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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

ARCAPITA BANK B.S.C.(C), et al, CASE NO. 12-11076-shl

Debtors.

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U.S. Bankruptcy Court
One Bowling Green
New York, New York

February 20, 2013
2:30 PM

B E F O R E :
HON SEAN H. LANE
U.S. BANKRUPTCY JUDGE

ECRO - JEANETTE

1 HEARING Re Doc #836 and #12 Debtors' Motion for Interim and
2 Final Orders (A) Authorizing Debtors to (I) Continue
3 Existing Cash Management System, Bank Accounts, and Business
4 Forms and (II) Continue Ordinary Course Intercompany
5 Transactions; and (B) Granting an Extension of Time to
6 Comply with the Requirements of Section 345(b) of the
7 Bankruptcy Code

8
9 HEARING Re Doc #799 Debtors' Application to Retain and
10 Employ Antony Zacaroli, Queen's Counsel for Limited Purposes

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12 BENCH DECISION

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Transcribed by: Sheila Orms

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good afternoon. Please be seated.

First off, my apologies for the delay, longer than I would like, but there are a few things going on in the courthouse these days. So let me get appearances.

MR. ROSENTHAL: Michael Rosenthal, Your Honor, Gibson Dunn & Crutcher with my partner Craig Millet on behalf of the debtors.

THE COURT: Good afternoon.

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

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

MS. FELDSHER: Good afternoon, Your Honor, Jennifer Feldsher from Bracewell & Giuliani on behalf of Tide and on the phone I believe you have my colleague, Trey Wood.

THE COURT: All right.

MR. ZDUNKEWICZ: Good afternoon, Your Honor, David Zdunkewicz with Andrews Kurth for the Hopper parties.

THE COURT: All right.

MR. VAN TOL: Good afternoon, Your Honor, Pieter

1 Van Tol from Hogan Lovells for HSBC.

2 THE COURT: All right. Good afternoon to you all.

3 MR. ROSENTHAL: Your Honor, I'm happy to proceed
4 however you would like. I know you have a ruling that you
5 wanted to inform us about.

6 THE COURT: Well, want may be a stronger word that
7 I would use, but I do have a ruling. But I see that there
8 are a couple of other matters on for today, so perhaps we
9 can address those. But I'm happy to do it whatever order
10 would be most efficient and useful for the parties.

11 MR. ROSENTHAL: Well then, let me give you a brief
12 update about the case, and we can address the matters.
13 There are only a couple of matters up.

14 First, Your Honor, the case update is relatively
15 short because the plan is the headline event here. As the
16 Court knows, we did file a plan and disclosure statement in
17 a related solicitation procedures motion on February 8th, we
18 were retaining exclusivity. Exclusivity expired on the 8th,
19 so we filed it before exclusivity expired.

20 We believe that the terms of the plan reflect the
21 economic terms that have been agreed by the committee
22 members, and we think the ad hoc members. There are still
23 some open issues that we're discussing with all
24 constituencies as you might expect, and in fact, we have a
25 full day of meetings scheduled in our offices tomorrow to

1 address those issues. We still remain hopeful that we're
2 going to be able to have a fully consensual plan to present
3 to the Court and have confirmed and go effective as
4 expeditiously as is possible.

5 Let me tell you what I foresee as the timetable
6 for this. You know, our proposed timetable is that
7 objections to the disclosure statement would be served on
8 March 11th. We would have a reply deadline of March 21st,
9 and the Court has set March 26th as the hearing on the
10 disclosure statement.

11 And from that point forward, we really don't have
12 any dates, but I think we would try assuming we hit those
13 dates, we would try to schedule a confirmation hearing as
14 quickly thereafter as possible, taking into consideration
15 the minimum voting requirements and the like.

16 THE COURT: All right.

17 MR. ROSENTHAL: Your Honor, that is briefly the
18 report on the plan, and so I'm prepared to go into the
19 Zacaroli engagement motion unless Mr. Dunne has a comment.

20 THE COURT: Mr. Dunne?

21 MR. DUNNE: Sure. I can never resist, Your Honor.
22 For the record, Dennis Dunne from Milbank Tweed on behalf of
23 the creditor's committee.

24 I just wanted to give Your Honor a description of
25 the plan from the committee's perspective, and I largely

1 agree with what Mr. Rosenthal said, but we kind of view the
2 plan in two categories. One is the economic terms, and the
3 second is everything else that's in the plan.

