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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 12-11076-shl

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In the Matter of:

ARACAPITA BANK B.S.C. (C), et al,

Debtors.

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U.S. Bankruptcy Court

One Bowling Green

New York, New York

October 9, 2012

2:18 PM

B E F O R E :

HON SEAN H. LANE

U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc. #279 (Status Conference) Motion For Relief
2 From Stay Re Tide Natural Gas I, LP and Tide Natural Gas
3 Storage II, LP

4

5 Hearing re: Doc. #509 Second Motion to Extend Exclusivity
6 Period for Filing a Chapter Plan and Disclosure
7 Statement/Debtors Second Motion for Order Extending the
8 Exclusive Periods to File a Plan or Plans of Reorganization
9 and to Solicit Acceptances

10

11 Hearing re: Doc. 513 Motion to Authorize/Debtors' Motion
12 for Entry of an Order Authorizing the Debtors to Enter into
13 a Financing Commitment Letter and Incur Related Fees,
14 Expenses and Indemnities

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25 Transcribed by: Dawn South

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Please be seated. Good afternoon.

We're here for Arcapita, an omnibus hearing.

MR. ROSENTHAL: Good afternoon, Your Honor,
Michael Rosenthal, Craig Millet, and Matt Williams of
Gibson, Dunn & Crutcher on behalf of the Arcapita debtors.

THE COURT: All righted. Let me get appearances
from everybody else who may be speaking this afternoon.

MR. DUNNE: Good afternoon, Your Honor, Dennis
Dunne from Milbank, Tweed, Hadley & McCloy on behalf of the
official committee of unsecured creditors. And I'm joined
by my partners Evan Fleck and Andrew LeBlanc.

THE COURT: All right. Anyone else?

MS. GREENBLATT: Good afternoon, Your Honor,
Nicole Greenblatt from Kirkland & Ellis on behalf of the ad
hoc group (indiscernible - 00:00:44).

MR. GREER: Brian Greer from Dechert LLP for
Standard Charter.

MR. MORRISSEY: Good afternoon, Your Honor,
Richard Morrissey for the U.S. Trustee.

THE COURT: All right.

MR. ROVIRA: Good afternoon, Your Honor, Alex
Rovira from Sidley Austin on behalf of the joint
professional liquidators.

1 THE COURT: All right.

2 MR. RECKMEYER: Jeremy Reckmeyer, Andrews Kurth on
3 behalf of the (00:01:04) claimants.

4 MR. LANGE: Marvin Lange, Bracewell & Giuliani on
5 behalf of Tile Natural Gas.

6 THE COURT: All right, I think that's cast and
7 crew.

8 So I do have the agenda here, and I assume it
9 would make sense to take the easy things first and then move
10 on to contested matters.

11 MR. ROSENTHAL: That's what I was intending to do,
12 Your Honor, and -- but I was also intending to give you a
13 brief update about the case.

14 THE COURT: All right.

15 MR. ROSENTHAL: First I think you have a spiffy
16 new courtroom. This is --

17 THE COURT: Yes, we do have, and as people are
18 here quite frequently, to the extent you want to take
19 advantage of all this newfangled equipment that is after all
20 the taxpayers, there is a document camera, although as I
21 always refer to those as an Elmo, they are -- can do all
22 sorts of interesting things on the various monitors that are
23 around the courtroom in terms of annotating that exhibit of
24 the other side that you don't like in various colors.

25 (Laughter)

1 THE COURT: So to the extent that anyone for this
2 case or in the future wants to take advantage of any of this
3 I understand we're going to have some training or certainly
4 can make essentially this available for people to take a
5 look at if they have an evidentiary matter that would prove
6 to be useful. I know I would have had a lot of fun with it
7 in my prior life if given the opportunity.

8 MR. ROSENTHAL: I'm sure we may have some fun with
9 it even in this case.

10 THE COURT: That may be true.

11 MR. ROSENTHAL: Your Honor, first I want to start
12 by apologizing for the late filing related to the commitment
13 letter motion. There were discussions into late last night.

14 THE COURT: I'm sure there were. The only thing I
15 will say is I had a large American Airline hearing this
16 morning where some issues actually were -- the argument
17 lasted less time than anticipated, and I have a contested
18 confirmation tomorrow. I can only consider what I have a
19 chance to read and then think about.

20 I understand and appreciate the parties' efforts
21 to work things out, but it is helpful if you give us some
22 idea when it's coming.

23 I -- somebody who has an 18 month old I'm up all
24 sorts of strange hours of the night to print out all sorts
25 of interesting things, and if I had known it was coming at

1 midnight I actually would have printed it out since I had a
2 very good friend of mine who was up with me at that time.
3 So --

4 (Laughter)

5 THE COURT: -- just if you would let me know these
6 things and give me some idea it -- I do have the advantage
7 of some time on at a train to do lots of interesting
8 reading. So it's always appreciated.

9 And again, I know you're all working hard, but
10 there's a lot of paper that passes through this courthouse
11 and so much of it ends up getting resolved, but I read it
12 all, and so you got to let me know. And even if it's, you
13 know, an email or a call to chambers to give us a status
14 update that's always appreciated.

15 MR. ROSENTHAL: I understand, Your Honor, and I'm
16 sorry for the --

17 THE COURT: All right.

18 MR. ROSENTHAL: -- for the problem.

19 Just so -- an update on some matters since the
20 last hearing, which was the middle of last month.

21 We had one deliverable that I had discussed with
22 the Court, which was a stand-alone business plan due on the
23 30th. That was actually completed and delivered on the 30th
24 to the UCC, JPLs, Standard Charter, the ad hoc -- the ad hoc
25 group, and they are -- they are reviewing it. We've --

1 we've offered to met with them. A meeting hasn't yet
2 occurred, but we understand we may be getting some questions
3 and some inquiries and there may have been some telephone
4 conversations about that.

5 As you'll recall the -- last month, the beginning
6 of the month we started with a motion to approve the IPO,
7 and we have been working feverishly to have the documents
8 agreed so that we could commence what's called the intention
9 to float the beginning of the IPO.

10 Last week and over the weekend we did actually get
11 to a position where all of those documents were signed off
12 by the parties at 2 a.m. on Monday morning, a consent was
13 filed on behalf of the joint provisional liquidators, the
14 committee, and Standard Charter consenting to the EuroLog
15 IPO documentation. And as the Court recalls, your order
16 said if the -- those three parties consent to the
17 documentation we do not need to come back --

18 THE COURT: Right.

19 MR. ROSENTHAL: -- to the Court.

20 As a result of the consent the initial phase of
21 the IPO, which is the intention to float, was -- was
22 published this morning in London. We are seeking -- and
23 this is all part of the documentation -- we are seeking what
24 is called a validation order in the Cayman Islands
25 effectively doing the same thing your order did for all of

1 the debtors, but this is limited to AIHL, and the
2 circumstance where AIHL might subsequently be in a
3 liquidation proceeding in the Cayman Islands. We don't want
4 that to vitiate the approvals and consents that --

5 THE COURT: Right.

6 MR. ROSENTHAL: -- have been obtained. That
7 hearing is set for Friday.

8 You know, Your Honor, as often happens when you're
9 negotiating one issue other issues bleed over into that, so
10 as a result of the IPO negotiations we also settled with
11 Standard Charter Bank with respect to their adequate
12 protection issues. And this again is an agreed resolution.

13 This Court will recall Standard Charter is our
14 only secured creditor and has approximately a hundred
15 million dollar claim secured by a pledge of certain equity
16 interests, including the equity interest in the portfolio
17 company that owns the largest share of the assets that are
18 involved in the IPO.

19 Now the good thing is that we reached the
20 agreement. The bad thing is that the agreement is subject
21 to the Court -- the Bankruptcy Court approval and the Cayman
22 Court approval. And the even worse thing for Your Honor's
23 calendar unfortunately is that we have some time frames in
24 the agreement that Standard Charter would like to be --
25 would like to ask the Court to schedule. And we understand

1 it's a -- it's difficult, but the agreement as it stands
2 requires that we get Court approval by the 19th.

3 We would intend to file an emergency motion, a
4 motion to shorten notice. I know you have a crowded
5 calendar, you've already told us that, but this would be an
6 unopposed motion at least from the perspective of the
7 committee, the JPL, and Standard Charter.

8 So I don't -- I think it would be a relatively
9 short hearing.

10 THE COURT: Well, I have two trials or evidentiary
11 matters, call them what you will, scheduled for next week
12 with one of them taking up the 15th and the 16th and the
13 other commencing on the 17th and continuing through the 19th
14 and then the following week. I see it's not on the 19th,
15 but I think that's a computer oversight.

16 I should have some time on the 19th, I think that
17 trial on that day is limited to either the morning or the
18 afternoon. So contact chambers, I think that's probably a
19 place we can schedule that motion to be heard.

20 MR. ROSENTHAL: Thank you, Your Honor.

21 We have -- I've mentioned to you a couple times
22 that we had discussions with the joint provisional
23 liquidators about a potential bank and AIHL settlement of
24 certain allocation issues and the like. We met with the
25 committee on those issues, and presently what we all

1 contemplate and believe might be more appropriate, is that
2 we roll the issues related to -- the issues that were
3 involved in that settlement into the more comprehensive plan
4 discussions that we hope will be taking place over the next
5 -- over the next 60 days.

6 So at least for now we do not intend to separately
7 present to the Court the proposed bank versus AIHL
8 settlement; nevertheless, all the issues that were on the
9 table in this settlement will be a part of and are essential
10 to the -- to the plan negotiations and may --

11 THE COURT: All right. But because they're an
12 involved allocation you think --

13 MR. ROSENTHAL: I do.

14 THE COURT: -- it'd wise to hold off to get formal
15 approval.

16 MR. ROSENTHAL: They do.

17 THE COURT: All right.

18 MR. ROSENTHAL: Briefly on new money. We -- our
19 efforts with respect to new money continue. A couple of the
20 Rothschild folks, including Mr. Parkhill (ph) who's here in
21 the courtroom and I were in the Middle East last week
22 talking to potential investors, and we are -- we are
23 continuing those efforts.

24 The exclusivity agreement that we reached with the
25 committee requires us to raise at least \$250 million of the

1 new financing on or before November 1st.

2 THE COURT: November 1st.

3 What level of commitment is required on that?

4 Obviously that is an overlap between some of the issues
5 we're talking about as to Silver Point here this afternoon.

6 In other words, what -- when it says raise \$250 million in
7 new money what does that look like in terms of -- because
8 obviously one of the objections related to a deadline for
9 this particular entity to meet various commitment
10 conditions, and so I'm wonder how -- if there's been any
11 discussion about this particular --

12 MR. ROSENTHAL: This is all -- this is all trying
13 to fold into the -- fold into that issue and is part of the
14 agreement with respect to the exclusivity extension.

15 So the \$250 million has to be either in escrow.
16 So we have to have the money either in escrow or we have to
17 have an irrevocable letter of credit for the 250 million or
18 whatever portion is not in escrow.

19 In order to continue discussions by November 1st
20 -- in order to continue discussions on a new money plan
21 after November 1st, and then there has to be a further
22 condition that at least 75 percent of that \$250 million be
23 earmarked for distribution to prepetition unsecured
24 creditors under the plan.

25 Now we have drafted an equity commitment letter

1 that we will be asking potential investors to sign at the
2 time they make their investment. And what we've tried to do
3 is describe for them in that letter the economics of what
4 they are bargaining for, leaving not settled what's
5 available for the creditors to distribute among themselves.
6 And through that we believe that we -- the money would be
7 deposited, the equity investors will get what they bargained
8 for, and that will leave the balance of the pool, if you
9 will, available to be negotiated and allocated by the
10 creditors of these various estates.

11 THE COURT: All right.

12 MR. ROSENTHAL: Plan negotiations was my next
13 topic. We intend immediately to begin plan negotiations on
14 both the stand-alone and the new money plan, and that too is
15 part of our exclusivity agreement with the committee.

16 THE COURT: Okay.

17 MR. ROSENTHAL: Budgeting. Again, we continue to
18 be careful. Our cash position as of the end of September
19 was \$34.4 million, our actual to budget variance is a
20 positive \$35 million, because receipts have exceeded
21 budgeted receipts and actual expenditures have been lower
22 than budgeted expenditures.

23 Now that 34 million -- 35 million -- I'm sorry --
24 \$34 million excludes the placement funds of 35 million. I
25 want to spend a little time talking about those this

1 morning.

2 The -- we -- Mr. Dunne had mentioned something
3 about it at the last hearing. We're not -- we're not
4 ignoring these funds, Your Honor, we -- it's pretty clear to
5 all of us, and we've been in discussions with the committee
6 and the JPLs, that these funds are not going to be
7 voluntarily turned over.

8 Another option is to try to use the influence of
9 the Central Bank of Bahrain to help with this process
10 whether it's through oral suasion or regulatory or legal
11 means. And we've had discussions with the committee about
12 that and we've had discussions with the Central Bank of
13 Bahrain about that. Those two have not been successful.

14 The third alternative obviously is to commence
15 litigation. We are evaluating that litigation. It is -- it
16 is my no means an easy piece of litigation. There are a
17 number of issues beyond the scope of this hearing that come
18 into play in terms of the likelihood of success with that
19 litigation and the expense and collectibility and things of
20 that sort.

21 So we are evaluating it, we haven't ignored it. I
22 think it's unwise for any of us to depend on that money to
23 come in in the connection 30 days or 60 days or 90 days,
24 litigation would take some amount of time to -- to resolve
25 and to actually receive the money. We've -- you know, we've

1 asked --

2 THE COURT: Well, I'd assume that given the -- I
3 think there's a reference in the papers talking about using
4 EuroLog proceeds but there's no reference to using any of
5 these monies. So it looked like it was contemplated that
6 that was in the -- any solution to any financing issues in
7 the near term.

8 MR. ROSENTHAL: It's not a solution to any
9 financing in the near term because although the IPO has --
10 is in its initial phase it's unclear whether it will
11 actually close. There -- you know, it has to price at a
12 certain level, we still have some uncertainties in the
13 market.

