Objection Deadline: March 19, 2013 at 4:00 p.m. (prevailing U.S. Eastern Time)
Hearing Date and Time: March 26, 2013 at 10:00 a.m. (prevailing U.S. Eastern Time)

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Attorneys for the Debtors
and Debtors in Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	:	**Chapter 11**
ARCAPITA BANK B.S.C.(c), *et al.*,	:	**Case No. 12-11076 (SHL)**
Debtors.	:	**Jointly Administered**

NOTICE OF DEBTORS' MOTION TO FURTHER EXTEND EXCLUSIVE SOLICITATION PERIOD

PLEASE TAKE NOTICE that on March 12, 2013, the above-captioned debtors and debtors in possession (the "***Debtors***") filed the annexed *Debtors' Motion to Further Extend Exclusive Solicitation Period* (the "***Motion***").

PLEASE TAKE FURTHER NOTICE that a hearing (the "***Hearing***") to consider the Motion will take place before the Honorable Sean H. Lane, United States Bankruptcy Judge, in Room 701 of the United States Bankruptcy Court, One Bowling Green, New York, New York 10004-1408 (the "***Bankruptcy Court***") on **March 26, 2013 at 10:00 a.m. (prevailing U.S. Eastern Time)**, or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any and all objections to the Motion (the "***Objections***") shall be filed electronically with the Court on the docket of *Arcapita Bank B.S.C.(c), et al.*, Ch. 11 Case No. 12-11076 (SHL) (the "***Docket***"), pursuant to the Case Management Procedures approved by this Court and the Court's General Order M-399 (available at http://nysb.uscourts.gov/orders/orders2.html), by registered users of the Court's case filing system and by all other parties in interest on a 3.5 inch disk, preferably in portable document format, Microsoft Word, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 on (i) counsel for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, New York, 10166 (Attn: Michael A. Rosenthal, Esq. and Matthew K. Kelsey, Esq.); (ii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey, Esq.); and (iii) Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis Dunne, Esq. and Evan Fleck, Esq.), so as to be received no later than **March 19, 2013 at 4:00 p.m. (prevailing U.S. Eastern time)** (the "***Objection Deadline***").

PLEASE TAKE FURTHER NOTICE that if no Objections are timely filed and served with respect to the Motion, the Debtors may, on or after the Objection Deadline, submit to the Bankruptcy Court an order substantially in the form of the proposed order annexed to the Motion, which order may be entered with no further notice or opportunity to be heard.

Dated: New York, New York
March 12, 2013

/s/ Michael A. Rosenthal

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	:	**Chapter 11**
ARCAPITA BANK B.S.C.(c), *et al.*,	:	**Case No. 12-11076 (SHL)**
Debtors.	:	**Jointly Administered**

DEBTORS' MOTION TO FURTHER EXTEND EXCLUSIVE SOLICITATION PERIOD

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Arcapita Bank B.S.C.(c) ("***Arcapita Bank***") and certain of its subsidiaries and affiliates (collectively, the "***Debtors***") hereby submit this Motion pursuant to section 1121(d) of the Bankruptcy Code, for an order further extending the Debtors' exclusive period to file a plan or plans of reorganization and to solicit acceptances thereof. In support thereof, the Debtors respectfully represent:

JURISDICTION

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

A. Brief History of the Cases

2. On March 19, 2012, Arcapita Bank and five of its affiliates commenced cases under chapter 11 of the Bankruptcy Code. On April 30, 2012, Falcon Gas Storage Company, Inc. commenced a case under chapter 11 of the Bankruptcy Code. The Debtors have continued to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On April 5, 2012, the United States Trustee for Region 2 appointed the Official Committee of Unsecured Creditors [Docket No. 60] pursuant to sections 1102(a) and 1102(b) of the Bankruptcy Code. Of the six current members of the Committee, three members are primarily creditors of only Arcapita Bank and three members are also creditors that have substantial claims against Arcapita Bank's subsidiary, Arcapita Investment Holdings Limited ("***AIHL***").

B. Plan Allocations and Previous Exclusivity Extensions

4. By order dated July 11, 2012, the Court granted the Debtors a 90-day extension of the initial 120-day period during which the Debtors have the exclusive right to file a chapter 11 plan or plans (the "***Exclusive Filing Period***") and the initial 180-day period during which the Debtors have the exclusive right to file a chapter 11 plan or plans and to solicit acceptances thereof if a plan was filed during the Exclusive Filing Period (the "***Exclusive Solicitation Period***," and together with the Exclusive Filing Period, the "***Exclusive Periods***") through and including October 15, 2012 and December 14, 2012, respectively.

5. Putting together a chapter 11 plan that contained a fair allocation of the Arcapita Group's value among various creditor constituencies proved to be a significant challenge. At first blush, value allocation appears to be quite straightforward: Arcapita Bank owns the majority of the assets of the Arcapita Group through AIHL and, as a result of the Debtors' corporate structure, the claims of AIHL's creditors are in large part structurally senior to the claims of Arcapita Bank's creditors. Accordingly, under this simplistic view of the Debtors' capital structure, the lion's share of value should be allocated to AIHL creditors.

6. As the Disclosure Statement indicates and the Court is aware, however, not all of the assets of the Arcapita Group are owned through AIHL, and the claims of AIHL's creditors are not always structurally senior. Moreover, the complexity of the Debtors' business and corporate structures and prepetition operations, coupled with consideration of intercompany claims, complicates value allocation among creditor constituencies. Indeed, reasonable value allocation would be impossible without a detailed analysis of, among other things, the appropriate waterfall to creditors from each deal exit and the relative risks associated with a variety of issues, including the legal treatment of intercompany claims if litigated, the treatment of the Debtors' headquarters lease and postpetition rent payments, the difficulties in enforcing

Bankruptcy Court orders in Bahrain, and the fact that a meaningful portion of the value of the Debtors' assets, namely the value derived from Arcapita Bank's non-debtor management subsidiaries and the value derived from the amounts owed directly to Arcapita Bank by the portfolio companies co-owned by the Debtors and their co-investors (the "***Portfolio Companies***"), runs directly to Arcapita Bank, rather than to AIHL. Accordingly, during these initial exclusivity periods, the Debtors and their advisors worked assiduously to develop a view on appropriate asset allocation that was informed by substantial analysis of the various issues that impact value allocation. The Debtors shared these views with the Committee's advisors.