4 And with respect to the economic terms, frankly
5 the committee was the primary architect of that. I spent
6 most of December and January flying to London, Frankfurt and
7 Bahrain to try to broker a deal within the committee between
8 the AIHL creditors and the parent bank creditors, and we
9 were ultimately successful.

10 I understand that those terms were acceptable to
11 the ad hoc committee of AIHL creditors, as well we provided
12 that to the debtors with some tweaks, they dropped it into
13 their plan. So I would characterize the economic
14 distributive elements of the plan as largely there, and
15 constitute the capstone of the efforts of the committee, the
16 debtors, and the ad hoc over the past couple of months.

17 The second category hasn't been negotiated yet.
18 That category includes corporate governance, it includes
19 releases for insiders, waivers for avoidance actions,
20 identity and compensation of management. And in essence,
21 that second category comprises the company's offer for the
22 creditors to continue with existing management. In other
23 words, this is the price that's in the plan for the
24 creditors to stay with the course that they rode in on.

25 We have a meeting tomorrow with the company to

1 drill down on this, as well as related issues. The
2 committee is also canvassing the market with respect to
3 alternative asset managers, and alternative general relief
4 that are out there. We were ultimately agnostic as to who
5 it should be, we just want to find the best party that can
6 maximize the returns to creditors here, and do it at the
7 most reasonable level of compensation.

8 And that's basically my overview of where things
9 are from the creditor's committee's standpoint, but there
10 may be significant changes to the plan in that second
11 category as we march towards the disclosure statement.

12 THE COURT: All right.

13 MR. DUNNE: I see that we have on the agenda is
14 also scheduling with respect to the Rule 2004 motion. We
15 can take that up at the end of the calendar.

16 THE COURT: All right.

17 MR. DUNNE: Thanks.

18 MR. ROSENTHAL: The first matter, Your Honor, I'd
19 like to take up is the retention application for Antony
20 Zacaroli. Your Honor, I think Mr. Zacaroli was attempting
21 to call in, but I'm not sure he's been successful. He's in
22 London, so there are no objections to this motion, and it's
23 supported by the committee, the JPL, and we resolved the
24 U.S. Trustee's objection.

25 The application, Your Honor, is to employ Tony

1 Zacaroli who is a Queens counsel to assist us to implement
2 and present our arguments to the Cayman court regarding the
3 plan. Mr. Zacaroli was first engaged by the debtors before
4 the filing, and was instrumental in presenting the motion
5 for the provisional liquidation and the appointment of the
6 JPLs to the Cayman court.

7 He's a very experienced, highly qualified, and
8 competent Queens counsel, very experienced in restructuring
9 matters. And we believe that now we're moving through the
10 plan process and we'll have to address not only confirmation
11 before this Court, but also implementation mechanics
12 relative to the Cayman case proceeding for IAHL in the
13 Cayman courts that it's important to bring Mr. Zacaroli back
14 into the fold.

15 And he has been -- we've been meeting with him,
16 we've tried to be as inclusive as possible with respect to
17 the JPL's, having the JPL's sitting in on some of those
18 meetings, having the UCC sit in on some of those meetings,
19 and I think we all believe that his retention is definitely
20 appropriate for the debtors at this point.

21 Mr. Morrissey had a couple of comments to the
22 engagement application. May I approach?

23 THE COURT: Certainly. Thank you.

24 MR. ROSENTHAL: Your Honor, if you -- let's just
25 page turn, if you don't mind, there was a -- there's a

1 deletion on page 2 solely because that was added at the end
2 of that paragraph on the top of page 3, to reflect that Mr.
3 Zacaroli's efforts will not be duplicative of the services
4 provided by the Moran firm in the Caymans.

5 Paragraph 3 is a new paragraph. It was clearly
6 the intent of the parties, under Cayman law, Mr. Zacaroli
7 has to be engaged by a Cayman, essentially a Cayman all
8 purpose firm. So -- but at the same time, wanted to make
9 clear that his -- the performance of his services on behalf
10 of the debtors and that he's responsible to the debtors, and
11 that we have had to pay him. That's paragraph 3.