14 We have though in the overall agreement with
15 respect to the IPO and Standard Charter put some provisions
16 into the Standard Charter term sheet agreement that deal
17 with the IPO, and I mean and the basic concept, Your Honor,
18 is that we would -- we would size the DIP as if no proceeds
19 were coming in. If proceeds did come in some portion of
20 those proceeds would be subject to an administrative claim
21 in favor of Standard Charter, the ones that came up through
22 the chain where Standard Charter had to pledge, some portion
23 would not be subject to that pledge.

24 The term sheet provides that to the extent those
25 proceeds come in and they're not subject to the

1 administrative claim of Standard Charter they would be used
2 either to reduce the DIP commitment or if we had drawn funds
3 to pay down -- to pay down the DIP.

4 So the concept built into these documents is that
5 at least with respect to that portion we're not planning on
6 for sizing purposes on getting the money, but if it comes in
7 the portion not related to the admin claim would pay down
8 the DIP, the DIP being a more expensive financing
9 alternative than using -- than using our own proceeds.

10 THE COURT: All right.

11 MR. ROSENTHAL: We've also agreed that to the
12 extent those proceeds come in and they're subject to the
13 administrative claim after Standard Charter that we would
14 use those proceeds first, but it wouldn't produce the DIP
15 commitment, because in the end we'd have to pay Standard
16 Charter their administrative claim, and we don't want to --
17 we don't want to be -- we don't want to be double dipped,
18 but we'd use those proceeds first. Again, under the theory
19 that using those proceeds is less expensive than any unused
20 line fee we might -- we might incur related to the DIP.

21 So we've tried to take that into consideration and
22 that was one of the last points we negotiated.

23 THE COURT: All right.

24 MR. ROSENTHAL: Your Honor, that's -- that's
25 essentially my report.

1 Dennis, you want to say something?

2 MR. DUNNE: Sure. Good afternoon, Your Honor, for
3 the record, Dennis Dunne from Milbank, Tweed on behalf of
4 the committee.

5 I'm just going to respond briefly on a couple of
6 those points just to give you the committees' perspective on
7 that, but a lot of this you're going to hear again more
8 fully in connection with the DIP.

9 But I think Your Honor was onto a good line of
10 questions with respect to the agreement on exclusivity and
11 the form of the deposit with respect to the new money
12 investment and the nature of the commitment.

13 I suspect that those commitments will be what
14 everybody in the capital markets understands is a
15 commitment. There will -- it will be subject to regulatory
16 approvals, governmental approvals, and the like, but the
17 point is vis-à-vis the new money investor, if you satisfy
18 those third-party consents and regulatory approvals and
19 definitive documentation and the like, it's binding on them
20 as opposed to what you'll hear about in the DIP financing
21 context. And even if you ticked off all the boxes that you
22 have to do with respect to third-party approvals, Court
23 approvals and the like, there's still a free walk for the
24 DIP lenders.

25 With respect to EuroLog and the placements. It's

1 relevant in this respect, Your Honor, is that we've been
2 concerned from the beginning about the burn of professional
3 fees and deal funding commitments and the like in this case,
4 and we were concerned we'd be here today that as a result of
5 not doing a plan over the summer not only would we need more
6 time to do it, but we'd have to bring in a very pricey
7 debtor-in-possession financing facility.

8 And one of the ways to avoid that would be if you
9 could get some of those dollars in, and you don't need all
10 of it. For instance, if you got the EuroLog proceeds at the
11 levels they anticipate and net of the standard charter
12 claims, you bring in \$50 million into this estate you can
13 then run this case for another, you know, three, four months
14 or whatever the period of time is, in the interim you're
15 going try to collect the CD placements at the local Bahrain
16 banks. And I don't think there's a dispute that under U.S.
17 law they don't have a set off right as a result of elevating
18 their position in the few weeks prior to the filing. It's a
19 preference that they just don't have a set off claim to.

20 I think what Mr. Rosenthal was eluding to was the
21 ability to take Your Honor's judgment on that and collect
22 and enforce in the Middle East.

23 But the point is do we need to do the DIP today
24 and could we manage through November with respect to cash?
25 If we get to a point where we actually need to borrow in

1 November that'll be very much like an interim debtor-in-
2 possession financing, we would limit it to precisely what we
3 need, we would have a better read on the EuroLog and the
4 like.

5 I will sit down with that, Your Honor, but that --
6 you'll hear more about those issues in connection with our
7 DIP objection.

8 THE COURT: All right, thank you.

9 MR. MILLET: We may have a disagreement about the
10 clarity of the U.S. law on the recovery of the preference.

11 Your Honor, we've got some people here for the
12 Falcon case.

13 THE COURT: All right.

14 MR. ROSENTHAL: So I think that's just a simple
15 report to the Court.

16 THE COURT: I think that's just a status report.
17 Certainly.

18 MR. MILLET: Your Honor, may I approach the podium
19 from the well?

20 THE COURT: Absolutely. Wherever you're
21 comfortable any microphone will do.

22 MR. MILLET: The Court will recall back in August
23 we had to motion for relief from stay brought by the Tide
24 parties in the Falcon case. The one thing that all parties
25 did agree upon was mediation.

1 THE COURT: Mediation.

2 MR. MILLET: And the Court then adjourned that
3 proceeding to today as a status conference to see how we
4 would come on that.

5 We have been able to agree on a mediator and set a
6 time for a mediation which will occur on October 30 and
7 therefore we're proceeding toward that now.

8 What we would request the Court to do is continue
9 the status conference today to December 13 and allow us to
10 get through that mediation, which is the omnibus date by the
11 way in that one.

12 THE COURT: All right.

13 MR. MILLET: And to allow us to get through that
14 mediation and see if we can resolve things. If we can
15 great, if not then we can report back to the Court on the
16 13th.

17 THE COURT: All right, that's fine. I just don't
18 anyone to think it was falling off the radar screen here
19 since you had filed the motion here, but obviously given
20 that all parties are interested in mediation, given what I
21 know of the dispute, which is in District Court, that
22 mediation seemed a very wise to proceed.

23 So I will say this, I don't necessarily need
24 people to come just to inform me if in fact you say, well,
25 here's where we are in the mediation, we've done this, we're

1 going to have further discussions. Feel free to adjourn it
2 as you see fit, just let my chambers know sort of where
3 things are procedurally and we'll have you in when it's
4 useful.

5 MR. MILLET: Very well, Your Honor.

6 THE COURT: All right. Thank you.

7 MR. MILLET: Thank you.

8 MR. ROSENTHAL: Your Honor, the next matter that I
9 think we should take up is the exclusivity motion.

10 THE COURT: All right.

11 MR. ROSENTHAL: Your Honor, through this motion
12 the debtors are seeking an extension of the exclusive filing
13 and solicitation periods for an additional 60 days until
14 December 15th, with an agreement that we will not seek a
15 further extension of the exclusive filing period.

16 A little background. I mean, I think the
17 objections are resolved, but I want to give the Court -- I
18 think the record and -- needs to be developed and I want to
19 give the Court a little background.

20 All parties in these cases I think have expended
21 Herculean efforts over the last six months. The Court knows
22 we've spent a lot of time on reductions and force motions,
23 on stabilizing the business, on bringing various
24 constituencies up to speed. It has -- it has -- there have
25 been some allegations in the objections that this is a

1 simple case, this is just a holding company. Lehman
2 Brothers was just a holding company, but it was a very
3 complex case. This is a very complex case involving 25 or
4 more portfolio companies in jurisdictions around the world,
5 and in reality Arcapita manages over \$5 billion of assets
6 for these companies. It's a complicated case, and anyone
7 who's been in the trenches with this case knows that we've
8 all been incredibly busy. The Court has been kept advised
9 of that at every hearing.

10 We think we've made significant progress towards
11 the plan. We don't have the plan negotiated, but we think
12 we've made significant progress in that we have set the
13 foundation for the parties to sit down and negotiate
14 reasonable resolution.

15 And what do I mean by that? We have -- we now
16 have the KPMG valuations in hand. We have waterfall
17 calculations that derive from the KPMG valuations so that
18 parties can determine whether they're bank creditors or AIHL
19 creditors, and what their relative leverage is against each
20 other, what their relative recovery would be.

21 We have the stand-alone business plan that is on
22 the table that people can view that talks about what the
23 company would look like if it did not engage in new
24 business, if it basically engaged in an orderly wind down.

25 We have the new money business plan on the table

1 which is what the company would look like if it disposes of
2 its existing portfolio in the normal course and it engages
3 in some new business down the road. The new money plan of
4 course involves the infusion of a significant amount of new
5 equity.

6 And we have a -- we have a good sense I think of
7 what our expenses are, what they -- we obviously know what
8 our expenses have been, I think we know pretty clearly what
9 our expenses will be during the balance of the
10 administration of the case. We've been pretty good about
11 budgeting. That will enable people to evaluate
12 administrative expense claims that one entity may have
13 against another, how to allocate some of those expenses.

14 So from our perspective, from the debtors'
15 perspective we now have the foundation to sit down and
16 negotiate with the various constituencies, and that's why we
17 have asked for the 60-day extension.

18 It's a measured extension though, because we've
19 provided that we will not request another extension of the
20 exclusive filing period and that we will file a plan by the
21 end of that period that will include a new money option if
22 it's available, and it will also include a stand-alone
23 option so that everyone that deals with these estates will
24 know that come December 15th either a plan will be on file
25 that promises to come to confirmation in the first quarter

1 of 2012 either on a new money basis or a stand-alone basis
2 or exclusivity will lapse and any party in interest can file
3 a plan.

4 We believe, Your Honor, that the Court's failure
5 to grant an extension would have disastrous results.

6 The ad hoc committee suggests that we should just
7 file a plan with -- without any negotiations. We do not
8 think that's appropriate. We do not think that saves --
9 saves the estate time or expense. We think it's more
10 appropriate to sit down with these constituencies and try to
11 reach agreement.

12 Now, as you know, Your Honor, we -- we have
13 reached an agreement with the unsecured creditors'
14 committee, and that agreement is an extension -- we talked a
15 little bit about it before -- it's an extension of what we
16 propose in the original motion.

17 The -- I can summarize the essential elements of
18 the agreement -- and I have no doubt that Mr. Dunne or
19 Mr. Fleck will correct me if I'm wrong -- but the essential
20 elements are that we will continue to pursue the new money
21 plan and the stand-alone plan with the parties and we will
22 commence discussions on both of those plans in good faith
23 immediately.

24 If we raise \$250 million by November 1st and that
25 money has been deposited in escrow whereas evidenced by an

1 irrevocable letter of credit, and if at least 75 percent of
2 that money is earmarked for distributions to prepetition
3 unsecured creditors under the plan, and if all of those are
4 met then the debtors and the committee have agreed that
5 further discussions about the new money plan can continue.

6 If those conditions are not satisfied then the
7 debtors have agreed that they will shift their focus, they
8 will not -- they will not continue discussions on the new
9 money plan and they will shift their focus to discussions of
10 the stand-alone plan only.

11 My understanding, Your Honor, is that the ad hoc
12 group, Ms. Greenblatt is here, the ad hoc group is satisfied
13 with that resolution of the exclusivity motion. They have
14 asked that they be allowed to participate in any
15 negotiations with respect to the plans, and we're happy --
16 we're happy to allow them to do that.

17 I will say that I've mentioned to Ms. Greenblatt
18 that her clients are not yet restricted, so it would be more
19 productive for them if they would agree to be restricted so
20 that they would have access to the same, you know,
21 confidential and non-public information that the others are
22 viewing in these plan discussions.

23 I want to spend -- before concluding, Your Honor,
24 I want to spend one minute talking about the committee
25 objection, and it's not the -- it's not the substance of the

1 committee objection. What I want to talk about is that we
2 think that the committee objection to some extent blindsided
3 us.

4 The committee negotiated with us and asked for an
5 extension of the time to respond to the exclusivity motion.
6 We gave them that extension, we negotiated with them. We
7 negotiated in good faith with them and reached an agreement
8 with them, and after we reached an agreement we receive a
9 pleading excoriating the debtor but then agreeing to the
10 rest of the motion that we had reached.

11 THE COURT: Well, let me -- let me cut this off
12 here, because this is an unusual case and it's a difficult
13 case, and I put a very different stock in we've reached an
14 agreement and here are our concerns type of pleadings versus
15 here's or objection and here's what we're going to go to war
16 over on Tuesday.

17 So parties such as the debtors and the committee
18 in this case don't need to defend their good faith, due
19 diligence, hard work, and exercise in their fiduciary
20 duties, and I particularly mention that because I don't want
21 to get into people defending the integrity of their
22 pleadings or the integrity of their position in response to
23 pleadings, because you certainly have enough to do if you've
24 gotten as little sleep as it sounds like you've gotten.

25 So I understand your comment and I think we can

1 leave it there.

2 MR. ROSENTHAL: That's fine, Your Honor. Thank
3 you.

4 THE COURT: Thank you. So anyone want to be heard
5 in connection with the exclusivity motion other than the
6 comment on the tenor -- tenor of pleadings?

7 MR. DUNNE: On that last point, yes, I will leave
8 that -- I will leave that out, Your Honor, but I'm prepared
9 to get into it, but I'll spare everybody in the courtroom
10 about it.

11 THE COURT: Well, again, what I will say is I have
12 seen firsthand in this case the diligence at which the --
13 with which the debtors and the committee have acted, and
14 that doesn't mean you're going to always agree in zealously
15 advocating on behalf of your clients.

16 So I take some of those kind of comments back and
17 forth sort of in the context in which they're offered, so
18 nobody needs to defend their -- their integrity from the
19 committee or the debtors in this case.

20 MR. DUNNE: And Your Honor, that's really it, I
21 mean our client wanted the Court to be alerted to these
22 issues, and said another way, if the debtors had asked us
23 not to file the pleading, that we wanted to as part of the
24 settlement, which they didn't, we would had no. Right?

25 THE COURT: Well --

1 MR. DUNNE: We would have to say that our client
2 wants us to --

3 THE COURT: Well, I think we can move on, but I
4 just mention that because it occasionally comes up and it
5 just -- those conversations if they go on too long usually
6 end up moving backwards rather than forward.