7. While the Debtors made substantial progress toward developing a strategy for a successful exit from these chapter 11 cases, the Debtors needed more time to complete their analysis of the various legal and business issues that drive value allocation among various creditor constituencies. Accordingly, the Debtors sought additional extensions of the Exclusive Periods. By order dated October 12, 2012, the Court granted the motion and further extended the Exclusive Filing Period to and including December 15, 2012, and the Exclusive Solicitation Period to and including February 12, 2013.

8. Thereafter, the Debtors and the various creditor constituencies worked diligently to develop a plan of reorganization that incorporates a rationale and defensible resolution of various inter-creditor and inter-estate issues. Indeed, the Debtors, the Committee, and the JPLs worked jointly in an attempt to develop a value allocation model that is reasonably acceptable to both groups of creditors.

9. As a result of these efforts, and although some issues remained unresolved, the Debtors were prepared to file a plan by the December 15, 2012 deadline. The Debtors' draft plan and related disclosure statement incorporated the detailed valuation analysis of the Debtors'

assets performed by KPMG, A&M, and the Debtors, and thus contained a reasonable settlement of the various intercreditor issues that impact value allocation.

10. At that time, however, the Committee—evenly split between AIHL creditors and Bank creditors—was still internally divided on the allocation of value between the creditors of Arcapita Bank and the creditors of AIHL. The Debtors, fearing that filing a plan might derail negotiations among the Committee members, agreed to extend exclusivity for a limited period of time so that those negotiations could be completed. To facilitate these intercreditor negotiations, the Court entered a series of orders granting short extensions of the Exclusive Periods—ultimately extending the Exclusive Filing Period to February 8, 2013 and the Exclusive Solicitation Period to April 8, 2013. *See* Docket Nos. 725, 743, 768, 786, and 818.

11. The Committee communicated its unanimous view of value allocation to the Debtors on February 7, 2013. Because the Committee allocations were within the range of the Debtors' own views with respect to a reasonable allocation of value, the Debtors filed their *Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors under Chapter 11 of the Bankruptcy Code* [Docket No. 826] (the "***Plan***") that incorporates the proposed economic spits and the related *Disclosure Statement in Support of the Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 827] (the "***Disclosure Statement***") prior to the expiry of the February 8 Exclusive Filing deadline. A hearing to consider approval of the Disclosure Statement is currently set for March 26, 2013.

C. Continued Plan Negotiations Among the Debtors and Various Creditor Constituencies

12. Since filing the Plan, the Debtors have continued to discuss certain issues related to the Plan with various creditor groups—including the Committee, the Ad Hoc Group, and the

JPLs. The Debtors are doing so to increase the likelihood of consensus support for the Plan and to ensure the Debtors' ability to implement the business plan for Reorganized Arcapita (as defined in the Plan) after the Effective Date. For instance, the Debtors' management and representatives from the Committee, the Ad Hoc Group, and the JPLs met in New York on February 21, 2013, to discuss, among other things, management of Reorganized Arcapita and issues related to cooperation between Reorganized Arcapita and the Debtors' co-investors that, in many cases, own the majority of the equity in Portfolio Companies. As recently as Wednesday and Thursday of last week, the Chairman of the Committee and the Committee's financial advisor traveled to Bahrain and met with the Debtors' management and representatives of the Debtors' board to continue these discussions. Indeed, during these discussions, the Committee and the Debtors agreed on the parameters of confidential disclosure of certain key information (thereby obviating the need for the entry of an order on the Committee's motion to conduct an examination pursuant to Bankruptcy Rule 2004).

13. Similarly, the meetings in Bahrain continued productive discussions regarding the possibility of cooperation agreements between Reorganized Arcapita and the Syndication Companies, the investment vehicles through which the co-investors hold their ownership interests in the Portfolio Companies (the "***Syndication Companies***"). These agreements, if they can be reached, would substantially enhance the Debtors' post-Effective Date rights. As the Court knows, the business plan that currently underpins the Plan contemplates a wind-down of the Debtors' assets, including its interests in the Portfolio Companies, managed by the Debtors' current deal teams (the "***Deal Teams***") for these Portfolio Companies, under the supervision of the post-Effective Date Board of Directors and senior management team of Reorganized

Arcapita.[1] Each Portfolio Company currently has a Deal Team intimately familiar with the business, operations and disposition alternatives available to such Portfolio Company, and the Plan contemplates that these historical Deal Team relationships would continue to exist post-Effective Date, and would report to the new Board of Directors and senior management of Reorganized Arcapita. Consistent with the provisions of the Bankruptcy Code, the Plan specifies that the identity and qualifications of the members of the new Board of Directors and senior management team of Reorganized Arcapita will be disclosed in the Plan Supplement; while the new Board of Directors and senior management team may consist of some members of the current Board of Directors and senior management team, the new equity owners of Reorganized Arcapita – the Debtors' creditors – would have significant input into selection of the members of the new Board of Directors and senior management team.

14. When the Plan was filed, however, no agreement had yet been reached between the Syndication Companies and Reorganized Arcapita to ensure post-Effective Date cooperation, and govern the respective rights, of these parties as co-owners of the Portfolio Companies.[2] Recognizing the importance of this issue, the Debtors, after discussion with the Debtors' key creditor constituencies, formulated and circulated to the Committee, the Ad Hoc group and the JPLs the terms of a proposal to address post-Effective Date cooperation and related issues between the Syndication Companies and Reorganized Arcapita. Discussions between the

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[1] The Debtors' projections, which will be filed as an amendment to the Disclosure Statement, reflect the implementation of this business plan.