12 In paragraph 4, pursuant to his normal practice,
13 Mr. Zacaroli had a provision that dealt with travel time in
14 a typical way that a Queens counsel does deal with travel
15 time. There was -- on travel days, there was a minimum
16 charge, and it wasn't done on an hourly basis. We have
17 revised through this language to provide that that would not
18 be applicable in this case, that he would be able to charge
19 for his time, based on an hourly rate, with no minimum
20 amount per day, and that travel time, consistent with all
21 the other professionals in the case, would be compensated at
22 50 percent for non-working travel time.

23 THE COURT: All right.

24 MR. ROSENTHAL: And other than that, we have a
25 standard, in the event of a conflict, the order will control

1 language that we added as paragraph 7.

2 THE COURT: All right. Anyone wish to be heard in
3 connection with this application to employ Mr. Zacaroli?

4 MR. FLECK: Your Honor, good afternoon, Evan Fleck
5 on behalf of the official committee. The committee has no
6 objection to the retention. I'll note, Your Honor, that the
7 committee is not seeking to retain its own Queens counsel at
8 this time, and in fact, hope that we don't need our own
9 services. There are a lot of professionals engaged in this
10 case, we're hopeful that we can, as we have in the past,
11 work with Mr. Rosenthal and coordinate with the Queens
12 counsel that's being engaged hopefully today, so that we can
13 get the benefit of some of his thinking on the issues that
14 need to be raised to his attention.

15 THE COURT: All right. Thank you.

16 MR. FLECK: Thank you.

17 THE COURT: Anyone else wish to be heard?

18 (No response)

19 THE COURT: All right. Based on the application
20 and the information contained therein, as well as the
21 explanation today, I will grant the application to retain
22 and employ Antony Zacaroli as Queens counsel, as special
23 counsel for the limited purposes, consistent with the
24 revised order that's been provided to me.

25 MR. ROSENTHAL: Thank you, Your Honor. Mr. Millet

1 will present the cash management matter.

2 MR. MILLET: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. MILLET: Craig Millet for the record on behalf
5 of the debtors.

6 On the interim cash management, we're settling for
7 the record, this is our thirteenth interim cash management
8 order that we're seeking approval of today. This covers the
9 budget period of February 23 through March 23. As in the
10 past, we've consulted with the committee and the JPLs and
11 others to come up with a budget, and we've had agreement
12 with respect to all line items with the exception of three,
13 which I'll cover in just a moment.

14 But as is our custom, as to those three, they
15 remain in the budget. Those three include funding for A, E,
16 I, Y, 1, REL ARREAL and Hontington (ph), as to those three
17 line items, they'll remain on the budget, but we will not
18 expend the funds, absent our further agreement with the
19 committee. We're having continuing discussions on those,
20 providing additional background to the financial advisors
21 for the committee. If we can't reach agreement, then of
22 course, we'll return to the court.

23 THE COURT: You reserve the right to come back.

24 MR. MILLET: And as we have in the past, then seek
25 the assistance of the Court, but we've usually been able to

1 work things out, and I'm hopeful that we'll be able to do
2 the same again with respect to those.

3 Other than that, Your Honor, and those three
4 reservations, my understanding that we have agreement on the
5 cash management budget for this thirteenth interim period.

6 THE COURT: All right. Anyone wish to be heard on
7 this thirteenth interim period?

8 (No response)

9 THE COURT: All right. Hearing no objections, and
10 based on the prior practices in connection with cash
11 management, and what I understand to be the case for this
12 period through March 23rd, I will grant the motion for a
13 thirteenth interim order.

14 MR. MILLET: Thank you, Your Honor. Another item
15 going back to the twelfth interim cash management budget at
16 our January hearing, Mr. Rosenthal at the time reported that
17 we did have a dispute as to that occasion with respect to
18 certain fees to be paid in connection with the IPO, the
19 Eurolog IPO.

20 THE COURT: Right.

21 MR. MILLET: And as we just discussed, we told the
22 Court that we would try to reach agreement as to those, we
23 hoped to do so, but if we couldn't, we would come back to
24 the Court and seek its assistance. But we wanted to make
25 sure we had enough time, so we would not plan to do that

1 until March 18th at that omnibus hearing if we could not
2 reach agreement.

