 today, Simon Appell and Mark Skelton, from Zolfo Cooper and  
4 -- out of London.

5 THE COURT: All right.

6 I'm happy to have you here.

7 MR. ROSENTHAL: Your Honor, since we last met, we  
8 had last week a significant meeting in London with the  
9 committee, advisers, standard charter advisers, the ad hoc  
10 committee advisers, and the -- and the joint provisional  
11 liquidators followed the next day by a meeting with the  
12 committee members themselves and the committee advisers. We  
13 discussed the business plan that had been circulated  
14 previously to then. We discussed issues related to the --  
15 to the IPL, and I think it was -- I think it was generally  
16 very productive for people finally to get together in the  
17 same room and sit -- sit face-to-face and have those  
18 discussions.

19 We -- as you know, we -- I -- I also report to the  
20 Court on what our cash position is. Our cash position as of  
21 -- as of today is \$47.6 million, but, of course, one of the  
22 reasons that we're here today is to talk about the beginning  
23 stages of implementing a debtor-in-possession financing.

24 We have two motions up today, both of which have  
25 been resolved in terms of any objections that have been

1 filed. The first one, Your Honor, is the debtor's motion  
2 for a limited expense reimbursement up to a cap of \$500,000  
3 in connection with negotiation documentation of proposed DIP  
4 financing. No party has objected to the motion.

5 Standard Chartered Bank, our only secured lender,  
6 filed a reservation of rights, where they did not object to  
7 the expense reimbursement, but they did note that they have  
8 a security interest in four pieces of collateral, the equity  
9 in long-term holdings, the equity in the three subsidiaries,  
10 Rail Invest (ph), Wind Turbine, and AEIB2 (ph), that are in  
11 -- that are in these Chapter 11 cases, and, Your Honor, they  
12 had said in their pleadings -- and we will confirm that it's  
13 currently not our intention to prime any of those four  
14 positions with -- in connection with debtor-in-possession  
15 financing.

16 The committee did not object, but, as we have had  
17 throughout this case, we had discussions with the committee  
18 before the objection deadline, and, as you'll see later, we  
19 built into the -- into the -- the order some protections for  
20 the committee so that they have a right to object to  
21 requested invoices to reimburse for fees and expenses.

22 Your Honor, we have filed in support of the motion  
23 the declaration of Bernard Douton, from Rothschild.  
24 Mr. Douton is a managing director of Rothschild, which is  
25 the company's investment banker. He's in court today and

1 can answer any questions the Court may have. His  
2 declaration details sort of what we've been through in terms  
3 of -- and what Rothschild went through in terms of the DIP  
4 marketing process. I would ask that Mr. Douton's  
5 declaration be admitted into evidence.

6 THE COURT: All right.

7 Anyone have any objection?

8 (No audible response)

9 All right. So admitted.

10 (Debtor's Exhibit, Mr. Douton's Declaration, was  
11 admitted)

12 MR. ROSENTHAL: Thank you, Your Honor.

13 Your Honor, as you know, we have taken steps  
14 throughout this case to ensure that the debtor's liquidity  
15 position is adequate. At each hearing, I've told the Court  
16 exactly where we stand in terms of available cash, how we  
17 fare actual versus projected budget. We're always ahead of  
18 -- ahead of actual budget in terms of reduced expenses and  
19 increased revenue.

20 To reinforce liquidity, again, as I've told the  
21 Court, we -- we initiated a rigorous process to identify  
22 potential DIP sources. Rothschild, after circulating a  
23 confidential offering information memorandum, approached 29  
24 separate potential lenders. Eighteen of them signed  
25 confidentiality agreements and engaged in some level of

1 diligence, and ultimately, we received seven indications of  
2 interest, and we sent people back to the drawing boards and  
3 said no, we want -- we want firm proposals, and we received  
4 two firm proposals last week.

5 We have not entered into a commitment letter at  
6 this point with either potential counterparty, and we  
7 continue to negotiate the terms of the financing, but each  
8 of those counterparties is -- is insistent that we obtain  
9 some measure of expense reimbursement for them, as they are  
10 -- as they are spending time and money. Now, we do not  
11 intend to pay expense reimbursement to both. We intend to  
12 select one and -- and provide expense reimbursement to that  
13 one selected bidder.

14 We believe, Your Honor, that this kind of expense  
15 protection is -- is typical, and, in fact, in this  
16 particular case, it's -- it's particularly appropriate  
17 because of the unusual nature of the financing we're looking  
18 for. We are looking for Shariah-compliant post-petition  
19 financing, which, to our knowledge, has never been done  
20 before.