7 MR. DUNNE: Right, so let's look on the positive.

8 THE COURT: Yes.

9 MR. DUNNE: Right. Again, with enough time we
10 reached an agreement on exclusivity. There are a lot of
11 positives on this in the sense that we know for certain now
12 that we're going to have directional occurrences in the next
13 few weeks whether they've raised the new money or not, if
14 they don't then we're focused solely on the stand-alone.

15 So those are positives and it built consensus and
16 it resulted in the ad hoc committee withdrawing their
17 objection, all of which were positive.

18 One thing that I can't let go unrebutted is the
19 comparison of this case to Lehman. Lehman did have a
20 private equity business, a small one --

21 THE COURT: Well --

22 MR. DUNNE: -- they also operated banks, SNL
23 institutions --

24 THE COURT: Lehman is Lehman and this case this
25 case, so I think the comment was meant to say -- was meant

1 in response to a pleading that you didn't file about the
2 characterization of what the debtors do and don't do. So I
3 don't think we need to go there.

4 MR. DUNNE: Right. And really that comes down to
5 this case, and this has been a repeated mantra of ours,
6 which is that exclusivity is not just a benefit to the
7 company, it's a burden. It's a burden to try to be
8 proactive in driving the process forward and building
9 consensus among various stakeholders, and we've been
10 concerned since the last hearing on exclusivity that what
11 would happen as a result of the focus on the new money is
12 that the company would get sidetracked by the allure of new
13 money investors coming in and not do the things that need to
14 be done under any scenario.

15 What do I mean by that? When Mr. Rosenthal said
16 we've seen plans, we've seen business plans, we haven't seen
17 draft term sheets either for the new money plan or
18 reorganization or for a stand-alone plan of reorganization,
19 that's all to come, and he's also referenced there's a fair
20 amount of work that needs to be done in any scenario for
21 intercreditor allocation. There's going to be value splits
22 between the various creditor constituencies regardless of
23 what that pie looks like whether it's in a wind down or
24 orderly over time or whether it's part of a new money
25 investment, and we should be doing that. We should have in

1 our view had that done already.

2 We look forward, Your Honor, to the next few weeks
3 in seeing whether the new money actually materializes or
4 not, and if it does does it come in on terms that are
5 acceptable to the creditors' committee?

6 One of our other concerns on the new money is that
7 they may -- they may -- the new money investors may be
8 looking for equity type returns, rates of returns that befit
9 a new money stock investment which are 20, 25, 30 percent
10 returns, and are where are those returns coming from? Said
11 another way, they shouldn't be coming from value that's
12 already in the system that would otherwise be available to
13 unsecured creditors if we just manage these properly and
14 monetize them in the near term.

15 But all of that we shall see in the next month or
16 so and hopefully we have agreement, if not we'll be I'm sure
17 back in front of you in the next month or 60 days.

18 THE COURT: Well, you know where to find me.

19 MR. DUNNE: Thank you, Your Honor.

20 MS. GREENBLATT: Good afternoon, Your Honor,
21 Nicole Greenblatt from Kirkland & Ellis on behalf of the ad
22 hoc group.

23 I will not belabor the points made in our motion
24 or defend any of the pleadings, I think I just want to make
25 a couple of points.

1 First is that my clients are not trying to
2 obstructionists, the exact opposite. These are economically
3 rational actors, their only goal is to see these cases make
4 progress and to eliminate any deterioration to creditor
5 recoveries.

6 While it's true that we have not -- Kirkland has
7 not been in the trenches with the debtors and the committees
8 throughout these cases, our clients have been there from the
9 very beginning hearing promises of a new money raise and
10 here we are seven months later and there are certain things
11 we also can't wrap our heads around. It's the same points
12 that Wilbank is making.

13 Frankly, the idea that the debtors can't propose
14 and file a plan prematurely without preventing -- without
15 incurring any waste of time and money simply justifies logic
16 from our perspective.

17 THE COURT: All right. Well, I don't -- I don't
18 need to hear the objection speech --

19 MS. GREENBLATT: Okay.

20 THE COURT: -- if you're not pursuing your
21 objection. I understand. And again, so you're either
22 defending your pleading, if you want to highlight some of
23 your concerns that's fine, but I don't need to hear the
24 full-blown objection speech.

25 I had prepared a ruling on exclusivity, which

1 sounds like I don't have to give, but so I won't make you
2 sit through a ruling that's not necessary if you don't make
3 me sit through your objection speech.

4 (Laughter)

5 MS. GREENBLATT: Fair enough, Your Honor. If I
6 could make one other point.

7 I think -- while we appreciate that the
8 fiduciaries in this case have negotiated a settlement and we
9 recognize what our role is, we do think it doesn't quite go
10 far enough, and you know, while what we don't to have -- it
11 requires the debtors and the committee to begin discussions
12 around these key issues, around creditor allocations. As
13 everyone has made clear in their papers on the record the
14 time for those negotiations is ripe, it should happen now,
15 and we should have a seat at the table.

16 What we don't want to do is be in a position where
17 the 250- comes in, a number that we think is far
18 insufficient to confirm a plan here --

19 THE COURT: Well, I did hear one thing in
20 connection with that. Are you going to enter into those
21 confidentiality agreements so you can get access to all the
22 information that you need to get access to?

23 MS. GREENBLATT: We, Kirkland, are subject to a
24 confidentiality agreement, yet we still get information
25 about settlements and things like that through pleadings

1 filed with the Court, so --

2 THE COURT: Well, I thought Mr. Rosenthal
3 identified something else to make it necessary for your
4 client to get access or did I misread that?

5 MR. ROSENTHAL: No, it's the clients who would
6 have to actually make the --

7 THE COURT: All right.

8 MR. ROSENTHAL: -- economic decision.

9 THE COURT: All right. So -- so I think -- I
10 think that needs to be done quickly if in fact you want the
11 information that is going to be necessary to make those
12 assessments.

13 MS. GREENBLATT: And let me be clear, Your Honor,
14 our clients are ready to get restricted at the right time
15 and when there's an appropriate cleansing mechanism in
16 place, we just need access to the --

17 THE COURT: All right. Well --

18 MS. GREENBLATT: -- parties in interest and
19 exposure to the meetings to advise them when that time is.

20 THE COURT: -- it's been teed up and so I'm just
21 essentially putting you on notice that if -- I don't want to
22 hear about lack of access to information if in fact there
23 are certain steps that need to be taken now to make that
24 happen, so -- in a robust way.

25 MS. GREENBLATT: I think we would just like a

1 commitment on the record from both the committee and the
2 debtors that we will be included in whatever meetings are
3 going to happen, if those meetings would start now and not
4 30 or 60 days from now.

5 Thank you.

6 THE COURT: Well, let me just clarify in light of
7 all your comments. You're withdrawing your objection? Is
8 that -- am I -- I just want to make it clear because your
9 comments are pretty much in the oppose vain, so.

10 MS. GREENBLATT: I think we accept that the
11 solution that's been agreed to between --

12 THE COURT: No, I need to hear a yes or a no, I
13 don't want to hear what you accept or don't accept.

14 MS. GREENBLATT: All right. Subject to -- subject
15 to a commitment that we will be included directly in the
16 conversations on behalf of AIHL creditors we would withdraw
17 our objection.

18 THE COURT: Well, I thought I heard that already,
19 so -- and again, I read these papers as sort of -- as things
20 keep changing, so you all have talked to each other.

21 Are you pursuing your objection or you're not? I
22 don't care, I have a ruling right here. So it's a yes or a
23 no. And if you need to talk to somebody to get an answer
24 talk to them right now.

25 So -- I'm not in the business of -- I am not the

1 place to negotiate. So talk to each other if you need to or
2 give me an answer yes or no. Yes, please?

3 MS. GREENBLATT: If I could have one minute.

4 (Pause)

5 MR. DUNNE: Your Honor, I'll answer this. I am
6 not in a position from my client to agree that they're in
7 whatever meetings we're in with the debtors, and I think
8 that's what the request is.

9 We'd been working I thought well with them and
10 we've had a lot of discussions and conversations with them
11 and we would obviously continue to do that, but a commitment
12 that they have to be included in whatever meeting we have to
13 I'm not prepared to do that today.

14 THE COURT: All right. So does your objection
15 stand then?

16 MS. GREENBLATT: The objection stands then.

17 THE COURT: All right, I'll make a ruling.

18 Anybody else want to be heard before I make a
19 ruling?

20 MR. ROVIRA: Good afternoon, Your Honor, Alex
21 Rovira for the record from Sidley Austin on behalf of the
22 joint provisional liquidators.

23 As Your Honor is aware the Grand Court of the
24 Cayman Islands appointed a JPL to oversee, monitor, and
25 assist the directors in the exercise of their management and

1 AIHL's participation in the Chapter 11 proceedings.

2 The JPLs and the AIHL directors, together with
3 their advisors, have worked hard and successfully together
4 to deal with many of the issues which have arisen during
5 these Chapter 11 cases without the need for the JPLs to file
6 objections or to come and make frequent appearances before
7 this Court or before the Cayman Island court.

8 However, the JPLs did think it appropriate given
9 the importance of the exclusivity issue and its impact on
10 the cases as a whole to inform the Court that they support
11 the debtors' request for an extension of the exclusivity
12 period on the terms agreed to between the unsecured
13 creditors' committee and the debtors.

14 The JPLs do however share the concerns expressed
15 to them by a number of AIHL creditors, which of course Your
16 Honor knows that extends beyond those AIHL creditors on a
17 creditors' committee. That concern, Your Honor, is that all
18 parties in interest should proceed forward with the process
19 of trying to achieve a consensual and equitable resolution
20 of the key issue of allocating value between the creditors
21 of Arcapita Bank and AIHL.

22 This is an issue which the JPLs and the debtors
23 have worked on for some considerable time, outlined
24 proposals to resolve the issue relating to value allocation,
25 help insure with the unsecured creditors' committee;

1 however, the committee, through its attorneys, has indicated
2 that it is not prepared to support the approval of those
3 proposals at this time.

4 As provided in his response to the debtors' motion
5 to extend exclusivity the creditors' committee believes that
6 the allocation issue can be resolved as soon as the parties
7 in interest are able to get a clearer picture of the path
8 forward for the debtors' estates.

9 Your Honor, the JPLs welcome clarity, but they
10 strongly believe resolution of the allocation value at least
11 as of a number of key issues relevant today can be advanced
12 immediately working on the basis of a stand-alone plan as
13 that plan will need to be developed irrespective of the
14 250 million is received by November 1st.

15 Your Honor, the parties in interest need to do as
16 much as they can without further delay to resolve the
17 allocation of value between Arcapita Bank and AIHL
18 creditors.

19 The JPLs note as the ad hoc group of holders of
20 Arcapita syndicate facilities pointed out that significant
21 work required to understand and facilitate resolution of
22 this issue has already been undertaken by the debtors and
23 resolution of value allocation is essential to help achieve
24 the expeditious and body maximizing restructuring of the
25 debtors which we all seek. This will be a principal focus

1 of the JPLs in the weeks to come.

2 Thank you, Your Honor.

3 THE COURT: All right. Thank you.

4 Anyone else want to be heard?

5 All right. Before the Court is a motion to extend
6 exclusivity. Section 1121(d) provides that a Court may
7 extend or reduce the debtors' exclusive period for cause,
8 the decision to extend or reduce exclusivity is within the
9 discretion of the Court. See In re: Adelphia
10 Communications 336 Bankruptcy Reporter 610 at 674, a
11 bankruptcy case from the Southern District of New York from
12 2006.

13 The burden of proving cause to reduce or increase
14 exclusivity is on the debtors. See the Borders Group, Inc.
15 decision 2011 Westlaw 2174408 at Star II, it's a Judge Glenn
16 decision from June 2nd of 2011.

17 While cause is not defined in the Bankruptcy Code
18 several factors are enumerated by Judge Gerber in Adelphia,
19 and I will go through those shortly.

20 But as a threshold matter I find it significant
21 that the debtors and the committee of unsecured creditors
22 have reached an agreement on the issue of exclusivity. This
23 is relevant because since its formation the committee has
24 been actively involved in every major decision in the case,
25 and from the Court's point of view there's been a continuing

1 and productive dialogue between the estate and the committee
2 even if as today later will demonstrate they don't always
3 agree.

4 The resulting agreement here between the debtors
5 and the committee on exclusivity provides a 60-day extension
6 but has numerous conditions which reflect the committees'
7 views about how the case should proceed going forward. And
8 so as a result the only objection I have today is from the
9 ad hoc group, and as to that objection I now turn to the
10 Adelphia factors.

11 First the size and complexity of the case.
12 There's been some argument that the cases are not complex,
13 but based on my personal experience in reviewing matters
14 that have come before me I disagree that they are not large
15 and complex.

16 There's a liquidation value of approximately
17 1.4 billion in portfolio investments, that's a valuation
18 provided by KPMG I understand. A scheduled list of
19 unsecured claims of 2.6 billion, and the ad hoc group makes
20 an allegation that I think is not actually correct about
21 whether these are operating companies. In fact they're
22 complex business structures with employees, daily
23 activities, and contractual management obligations from
24 which they earn management fees, and the debtors -- this
25 group of debtors have payroll and maintain offices.

1 Secondly, there's a -- this is as far as I know
2 the first U.S. bankruptcy involving a comprehensive
3 restructuring of a Sharia compliant Middle Eastern entity,
4 and while there's been some allegation that it's not nearly
5 as complex as that may make it sound, I think the current
6 discussion about financing shows that that fact impacts the
7 case in a significant way.

8 Moreover, the debtors' investments are in a number
9 of categories involved in worldwide locations, there are
10 also cross border issues, the case being coordinated in
11 ancillary proceedings in the Cayman Islands, and joint
12 provisional liquidators appointed in those cases. Obviously
13 there's also as has been referenced this morning allocation
14 issues between creditors of Arcapita Bank and Arcapita
15 Investment Holdings Limited, and this is an issue that
16 numerous parties have acknowledged is necessary to be
17 addressed before emergence from Chapter 11.