3 I have good news and bad news with respect to
4 that. The good news is, is the discussions -- through the
5 discussions that have ensued, we have reached agreement with
6 respect to all but three of the seventeen entities that are
7 seeking funds in connection with the Eurolog IPO, and with
8 respect to those three, which are the largest three, KPMG,
9 Fresh Fields (ph), and Linkletters (ph), it's a total of
10 about \$11 million in funding. It appears we are going to
11 need the assistance of the Court in resolving those.

12 I've had discussions with Mr. Morecki (ph) from
13 the committee's counsel's office, and we've reached an
14 agreed upon schedule with the permission of the Court that
15 we'd like to propose for briefing, and then for the hearing
16 itself.

17 THE COURT: Sure.

18 MR. MILLET: The schedule that we've discussed,
19 that I discussed with the committee's counsel is that the
20 debtors, along with KPMG, Linkletters and Fresh Fields would
21 file a briefing, they wish to file in support of those fees
22 by Wednesday, February 27th, that the committee would file
23 its opposition on March 8, that any replies would be due on
24 March 13, and then the hearing would be at the March omnibus
25 hearing, which is set for Monday, March 18.

1 THE COURT: All right. Do you have any sense of
2 how long the hearing would take?

3 MR. MILLET: Well --

4 THE COURT: And that's probably an impossible
5 question to ask under the circumstances.

6 MR. MILLET: I hope it'll be narrow. I don't
7 think there are many factual disputes. There's no dispute
8 that the money was spent. The disputes are going to be
9 whether or not it was reasonable or not, so I suspect that
10 there will be considerable argument, but I'm not sure what
11 there will be in the way of testimony or factual issues.

12 THE COURT: All right. Perhaps you can do it this
13 way is on the 13th when replies are due, you can just submit
14 a short letter on the docket, just to explain what you
15 anticipate the 18th looking like as an evidentiary matter if
16 we're talking about a few hours or a half a day, a whole
17 day.

18 MR. MILLET: Exactly.

19 THE COURT: Just so we'll know, and we can use
20 that as a date by which parties exchange the identity of any
21 witnesses they intend to call if they haven't already done
22 so, and we can take it from there.

23 MR. MILLET: Very well, Your Honor. I did discuss
24 with Mr. Morecki, we both agreed we would try to reach ways
25 to narrow the issues, and as to those matters where there's

1 really not a dispute as to a particular document or a number
2 that we would not burden the Court by putting that material
3 on, and we would try to get this down to the essential
4 issues.

5 THE COURT: All right.

6 MR. MILLET: So, yes, that'll be fine. We'll be
7 able to advise the Court on the 13th what we expect.

8 THE COURT: All right. That's fine. We can use
9 that schedule, if you want an order memorializing it, just
10 submit a stipulation and a proposed order, if not, we can
11 just use the schedule as you set forth with everyone
12 understanding that's what it is.

13 MR. MILLET: Very well, Your Honor. The only
14 other item was the item mentioned by Mr. Dunne, I don't know
15 if he wants to speak to it, or I can go first. I did talk
16 to Mr. Morecki about the 2004 schedule as well so.

17 THE COURT: All right.

18 MR. DUNNE: Your Honor, we filed a Rule 2004
19 motion last night. It relates to some information that we
20 think is critical to our ability to assess the plan and some
21 of the issues in that second category that I described. I'm
22 not going to get into the merits now. We've conferred with
23 debtor's counsel on a schedule, and let me propose it to the
24 Court and see if Your Honor can accommodate it.

25 We were discussing with the debtors an objection

1 deadline, and a response deadline of February 28th, and
2 targeting a hearing subject to Your Honor's availability of
3 the following Monday if possible. And we're asking for it
4 on an expedited basis because of its interrelationship with
5 the plan issues that remain open.

6 THE COURT: All right. I confess I'm going to
7 probably need to look at my comically large calendar and get
8 a sense of how that fits in. Hold on one moment.

9 (Pause)

10 THE COURT: All right. I think let's do this,
11 let's schedule it for the 4th, and I'll -- we'll double-
12 check on that in chambers. I think that that actually might
13 be a window that works. So let's pencil it in, and if it
14 needs to be a different date we'll give you a holler, and
15 we'll figure out the next closest date to get it teed up.