21 We are seeking, as I said, Your Honor, authority  
22 to pay an expense reimbursement of \$500,000. We believe it  
23 constitutes a sound exercise of the debtor's business  
24 judgment and that, without approving this expense  
25 reimbursement, neither of these lenders will continue to



1 move forward expeditiously with their -- with their due  
2 diligence and to a full-blown commitment letter.

3 Your Honor, we -- we are not at this point at  
4 liberty to actually disclose these two names to the Court.  
5 We have, though, shared all of the information, all of the  
6 proposals, you know, all of the indications of interest with  
7 the committee. The committee is fully aware and the JPLs  
8 are fully aware of the -- of the proposals we've -- we've --  
9 we've received, and we think that there is clearly precedent  
10 in this district, and I would refer the Court to the Eastman  
11 Kodak case and the Borders Group case for approving payment  
12 of expense reimbursements to unnamed counterparties.

13 Your Honor, if I may approach, there are some  
14 changes to the order that we negotiated to resolve the --  
15 the committee's objection.

16 THE COURT: Yes, please.

17 Thank you.

18 MR. ROSENTHAL: So, Your Honor, these -- these  
19 changes were as a result of input, not only from the  
20 committee, but also from the -- from the -- the proposed DIP  
21 financing parties. If you turn to page 2, you'll see that  
22 on page 2, we have clarified that the payments would be made  
23 for actual and reasonable costs and expenses upon delivery  
24 of -- of invoices. So we have -- we have a documentation  
25 requirement that I think is consistent with -- with other --

1 other similar orders.

2 We had previously had in this section a proviso  
3 that provided the committee with, in effect, a right to see  
4 -- see the -- see the invoices and be consulted with respect  
5 to the invoices. As you can see in paragraph four, we've  
6 changed that right to a right to object.

7 So the procedure that is implemented by paragraphs  
8 three and four is that we will receive the invoices. We  
9 will transmit them to the committee promptly, and both the  
10 committee and the debtors will have three days in which to  
11 review and object to the invoices, and, to the extent -- to  
12 the extent that there is an objection to the invoices, if  
13 you look at paragraph five, that those disputed fees and  
14 costs will not be paid, absent either a resolution by the  
15 committee and the debtors and the potential lender or  
16 resolution by the Court.

17 THE COURT: All right.

18 MR. ROSENTHAL: Now, there is one other -- there  
19 is one other concept that has changed here. The lenders  
20 have asked us to -- instead of having a -- submitting an  
21 invoice and then, reimbursing them, they have asked to have  
22 an -- an expense deposit put up in the amount of \$500,000.  
23 We -- we have agreed to that, and we thought about it long  
24 and hard. We discussed it with the committee. The  
25 committee supports the provision of this deposit because of

1 the objection mechanisms in the order, but I just point out  
2 two points to the Court.

3 One, we're only authorized to pay actual and  
4 reasonable documented fees and expenses. So, having the  
5 money in the hands of the lender doesn't mean they're going  
6 to get it, if they don't have actual and reasonable  
7 documented fees and expenses, and second, as we're both  
8 entitled, the committee and the debtors, to raise an  
9 objection to any invoice, if we raise the objection, they  
10 cannot withdraw money from the -- from the expense deposit.

11 THE COURT: Can you tell me, or is it problematic  
12 to say it in open court, as to where the funds would be  
13 deposited, whether it would be in the United States or  
14 overseas, because I know there's been a lot of discussion  
15 about assets of the estate and where they are, whether  
16 they're subject to the jurisdiction of the Court?

17 MR. ROSENTHAL: I -- I can't tell you exactly,  
18 Your Honor. My sense would be the United States.

19 THE COURT: All right.

20 MR. ROSENTHAL: The -- the -- my sense would be --  
21 these are -- I don't think we would have any problem with  
22 having these parties deposited in the United States, quite  
23 frankly.

24 THE COURT: All right.

25 MR. ROSENTHAL: They're -- the -- the second --

1 the second change we made at the request of the lenders is  
2 it's -- these lenders have started doing some of their due  
3 diligence, and they wanted the expense reimbursement to  
4 apply to fees that they -- and expenses that they incurred  
5 before September 7th, and we had agreed to that as -- as has  
6 the committee. Based on that, Your Honor, we would ask the  
7 Court to enter the proposed order.