18 As to the second Adelpia factor, necessity of
19 sufficient time to permit a debtor to negotiate a plan of
20 reorganization to prepare adequate information to allow a
21 creditor to determine what to do with that plan, I agree
22 that also supports an extension of exclusivity here.

23 The bar date has just passed, the committee again
24 acknowledges, along with other parties, that there are
25 intercreditor issues that require negotiation to produce

1 some sort of resolution either consensual, in whole, or in
2 part. And while the ad hoc group asserts that the debtors
3 have a fully developed plan there's several problems with
4 that position.

5 One is that the only evidence I have in front of
6 me is from Homer Parkhill of Rothschild, the debtors
7 financial advisor and investment banker, who testified in
8 his declaration that a plan can't be filed by October 15th
9 and additional time is necessary to negotiate, resolve
10 issues, and document a proper plan and disclosure statement.

11 Secondly, and perhaps even more relevant, is that
12 the idea of filing a mere placeholder plan, which puts off
13 till tomorrow some of the discussions and fights that need
14 to be worked out, it does not really advance the case, and
15 no one has really given any explanation as to how that could
16 be the case. Here back-loading the heavy lifting does not
17 advance a case.

18 As to the third factor, just as a good faith
19 progress towards a reorganization, cases recognize that
20 progress on the operational side qualifies, and again, I
21 cite Adelpia Communications and Borders Group, Inc.

22 Here as the first day has demonstrated the debtors
23 had very a short time to prepare the filing and as a result
24 spent a considerable amount of time at the beginning of the
25 cases trying to stabilize and control the debtors' business,

1 something that's often done pre-filing of the bankruptcy,
2 and substantial operational progress has been made here.

3 Since that time the debtors have also taken
4 numerous steps necessary for reorganization. I understand
5 they may not be all the steps that the parties want to have
6 happen, but I think substantial progress has been made.

7 This includes the KPMG evaluations, discussions
8 about different alternative business plans, and other very
9 specific things, including, but not limited to, setting up a
10 data room, working to monetize certain assets, including the
11 EuroLog assets, considering and taking steps towards
12 evaluated a new money business plan, as well as formulating
13 an alternative stand-alone business plan, starting
14 negotiations with the committee, the JPLs, and Standard
15 Charter, including resolution of some thorny issues that
16 have already been discussed this morning.

17 As to other factors the debtors are paying their
18 bills as they come due, no one has shown to me that debtors
19 do not have a reasonable prospect of filing a viable plan.

20 And as to another factor I think the debtors have
21 made progress in negotiations with creditors, there was a
22 reference here this morning for example as to a negotiated
23 settlement with Standard Charter Bank as well as details of
24 a new money plan and what terms of a new money plan would be
25 acceptable to the committee.

1 And in fact here the committee and the debtors, as
2 I mentioned, have reached an agreement on the path forward
3 and therefore the committee does not object to the requested
4 extension of exclusivity because they've set forward certain
5 requirements for that extension, including the pursuing of
6 new money on various conditions, that is raising at least
7 250 million by November 1st, 2012 where 75 percent of those
8 funds are earmarked for prepetition allowed unsecured
9 creditors, there's also an agreement if that is not
10 accomplished debtors will negotiate a plan with creditors
11 that contemplates an orderly wind down of business and
12 assets.

13 Moreover, the two parties have agreed that if
14 debtors do not file a plan by December 15th exclusivity
15 expires with prejudice.

16 There's been numerous parties that have commented
17 today about the discussions that are contemplated to begin
18 immediately about a plan that involves for an orderly wind
19 down of business and assets as well as for discussion of
20 intercreditor issues that are central to any successful
21 plan. Just because the ad hoc group may not be happy with
22 all of the steps being taken it's not a basis to terminate
23 exclusivity.

24 As to another Adelpia factor the amount of time
25 which has elapsed in the case, that also favors the debtor.

1 This is the second request for an extension of exclusivity
2 in a case that was filed I believe about some seven months
3 ago when debtors have only asked for 60 days in connection
4 with their agreement with the unsecured creditors'
5 committee.

6 As to another Adelpia factor there's no evidence
7 that debtor is seeking an extension in order to pressure
8 creditors to submit to the reorganization demands and no one
9 has mentioned any unresolved contingency that exists.

10 For all these reasons and weighing these factors
11 in this case I find it is appropriate to grant the motion to
12 extend exclusivity by 60 days consistent with the agreement
13 that's been worked out by the debtors and the unsecured
14 creditors' committee.

15 MR. ROSENTHAL: Thank you very much, Your Honor.

16 May I approach with a black line of the order?

17 THE COURT: Certainly. Thank you.

18 MR. ROSENTHAL: The -- the only thing we will have
19 to add is that the objection of the ad hoc group is
20 (indiscernible - 00:52:12).

21 THE COURT: All right.

22 MR. ROSENTHAL: This is -- this is the order that
23 we have negotiated and is agreed to with the committee. I
24 can walk you through each of the changes -- each of the
25 changes was to implement the agreement.

1 So if you look at paragraph 5 we've added that the
2 exclusive filing period shall expire on December 15th if we
3 do not file a plan --

4 THE COURT: All right.

5 MR. ROSENTHAL: -- with prejudice.

6 Paragraph 6 are the conditions that we've talked
7 about throughout -- throughout this hearing. \$250 million
8 of new money, which funds shall have been either deposited
9 in escrow or evidenced by a letter of credit, and 75 percent
10 of that have to be available for distribution prepetition to
11 unsecured creditors. So that's 7 small I and -- 6 small one
12 and small two in the hold.

13 Seven is what happens if we do not meet the
14 conditions in paragraph 6, that the -- I'm sorry -- 7 deals
15 with if we meet the conditions in paragraph 6 the money is
16 in escrow, the concept that the money can't just be released
17 from escrow the next day, that -- that the debtors could
18 decide, for example, to abandon totally their new money
19 plan. That's not -- that would not be our intent, but short
20 of that or short of failing to reach the additional amount
21 of proceeds that we need for the new money plan, that --
22 that money remains in escrow and the letters of credit stay
23 in place.

24 We don't -- paragraph 8t deals with the agreement
25 to engage in good faith discussions with the committee on

1 both the wind down and the new money plan.

2 THE COURT: All right. Thank you.

3 MR. ROSENTHAL: Thank you, Your Honor.

4 MR. DUNNE: There's one miss here I think on
5 paragraph 5, which reads the exclusive filing period shall
6 expire with prejudice on December 15th, 2012 if the debtors
7 have not filled -- has not filed a plan as of that date.

8 The filing period as opposed to the solicitation
9 period expires whether they file it or not. If they file it
10 they get to solicit it and you can get extensions of the
11 solicitation period, but the filing period expires on
12 December 15th.

13 I think that's the deal. You file a plan and you
14 preserve the solicitation period, and if you don't file it
15 then obviously it's gone.

16 THE COURT: Well, I think there's an agreement in
17 principal and we're talking about wordsmithing, so I'll let
18 the parties work out something on that.

19 MR. MILLET: Well, this was the committees'
20 language, Your Honor, but that's fine, you're right.

21 THE COURT: All right. I think I understood what
22 the language gets at, but there may be some wordsmithing
23 that parties want to do. So when you send me and email the
24 final to chambers just let me know if that's been tweaked or
25 not and -- but I don't think there's anything I need to

1 comment on in connection with that.

2 MR. ROSENTHAL: That's fine, Your Honor.

3 MR. DUNNE: Agreed.

4 THE COURT: Thank you.

5 MR. ROSENTHAL: The next matter, Your Honor, deal
6 with -- I guess we can go to the -- either to the cash
7 management issues, because I think the commitment letter is
8 useful. I think the commitment letter motion will take the
9 longest period of time.

10 THE COURT: Well, whatever you think in terms of
11 orderly proceedings. I'm happy to do it in any order you
12 like.

13 MR. ROSENTHAL: Let's do cash management.

14 MR. MILLET: This will not take long, Your Honor.

15 With respect to the budget that's been proposed,
16 once again we generally have an agreement with the committee
17 as to all amounts with the exception of one, which is the
18 only I'll address.

19 Similar to what we've done in the past as before
20 it deals with our friend AGUD, or known as the District
21 Cooling, the entity that provides cooling services in the
22 Middle East.

23 We have two components of funds in the budget. We
24 have a first component of \$1,034,000 which is funding needed
25 beginning the week of October 8th, this week, that portion

1 that has been agreed to by the committee and so that would
2 be -- remain in the budget and would go forward as proposed.

3 There's a second component of \$500,000 that would
4 be due -- need or would be needed the week of November 5.

5 The committee, through its professionals have
6 asked for some more information regarding the status of how
7 negotiations are ongoing in terms of modifying agreements
8 with other parties related to the District Cooling and we'll
9 be providing those.

10 And so the committee is not necessarily objecting,
11 but it's not necessarily agreeing. So we basically have
12 split these into two components so that we could get the
13 first component approved. The second component would remain
14 in the budget as we've done in the past, but what we would
15 agree to do is that we'd have these further discussions and
16 that if the committee could then tell us by the 2nd of
17 November whether or not it does in fact object, if it does
18 our goal would then be to have a hearing on it on our next
19 omnibus date, which is November 15, so therefore we'd have a
20 briefing session --

21 THE COURT: All right.

22 MR. MILLET: -- we'd propose as to the debtors'
23 brief substantiating the expenditure would be due on the 6th
24 of November, a committee brief in opposition on the 9th, a
25 debtors' reply on the 13th, and then a hearing on the 15th

1 so that we can get it resolved on that hearing one way or
2 the other as to that second piece.

3 THE COURT: That's fine. That process has worked
4 well in the past --

5 MR. MILLET: Yes, Your Honor.

6 THE COURT: -- so I'm happy to use it here as
7 well.

8 MR. MILLET: And with that cash management would
9 be done for this month.

10 THE COURT: All right. Anyone want to be heard in
11 connection with the cash management motion?

12 MR. FLECK: Your Honor, good afternoon, Evan Fleck
13 on behalf of the official committee.

14 Everything that Mr. Millet said with respect to
15 the committees' position on the budget is accurate. We're
16 fine with the process that was outlined, and we expect -- we
17 hope to get to resolution, if not we'll be before Your
18 Honor.

19 THE COURT: All right.

20 MR. FLECK: Thank you.

21 THE COURT: Thank you. With that explanation
22 caveat I'm happy to grant that motion --

23 MR. FLECK: Thank you, Your Honor.

24 THE COURT: -- and if we need to talk about it on
25 the 15th of November we will, if not then that matter will

1 have resolved itself.

2 All right.

3 MR. ROSENTHAL: Your Honor, my partners,
4 Mr. Williams is going to handle the commitment letter
5 motion.

6 THE COURT: All right. Let me just before we get
7 into it, I know parties have been talking about this
8 extensively over time and I understand that the picture may
9 or may not have changed since conversations we had I believe
10 Thursday afternoon.

11 So is there any factual update that's relevant to
12 consideration of the motion in terms of other possibilities
13 that are out there that the committee would want to share at
14 this point?

15 MR. DUNNE: Sure let me -- let me address that.

16 THE COURT: Sorry, I didn't mean to push you off
17 the podium.

18 MR. DUNNE: Again, thank you Your Honor for making
19 yourself available last week on an expedited basis for the
20 chambers conference, that was very helpful.

21 As a result since that time we have managed to get
22 two prospective lenders confied up, they've executed NDAs
23 and they've had access to the data room and they're
24 conducting their due diligence on as expedited a timeline as
25 they can. We don't have written firm proposals from them.

1 We're likely as a process point to be back in
2 front of you shortly because they've already mentioned the
3 need to talk to the company. It's highly unusual for a
4 lender not to talk to their borrower, and there's only so
5 far we can take them down the path as a creditors' committee
6 in terms of --

7 THE COURT: That was why I wanted to chat about
8 this now, because it would seem to have some overlap with
9 some of the issues raised in the commitment letter.

10 And here's the difficulty that I face. I am not
11 an expert on Sharia compliant financing. I imagine it's a
12 little difficult to find such people. And so this was the
13 reason that after the discussions back and forth I was happy
14 to approve the initial commitment letter with the
15 understanding that this is different than ordinary financing
16 and requires a little more of an all in on behalf of the
17 party providing the funds.

18 The extent to which it's unique obviously has a
19 lot to do with this motion and how I decide it.

20 The other blind spot that I have is what this
21 looks like in the marketplace. The debtors obviously make
22 repeated references to the fact that we've looked for four
23 months, this is what we came up with, we don't want the bird
24 in the hand to leave, and it would be a violation of our
25 responsibilities if we took actions to do that. The

1 committee -- and that's very understandable.

2 What I have here is essentially very good parties,
3 well-represented parties acting the way they're supposed to
4 act, which is the debtors don't want the financing they need
5 to leave and the committee says maybe we can do better and
6 we're not a fan of some of these terms, which the debtors
7 acknowledge are not terms that they would voluntarily sign
8 up for. And -- but I don't know what the marketplace looks
9 like for something like this.

10 So I'm happy to have a hearing, I'm happy to have
11 an argument, but one of the things I'm concerned about is,
12 as I've said in other context, I'm a blunt instrument. You
13 get as good a decision or as bad a decision as I am limited
14 by my knowledge and capacity, and there are several obvious
15 blind spots that I have here, and I know less about this
16 issue of the case than either of the parties that are
17 debating it.

18 So one of the things I thought about is whether
19 there was any additional time in the form of some sort of an
20 adjournment to see what things look like, but that time idea
21 is hampered by what I thought you were going to say, which
22 is anybody who would want to lend money would want to talk
23 to the debtors.

24 So I don't know if it is productive to have a
25 conversation today to see if there is -- I also don't know

1 how much time we're talking about, whether the debtors can
2 afford to wait that long in dealing with this particular
3 party that is known and willing to move forward. So that's
4 my threshold question. And I realize I was asking for facts
5 and now I don't want to steal the podium from the debtors
6 whose motion it is.

7 So -- but that's something I want to talk about
8 before we get into arguing about each of the individual
9 provisions, which we can argue about, and I have a wonderful
10 outline here that I worked on about each of the things that
11 are objected to and the response of each side and the
12 questions I have. but it's always helpful when the
13 marketplace tells everyone what is and isn't a good idea,
14 and that's even more true in a circumstance where you're
15 talking about unique financing like we are here.