16 MR. DUNNE: Does Your Honor have a tentative time
17 for that?

18 THE COURT: How long do you expect that will be?

19 MR. DUNNE: I really believe it's just going to be
20 oral argument. The facts aren't in dispute.

21 THE COURT: All right. So let's set it for 2 in
22 the afternoon.

23 MR. DUNNE: That's fine.

24 THE COURT: On the 4th. So I understand, there
25 will be an objection filed on the 28th, and those are the

1 only two papers that I'm going to get?

2 MR. DUNNE: That is a question. We -- I think
3 it's amenable to the debtors that we file a reply, but we
4 also don't want to file a reply over the weekend, and leave
5 little time for Your Honor to review and reflect upon it.

6 So it's really up to the Court. We could make our
7 reply arguments orally at 2 o'clock, or we could file
8 something over the weekend or by, you know 9 a.m. Monday
9 morning or something of that sort.

10 THE COURT: Well, I'm sort of contemplating that
11 you probably would take a shot at the reply. So if you
12 could get me something that morning at 9 o'clock, that'll
13 give me a chance to take a look at it, and probably will
14 speed up the hearing rather than have me hear everything for
15 the first time at the hearing, so -- in terms of reply
16 issues.

17 So is that schedule acceptable?

18 MR. MILLET: Very well, Your Honor.

19 THE COURT: All right. And if for some reason the
20 4th doesn't work, and we move it back, we can tweak the
21 dates so people can do something else with their Saturdays
22 and Sundays perhaps.

23 MR. DUNNE: I appreciate Your Honor's
24 accommodation. One housekeeping matter, the rules require
25 us to file a motion to expedite consideration of the Rule

1 2004 motion. If you could deem it orally --

2 THE COURT: A motion to shorten time. Yeah, I
3 would say file it with these dates, or even if you want to
4 just give me a stipulation, an order, but probably -- I take
5 that back. Probably the correct procedural way to do it is
6 to file a very short motion.

7 MR. DUNNE: We'll do that.

8 THE COURT: All right.

9 MR. DUNNE: Thank you, Your Honor.

10 THE COURT: Thank you. All right. Anything else
11 that we should discuss before I give you my ruling on the
12 matters we discussed last time we were here?

13 MR. ROSENTHAL: No, Your Honor.

14 THE COURT: All right. Before the Court is a
15 motion of Tide Natural Gas Storage to lift the automatic
16 stay with respect to a prepetition action brought by Tide in
17 the district court for the Southern District of New York.
18 It is opposed by the debtors, Hopper, and the unsecured
19 creditor's committee. Also before the Court is Debtor
20 Falcon's (ph) motion for leave to file a counterclaim
21 against Hopper and third party claims against Tide in an
22 adversary proceeding brought by Hopper against Falcon. And
23 that motion is opposed by Tide and HSBC, but only to the
24 extent that debtors seek to file counterclaims against HSBC.
25 When relief from the automatic stay is being

1 sought to commence or proceed with litigation against the
2 debtor, the Second Circuit has articulated the twelve
3 factors that should be considered to determine whether cause
4 exists.

5 These factors are set forth in *Sonax Industries,*
6 *Inc. versus Dry Component Products Corporation*, 907 F.2d
7 1280 at 1286, a Second Circuit case from 1990. The factors
8 are 1) Whether relief would result in impartial or complete
9 resolution of the issues; 2) The lack of any connection with
10 or interference with the bankruptcy case; 3) Whether the
11 other proceeding involves the debtor as a fiduciary; 4)
12 Whether a specialized tribunal with the necessary expertise
13 has been established to hear the cause of action; 5) Whether
14 the debtors ensure, has assumed full responsibility for
15 defending it; 6) Whether the action primarily involves third
16 parties; 7) Whether litigation in another forum would
17 prejudice the interest of other creditors; 8) Whether the
18 judgment claim arising from the other action is subject to
19 equitable subordination; 9) Whether movant's success in the
20 other proceeding would result in a judicial lien avoidable
21 by the debtor; 10) The interest of judicial economy and the
22 expeditious and economical resolution of litigation; 11)
23 Whether the parties are ready for trial in the other
24 proceeding; and 12) The impact of the stay on the parties
25 and the balance of harm.

1 These factors are not to be assigned equal weight,
2 but only those factors relevant to the particular case need
3 to be considered. See *In Re Keen Corp*, 171 B.R. 180, a
4 bankruptcy case in the Southern District of New York, 1994.