8 THE COURT: All right.

9 Anyone want to be heard in connection with this  
10 request?

11 MR. DUNNE: Good afternoon, Your Honor. Dennis  
12 Dunne, from Milbank, Tweed, Hadley & McCloy, on behalf of  
13 the official creditors' committee, and I'll -- I'll be brief  
14 here.

15 We wish we were in a position where we did not  
16 need to seek debtor-in-possession financing at this juncture  
17 in the case. We support entry of the motion today, because  
18 we found ourselves where we are. It's the economic  
19 realities of the case, but we are going to be looking for  
20 ways to minimize the costs associated with the DIP, and  
21 there's a couple of kind of big-ticket items to do that.

22 One is the return of the funds that are currently  
23 on deposit at some local banks in the -- in the Middle East.  
24 We had discussed this at a previous hearing, Your Honor, and  
25 we thought we would have those funds returned by now. They

1 were basically amounts that were put on deposit at local  
2 banks in the weeks prior to the filing, which, under U.S.  
3 law, would be a classic, you know, elevation of your rights.

4 THE COURT: Right.

5 MR. DUNNE: You wouldn't have setoff rights,  
6 because you've improved your position within the 90 days  
7 prior to the filing. We're still working on that. We may  
8 need Your Honor's help on that in the near-term.

9 The other factor that will move the needle on  
10 ultimate -- ultimate costs associated with the DIP is just  
11 how long we stay in Chapter 11. There -- there -- there's a  
12 critical need to expedite the case, and, while I agree with  
13 Mr. Rosenthal that the meetings that we had were productive  
14 last week in London, they were productive from the sense of  
15 information and views were aired and shared, but we did not  
16 reach agreement on what is the best path for exit right now.  
17 Actually, we're not presented with a proposal yet. They're  
18 still working on that.

19 We need to do that in the near-term, and  
20 Your Honor's going to hear a lot of this in upcoming  
21 hearings, whether it's with respect to exclusivity or a  
22 management incentive plan and the like. Also, all we're  
23 approving today is expense reimbursement. It leaves open  
24 for another day the appropriate terms of bar and what are  
25 the interest rates, what are the fees, what's an appropriate

1 covenant package, and most importantly for us, what are the  
2 anticipated borrowing costs. What -- what do we think we're  
3 going to find ourselves at the end of the case with what  
4 quantum of DIP borrowings that has to be satisfied in full  
5 before all creditors get a recovery? But all of that's for  
6 another day. For today, Mr. Rosenthal said -- as he  
7 accurately informed the Court, the order includes our latest  
8 set of comments, and we are supportive of its entry.

9 THE COURT: All right. Thank you.

10 Anyone else want to be heard?

11 (No audible response)

12 All right. Based on the information I have in  
13 front of me and the consent of the committee, I'm happy to  
14 approve the expense reimbursement that's sought. I would  
15 just ask for two minor tweaks to the order. One is a very  
16 standard tweak, which is paragraph one. The motion is  
17 granted to the extent provided herein, and two is to just  
18 add something to reflect the -- the fact that the deposit  
19 that -- the expense deposit, and I think which is defined in  
20 paragraph eight, is going to be made -- essentially, kept  
21 somewhere in the United States.

22 MR. ROSENTHAL: That's fine, Your Honor. We'll --  
23 we will add that and resubmit the order.

24 THE COURT: All right. Thank you.

25 MR. ROSENTHAL: Now, before I turn it over to the

1 -- to talk about AGUD, which is also resolved, let me -- let  
2 me just raise the timing issue.

3 Based on the discussion with the two potential  
4 lenders, we -- we believe that, in order to, again, move  
5 this process forward, we are going to have to have two  
6 hearings, if the Court can -- can accommodate us. We think  
7 we're going to have to have a hearing to approve a  
8 commitment letter and then, a hearing to actually approve  
9 the -- the -- the DIP.

10 The commitment letter would provide the lender  
11 with certain protections that -- exclusivity-type  
12 protections are -- there are things we're -- we're still  
13 talking about, but -- but, from what we've heard from each  
14 of these parties, this will be important to them to proceed  
15 to -- to file the documentation. They want to make sure  
16 they're protected. They're going to be spending a lot of  
17 time and effort in this process.