[2] The Plan currently assumes that the historical relationship between the Syndication Companies and the co-investors, on the one hand, and Reorganized Arcapita, on the other hand, will not be altered, and that reasonable business and exit decisions made by Reorganized Arcapita will be joined by the Syndication Companies. Absent a formal cooperation agreement, however, there can be no assurance that Reorganized Arcapita will be able to maintain this historic relationship.

Committee and the Debtors regarding this proposal, documented in a draft term sheet (the "***Cooperation Term Sheet***"), continued in Bahrain last week. And, yesterday, the Debtors received a constructive counter-offer from the financial advisors to the Committee that, if it ultimately results in an agreement, will ensure post-Effective Date cooperation between the Syndication Companies and Reorganized Arcapita related to management and disposition of the Portfolio Companies, provide the framework for coordinated post-Effective Date management of Reorganized Arcapita and the Syndication Companies,[3] and protect Reorganized Arcapita from potential minority discount risk, thereby allowing Reorganized Arcapita to maximize the value of its assets. Further negotiations between the Debtors, the Committee, the Syndication Companies (and their anchor co-investors), the Ad Hoc group and the JPLs regarding the Cooperation Term Sheet are anticipated.

15. Throughout this process, the Debtors' professionals have been in frequent contact with the professionals representing the various key creditor constituencies—all in an effort to refine the Plan, broaden support for it, and constructively address not only the Syndication Company/Reorganized Arcapita cooperation issues, but any remaining open issues between the Debtors and these groups. While the Debtors believe that the Plan as filed is confirmable and will satisfy the requirements of section 1129 of the Bankruptcy Code with or without further agreements with the creditors or the Syndication Companies, they also believe that it would be

[3] Among other things, the Cooperation Term Sheet contemplates that both Reorganized Arcapita and the Syndication Companies will enter into arms-length agreements with a new management company formed by certain of the anchor co-investors and managed, in part, by some current members of the Debtors' existing senior management team who were integral to the original decision of the co-investors to invest, through the Syndication Companies, with the Debtors and who are trusted by these co-investors. The anticipation is that the involvement of these trusted anchor co-investors and members of the Debtors' senior management team will give the Syndication Companies (and their other co-investor owners) confidence that their interests are being adequately protected and that the terms of the proposed Cooperation Term Sheet are appropriate and reasonable.

advantageous, particularly given the status of the negotiations relative to the Cooperation Term Sheet, to have an additional short period of time to continue these negotiations without losing the benefit of exclusivity. The hearing to approve the Disclosure Statement and related solicitation procedures is currently scheduled for March 26, and the Exclusive Solicitation Period expires April 9, 2013. This deadline does not give the Debtors sufficient time under the Bankruptcy Rules to solicit votes to accept or reject the Plan, nor does it provide the Debtors or the parties any leeway for further productive discussions under the mutually protective umbrella of exclusivity.

RELIEF REQUESTED

16. To ensure that the solicitation of votes with respect to the Plan proceeds in an orderly fashion and in a time frame consistent with Bankruptcy Rule 2002, the Debtors request that the Court further extend the Exclusive Solicitation Period through and including July 7, 2013.

BASIS FOR RELIEF REQUESTED

17. The primary objective of a chapter 11 case is the formulation, confirmation, and consummation of a chapter 11 plan. *See Bank of America Nat'l Trust and Sav. Ass'n. v. 203 N. LaSalle St. P'ship* , 526 U.S. 434, 465 (1999) ("Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case.") (citation omitted). Congress established and incorporated the Exclusive Periods into the Bankruptcy Code to afford debtors a full and fair opportunity to propose a chapter 11 plan and to enable solicitation of acceptances of the plan without disruption that could be caused by the filing of multiple competing plans. *See In re Texaco, Inc.*, 81 B.R. 806, 809 (Bankr. S.D.N.Y. 1988) (exclusivity period intended to afford debtors an "unqualified" opportunity to propose and solicit acceptance of a chapter 11 plan); *see also In Re Geriatrics Nursing Home, Inc.*, 187 B.R. 128, 132-32 (Bankr. D.N.J. 1995).

18. The Court may extend the Exclusive Periods for cause. *See* 11 U.S.C. § 1121(d). The Bankruptcy Code neither defines the term "cause" for purposes of section 1121(d) nor establishes formal criteria for an extension. The legislative history of section 1121 indicates, however, that it is intended to be a flexible standard to balance the competing interests of a debtor and its creditors. *See* H.R. Rep. No. 95-595, at 231-32 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 (noting that Congress intended to give Bankruptcy Courts great flexibility to protect a debtor's interests by allowing a debtor an unimpeded opportunity to negotiate settlement of debts without interference from other parties in interest); *see also Gaines v. Perkins (In re Perkins)*, 71 B.R. 294, 297 (W.D. Tenn. 1987) ("The hallmark of [section 1121(d) of the Bankruptcy Code] is flexibility.").

19. In exercising its broad discretion, the Court may consider a variety of factors to assess the totality of circumstances in each case. *See In re Borders Group, Inc.*, 460 B.R. 818, 821-22 (Bankr. S.D.N.Y. 2011) ("The determination of cause under section 1121(d) is a fact-specific inquiry and the court has broad discretion in extending or terminating exclusivity."); *In re Adelphia Commc'ns Corp.*, 352 B.R. 578, 587 (Bankr. S.D.N.Y. 2006) (identifying objective factors courts historically have considered in determining whether cause exists to extend or terminate exclusivity); *In re McLean Indus., Inc.*, 87 B.R. 830, 834 (Bankr. S.D.N.Y. 1987) (identifying factors used by courts to determine whether cause exists to extend exclusivity). Those factors include, but are not limited to:

1. the size and complexity of the case;
2. the necessity for sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information;
3. the existence of good faith progress toward reorganization;
4. the fact that the debtor is paying its bills as they become due;

5. whether the debtor has demonstrated reasonable prospects for filing a viable plan;

6. whether the debtor has made progress in negotiations with its creditors;

7. the amount of time which has elapsed in the case;

8. whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and

9. whether an unresolved contingency exists.