16 So -- so let me hear from the debtors in the first
17 instance if you have any views about whether additional time
18 is helpful or how to think creatively about the situation we
19 find ourselves in.

20 So I'm essentially sort of bifurcating this. I
21 just want to think about process first before we get into
22 arguing about each of the objections.

23 MR. WILLIAMS: Good afternoon, Your Honor Matthew
24 Williams of Gibson, Dunn & Crutcher for the debtor.

25 With respect to your comment about whether

1 additional time would help I do not think it would help, I
2 actually think it would hurt.

3 We were on a conversation call with Your Honor
4 last week last Thursday where the debtors -- I'm sorry --
5 where the creditors' committee had informed us for the first
6 time that morning that they had been approached by some
7 potential alternative lenders. Obviously that was part of
8 the result at least of the fact that Silver Point is out
9 there. The Silver Point process is working. Right? We
10 filed a motion, obviously Silver Point is still subject to
11 due diligence, we admit that, but what this document does,
12 what this commitment letter does is it obligates Silver
13 Point to do the hard work that you were talking about
14 earlier, this idea of back-loading the hard work. There's a
15 lot of work to do in connection with Sharia compliant
16 financing.

17 THE COURT: Well, let me ask you baked into this
18 motion --

19 MR. WILLIAMS: Uh-huh.

20 THE COURT: -- are discussions about how unique
21 this financing is and there's a reference to how much work
22 needs to be done, but there's not a lot of details as to
23 what that means, and so if I'm going to -- if I'm going to
24 be asked to make a call on that I was hoping you could
25 explain to me in more detail exactly what that means and

1 exactly what makes this unique such that even after the
2 initial commitment letter was approved that there's
3 additional terms which quite frankly seem to benefit the
4 lender more than the estate that are necessary before we get
5 to the point of getting a commitment.

6 MR. WILLIAMS: Okay, I'll do that, Your Honor.

7 With respect to Sharia compliant financing there
8 are -- and you know, I'm not an expert in Sharia compliant
9 -- in Sharia compliant financing, I'll be the first to admit
10 it, I've been learning as I do here, but obviously as Your
11 Honor knows it's in essence of purchase of commodity
12 contracts. So because of that this mechanics are completely
13 different from your typical DIP financing. The mechanics
14 are just completely different.

15 But I don't think that that's the biggest issue
16 here. I think the bigger issue is not the fact that this is
17 Sharia compliant, but that this case is so complex. And if
18 you look at the --

19 THE COURT: Well, but lots of cases have complex
20 -- lots of complex cases have times when they seek financing
21 and the financing seeks certain conditions. It usually
22 comes in the context though of a quid pro quo --

23 MR. WILLIAMS: Uh-huh.

24 THE COURT: -- which is we don't get these things
25 essentially unless we're willing to lend, and so the

1 commitment letter was something that, while not unheard of,
2 was a little unusual of saying no, no, before we even or get
3 close to that process we want this commitment because we
4 require it and because we're essentially being asked to do
5 more heavy lifting than is standard.

6 MR. WILLIAMS: Yes. Yes.

7 THE COURT: So that's why I do think it's relevant
8 what the heavy lifting from this point forward looks like.
9 And -- because I don't think the mere fact that the case is
10 complex means anything, because usually again the
11 marketplace is about saying, well, are you going to see
12 those terms? They've made a commitment and so it's a
13 binding commitment, so for all the protections they're
14 locking up, they're agreeing to lend the money so we've got
15 literally the bird in the hand and we can compare it and
16 somebody else can either put up or shut up.

17 MR. WILLIAMS: And I don't mean to interrupt, Your
18 Honor, but Your Honor makes a fantastic point, and the point
19 being the marketplace will typically tell you what is
20 reasonable in this situation. And to that point Rothschild
21 did a four-month marketing process, and we were in front of
22 you, and with the committees -- we consulted with the
23 committee on this marketing process, and you have evidence
24 about that marketing process. And what we found out because
25 of the complexity of this collateral package that people

1 were not willing to commit the time, energy, and resources
2 to do this deal.

3 Your Honor will remember back in August this was
4 not a lay down by the debtor. Back in August we were here
5 and we told Your Honor that we were having issues getting
6 people to sign up commitment letters. So we asked Your
7 Honor, we said, maybe if we got a \$500,000 expense
8 reimbursement that would be enough. Right? We were trying.
9 We said maybe we can incentivize people to do this complex
10 collateral package with L-liquid investments in foreign
11 entities, maybe people will sign up if we can give them
12 \$500,000. We got -- the order was very helpful, but it
13 wasn't enough.

14 The truth of the matter is Rothschild has gone for
15 four months and this is the best deal that we can get. We
16 cannot get -- we have been unable to get somebody to come in
17 here and do the heavy lifting that is required. This is the
18 best deal that we have, and that's what the marketplace
19 tells us.

20 THE COURT: All right. Well, then let me ask you
21 to address what the committee has requested for changes, and
22 I think the common theme is that certain of these things
23 might be okay if there was a commitment, and it's the --
24 it's the failure to get a commitment that is the troubling
25 aspect of it. Meaning we don't really truly have the bird

1 in the hand, what we have is a party who's doing work, but
2 if they're getting compensated for that work then at the end
3 of the process they lose nothing by essentially pulling up
4 stakes and going home.

5 MR. WILLIAMS: But they do, Your Honor, they lose
6 a lot, right? And Silver Point more than any other lender
7 to date -- and I don't want to keep referring to the market
8 process but it was an extensive process -- Silver Point was
9 willing to put its name on this transaction. What you've
10 heard the committee say --

11 THE COURT: Well, but -- I mean there's the rub
12 though, I think what you just said, willing to put its name
13 on this transaction. They're willing to be a party
14 considering lending --

15 MR. WILLIAMS: Uh-huh.

16 THE COURT: -- and they may get there but they may
17 not, and the concern I think is they're being incentivized
18 to take further steps --

19 MR. WILLIAMS: Uh-huh.

20 THE COURT: -- but not necessarily being
21 incentivized to actually lend, and that's the concern is
22 that, you know, in exchange for getting certain benefits the
23 initial time ran \$500,000, the idea was we really need this
24 to be able to market this to the community that would be
25 interested.

1 MR. WILLIAMS: Uh-huh.

2 THE COURT: Okay. Now we're talking about
3 additional protections where you actually have a party
4 that's interested, but the question is what does the estate
5 get out of it other than I guess keeping this party around?
6 And I think that that's what I -- that's what I get.

7 Is there anything else that it's getting out of
8 this other than keeping this party around as a potential
9 lender? And that's -- that's --

10 MR. WILLIAMS: Yes. Yes.

11 THE COURT: -- that sort of goes back to the --

12 MR. WILLIAMS: The estate is getting a lot out of
13 it, Your Honor, because what the estate hasn't been able to
14 do to date is to get somebody who's ready, willing, and able
15 to do the hard work to get to definitive documents.

16 What we have in this commitment letter, to be
17 clear -- and again, it is a commitment to commit -- but they
18 are committed to do due diligence and to negotiate
19 definitive documentation with us. If they don't do that, if
20 they are not doing the due diligence in a commercially and
21 reasonable manner and if they're not getting the definitive
22 documentation with us we're allowed to terminate it without
23 any penalty, without the 75 basis point fee. And Silver
24 Point has already spent a substantial amount of time looking
25 at this.

1 And from the estate's perspective our concern is
2 -- you know, we talked about cash management earlier, if you
3 look at the cash management numbers -- and I understand the
4 committees' comments maybe the EuroLog IPO comes in, maybe
5 we get some asset sales, or maybe we get some of the cash
6 back in (indiscernible - 01:12:07). We don't know if that's
7 going to happen. So from the estate's perspective we're in
8 a situation right now where we've got a DIP that's been
9 marketed for four months and nobody has done the hard work
10 to get to yes.

11 THE COURT: Well, let me ask you when -- when was
12 the date in which Silver Point became the party which
13 debtors were talking to and at what point did that become
14 exclusive to Silver Point? So when you say four and a half
15 months I'm trying to figure out is that the entire four and
16 a half months or some subset of that four and a half months.

17 MR. WILLIAMS: Oh, it was the quote "selected
18 lender," I believe that happened -- originally we wanted to
19 do it by September 7th, that was our goal, but it got kicked
20 subsequent to that because we got the proposals and we were
21 still negotiating, so I think we agreed to go exclusive with
22 Silver Point some time in mid to late -- I would say mid
23 September, Your Honor, so it was least a three -- you know,
24 I'm saying a four-month process -- it's been at least a
25 three-month process.

1 But then, right, I would say a couple of other
2 things, which is back in August as you'll recall we filed a
3 -- right, let's assume that the process didn't canvass the
4 world, we think we ran a good process, we think the
5 committee was very helpful running that process, but let's
6 assume that it didn't, we filed a motion back in August with
7 the Court and we told the world, we said, we're looking for
8 DIP financing, we're looking for Murbaha (ph) compliant DIP
9 financing, and still nobody came, right, other than the
10 parties who are already in.

11 The committee has been in this process, they know
12 we've gone through, and this is -- right, the collateral
13 package here is confusing people and it's very, very
14 difficult.

15 In essence what you're getting is you're getting a
16 security -- a security interest in an ill-liquid minority
17 equity stake in foreign companies. It's not something that
18 everybody will sign up to. And we -- we're sorry that's not
19 the case.

20 We -- trust me, we fought this commitment letter
21 extremely hard, and I agree with a lot of the comments the
22 committee makes. I -- I have -- right, it's not typical to
23 have to sign somebody up before they're hard on their
24 diligence. In the same vein it's not typical to run a four-
25 month DIP process and have nobody willing to commit without

1 a diligence out. And that's where we are.

2 And if you'd look moreover Judge I'd say to the
3 benefit perspective I think we've gotten a huge benefit from
4 Silver Point. Because the process that we ran has resulted
5 -- and according to the committee -- two new potential
6 lenders who we didn't know about showing up, and that --

7 THE COURT: Well, let's segway to that point.

8 MR. WILLIAMS: Uh-huh.

9 THE COURT: The concern is about the fiduciary
10 out, and this Court sees a lot of variations of fiduciary
11 outs and the question is always whether they are a
12 quote/unquote "true" fiduciary out. And here the concern I
13 have is that Silver Point may terminate if the debtors
14 decide to negotiate and provide due diligence with other
15 lenders.

16 So I'm wondering how that constitutes the
17 fiduciary out. Meaning you can sort of look but not touch
18 at a certain point and say, I can't -- you know, it may be
19 great and I don't -- I have some very practical questions
20 about what the debtors can and can't do, what the committee
21 can and can't do, so I think there was some notion that the
22 committees' ability to act can cure some of the problems of
23 the debtor's inability to act and that sometimes can solve
24 some problems.

25 But what I heard at the outset was what I thought

1 I was going to hear, which is that the committee can only go
2 so far and nobody is going to want to lend money until they
3 talk the parties they're lending the money to.

4 And so if that works out and the committee says
5 we're going to bring somebody to you and they're 50 percent
6 there, they're 75 percent there, it's a better deal, I would
7 think a fiduciary out would require the debtors to say,
8 okay, what do you got and answer any questions and figure
9 out whether it's going to work. And I have some doubts and
10 some concerns that that wouldn't operate here.

11 Because if you have various conditions and you
12 have a true fiduciary out then, you know, people can sleep
13 at night saying, well, if some great deal does come in then
14 it comes in, and that's sort of a separate issue from well,
15 the party who's in has been compensated up to a certain
16 point, and those are different problems but they overlap,
17 because sometimes you can live with one if you have the
18 other.

19 MR. WILLIAMS: Uh-huh.

20 THE COURT: So -- so what can you tell me about
21 the fiduciary out here in terms of how you understand it
22 would work? Either with the debtors being able to do
23 certain things or with the committee being able to take
24 certain actions and then the debtors taking it the rest of
25 the way home.

1 MR. WILLIAMS: That's a good question, Your Honor,
2 I wish I had a complete answer, but I'll give you at least
3 what's worked so far.

4 And when we're talking about the fiduciary out
5 here just to be clear the revised commitment letter provides
6 that -- it provides for two things in essence. It provides
7 that we're allowed -- the debtor is allowed to terminate, if
8 it determines in accordance with its fiduciary duties, it's
9 allowed to terminate the letter if for any reason in its
10 fiduciary duties it determines it needs to. It has to pay
11 the 75 basis point fee there, but it would.

12 I'll caveat that with one other thing though,
13 which is if we terminate for a competing proposal, in
14 essence another DIP -- yeah, I was getting there -- if it --
15 if there's another DIP out there that fiduciary out is
16 limited to we need -- it needs in essence to be a hard
17 commitment, it needs to be a hard and fast commitment.

18 THE COURT: But how can they get to the point of
19 being a hard commitment? That's --

20 MR. WILLIAMS: Well, I -- I'll -- I'm going to go
21 through next.

22 THE COURT: All right.

23 MR. WILLIAMS: But I just wanted to make sure we
24 were talking about the same thing. When I talk about
25 fiduciary out that's the provision I talk about.

1 The provision we're talking about I think and what
2 Mr. Dunne and I had the conference with you about the other
3 day was exclusivity, the exclusivity provision which in
4 essence prohibits the debtor from quote "negotiating and
5 delivering" documents to third parties. I just wanted to
6 make sure that I was being clear.

7 THE COURT: No, no, that's helpful, I appreciate
8 the clarification.

9 MR. WILLIAMS: With -- look, it's not a typical
10 provision. I'm -- I --

11 THE COURT: Well, I understand that, but how does
12 it work as a practical matter here?

13 MR. WILLIAMS: Well, how I view it working and how
14 -- as we talked about in a chambers conference the other day
15 and as the committee said in their pleadings, which we're
16 not allowed to -- right now we're not allowed to do provide
17 information. So we're doing that in essence through the
18 committee, and Silver Point knows this, I told them about
19 the conference call. I said the judge was very concerned
20 about this fiduciary out provision and we need to be able to
21 get third parties diligence, that's what you signed up for,
22 the committee is allowed to do it. We have done that, I
23 think the committee would agree with us that we've done it
24 more than in good faith. We've bent over backwards to get
25 the confidentiality. So we're getting people information.