18 We think, again, that's common. There are other  
19 instances in this -- in this jurisdiction of that.

20 We do have a hearing on October 2nd, and we do  
21 have one on October 9th. So what -- what we -- what we are  
22 hoping is that we can sign a commitment letter by the end of  
23 the week, file a motion, and try to get that heard on a  
24 shortened -- on a shortened notice at the October 2nd  
25 hearing, and then, we would file a -- the -- the financing

1 motion and get that heard at the October 9th hearing.

2 We think we'll have enough time to get it done so  
3 that the relief on October 9 would not have to be interim  
4 relief. We need 15 days. But, if we don't, then we'll have  
5 to -- we'll have to get interim relief and have a -- and  
6 have another -- and have another hearing, but we -- we  
7 understand the 15-day requirement for that.

8 THE COURT: All right.

9 I'll just say October is shaping up to be a rather  
10 hectic month. I think right now I have three trials set of  
11 varying lengths, anywhere from a few days to as much as a  
12 week. I don't know whether all these things that have been  
13 promised will actually occur, but it -- to the extent you  
14 can minimize the number of hearings required, that's --  
15 that's probably a good thing, and certainly, we'll get you  
16 in, if -- if it needs to be done, for the betterment of the  
17 -- of the case, but less hearings is -- is probably  
18 preferable, just so you don't have to live with some  
19 uncertainties we jockey around for dates.

20 MR. ROSENTHAL: We'll try, Your Honor, but I --  
21 but I know that there's going to be a push to try to get  
22 something in front of you early October. So --

23 THE COURT: Well, it's -- well, I -- I think the  
24 2nd or the 9th seem to make some sense. It's just, to the  
25 extent that you can't get it teed up by the 9th and we're



1 talking about a third hearing --

2 MR. ROSENTHAL: I -- I --

3 THE COURT: And -- and I think the later in the  
4 month you go, the -- the more problematic it -- it becomes.

5 MR. ROSENTHAL: Fine.

6 THE COURT: At least, at the moment. That -- that  
7 may all resolve itself in some miraculous set of events, but  
8 --

9 MR. ROSENTHAL: Thank you, Your Honor.

10 MR. DUNNE: On -- on that, Your Honor, this is the  
11 first we're hearing of the bifurcation, and I -- I recognize  
12 that it's common to have an interim hearing for debtor-in-  
13 possession financing and then, have a final hearing  
14 thereafter. That's usually when you're rushing into the  
15 case on -- on the first day and you -- and you need to  
16 borrow.

17 I don't know, frankly, why we can't do both on the  
18 9th. Meaning, typically, there's a need for borrowing so  
19 that the -- the estate is getting those -- those loaned  
20 dollars in exchange for some portion of the fees and the  
21 rest of the economics that get approved on an interim basis,  
22 and then, you come back on a final. I don't know why, since  
23 we don't have a need to borrow between the 2nd and the 9th,  
24 why we can't just do this all at once on the 9th.

25 THE COURT: Well, the -- the one thing that I

1 thought and didn't say, but now I -- I think I will is when  
2 I heard that they may have a desire to get the commitment  
3 letter and that it would give them a certain amount of -- of  
4 incentives is probably not the full word, but some sort of  
5 comfort, incentive and a sort of a stake in things as it  
6 goes forward. I think, obviously, the expense reimbursement  
7 motion does a lot of that.

8 So, to the extent that it can be teed up to be  
9 heard on the requisite notice on the 9th, that -- that  
10 probably makes the most sense, and, to the extent that it  
11 helps for your conversations with them for me to say that,  
12 you can report to them that I said that, just -- just  
13 because I think one-stop-shopping may be beneficial, but it  
14 may be, to the extent that there is a benefit to getting  
15 some of the information out there, certainly, nothing  
16 prevents filing on the docket the information as soon as  
17 possible so that the discussions can begin and -- and  
18 communications can -- can start.

19 MR. ROSENTHAL: Understood, Your Honor. We'll --  
20 we'll communicate that to the prospective lenders.

21 THE COURT: All right. Thank you.

22 MR. ROSENTHAL: May I turn it over to Mr. Millet?

23 THE COURT: Certainly.

24 MR. MILLET: Again, Your Honor, Craig Millet, for  
25 the debtors.

1 THE COURT: Afternoon.

2 MR. MILLET: I'm going to address the second  
3 matter, Your Honor, which is also resolved with respect to  
4 -- it has several names. We call it District Cooling, which  
5 is what it's called in the motion, and it deals with  
6 operations of a chilling facility, a cooling facility in Abu  
7 Dhabi, which as, you can imagine, is very near and dear to  
8 the hearts of those who are customers of that service.