In re Dow Corning Corp., 208 B.R. 661, 665 (Bankr. E.D. Mich. 1997); *see also Borders*, 460 B.R. at 822 (evaluating these nine factors to hold that debtor established cause to extend exclusivity); *Adelphia*, 352 B.R. at 587 (noting that the nine factors listed above are "objective factors which courts historically have considered in making determinations of this character"). No one factor on this non-exhaustive list is dispositive. Rather than merely checking off or mechanically counting which factors apply, courts "tak[e] a broader, more global view—focused on what is best for these chapter 11 cases; most in keeping with the letter and spirit of chapter 11; and what is most appropriate under the unique facts of a case . . . ." *Adelphia*, 352 B.R. at 582. In this instance, the factors overwhelmingly support an extension of the Exclusive Solicitation Period.

A. Ample Cause Exists to Extend the Exclusive Solicitation Period

1. The Size and Complexity of These Cases Necessitate Additional Time to Permit the Debtors to Develop Support for the Plan (Factor 1)

20. As Congress has expressly recognized, courts will likely extend the Exclusive Periods if a debtor's case is unusually large or complex. H.R. Rep. No. 95-595, at 231, 232, 406 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6191, 6362 ("[I]f an unusually large company were to seek reorganization under Chapter 11, the Court would probably need to extend the time in order to allow the debtor to reach an agreement."); *see In re Texaco Inc.*, 76 B.R. 322, 326

(Bankr. S.D.N.Y. 1987) ("The large size of a debtor and the consequent difficulty in formulating a plan . . . for a huge debtor with a complex financial structure are important factors which generally constitute cause for extending the exclusivity periods.").

21. The Debtors' bankruptcy cases are large and exceedingly complex. The complexities of the Debtors' global enterprise are set forth in detail in the Debtors' proposed Disclosure Statement. The worldwide reach of the Debtors' business operations and creditor constituencies add an additional component to the overall complexity of the Debtors' chapter 11 cases, as does the overlay of a coordinated proceeding in the Cayman Islands (and concomitant participation in these cases of the JPLs), and the rather sophisticated deal structuring necessitated by the Debtors' commitment to provide its customers with Shari'ah-compliant investment opportunities. Indeed, at several hearings, including hearings to approve the Debtors' previous requests to extend the Exclusive Periods, the Court acknowledged that the Debtors' cases are large and exceedingly complex. *See, e.g.*, Hr'g Tr. 41:11-25, 42:1-17, Oct. 9, 2012.[4]

22. Indeed, the size and complexity of these chapter 11 cases alone warrant extension of the Exclusive Solicitation Period. *See, In re Texaco*, 76 B.R. at 325–27; *In re Borders*, 460 B.R at 824 (noting that when debtors are "unusually large," courts "probably need" to extend exclusivity to allow debtors and creditors to reach an agreement) (citation omitted). That is especially true where, as here, the Debtors have filed a confirmable chapter 11 plan and need additional time to only comply with the solicitation time frames set forth in the Bankruptcy Rules.

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[4] A true and correct copy of the October 9, 2012 hearing transcript is annexed hereto as Exhibit B.

2. The Debtors Have Made Substantial, Good-Faith Progress Toward Reorganization, Including Filing a Confirmable Plan and Continuing to Negotiate with Key Creditor Groups to Develop Broad-Based Support for the Plan (Factors 2, 3, 5, 6, and 8)

23. As described above, the Debtors worked diligently to prepare a confirmable chapter 11 plan and, ultimately, were willing to agree to further exclusivity extensions to reach a consensual view on the allocation of value among various creditor constituencies. Further, as described above, since filing the Plan, the Debtors continue to discuss certain issues related to the Plan with various creditor groups to achieve support for the Plan, in particular with respect to formalizing the arrangements contemplated by the Cooperation Term Sheet. Consistent with their practice throughout these cases, the Debtors have been, and will continue to be, a "model of cooperation" so that the legitimate concerns of the Debtors' creditors are addressed. Hr'g Tr. 6:9-12 March 5, 2013.[5] Extending the Exclusive Solicitation Period will enhance the Debtors' efforts to be a fair broker by providing all parties in interest with additional time to identify and implement a resolution to any remaining plan issues. In short, the Debtors are making obvious progress toward a consensual confirmation in an orderly and productive way.

24. Nevertheless, even if the Debtors are unable to obtain complete consensus among all competing creditor constituencies, the Debtors believe that the Plan as filed is confirmable, and that the Debtors should be given an opportunity to solicit support for the Plan without the distraction—and concomitant cost and delay—that would occur if the Exclusive Solicitation Period were allowed to lapse prior to the conclusion of the Debtors' solicitation efforts. Allowing the Debtors to prosecute confirmation of a confirmable plan without the distraction, cost, and delay of competing plans is completely consistent with the goals of the exclusivity

[5] A true and correct copy of the March 5, 2013 hearing transcript is annexed hereto as Exhibit C.

periods. *See In re Texaco, Inc.*, 81 B.R. at 809 (Bankr. S.D.N.Y. 1988) (purpose of exclusivity is to enable debtors to negotiate plans without undue interruption); *see also In re Mother Hubbard, Inc.*, 152 B.R. 189, 195 (Bankr. W.D. Mich. 1993); *In re Gibson & Cushman Dredging Corp.*, 101 B.R. 405, 409-11 (Bankr. E.D.N.Y. 1989) (granting debtor's motion to extend the exclusive solicitation period after debtor had filed a plan was "not at odds" with the purpose of exclusivity under section 1121 of the Bankruptcy Code).

3. The Debtors Have and Will Continue to Pay Postpetition Administrative Expenses As They Come Due (Factor 4)

25. Since filing these chapter 11 cases, the Debtors have taken numerous affirmative steps to reduce costs and ensure that administrative expenses are paid. They have done this in part through prudent business decisions and cash management—including a substantial reduction in force—and in part by securing the first-ever Shari'ah-compliant debtor in possession financing facility. Further, the Debtors have negotiated a standstill of the rent due on the headquarters building lease, which results in a significant preservation of cash during these chapter 11 cases. The Debtors' success in managing their businesses effectively and preserving the value of their assets for the benefit of creditors is another factor that militates towards granting an extension of the Exclusive Solicitation Period.