1 THE COURT: Right.

2 MR. WILLIAMS: People are getting information.

3 With respect to negotiating the information, well,
4 we haven't had to negotiate because nobody has come back to
5 us with anything yet. To the extent somebody does come back
6 to us with something we'll look at it and we'll determine if
7 we want to negotiate with them or not. If it's -- if --

8 THE COURT: Yeah, but my question is a very
9 specific one.

10 MR. WILLIAMS: Uh-huh.

11 THE COURT: Which is what is your ability to talk
12 to them and to negotiate either to negotiate terms or to
13 answer questions that the committee can't answer?
14 Essentially saying potential lender to borrower we need --
15 the lender says we need to know before we make a commitment
16 the following things, can you give us the information? Or
17 the committee has given us enough information to make a --
18 here's our proposal and then to haggle over what the terms
19 are.

20 So my question is what under this -- if I approve
21 this what can the debtors do or not do under those two
22 scenarios?

23 MR. WILLIAMS: I think, and Silver Point's counsel
24 is here and they can speak if I'm misstating it, I view this
25 commitment letter to read that to the extent we quote

1 "negotiate" with a third party, we're allowed to receive
2 proposals, but if we negotiate, if we get a proposal that in
3 our view is so good it doesn't terminate the letter, what it
4 does is it says Silver Point has the right to terminate the
5 letter and get its fee.

6 But strange provision I would concede, but in the
7 context of this case it's not so bad, and the reason being
8 is follows, which is we want to incentivize people -- you
9 know, we talked about cash management earlier, Your Honor,
10 the estate -- at least my reading of the cash management
11 budget -- we're down to \$10 million on November 17th. We
12 want to incentivize people to come in with the hardest
13 proposals possible where -- so --

14 THE COURT: Yeah, but what I'm -- what I'm hearing
15 or I think I'll hear, and Mr. Dunne can straighten me out if
16 I'm misunderstanding the argument, is that you won't get
17 those, you won't get to that point because the ability to
18 either have enough information or to haggle over terms, the
19 fact that either of those two actions by the debtors will
20 allow Silver Point to walk away will prevent a hard fast
21 commitment.

22 MR. WILLIAMS: Well, it may. It may wind up --
23 under this letter I agree with you, Your Honor -- it could
24 wind up with Silver Point walking away. They would have
25 that right to walk away.

1 I would submit given the amount of interest and
2 time and energy that they've spent in the transaction we
3 don't think that they're in this for a 75 basis point fee.
4 They're spending a lot of time and energy doing this deal.

5 THE COURT: Well, I understand that, but I guess
6 my point is that you would think -- one way to view this to
7 put it in simplistic terms.

8 MR. WILLIAMS: Uh-huh.

9 THE COURT: Is if you're Silver Point and you're
10 getting what one might term sufficient protections, but
11 let's just call it protections, such that it says I am
12 protected in case somebody else comes in with a great deal
13 and I'm out because I've been compensated for my time.

14 MR. WILLIAMS: Uh-huh.

15 THE COURT: But it's another to say that I have
16 those protections as well as an ability to essentially keep
17 somebody else out, and there are a couple of provisions here
18 that just give them ability to say before there's any other
19 commitment even we're gone. So there's this one and then
20 there's also the material adverse effect.

21 MR. WILLIAMS: Uh-huh.

22 THE COURT: And I know there's a statement in the
23 reply that says, we don't think it's going to come up, but I
24 have trouble understanding what it means. And to allow a
25 party to walk away for something where it's just not clear

1 what it means.

2 So if we can't get sort of clarity on the
3 fiduciary out and what the debtors can and can't do I'm
4 really doubtful we'll get clarity on the materially adverse
5 effects language.

6 MR. WILLIAMS: I -- on both of those, Your Honor,
7 I will tell you they were hotly negotiated provisions.

8 With respect to the fiduciary out I think that we
9 are not -- under the language as written we're not allowed
10 to quote "negotiate" with a third party. We're allowed to
11 work with the committee to get third parties as much as
12 information as possible. To the extent that they want to
13 submit a proposal to us we're allowed to look at it, if we
14 delve into quote "negotiations" with them at that point
15 Silver Point would have the right, although not the
16 obligation, to terminate the letter and get the 75 basis
17 point fee.

18 And I would agree, we -- at some point we were the
19 takers of terms here, Judge, and the reason for that was
20 because of the process that we were in.

21 THE COURT: Well, I understand that --

22 MR. WILLIAMS: Yeah.

23 THE COURT: -- I'm not casting any aspersions.

24 MR. WILLIAMS: Yeah.

25 THE COURT: Somebody is driving a particularly

1 hard bargain.

2 MR. WILLIAMS: Yeah, you can probably hear my
3 voice is a little horse, I've spent a lot of time yelling at
4 a lot of people --

5 THE COURT: Right.

6 MR. WILLIAMS: -- and at some point the document
7 -- we didn't win every point and this was a point that we
8 didn't win, but at the end of the day this -- we think that
9 if we sign this document up it will at least obligate Silver
10 Point -- at least we'll have somebody. Right now we have
11 nobody, and we've --

12 THE COURT: No, I understand that. I guess my
13 thought is that you can sort of have it one way or the other
14 in the sense that if somebody wants to get compensation
15 essentially up front for various things then at a certain
16 point that's got to ripen into a commitment, because then
17 the estate has sort of put itself out, but in return its
18 gotten something.

19 MR. WILLIAMS: Well, that one I have an answer for
20 Your Honor.

21 THE COURT: All right.

22 MR. WILLIAMS: All right? And the answer for that
23 one least is they -- you know, the committee wanted Silver
24 Point to be subject to a hard date. Yeah, I -- you know,
25 and I thought about that. We didn't get it, we pushed for

1 it, and the hard date that we ultimately got wouldn't have
2 worked for a number of reasons because we would have run out
3 of money beforehand, it would have been counterproductive.
4 But the -- they do have an obligation to get to yes at a
5 point. It's not set in stone, it's not, you know,
6 October --

7 THE COURT: But what is that point though? How do
8 I --

9 MR. WILLIAMS: The point is when they --

10 THE COURT: -- how does anyone measure it?

11 MR. WILLIAMS: The point is when -- you measure it
12 by a commercially reasonable standard. It's not ideal.
13 Again, Judge --

14 THE COURT: Well, I just feel like I'm setting
15 myself up for another hearing though, right? I mean at a
16 certain point isn't there a motion to terminate commitment
17 letter filed by the committee on the horizon saying it's
18 been a commercially reasonable amount of time and we seek to
19 essentially get the -- get the estate to shed this
20 burdensome obligation which hasn't proven to be additional.

21 Now maybe it's more of a threat to get something
22 in a commitment than it is a reality, but I just -- I'm
23 often happy to kick the can down the road to see how things
24 go, but I think I'm smart enough to figure out how that one
25 might look in a couple of weeks.

1 MR. WILLIAMS: But, you know, I don't think -- on
2 that point I don't think you have to worry about the
3 committee making that motion, because I think the debtor
4 would be make thing motion first. Again, to the point
5 that --

6 THE COURT: But it seems to be an avoidable motion
7 no matter who makes it.

8 MR. WILLIAMS: Unless they --

9 THE COURT: If it is commercially reasonable then
10 I would think, even though this is not your standard
11 financing, it certainly I would imagine is not heretofore
12 never been done on the globe and that somebody could say
13 well commercially reasonable under the circumstances is X
14 amount of time from today and that's this date, and at least
15 people know what they're dealing with. And if you have a
16 hard date then you can negotiate as to whether someone is
17 happy with the hard date. And you say, well, listen, you
18 asked for a hard date so be careful what you wish for,
19 here's the hard date. It is what it is and this is the
20 folks who are our financial advisors will tell you that if
21 you canvass folks, you do this sort of thing that this is,
22 you know, not unreasonable.

23 But the problem is sort of a commercially
24 reasonable date it's asking an awful lot under the
25 circumstances to ask people to sort of sign off on that.

1 MR. WILLIAMS: I understand, Your Honor. And
2 again, you know, I hate to keep falling on my sword on this,
3 but at some point this was the best deal we could get, and
4 given the fact that we know Silver Point has done a lot of
5 work on this, and we know that they're much further along
6 than everybody else.

7 As a practical matter we think with Silver Point
8 that date with come sooner rather than later. We just think
9 those are the facts. And we also think that given the fact
10 that we're going to need financing soon, I mean our
11 expectation is that we're going to have, you know, subject
12 to Your Honor's calendar --

13 THE COURT: Well, but isn't that part of the way
14 that I should consider it in the sense that Silver Point as
15 you say sort of had a head start, they're further along, and
16 that plus various other protections I'm not so sure why
17 there's such a worry about a -- like a true fiduciary out.

18 So that's my -- well -- before we're done here let
19 me you about material adverse effect. I understand your
20 point is it may not have any impact here given the
21 chronology, but I have trouble understanding what it means.
22 And again, I think some of these things are things that make
23 people very nervous. It may not matter, just like the date,
24 you know, somebody probably has on the calendar what they
25 think the commercially reasonable date is to make a decision

1 on this and probably they have something in mind or not in
2 mind for materially adverse effect, but where there's
3 uncertainty there's also agita and concern and objections.

4 So what can you tell me about this? Because I
5 think this is a classic litigation over the concern about
6 what this means, the potential perhaps even more than the
7 actual.

8 MR. WILLIAMS: Well, again, you know, we tried to
9 get this provision removed.

10 THE COURT: Yeah, I know I'm putting you in an
11 uncomfortable position to stand as the advocate for
12 something that you are not a fan of.

13 MR. WILLIAMS: Your Honor, in some respects I feel
14 like I --

15 THE COURT: I know, but --

16 MR. WILLIAMS: -- our positions have been
17 reversed.

18 THE COURT: -- but I appreciate your efforts,
19 and --

20 MR. WILLIAMS: It's not -- it's not an ideal
21 provision, right? And our --

22 THE COURT: Fair enough. I will take that as a
23 subtext for --

24 MR. WILLIAMS: Yes.

25 THE COURT: -- any of my conversations on these

1 things. But what is your understanding of what it means and
2 how it would operate if it does come up?

3 (Pause)

4 MR. WILLIAMS: I view this, Your Honor, as I said,
5 and again, and we said this in our pleading, which is after
6 the diligence out, right, after they go hard on diligence to
7 the extent that they found a coffin with a body in it
8 somewhere that we hadn't told them about that they could
9 call a material adverse effect, and in that scenario they
10 would get the -- they would be able to terminate the letter
11 and they would be able to get in essence -- they would still
12 are their 1.5 percent break fee. They wouldn't get the 75
13 basis point, but they would still have the 1.5 percent in
14 essence commitment fee because they had committed, but the
15 commitment was on terms that they didn't -- you know, that
16 there was something else that had happened.

17 THE COURT: But I would think that there's a way
18 to write that that it's not as broad as material adverse
19 effect, but I guess I --

20 MR. WILLIAMS: I agree with you 100 percent.

21 THE COURT: There's something germane to the
22 ability to give financing or creditworthiness or something
23 that is relevant. I would imagine that there's -- I'm sure
24 there's boilerplate language out there somewhere that fits
25 that circumstance better than material adverse effect.

1 But I understand your view. I don't want to get
2 caught up on avoidance actions, I understand your view about
3 avoidance actions is this is the one part of this that is
4 somewhat standard, which is people ask for it, the committee
5 always objects to it --

6 MR. WILLIAMS: One way or the other.

7 THE COURT: -- and so there's nothing really new
8 there.

9 There is obviously an objection to the expense
10 reimbursement with the thought that, again, sort of dumb it
11 down, like what's the quid pro quo? Meaning if you're
12 anteing up for more expenses what does the estate get out of
13 it?

14 And I think I understand your argument to be that
15 we looked around for something better than this, what we're
16 told is this is what it's going to take to keep them at the
17 table and therefore we don't really have much of a choice.

18 So is there anything else to add to that?

19 MR. WILLIAMS: Just that it's subject to the
20 reasonableness standard, Your Honor. There's a \$900,000 cap
21 obviously pre-diligence, post diligence. Once they go hard
22 with the commitment it's obviously uncapped, but again, it's
23 subject to the reasonable standard, the committee gets to
24 review the fees and expenses.

25 THE COURT: All right. What happens if the

1 committee says we don't think it's reasonable? Does that
2 come in front of me for a reasonable inquiry?

3 MR. WILLIAMS: It does, Your Honor.

4 THE COURT: All right. All right, I've asked a
5 lot of questions, so let me give you a chance to speak
6 uninterrupted as to anything else you want to say.

7 MR. WILLIAMS: I will. And just going back to the
8 75 basis point fee for a minute. This could have been
9 structured another way, and you know, there had been some
10 back and forth with lenders about work fees and the like. I
11 know Silver Point in essence views this as a work view,
12 they're viewing this as, you know, we get our 75 basis
13 points because we're providing value to the estate because
14 we're doing all this work, right? This commitment letter
15 requires them to put a side the 150-, they can't invest it
16 in -- you know, they've got to set it aside, and they're
17 spending a lot of time and resources, man hours they could
18 be spending on other credits. So they view it as a work
19 fee.

20 And when viewed as a work fee I would say, Your
21 Honor, from the estate's perspective, it probably is
22 beneficial how it's structured. And the reason for that is
23 because we may not have to pay it. Typically with work fees
24 they get paid up front. We say Silver Point we need you to
25 come in, here's your 75 basis points, whatever the work fee

1 is, and that's it. Here, to the extent Silver Point
2 actually gets to yes, we never even pay that fee. And from
3 the estate's perspective, just given what we've seen through
4 that marketing process, and you know, I hope we get better
5 lenders, to the extent that we do it will be because Silver
6 Point has joined this process.

7 I think everybody -- maybe the committee won't
8 concede that -- I think it's at least an arguable debate,
9 because we haven't seen them before, I'm still not sure who
10 they are, but they will -- whether you look at it as a work
11 fee or a break fee it seems to me that they've earned it.