5 The inquiries of facts specific one, "ultimately
6 the determination of whether to lift the stay depends on the
7 facts underlying a given motion." *Schneiderman versus*
8 *Bondovich*, 292 F.3d 104, 110, Second Circuit case from 2002.

9 "The Court should consider the particular
10 circumstances of the case and ascertain what it is just to
11 the claimants, the debtors, and the estate." *In Re*
12 *Containership (ph)*, 466 B.R. 219 to 226, Bankruptcy,
13 Southern District of New York, 2012, citing another case
14 from the Southern District of New York, *Touloumis*, 170 B.R.
15 825, at 828, Southern District case from 1984.

16 "The facts that appear to apply in these
17 circumstances include whether there's a partial or complete
18 resolution of the issues. Any connection or interference
19 with the bankruptcy case, the interest of judicial economy,
20 or the parties are ready for trial, and the impact to the
21 parties and the balance of the harm."

22 Given the facts here, the Court will grant the
23 motion to lift stay to proceed in the district court on two
24 issues. The first issue is to determine the parties' rights
25 with respect to the escrow. The district court was

1 specifically asked by Falcon to release the escrow, and in
2 denying that request, the district court made certain
3 statements on the issue. Both sides have expressed their
4 views on what the district court meant by those statements.

5 But it is clear that the parties' rights with
6 respect to the escrow were squarely placed before the
7 district court is a matter of state law, and since the
8 debtor takes the property rights it has at the time of
9 filing, no more, no less, that is a question that has been
10 raised and is on its way to being resolved in the district
11 court.

12 The second issue that I will lift the stay as to
13 is, to rule on the merits of Tide's claim in that court. In
14 lifting the stay, the Court notes it appears highly likely
15 that these issues will need to be resolved for the ultimate
16 resolution of this bankruptcy, particularly the ownership
17 rights as to the escrow account that appears to be the
18 primary asset of debtor Falcon, but the Court notes that as
19 a matter of judicial efficiency, the district court is the
20 appropriate forum for such matters to be heard, and has
21 already issued two opinions specifically addressing Tide's
22 claims and the escrow.

23 Thus that Court has a significant head start in
24 understanding those issues, and will be the most efficient
25 for those matters to proceed in that forum.

1 Moreover, the Court notes that the debtors have
2 proposed a plan that contemplates a wind down of the
3 debtor's assets, rather than an reorganization of an entity
4 that would continue business after exiting Chapter 11. This
5 fact lessens the potential interference with the bankruptcy
6 case.

7 Falcon's corresponding motion is denied as moot to
8 the extent that Falcon should proceed with counterclaims in
9 the district court that overlap with the two issues that are
10 moving forward in that court.

11 The Court is mindful that that leaves any
12 bankruptcy related issues to the bankruptcy court for
13 determination. This includes 1) The distribution of any
14 escrow funds that Falcon may have a right to, since this
15 must be decided in the context of the priority scheme of the
16 Bankruptcy Code, and 2) The status of Tide's claim for
17 purposes of the Bankruptcy Code, specifically whether that
18 claim is subordinated under Section 510.

19 The Court's decision today to lift the stay to
20 address the two issues in district court leaves open the
21 question of whether it is appropriate or necessary for this
22 Court to move forward with the subordination issue at the
23 same time, or to wait.

24 The answer to that question will no doubt involve
25 consideration of the debtor's plan of reorganization,

1 including the potential consolidation, which is
2 (indiscernible) in the disclosure statement and the weighing
3 of the costs of moving forward with the subordination claim
4 as it gets the benefits in proceeding with both forums
5 simultaneously.

6 Whether to move ahead on subordination also
7 depends on whether that issue will have any overlap on the
8 issues to be decided by the district court, such as whether
9 the two courts might be asked to issue inconsistent rulings,
10 although sitting here today, that seems very unlikely to be
11 the case.

12 So given these facts, the Court doesn't decide and
13 has no opinion on whether it is appropriate to move forward
14 with the subordination issues in this court at the same
15 time. The Court notes that the supplemental pleadings that
16 it received on subordination, rather than addressed that
17 procedural question, spent more time talking about the
18 merits. Those papers revisited the district court's prior
19 decisions on escrow, and argued the merits of subordination
20 itself. But each side's gleaming of what the quote/unquote
21 true meaning of the district court's statements about
22 various matters, including the escrow, are things that are
23 not going to be revisited by this Court, and are matters
24 left to the district court to interpret its own orders and
25 opinions.