4. The Requested Extension is for a Reasonable Period of Time (Factor 7)

26. The Debtors are seeking to solicit votes on, and to prosecute confirmation of, the Plan as soon as practicable, taking into consideration the schedule of the Court, the complexity of the Debtors' chapter 11 cases, the global span of the Debtors' creditors, and the ongoing negotiations with the various key creditor constituencies. Under the circumstances, the two-month period contemplated by the Bankruptcy Code between the end of the Exclusive Filing Period and the end of the Exclusive Solicitation Period is simply too short in the context of the

Debtors' complicated chapter 11 cases. Bankruptcy Rule 2002(b) requires that the Debtors give 28-days' notice of the time fixed for filing objections to the Disclosure Statement. The Debtors must then have ample time to respond to these objections and to provide the Court with sufficient time to make an informed ruling on the Disclosure Statement.

27. Following approval of the Disclosure Statement, the Debtors must finalize the Disclosure Statement and mail ballots to accept or reject the Plan to numerous creditors. Then, the Debtors are required to provide parties in interest with another 28 days' notice of the time fixed for filing objections to the Plan. *See* Bankruptcy Rule 2002(b). Following that notice period the Debtors need additional time to respond to objections to the Plan and to proceed with the confirmation hearing. Here, given the competing creditor constituencies and the outstanding issues that the Debtors are seeking to address consensually, it is impractical that all of this would occur in the two-month period contemplated by the Bankruptcy Code. Under the circumstances, the extension of the Exclusive Solicitation Period that the Debtors seek is reasonable.

B. Allowing Exclusivity to Lapse Would Harm the Estates

28. If exclusivity were not preserved, numerous competing plans could be filed by the Committee, the Ad Hoc Group, the JPLs, Standard Chartered Bank, certain creditors of Debtor Falcon Gas Storage Company, Inc., or others. Such a free-for-all might fracture the alliances that have been formed or agreements that already have been reached and harm the Debtors' efforts to coalesce support for a single Plan. Indeed, the concerns expressed by Judge Gerber in rejecting a request to terminate exclusivity after a plan had been filed in the *Adelphia* case apply with equal force here:

> [T]ermination of exclusivity, just a few weeks before the Debtors might be in the position to confirm a plan, would be at odds with moving the case forward, and could be disastrous. Terminating exclusivity might well result in the solicitation of three or even more plans (not just one or two), with some addressing only

> parochial concerns. … A competing plans battle now might well jeopardize current fragile agreements between various stakeholders, re-ignite intercreditor disputes, and push this process back to square one. A competing plans battle would also likely drag out the solicitation process, subjecting the estate to substantial extra costs that might otherwise be avoided…. As we'll know whether the Joint Plan has secured the necessary votes and is confirmable in just a few weeks, this time is, in my view, exactly the wrong time to be terminating exclusivity.

Adelphia, 352 B.R. at 590.

29. Likewise here, allowing the Exclusive Solicitation Period to lapse would cause the kind of dislocation to these chapter 11 cases that Judge Gerber articulated in the *Adelphia* case. If the Exclusive Solicitation Period lapsed, the Debtors could be saddled with substantial additional administrative burdens, including the cost of soliciting two or more competing plans and the concomitant delays in executing that plan process, which could risk the Debtors' liquidity and present obstacles to the Debtors' ability to obtain exit financing, which all parties agree will be necessary. Finally, allowing the Exclusive Solicitation Period to lapse could impact the pending Cayman Islands provisional liquidation proceedings if the Grand Cayman Court is not satisfied that sufficient and timely progress in the chapter 11 cases is being made.

30. For all of these reasons, the Debtors submit that now, like in *Adelphia*, is "exactly the wrong time" to allow the Exclusive Solicitation Period to lapse.

NOTICE

31. No trustee or examiner has been appointed in these Chapter 11 Cases. The Debtors have provided notice of filing of the Motion by electronic mail, facsimile and/or overnight mail to: (i) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey, Esq.); (ii) Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis Dunne, Esq. and Evan Fleck, Esq.); and (iii) all parties listed on the

Master Service List established in these chapter 11 cases. A copy of the Motion is also available on the website of the Debtors' notice and claims agent, GCG, Inc., at www.gcginc.com/cases/arcapita.

32. This Motion is the Debtors' eighth request for an extension of the Exclusive Periods.

CONCLUSION

For the reasons set forth herein, the Debtors respectfully request that the Court enter an order, substantially in the form annexed hereto as Exhibit A, extending the Debtors' Exclusive Solicitation Period through and including July 7, 2013, and granting the Debtors such other and further relief as is just and proper.

Dated: New York, New York
March 12, 2013

Respectfully submitted,

/s/ Michael A. Rosenthal

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ATTORNEYS FOR THE DEBTORS AND
DEBTORS IN POSSESSION

EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	:	**Chapter 11**
ARCAPITA BANK B.S.C.(c), *et al.*,	:	**Case No. 12-11076 (SHL)**
Debtors.	:	**Jointly Administered**

ORDER GRANTING DEBTORS' MOTION TO FURTHER EXTEND THE EXCLUSIVE SOLICITATION PERIOD

Upon consideration of the Motion (the "***Motion***")[1] of Arcapita Bank B.S.C.(c), and certain of its subsidiaries and affiliates, as debtors and debtors-in-possession herein (collectively, the "***Debtors***" and each, a "***Debtor***"), for entry of an order pursuant to section 1121(d) of title 11 of the United States Code (the "***Bankruptcy Code***"), for an order further extending the Debtors' Exclusive Solicitation Period through and including July 7, 2013, and the evidence in support thereof; the Court finds that:

a) It has jurisdiction to consider this Motion pursuant to 28 U.S.C. sections 157 and 1334;

b) Venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. sections 1408 and 1409;

c) Notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances of these cases; and,

d) The relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest.