12 And yeah, a lot of this -- a lot of these other
13 points, it's -- I've -- as I said, Your Honor, we negotiated
14 very hard, we did the best we could do. But at the end of
15 the day this is the best deal that we have, and if this goes
16 away we're back to square one and we're going to be the
17 takers of terms I think all over again, but we're going to
18 be with a potential lender who hasn't spent the time and the
19 energy on this credit, and that's the concern that we have.

20 THE COURT: All right. Thank you.

21 MR. WILLIAMS: Thank you, Your Honor.

22 MR. DUNNE: Good afternoon, Your Honor. Let me --
23 really the theme of my argument to get to, but I want to
24 pick up with some of Your Honor's questions, which go to
25 what's been approved today, what we're -- why we're here,

1 and the importance or non-importance -- or how important an
2 issue (indiscernible - 01:34:12) compliant aspect of the
3 financing is.

4 First of all I want to say that Your Honor hasn't
5 approved the commitment letter before, you approved \$500,000
6 of an expense reimbursement, which is a large expense
7 reimbursement for financing transactions. And to be clear
8 the committees' position is if what we're asking for today
9 was to upsize that from 500,000 to the 900,000 that they
10 were asking we'd probably be behind that because of the
11 amount of work that they have to do. And whether you call
12 that 900,000 a 60 bit work fee or whatever it seems
13 appropriate to keep the prospective DIP lender going.

14 And I think on the Sharia compliance side much has
15 been made of that fact, and I'm going to make a couple facts
16 here.

17 Gibson Dunn and Milbank within their firm has done
18 a lot of Sharia compliant financings. They're not that
19 complicated, indeed they can't be by definition. You don't
20 have to ability to really stray far from the forms for the
21 reason that they need to be very precise on certain key
22 components in order to be Sharia compliant. Basically you
23 don't have interest, you have to call it profit. I agree to
24 basically give you a commodity, lead or something, you agree
25 to sell that back to me for some amount in excess of what I

1 provided, you know, that's profit. That's basically it.

2 And I think that Mr. Williams focused more on the
3 complexity of the collateral package which was not Sharia
4 compliant focused, it was the nature of the particular
5 portfolio company investments, and there I think Your Honor
6 was right, that's no different than what the courts and the
7 committees and the debtors face every day. You have a
8 particular collateral package, it may be domestic or
9 otherwise, it may be investments in other companies, it
10 doesn't justify giving a break-up fee and commitment fee
11 before people are firm.

12 And that's really -- Your Honor kept saying well,
13 at least I have somebody willing to do -- a lender willing
14 to do a Sharia compliant facility. We don't. We don't. If
15 we did the committee would be in a very different position.
16 Meaning there's not only a due diligence out. Mr. Williams
17 was very good saying there's a -- and very precise -- that
18 there's a commercial reasonableness overlay on the due
19 diligence.

20 Well, I have no doubt they're going to act in a
21 commercially reasonable way, but if they find something in
22 their sole discretion in their diligence that leads them to
23 conclude this was riskier than they thought they can walk or
24 they could say I need to be compensated for that risk and
25 this deal isn't this deal anymore it's more expensive. The

1 interest rate goes up or covenants get tightened.

2 THE COURT: Well, that's part of my concern is
3 that it does seem to further hitch the wagon of the estate
4 to something that is subject to the whims of this particular
5 lender because there is no -- really no commit.

6 MR. DUNNE: And just -- one of the two prospective
7 lenders that we're talking about has done Shari compliant
8 loans before and is very familiar with that, so we don't
9 believe that will be an issue for them.

10 But the other point -- and this is really -- goes
11 to the heart of the matter, because I think the robustness
12 of the process where we are right now really is a legal
13 matter, is almost extraneous, because this commitment letter
14 is subject to internal credit committee approval. Which
15 means even if due diligence comes back satisfactory they
16 take it internally to their internal credit committee
17 approval and the parties proposing this loan say would you
18 like to do this loan on these terms? We have a mack (ph)
19 out, we have a whole bunch of other conditions precedent and
20 they say no. They can say we don't like to loan to a debtor
21 in the Mideast, we don't like the fact that it's Sharia
22 compliant, they could say no for whatever reason. There's
23 no commercial reasonableness overlay, there's no constraints
24 on the exercise of that approval.

25 And I submit if you got Mr. Parkhill on the stand,

1 which we'd like to do eventually, and asked him whether in
2 the marketplace, in the non-bankruptcy context what people
3 mean in the plan by commitment letter they mean precisely
4 that. That at the very least the lender or the bidder has
5 gotten the internal institutional approvals, and they may be
6 subject to third-party approvals, regulatory approvals, or
7 even a mack -- and I'll come back to this mack in a second
8 -- but at least if you know if you can trap all those other
9 conditions that this institution is willing to lend, and we
10 do not have that today.

11 And I'm unaware, Your Honor -- I'm aware of lots
12 of courts that for that reason have refused giving stalking
13 horse type protections -- I'm unaware of a single case, and
14 I think you're actually being asked to be the first -- where
15 with an internal credit committee approval as an out and a
16 due diligence out the Court is being asked to give kind of
17 standard stalking horse bid procedure protections.

18 You have exclusivity, you have a no shop, you have
19 a break-up fee, and you have commitment fees that are
20 approved today. Usually you do that in order to have the
21 bird in the hand and to allow that bird in the hand to be
22 used as a stalking horse and the debtors and the committee
23 can go out and see if you get somebody better who can beat
24 those terms, but you at least have something that you could
25 close on.

1 It would give -- it's the debtor buying on option,
2 it's buying an option to say I will and I can and must close
3 on this if when we run this auction process nobody else
4 comes in. If they do come up in you get the break-up fee
5 and the commitment fees and the expense reimbursement.

6 But here we have that situation where they're
7 getting those bowls over here and you turn around and say,
8 okay, nobody came out of the woodwork now I'm ready to close
9 with you. Well, I'm not ready, I have a due diligence out
10 and I have an internal credit committee approval and I
11 didn't get there. That's -- as far as I know, and there's
12 no cases that they cite that say otherwise, and I haven't
13 run into it, you're being asked to be the first Court in the
14 land when you talk about precedent that will ripple through.

15 To have the -- this will be waived around to say
16 in Arcapita we actually got break-up fee, no shop,
17 exclusivity, and commitment fees approved with the due
18 diligence out and internal committee approval out, let alone
19 the mack.

20 So, Your Honor, I would say this is not a bird in
21 the hand at all, it's something on the horizon, whether it's
22 a bird or a plane or something, I don't know what it is, but
23 it's not a bird in the hand.

24 I also wanted to talk about some of the fees.
25 There are -- if there is an alternative transaction it may

1 not just be the 75 bit break-up fee that gets paid and the
2 \$900,000 expense reimbursement, it may also be the
3 commitment fee. And the reason for that is there's a
4 timing. If the debtors, which they're obligated to do,
5 provide notice that they're transitioning and moving to an
6 alternative lender they'll give lender to this prospective
7 DIP lender who can then decide whether to terminate. But if
8 they then say you know what right before I terminate I'm
9 going firm on my conditions -- my diligence condition and my
10 internal credit committee approval and then terminate,
11 voila, I get my additional commitment fee -- which I've been
12 told I can't saw out loud what it is, it's apparently under
13 sale so I will not, but it's significant Your Honor -- and
14 it's -- and it's -- as a result we're assuming that since
15 that's not trapped in the documents that an economically
16 rational actor might do that.

17 Lastly, Your Honor, in the documents that got
18 filed last night I think, the break-up fee triggers actually
19 got worse. It seems to be payable even if the debtors don't
20 close with another lender, don't close with this lender,
21 they -- it's paid even if no DIP is necessary.

22 For instance, if as I was eluding to at the outset
23 of the case as a result of EuroLog coming in sooner than we
24 thought or managing cash and disbursements internally we can
25 delay the need for borrowing that we don't actually need to

1 borrow a DIP -- which by the way would be the committees'
2 preference, because this is expensive. I think we all agree
3 that whatever the loan is that it ultimately -- it will be
4 expensive. We would still need to pay those fees, again for
5 something that's a non-commitment right now because it's
6 subject to -- to the internal credit committee approval and
7 the diligence out.

8 Your Honor, also where is the definitive
9 documentation? I know that we have done deals occasionally
10 on term sheets. Didn't have diligence outs and internal
11 committee approval outs but we have done them occasionally.
12 It's when there's been an absolute need to fund immediately
13 and exigent circumstances prohibited the full negotiation of
14 definitive docs.

15 But even if you think of the situation where a
16 company has just filed, Your Honor, on day one you typically
17 have the credit agreement.

18 Here we've had weeks and months and don't have the
19 definitive documentation and we don't have a need to borrow
20 today, and that's important because there are a number of
21 provisions that need to be fleshed out from the term sheets
22 stage to the definitive documentation.

23 And Your Honor mentioned what I think is at the
24 top of that list, which is the mack out. The term sheet
25 does not define what an MAE, what a material adverse effect

1 is, it doesn't even say on who. It simply says if there
2 occurs a material adverse effect. Typically it says on the
3 borrower or the borrower on the subsidiaries, it's blank, it
4 leaves open the possibility, which I've only rarely seen and
5 I hope it's not the case here, that it could be a material
6 adverse effect on the prospective lender, that for whatever
7 reason on some other investment or cost of capital changes
8 that they could say that was a material adverse effect. It
9 also doesn't talk about whether there's something that
10 actually is changing the financial condition of the company
11 now or simply its prospects. Also something yet to come.
12 Whether you're excluding geopolitical events around the
13 globe from the MAE; don't know. All of this is to come.

14 And, Your Honor, as a result we agree that is
15 premature. We don't begrudge the DIP lender any of their
16 asks. I would frankly do the same if I were in their shoes.
17 It was really whether the debtors' request to grant through
18 Your Honor's order those benefits today in exchange for
19 nothing. And I mean nothing in the strictly legal sense.

20 THE COURT: Well, what do you make of and what am
21 I supposed to make of the fact that there was a -- at least
22 a three-month marketing period and then -- at least three
23 months and then another period of time where Silver Point
24 was sort of locked in and no one else emerged? And so what
25 the debtors say is I've got nothing else, so I'm not -- I

1 mean the papers are full of I'm not happy with this either,
2 but language. So what in your view is -- is the way to
3 respond to that concern?

4 MR. DUNNE: Let me address it two ways. One is
5 purely with my legal principal hat on. It doesn't matter
6 because this isn't the commitment. Because with the
7 diligence out and subject to internal committee approval
8 you're not getting anything that justifies granting a
9 commitment fee and a break-up fee right now. That's just a
10 pure legal principal. No one has been able to show Your
11 Honor any case law precedent that does that.

12 Second, we're the creditors' committee, we are the
13 other fiduciary in the case and we've thought long and hard
14 about those arguments that the debtors assert. We care
15 deeply about the ability of the estates to finance their
16 deal funding commitments, their operations, pay their
17 employees. No one, let alone a fiduciary, wants to see this
18 case run out of cash.

19 And I think Mr. Williams said this, he said he
20 doesn't think that the prospective lender is going anywhere.
21 All we know is that that prospective lender is also an
22 investor in the case. It's not like we're talking about a
23 pure third-party potential investor who for the first time
24 has agreed to transact in the debtors' debt or securities,
25 and we also have two other prospective lenders, one of whom

1 was not contacted by the debtors previously and the other
2 was an different arm of the same institution, not the DIP
3 lending arm.

4 So we're confident that one of those three will
5 get to the finish line, and at the end of the day we believe
6 that the parade of horrors is really overblown. We'll fix
7 this, we'll get to -- to the finish line with somebody.

8 It may be closer as it always is to us needing to
9 borrow when okay the rubber hits the road with a number of
10 institutions and we're back with you on an interim basis.

11 THE COURT: When is that time wise in this case?

12 MR. DUNNE: It depends on the assumptions you
13 make, and the debtors have been pretty transparent about
14 this. If you assume, you know, kind of worse case scenario,
15 what they have to do, which is sort of -- I think it's
16 beginning of November. We believe if you manage certain
17 things that it could move a few weeks, and then if it moved
18 significantly more than that, you may get the EuroLog
19 proceeds in. So November is clearly going to be I think the
20 time to borrow.

21 And we just think at the end of the day, Your
22 Honor, that you can't justify approval of a letter that
23 contains no commitment to lend either because of the
24 diligence, credit committee approval out and the open-ended
25 mack will saddle the estate with millions of dollars

1 administrative expenses in terms of break-up fee and
2 commitment fees.

3 And lastly, which we haven't talked a lot about,
4 but I'm happy to, but Your Honor nailed it, so I don't think
5 I need to, it handcuffs the debtors in their pursuit and
6 review of any alternative lending facility. All we really
7 can do is find some people, get them generally smart on the
8 transaction, get them interested and hand them off.

9 And what people do before they put in a term sheet
10 is they like to talk about some things so say, okay, how
11 would the company react if I had this covenant in here or if
12 I had this draw schedule here or this interest rate? But
13 what I'm hearing them saying is no, no, they got to put a
14 term sheet in, and if that term sheet is lobbed in over the
15 transoms without our assistance or discussion, if we like it
16 then yeah, our fiduciary duties may compel us to it, but
17 obviously the probability that you're going to like it is
18 greatly reduced by the fact that you're not talking to them
19 or guiding them to a particular transaction, which is what
20 we really need here, which is why we're standing up here
21 objecting to -- to the transaction.

22 And lastly, Your Honor, if Your Honor does
23 approval it today, which I'm hoping you do not, that we have
24 some ability to tell the prospective lenders what is the
25 goal then.

1 Because what's going to happen if you baked in
2 these fees is that they'll get a term sheet and they say,
3 okay, on the face of it that actually beats what we have,
4 but when you bake in the Court-approved fees it really
5 doesn't beat it on economic terms.

6 We'd have to be able to manage for that to try to
7 get a better perspective, but if we're in the dark and can't
8 share the terms of the all in economics then we're at a
9 disadvantage to do that.