1 Moreover, the merits of subordination are not yet
2 in front of me, and therefore, there's only so much I can do
3 with arguments about subordination at this point.

4 So that discussion was of limited utility in
5 sorting out what is really a procedural question. The one
6 thing I did glean from the papers is that resolution of what
7 I will call the district court issues appears unlikely to
8 resolve what I will call the bankruptcy court issues and
9 vice versa.

10 Accordingly, I ask that the parties discuss the
11 issues of subordination as a procedure matter in light of my
12 ruling today. And it may be that if all these issues, that
13 is the district court issues, and the bankruptcy court
14 issues have to be decided, that the most efficient way to do
15 it, is to do them simultaneously, while the district court
16 deals with certain issues that it's already spent time on,
17 and has equities in, this Court it may be appropriate for me
18 to deal with subordination, which is a discreet, looks like
19 a discreet question.

20 So that actually may minimize any risk of delay to
21 the estate by essentially having two courts working full
22 time to address matters of interest to the debtors. Of
23 course, I realize that also increases costs. If I thought
24 that resolving one set of issues versus the other would moot
25 out the other and we knew that for a fact, I think my answer

1 today would be different. But I don't think I know that to
2 be the case, and in fact, it appears to be, at least based
3 on what I've seen, not a particularly likely scenario.

4 So in light of that, I'd ask the parties to talk
5 about what they want to do about subordination in terms of
6 the plan, its role in the plan, whether it's an impediment
7 to confirmation, and whether as a matter of cost benefit
8 analysis, it makes sense to move forward simultaneously in
9 this forum on discreet bankruptcy questions.

10 So that's my ruling. And I would ask that Tide
11 submit an order consistent with it, and that order should be
12 shown to the debtors and other interested parties, such as
13 the Hopper parties and the committee before submitting to me
14 for approval. But I think what we can do is talk about
15 subordination the next time we're together, in terms of
16 determining the best thing for the case going forward.

17 All right. Any questions?

18 MR. ROSENTHAL: No questions, Your Honor, thank
19 you.

20 MR. ZDUNKEWICZ: Your Honor, again David
21 Zdunkewicz with Andrews Kurth for the Hopper parties. It's
22 not clear to me what Your Honor wants to do with my
23 adversary proceeding, which only involves the Hopper parties
24 and the debtor.

25 THE COURT: Well, that wasn't the subject of the

1 motion to lift stay, so I guess I didn't address it. I only
2 addressed the motions I had in front of me. Sitting right
3 here now, I'd have to look at it to decide what makes sense,
4 but I would imagine the parties can probably in the first
5 instance take a look at it in light of my ruling and decide
6 what they want to do with it.

7 I think the idea is that issues that deal with the
8 escrow and the merits, and anything that's essentially a
9 repackaging of the same issues but going the other way,
10 should be in one forum. And the bankruptcy issues, that is
11 distribution of any assets of the estate, as well as any
12 subordination issues can stay here and be resolved here.

13 MR. ZDUNKEWICZ: Very well.

14 THE COURT: All right. So if you need any further
15 guidance on that, let me know, but I would imagine you can
16 probably work together to figure that out in the first
17 instance.

18 MR. ZDUNKEWICZ: Have a nice day, Your Honor,
19 thank you.

20 THE COURT: Anything else? All right. If there's
21 a problem with March 4th, we will let you know no later than
22 this week.

23 MR. ROSENTHAL: Thank you, Your Honor.

24 THE COURT: Thank you.

25 (Proceedings concluded at 3:01 PM)

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I N D E X

R U L I N G S

IDENTIFICATION

PAGE

Doc #836 and #12 Debtors' Motion for Interim
and Final Orders (A) Authorizing Debtors to
(I) Continue Existing Cash Management System,
Bank Accounts, and Business Forms and
(II) Continue Ordinary Course Intercompany
Transactions; and (B) Granting an Extension
of Time to Comply with the Requirements of
Section 345(b) of the Bankruptcy Code

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Doc #799 Debtors' Application to Retain and
Employ Antony Zacaroli, Queen's Counsel for
Limited Purposes

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BENCH DECISION

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

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: February 21, 2013

Signature of Approved Transcriber

Veritext

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