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

After the consideration of any objections to the Motion; all proceedings that have occurred before the Court in the above-captioned chapter 11 cases; and having determined after due deliberation that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein;

IT IS HEREBY ORDERED:

1. The Motion is granted to the extent set forth herein.

2. Pursuant to section 1121(d) of the Bankruptcy Code, the Debtors' Exclusive Solicitation Period is extended through and including July 7, 2013.

3. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
_____, 2013

_____
THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

October 9, 2012 Hearing Transcript

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 12-11076-shl

- x

In the Matter of:

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

Debtors.

- x

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

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

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

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

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.

THE COURT: All right.

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

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

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

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

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

THE COURT: All right.

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

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

(Laughter)

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

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

THE COURT: That may be true.

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

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

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

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

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

(Laughter)

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

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

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

THE COURT: All right.

MR. ROSENTHAL: -- for the problem.

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

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

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

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

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

THE COURT: Right.

MR. ROSENTHAL: -- to the Court.

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

MR. ROSENTHAL: Thank you, Your Honor.

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

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

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

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

MR. ROSENTHAL: I do.

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

MR. ROSENTHAL: They do.

THE COURT: All right.

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

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

new financing on or before November 1st.

THE COURT: November 1st.

What level of commitment is required on that? Obviously that is an overlap between some of the issues we're talking about as to Silver Point here this afternoon. In other words, what -- when it says raise $250 million in new money what does that look like in terms of -- because obviously one of the objections related to a deadline for this particular entity to meet various commitment conditions, and so I'm wonder how -- if there's been any discussion about this particular --

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

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

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

Now we have drafted an equity commitment letter

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

THE COURT: All right.

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

THE COURT: Okay.

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

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

morning.

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

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

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

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

asked --

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

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

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

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

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

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

THE COURT: All right.

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

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

THE COURT: All right.

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

Dennis, you want to say something?

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

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

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

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

With respect to EuroLog and the placements. It's

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

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

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

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

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

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

THE COURT: All right, thank you.

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

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

THE COURT: All right.

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

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

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

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

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

THE COURT: Mediation.

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

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

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

THE COURT: All right.

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

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

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

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

MR. MILLET: Very well, Your Honor.

THE COURT: All right. Thank you.

MR. MILLET: Thank you.

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

THE COURT: All right.

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

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

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

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

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

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

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

We have the new money business plan on the table

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I understand your comment and I think we can

leave it there.

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

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

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

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

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

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

THE COURT: Well --

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

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

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

THE COURT: Yes.

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

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

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

THE COURT: Well --

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

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

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

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

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

our view had that done already.

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

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

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

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

MR. DUNNE: Thank you, Your Honor.

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

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

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

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

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

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

MS. GREENBLATT: Okay.

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

I had prepared a ruling on exclusivity, which

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

(Laughter)

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

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

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

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

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

filed with the Court, so --

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

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

THE COURT: All right.

MR. ROSENTHAL: -- economic decision.

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

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

THE COURT: All right. Well --

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

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

MS. GREENBLATT: I think we would just like a

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

Thank you.

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

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

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

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

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

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

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

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

MS. GREENBLATT: If I could have one minute.

(Pause)

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

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

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

MS. GREENBLATT: The objection stands then.

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

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

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

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

AIHL's participation in the Chapter 11 proceedings.

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

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

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

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

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

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

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

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

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

of the JPLs in the weeks to come.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Anyone else want to be heard?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

May I approach with a black line of the order?

THE COURT: Certainly. Thank you.

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

THE COURT: All right.

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

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

THE COURT: All right.

MR. ROSENTHAL: -- with prejudice.

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

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

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

both the wind down and the new money plan.

THE COURT: All right. Thank you.

MR. ROSENTHAL: Thank you, Your Honor.

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

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

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

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

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

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

comment on in connection with that.

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

MR. DUNNE: Agreed.

THE COURT: Thank you.

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

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

MR. ROSENTHAL: Let's do cash management.

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

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

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

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

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

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

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

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

THE COURT: All right.

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

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

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

MR. MILLET: Yes, Your Honor.

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

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

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

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

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

THE COURT: All right.

MR. FLECK: Thank you.

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

MR. FLECK: Thank you, Your Honor.

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

have resolved itself.

All right.

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

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

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

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

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

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

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

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

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

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

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

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

committee -- and that's very understandable.

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

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

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

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

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

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

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

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

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

With respect to your comment about whether

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

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

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

MR. WILLIAMS: Yes. Yes.

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Uh-huh.

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

MR. WILLIAMS: Uh-huh.

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

MR. WILLIAMS: Uh-huh.

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

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

MR. WILLIAMS: Yes. Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

But what I heard at the outset was what I thought

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

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

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

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

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

THE COURT: All right.

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

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

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

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

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

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

THE COURT: Right.

MR. WILLIAMS: People are getting information.

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

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

MR. WILLIAMS: Uh-huh.

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

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

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

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

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

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

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

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

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

MR. WILLIAMS: Uh-huh.

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

MR. WILLIAMS: Uh-huh.

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

MR. WILLIAMS: Uh-huh.

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

what it means.

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

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

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

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

THE COURT: Well, I understand that --

MR. WILLIAMS: Yeah.

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

MR. WILLIAMS: Yeah.

THE COURT: Somebody is driving a particularly

hard bargain.

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

THE COURT: Right.

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

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

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

THE COURT: All right.

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

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

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

MR. WILLIAMS: The point is when they --

THE COURT: -- how does anyone measure it?

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

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

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

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

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

MR. WILLIAMS: Unless they --

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

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

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

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

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

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

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

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

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

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

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

THE COURT: I know, but --

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

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

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

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

MR. WILLIAMS: Yes.

THE COURT: -- any of my conversations on these

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

(Pause)

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

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

MR. WILLIAMS: I agree with you 100 percent.

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

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

MR. WILLIAMS: One way or the other.

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

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

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

So is there anything else to add to that?

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

THE COURT: All right. What happens if the

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

MR. WILLIAMS: It does, Your Honor.