10 But hopefully we don't get there because we don't
11 think that there's a basis today legally to -- to approve it
12 based on, as I've said before, it's not even an exception
13 that you could drive a truck through, it's just not an
14 commitment at all to lend.

15 And with that, Your Honor, unless you have any
16 further questions.

17 THE COURT: All right. Well, let me ask one
18 different kind of question, which is you mentioned cross-
19 examination. Under what circumstances, if any, do you want
20 to cross-examine any witnesses? Obviously that opens the
21 door to the debtor putting on a witness. The facts to me
22 seem to be fairly undisputed that the language is what it
23 is. What's your thinking on that?

24 MR. DUNNE: It depends --

25 THE COURT: Or are you waiting for guidance from

1 me?

2 MR. DUNNE: Right. Basically I have my litigation
3 partner here, Mr. LeBlanc, who was prepared to cross-examine
4 Mr. Parkhill, but it would go into the other proposals that
5 you had received, there was more activity among five why did
6 you choose the more expensive proposal? The answer we
7 believe is going to be certainty of closing. Well, how --
8 what is that certainty in light of the open-ended
9 commitment? It would be things of that nature which you've
10 kind of heard argument about, but it would flesh it out.

11 THE COURT: Ultimately I think it sounds like it
12 gets back to what the agreement is here that I'm being asked
13 to approval.

14 MR. DUNNE: Correct.

15 THE COURT: All right.

16 MR. DUNNE: And how unusual it is, what it means
17 by commitment, and how often you've seen this. It would be
18 that all, so, but it all gets back to the argument we've
19 raised.

20 THE COURT: All right, thank you.

21 MR. WILLIAMS: I'm just going to address a couple
22 of the points that Mr. Dunne raised.

23 First the point that a break fee has never been
24 approved with a diligence out. I don't think -- that has
25 been done, it was done in Metaldine (ph), it wasn't a loan,

1 it was an asset agreement. Whether it was credit approval
2 out or I guess it was irrelevant because it was an asset
3 purchase agreement.

4 But if you look at this as a work fee, as I talked
5 about earlier, the 75 basis points, I don't think you would
6 get credit approval or a due diligence, it wouldn't be done.
7 So I don't think this is as shocking or is un-American as
8 Mr. Dunne would make it seem.

9 With respect to the second point, Your Honor asked
10 a question and I didn't hear an answer. Which is well, what
11 about the process? Right? Why doesn't the process speak
12 for itself? And the committee was involved in this process.

13 I am surprised, to say the least, to hear Mr.
14 Dunne say that he's confident that these three lenders --
15 these three secret lenders, who we don't know who they are,
16 we don't know what -- well, in fairness I know who two of
17 them are, I don't know who the third is -- one of whom I
18 would say was -- had previously indicated an interest in our
19 process, got almost to a confi agreement and dropped out. I
20 have no confidence that that's going to happen.

21 We're supposed to trust the committee with our
22 secret lenders, that's what they're asking us to do.

23 THE COURT: Well, yes and no.

24 MR. WILLIAMS: Uh-huh.

25 THE COURT: There is some truth to the notion that

1 everybody pays a lot of attention to agreements that come
2 before a court, and what is proved in a case as a
3 exceptionally rare circumstance is a case like you've never
4 seen before, Your Honor, miraculously appears in a pleading
5 filed almost instantaneously somewhere else.

6 And my -- all sorts of fees -- I've seen a lot of
7 them, and you can kind of work with those. My concern is
8 about the lack of a commitment. Again, there's usually --
9 you get something, you give something. And when you give
10 something you get an ability to say I now can rest easy
11 because I know what I have. And then it often provides a
12 bit of a hurdle for anybody else who wants to come in,
13 because after all you're compensating somebody for their
14 time and effort. But I'm just not sure what the estate is
15 really getting here.

16 I have no doubt that the estate has -- has labored
17 long and hard to approve the terms here, but this wouldn't
18 be the first or the last case where essentially I'm the one
19 who says, no, and then people say, well, you heard what the
20 judge said, it's not on us; it's not.

21 So my concern is about what the estate ultimately
22 gets here, and that as a federal judge in a case I handled a
23 litigator in the U.S. Attorney's Office once asked me how do
24 I give you what you want without giving you a blank check?
25 And judges don't like things that look like they don't have

1 any sort of checks and balances to them. And that's really
2 the concern.

3 So the fees -- I'm not saying we're playing at the
4 margins --

5 MR. WILLIAMS: Uh-huh.

6 THE COURT: -- but to some extent we are.

7 MR. WILLIAMS: I would agree with that, Your
8 Honor, we're talking about in essence a \$1.125 million fee
9 in a case that, yeah, every dollar is important, I don't
10 mean to minimize that, but the fees, they're not massive
11 here, and in essence had we called it a work fee instead and
12 we said Silver Point, this is a complicated deal, we've
13 found to get other people interested enough to give us real
14 terms, we'll pay you to put the capital aside and to come do
15 some real work and kick the tire, do more than kick the
16 tires -- kick a tire is the wrong word, or wrong phrase --
17 maybe Your Honor would have approved that or maybe you
18 wouldn't have, but you know, at least this was structured in
19 a way that it might not always be payable.

20 And from that -- I'm not saying it's perfect, it's
21 far from perfect, trust me, I've had a lot of issues with
22 it, but we've done our best.

23 I think what would make sense, Your Honor, is you
24 know, given Your Honor's comments maybe we could talk to the
25 DIP lender's counsel a bit and see if we could -- and you

1 know, caucus with the committee and see if we -- right now
2 the way the document reads is I think there's a termination
3 date of I believe it's October 15th, and maybe we could get
4 to a consensual resolution. My concern is that the company
5 does run out of money and --

6 THE COURT: Well, that's why I started with --

7 MR. WILLIAMS: Yeah.

8 THE COURT: -- with a -- whether there were any
9 further productive conversations to be had. Because again,
10 I'm not professing to be an expert in Sharia compliant
11 financing or in something that deals with this particular
12 collateral package --

13 MR. WILLIAMS: Uh-huh.

14 THE COURT: -- and I am conscious of the fact that
15 the debtors have marketed this and looked for financing.

16 MR. WILLIAMS: Uh-huh.

17 THE COURT: All that gives me great sympathy for
18 the circumstance you find yourself in, but I have grave
19 concerns, and I -- one could even call them insurmountable
20 concerns at this point about what the estate is really
21 getting out of this, and this is also not the first bite at
22 the apple, this is the second bite at the apple.

23 So again, when you talk about fees and expenses we
24 went there sort of first time around, but I just -- at the
25 end of the day it gives too much power to the lender who

1 could -- who could really -- and I'm not casting any
2 aspersions, but just a hypothetical lender to say, well, I
3 can extort you because I've made you -- I've made myself the
4 only game in town, and now the further we go down this path
5 and the further the -- you know, the stiff arm is up to
6 other possibilities, I can be fairly arbitrary about whether
7 I want to participate and on what terms, all to the
8 detriment of the estate, notwithstanding I'm sure the fine
9 efforts of everybody on behalf of the Arcapita debtors.

10 MR. WILLIAMS: I understand the point, Your Honor,
11 and you know, I won't belabor it, but to the point about
12 them having leverage because they're the only game in town,
13 I mean as a practical matter, you know, we determine -- you
14 know, I don't want to say you should have seen the other
15 letters we got, but --

16 THE COURT: Well, you're saying they are the
17 only --

18 MR. WILLIAMS: -- you should have seen the other
19 letters we got.

20 THE COURT: -- game.

21 MR. WILLIAMS: Right?

22 THE COURT: No, I understand, you're saying they
23 are the only game in town.

24 MR. WILLIAMS: We didn't pick a letter out of the
25 air and said, oh, great, you know, they've got all these

1 crazy fees as opposed to this much more standard letter.

2 THE COURT: Right.

3 MR. WILLIAMS: And so I just want to be clear that
4 this is a difficult transaction and we'll talk to Silver
5 Point, but I also want to say that, you know, the estate is
6 getting a benefit here, and the estate -- right, to the
7 extent the estate were to pay the work fee we would get
8 somebody who's really in here working.

9 THE COURT: Well, I think the \$500,000 locking
10 Silver Point to do certain things has led to a benefit.
11 It's led --

12 MR. WILLIAMS: I would agree with that, Your
13 Honor --

14 THE COURT: -- for reasons I can't --

15 MR. WILLIAMS: -- I would agree with --

16 THE COURT: -- explain or you can't explain to
17 other folks appearing who hadn't previously appeared, but
18 for whatever reason strange things happen in the courthouse
19 and this courtroom all the time, so I don't think we'll ever
20 figure out some of the -- some of the mysteries of things
21 like that.

22 But I would suggest the following. I could do one
23 of two things. I could take a short adjournment and go back
24 and prepare a ruling, but what I hear you to say is that it
25 would be beneficial to the debtors to not have a ruling just

1 yet, and I think that that's -- that that -- if I'm hearing
2 that correctly that's not a surprising position, it seems
3 like a wise position, and then I'll sort of be guided by
4 what the parties want to do in terms of time frame and
5 conversations.

6 So why don't I do this, why don't I take a short
7 break so folks can talk to each other and see if you reach
8 some sort of agreement on procedure and process. I can rule
9 really any time, but I've learned from other cases that
10 ruling doesn't always improve things.

11 So why don't I take a short break, you can come
12 out -- come into chambers, let me know when you're -- when
13 you have had a conversation and what you'd like to do.

14 MR. WILLIAMS: If I could indulge the Court with
15 one request.

16 THE COURT: Sure.

17 MR. WILLIAMS: If we could -- and when I say we I
18 think I mean the collective we, both the committee and the
19 debtors and Silver Point -- if we could get a list -- and
20 maybe Your Honor isn't inclined to do this -- but of --
21 other than what was said on the record your real concerns
22 with the letter, that may be helpful. Obviously it's the
23 payment of the before hard diligence --

24 THE COURT: Well, again, I think my concerns are a
25 number of things. I think you solved the single versus

1 multiple draw. That's something that's been addressed.

2 My -- again, not to dumb it down -- but I think
3 the basic concern is that you're not getting a commitment.
4 That's the basic concern. I think once there's a commitment
5 then people can negotiate as to what they're willing to pay
6 for that kind of commitment and how it compares in the
7 industry, but I just don't think there's a commitment.

8 The other concern I have is the fiduciary out,
9 such that once you have a commitment you say, well, you're
10 going to be compensated for your hard work, then if there is
11 another transaction that shows up that it can actually be
12 considered on the merits, and that has certain prerequisites
13 to it such that whether it's discussions, adequate
14 information, no one is going lend to somebody that haven't
15 talked to the borrower. It's never going to happen. So
16 it's a de facto barrier to an actual other agreement.

17 But again, the idea is that the potential lender
18 here is making a commitment and be compensated for having
19 done the hard work in exchange for the commitment and the
20 ability if somebody is going to come in and say, yeah,
21 factoring in all your costs, I'm going to -- I'm going to
22 give you something better, and it's just standard -- sort of
23 a standard way of looking at things.

24 So those are my two main concerns, and I guess
25 part and parcel of that would be the material adverse

1 effect, just because I think again it makes it not a
2 commitment, because again, I don't know what it means, it
3 seems to be -- and I guess the best word is untethered to
4 any objective criteria.

5 MR. WILLIAMS: Okay.

6 THE COURT: So that's -- that's probably the three
7 item hit list, and I think the rest are, depending on how
8 these things work themselves out, can be addressed.

9 So why don't I take a short break and then why
10 don't you talk about process and let me know what you'd like
11 to do and I'll come back out and we can chat.

12 MR. WILLIAMS: Thank you, Your Honor.

13 THE COURT: So 10, 15 minutes?

14 UNIDENTIFIED SPEAKER: Fine, Your Honor.

15 MR. WILLIAMS: Fine.

16 THE COURT: All right. Thank you.

17 (Recess at 4:19 p.m.)

18 THE CLERK: All rise.

19 THE COURT: Please be seated.

20 All right. I think we had a brief discussion
21 about what to do from this moment forward, and if I
22 understand correctly the idea is to adjourn today's hearing
23 to a date later in the week -- a date and time later in the
24 week?

25 MR. ROSENTHAL: That's correct, Your Honor. We

1 would -- we would respectfully ask for a short adjournment
2 so we can continue discussions With Silver Point.

3 THE COURT: All right. Why don't we do this, why
4 don't we say Friday at 11:00, and then we'll come back in,
5 and I think for from my comments I think you have a sense of
6 my serious concerns.

7 I don't cast any aspersions on the good faith of
8 all parties involved in terms of what -- why we ended up
9 here, and that includes the potential lender in asking for
10 what its asked for, but as I've often been told by other
11 judges who have been on the bench a little longer, if the
12 doctrine of necessity doesn't have any limits then I should
13 just get a name stamp and free up a lot of time.

14 So -- and the only thing I would end by saying is
15 we had a discussion about sort of the main issues that I
16 have, and I think I did identify the main issues, but I
17 think you can get my sense of things from the question that
18 I had on the other issues, and I don't want to belabor the
19 parties patience at quarter after 5:00 in going through all
20 of this, but I think you can get a sense from our
21 conversation.

22 MR. DUNN: Your Honor, one question. Would it be
23 helpful to the Court -- and I'm picking up on a comment you
24 had at the beginning of the omnibus hearing -- to give you a
25 status report? Maybe we can do that collectively Thursday

1 afternoon.

2 THE COURT: Yeah, that would be helpful. It's
3 always helpful for me to know what I have to do and -- so
4 that way I can actually serve the needs of the case best.

5 So why don't you -- my thought would be that, you
6 know, Thursday afternoon say 5 o'clock would be a reasonable
7 time to do that, and that would be very helpful. So you can
8 just call chambers with whoever needs to be on the line and
9 just -- we'll just have an informal conference at that point
10 about where things stand. All right?

11 MR. ROSENTHAL: Thank you.

12 THE COURT: Anything else before we adjourn?

13 UNIDENTIFIED SPEAKER: Nothing, Your Honor.

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

15 (A chorus of thank you)

16 (Whereupon these proceedings were concluded at 5:15 PM)

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I N D E X

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

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

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