9 When we presented our budget last -- earlier this  
10 month, on September 5, we -- we did have agreement with the  
11 committee and others as to all items of the budget, with the  
12 exception of this \$1.9 million in funding for District  
13 Cooling. We then agreed at that hearing that the remainder  
14 of the budget would be approved. We could make those  
15 expenditures. This item would remain in the budget. It  
16 would be approved in the eighth interim cash management  
17 order, but we would not fund this amount, absent a further  
18 order of the Court, which was going to be considered today,  
19 or an agreement with the committee.

20 As you know, we have reached an agreement, and  
21 we're pleased that -- that we don't have to go forward at  
22 least litigating whether or not to make this \$1.9 million.  
23 We -- we reached that agreement based on the discussions we  
24 had in London last week that Mr. Rosenthal referenced in  
25 which we did have a chance to talk to both the professionals

1 of the committee as well as the committee itself, and then,  
2 after we had filed our brief and before we had responded to  
3 any discovery and before any opposition was filed by the  
4 committee or anyone else, we did reach an agreement six days  
5 after we filed our brief, and we advised the Court.

6 Now, we understood that the committee was going to  
7 file something that reflected the fact that they no longer  
8 had an objection, and we expected that to occur, but, when  
9 we received the pleading that was filed yesterday, we were a  
10 little bit surprised because it did go into a considerable  
11 discussion as to how or why a resolution was reached. We  
12 feel that it makes misrepresentations of facts as to how  
13 that occurred and that --

14 THE COURT: Well, you know, as I think I've said  
15 before, I -- I don't need to parse that, and so, I -- I  
16 understand folks sometimes have a need to say things, but it  
17 sounds like the ultimate resolution is -- is just that, a  
18 resolution of -- of the need for this and the committee's  
19 assent to the -- the expenditure.

20 MR. MILLET: Exactly, Your Honor. We -- we did  
21 not want to be in the position of litigating why a  
22 resolution was reached.

23 THE COURT: No, no, that --

24 MR. MILLET: It's difficult to resist, but we --

25 THE COURT: I think that --

1 MR. MILLET: -- did not file a response.

2 THE COURT: We all have better things to do.

3 MR. MILLET: Right. And so, just suffice it to

4 say we disagree substantially with the position then.

5 Having said that, moving on to the -- the end here, because

6 the -- the expenditure was included in the budget that was

7 approved by the Court in the eighth cash management order,

8 this matter can be resolved without the entry of a further

9 order.

10 THE COURT: All right.

11 MR. MILLET: So, since we do have agreement, the

12 money has been funded, and this matter should be at a

13 conclusion without the need of a further order of the Court.

14 THE COURT: All right. All right.

15 Any comments from the committee?

16 MR. FLECK: No, Your Honor. The committee is

17 pleased to have reached a resolution of the dispute.

18 THE COURT: All right.

19 MR. FLECK: Thank you.

20 THE COURT: Again, I appreciate all the efforts of

21 parties to reach resolutions on things like this.

22 Obviously, you're much closer to the facts than I am, and

23 the process has served the case very well. So certainly, to

24 the extent that you can all sing Kumbaya on every issue does

25 -- does not reflect poorly on anybody. It's a -- it's a

1 very interesting and unique case. So -- so again, I  
2 appreciate all your efforts.

3 And so then, the upshot of today is just the entry  
4 of the one order approving the expense reimbursement, and  
5 I'll wait for a revised order to be sent by e-mail, and  
6 we'll get that entered as soon as we get it.

7 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

8 THE COURT: Thank you.

9 Anything else we should discuss?

10 (No audible response)

11 All right. Thank you.

12 UNIDENTIFIED SPEAKER: Thank you, Your Honor, for  
13 your time.

14 (Proceeding concluded at 2:40 PM.)

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**E X H I B I T S**

| <b>PARTY</b> | <b>DESCRIPTION</b>           | <b>EVID.</b> |
|--------------|------------------------------|--------------|
| Debtor       | Bernard Douton's declaration | 7            |

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I N D E X

RULINGS

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| Motion to Approve/Debtors                              | 14   | 13   |
| Motion for an Order Approving<br>Expense Reimbursement |      |      |

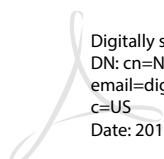


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C E R T I F I C A T I O N

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

Nicole  
Yawn

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