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

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

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

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

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

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

THE COURT: All right. Thank you.

MR. WILLIAMS: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

interest rate goes up or covenants get tightened.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DUNNE: It depends --

THE COURT: Or are you waiting for guidance from

me?

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

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

MR. DUNNE: Correct.

THE COURT: All right.

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

THE COURT: All right, thank you.

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

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

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

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

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

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

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

THE COURT: Well, yes and no.

MR. WILLIAMS: Uh-huh.

THE COURT: There is some truth to the notion that

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

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

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

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

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

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

MR. WILLIAMS: Uh-huh.

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

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

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

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

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

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

MR. WILLIAMS: Yeah.

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

MR. WILLIAMS: Uh-huh.

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

MR. WILLIAMS: Uh-huh.

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

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

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

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

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

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

THE COURT: -- game.

MR. WILLIAMS: Right?

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

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

crazy fees as opposed to this much more standard letter.

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

MR. WILLIAMS: Okay.

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

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

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: So 10, 15 minutes?

UNIDENTIFIED SPEAKER: Fine, Your Honor.

MR. WILLIAMS: Fine.

THE COURT: All right. Thank you.

(Recess at 4:19 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

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

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

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

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

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

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

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

afternoon.

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

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

MR. ROSENTHAL: Thank you.

THE COURT: Anything else before we adjourn?

UNIDENTIFIED SPEAKER: Nothing, Your Honor.

THE COURT: All right. Thank you very much.

(A chorus of thank you)

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

I N D E X

RULINGS

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.

Dawn South

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EXHIBIT C

March 5, 2013 Hearing Transcript

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-11076-shl

- x

In the Matter of:

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

Debtors.

- x

United States Bankruptcy Court

One Bowling Green

New York, New York

March 5, 2013

3:12 p.m.

B E F O R E :

HON SEAN H. LANE

U.S. BANKRUPTCY JUDGE

Doc. #843 Motion to Authorize / Motion of Official Committee of Unsecured Creditors for Entry of an Order Pursuant to Fed. R. Bankr. P. 2004, 9006, and 9016 Authorizing Expedited Discovery from the Debtors

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

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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.

All right. We are here this afternoon for a -- the continuation of a hearing begun on Monday, a motion to auth -- of the committee to authorize certain discovery under Rule 2004.

Let me make sure that I have track of everybody who is on the phone or who should be on the phone. Who is it who we expected to dial in today?

MR. FLECK: Your Honor, my partner, Dennis Dunne, should be on the line as well as our co-counsel, Jalli Al-Aradi from the Hassan Radhi firm.

THE COURT: All right. Are they on listen only or are they -- it's a live line?

MR. FLECK: They should have live lines.

THE COURT: All right. Are both those folks on the line?

MR. DUNNE: Good afternoon, Your Honor. It's Dennis Dunne.

MR. ROSENTHAL: And, Your Honor, I believe that for the -- from the debtor's side we have some -- Henry Thompson. We may have Attefab Dumaleck (ph), Mohammed Chowdhery. We have some -- some of the senior management team at Arcapita in Bahrain on the line as well.

THE COURT: All right. And are the folks in Bahrain able to hear us okay?

They may be in a listen-only line as well.

MR. ROSENTHAL: Okay.

THE COURT: All right. So where do things stand?

MR. ROSENTHAL: Well, first, Your Honor, good afternoon. Michael Rosenthal on behalf of the Arcapita debtors.

The good news, Your Honor, is that we do have an agreement that I will report to you in a second. But -- but I would like to give a little preface and I -- it seems like the way to start was that from adversity comes strength because although we have had a scuffle in the last day or so over this issue, I want to bring us back to the center.

And I think it's important, particularly in this case because we have international creditors and international investors. And sometimes the way of the Bankruptcy Court and the bankruptcy system in the United States are not as -- not entirely clear, not -- not as familiar to -- to those -- to those parties as it is to those of us who practice this day in and day out.

And I know that there may be some people who read the record and I -- and I think we both share -- the committee and the debtors -- we both share the need to reassure our creditor and investor-base that, you know, the

case is -- the case is proceeding smoothly and that these kinds of small bumps in the road are just small bumps in the road.

We've all worked hard --

THE COURT: Well -- and let me interject here. It would be a first for me if -- if there were -- in a case of this size and complexity if there were no bumps in the road. And I would probably be out of a job if -- if that were the case. And, in fact, this case has been a mile of cooperation in trying to work out issues where I've had this kind of cooperation and excellent lawyering (sic) in all my matters before me.

So the mere fact that a motion comes up and is vigorously contested is -- really reflects nothing more than parties doing what they think they have to do to protect their clients' interests vigorously. So -- so that's -- that's what I took the issue that we discussed Monday and are still discussing today to be.

MR. ROSENTHAL: Well, thank you, Your Honor. We -- we've all worked hard to move the process along. You know, we've -- we have gotten past the stage where the committee has -- has -- and the debtors have talked about allocation issues. The debtors have been considering management issues for some time and now we've got all the parties in -- in the room to talk about management issues,

which -- which are critical here.

I want to emphasize, we have a limited time to focus on -- on these issues because we're -- we would like very much to keep to the timetable that we have before the Court. And so we hope that from here forward, the process can unfold quickly and we hope that our agreement actually will implement that.

And as you know, we're -- we're trying to move the Chapter 11 process forward, but we're also trying to keep stability among the investor and the creditor ranks. And I -- and I think we've been very successful at doing that so far, and we hope to do it in the future.

Let me -- let me talk to you about the proposal for the disclosure of the investor list. But, again, before I do that, I want to -- I want to make clear that we are ultra-sensitive to the privacy and confidentiality concerns of our investors. And this isn't just a matter of contract or even of applicable law. It's a matter of culture. It's a matter of custom in the middle east. And, frankly, when dealing with a number of our investors who have connections with sovereign entities, it's a matter of protocol for how you handle the Royal Court of, you know, a foreign state.

So that's one of the reasons we've been very sensitive to this and we know that the U.C.C. will be sensitive with this information as well, but we want to make

sure that -- that that's on the record.

So our -- our understanding with the U.C.C. is that we would provide a list of our investors together with their ownership percentages in the various syndication companies, and that would be provided -- it would be a list with names only and their ownership percentages. That would be provided to the professionals for the committee and to a sub-committee of the full committee. We were -- we were thinking between two and four of the members, they would form a sub-committee.

Those parties would receive the list in confidence. They would not be able to disclose the list generally, even to others in their own organization. And we would put all of this in -- in the order. And we would separately provide a list, a shorter list, of the 25 largest investors in the -- in the various syndication companies. And that list would actually have contact information. We would provide that to the professionals for the -- for the committee and to this sub-committee of the -- of the committee. And, again, they would be under an order to keep it confidential and not disclose it.

For Your Honor's information, we believe that the top 25 represents roughly 50 percent of the assets under management at the syndication company level.

Now we have an additional agreement with the

U.C.C. that if that 25 -- if those 25 investors are not enough for the purposes of the U.C.C., that we would provide contact information for another r-- up to another 25 investors after they review the initial list and give us -- give us their comments.

The issue, then, Your Honor, that we -- we discussed was what -- what could the committee do with that list. And what we have agreed is that the professionals for the committee and the members of the committee would be prevented from contacting or meeting with anyone on the investor list except the 25 largest or, if that 25 list is expanded, to -- to include some additional creditors.

And that if -- that if a meeting were, in fact, scheduled and occurred, that it could be attended not only by the U.C.C. professionals, but by all of the members of the committee, not just the sub-committee. Again, everyone would be bound by confidentiality.

Now we -- a couple of further points. First, we've agreed that under no circumstances would these investor lists be made available to third party asset managers. We've also agreed that nothing -- while nothing prevents a member of the U.C.C. from contacting someone that they now know to be an Arcapita investor, I mean, because -- through public information -- so if they publicly know -- if they know as a result of a public source that someone is an

investor in Arcapita, they -- they can call them. I assume they could call them now. They could call them later.

On the other hand, they cannot look at the list and say, oh, I know this particular party on the list and now that -- since I know that party, I happen to -- and I know -- I now know they're an investor and put two and two together and use that as a basis for -- for contacting them.

Two final points. Your Honor, we would -- because of the Bahrain law issues involved, we would -- we would ask -- we would like a period of time to discuss this with the CBB and the results of that discussion will be embodied in an -- in the order that we present to the Court later in the week.

And, finally, Your Honor, if -- if we -- we've agreed with the committee that if there are further issues regarding these lists, we will -- you know, we'll work with the -- we'll work with the committee to have matters heard before the Court on a relatively expedited basis, consistent with the Court's calendar.

THE COURT: All right. That's all fine. Thank you very much for the update.

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

The committee is pleased to have reached a resolution of this issue. We -- we obviously think it's

very important and the committee -- all the members of the committee felt that it did rise to the level of something to bring to Your Honor's attention as a gating issue for us to move to the next step in the plan process.

I just want to mention a few points with respect to the agreement. This will all be memorialized in an order, obviously, and the language will be clear there. But for purposes of the record, just three points that I just wanted to highlight and clarify.

The sub-committee that Mr. Rosenthal mentioned will be of the committee's choosing. The debtors are not going to determine who is on that sub-committee. The committee itself will decide. There are no criteria for that, but the committee members will make that decision and it will be a subset. We haven't yet made that determination, but we'll do that promptly.

The committee does believe that this should move along as quickly as possible. I think the debtors agree with that. And to that point, there is a staging process that Mr. Rosenthal mentioned and that's accurate; that we're going to receive full information and authority to reach out to the 25 largest investors.

I wanted to be clear that for the remaining 25 that -- that the committee's going to identify, there's no additional showing or discussion that needs to happen with

the debtors in order to demonstrate the need for that. We'll review the list and then, assuming if the committee does want to and believes it's appropriate and necessary to reach out to additional investors, will provide that list to the debtors and they will promptly provide those names to the advisors and the sub-committee, together with the relevant contact information. And then the authority to speak with and interact with those investors will be broadened to that group and that universe.

And the last point, I think, is just a clarifying point. I don’t think Mr. Rosenthal intended this, but what -- what I heard him say was that with respect to the investors other than those 50, the committee would be prevented from meeting with them. And the committee will be prevented from contacting them and the committee -- nothing -- this is not intended to be a loophole here, but, obviously, the committee has statutory duties to interact with creditors. Some of these investors are creditors. The committee certainly receives inbound inquiries, as do its advisors, from this population.

So to the extent that creditors are reaching out to the committee, I don't think this agreement is intended to prevent the committee or its advisors from responding to inbound inquiries from this -- this population of creditor/investors.

And with that I think that reflects the agreement and we're pleased to have reached on.

THE COURT: All right. Thank you. That's very helpful.

Mr. Rosenthal, anything else to add on to the substance of the agreement?

MR. ROSENTHAL: No, Your Honor. I -- I don't have any problem with -- with any of the three qualifications.

THE COURT: All right.

All right. Well, thank you very, very much for the update and thank you very much for your efforts to resolve the problem in what I think is a fairly elegant and nuanced solution that respects the concerns that the debtors have about sensitivities in the case and respects the committee's need for sufficient information to do its job, and as is often the case with these agreements, reaches what I think is a -- a more nuanced and subtle resolution that I would have been capable of giving you as a judicial matter.

So I appreciate all your efforts and, again, I would say this case has been very, very well-handled. It just has had a knack for presenting really interesting challenging issues for the lawyers and the parties involved.

All right. I will wait to hear from the parties in terms of getting an order and just keep chambers apprised as to any -- any sensitivity in terms of turning that order

around and getting it entered. So we'll wait to hear from you on that front.

Anything else before we adjourn?

All right. Thank you very much.

MR. ROSENTHAL: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 3:27 p.m.)

I N D E X

RULINGS

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

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

SHERRI L. BREACH

AAERT Certified Electronic Reporter & Transcriber

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