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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-11076-SHL

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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 10004

April 26, 2013  
11:00 AM

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

ECRO: Michelle Brown

1 HEARING re Motion to extend exclusivity period for filing a  
2 Chapter 11 plan and disclosure statement/Debtors' motion to  
3 further extend exclusive solicitation period [Doc. #911].  
4

5 HEARING re Motion to approve Debtors' motion for an order (I)  
6 approving the disclosure statements and the form and manner of  
7 notice of the disclosure statement hearing, (II) establishing  
8 solicitation and voting procedures, (III) scheduling a  
9 confirmation hearing, and (IV) establishing notice and  
10 objection procedures for confirmation of the Debtors' joint  
11 Chapter 11 plan (related document(s) 827) [Doc. #828].  
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25 Transcribed by: Mary Zajackowski

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P R O C E E D I N G S

THE COURT: Good morning. Please be seated. We're here this morning for Arcapita Bank B.S.C. for two matters: the motion to extend exclusivity and second the motion to approve Debtors' motion for an order approving the disclosure statement. So, let me get appearances.

MR. ROSENTHAL: Good morning, Your Honor, Michael Rosenthal and my partner Craig Millet on behalf of the Arcapita Debtors.

MR. DUNNE: Good morning, Your Honor, Dennis Dunne from Milbank Tweed, Hadley & McCloy on behalf of the Official Creditors Committee. And I am joined by my partner Evan Fleck.

MR. GREER: Good morning, Your Honor, Brian Greer of Dechert LLP for Standard Charter Bank. And I am here with my partner David Kotler.

THE COURT: All right, if there is anyone else who is not sure whether they'll need to speak, you don't necessarily have to chime in now, but just please if you do and you haven't identified yourself, just now when you come up please do identify yourself, all right.

MR. ROSENTHAL: Your Honor, let me start by apologizing to the Court for all the fits and starts related to this disclosure statement hearing, but say to you that we are finally here and we are very pleased to be able to present to the Court today the Debtors' disclosure statement.

1 THE COURT: Well life goes in fits and starts, right?

2 MR. ROSENTHAL: It does.

3 THE COURT: So that's often the case, but happy to be  
4 here for you.

5 MR. ROSENTHAL: As you might have imagined the  
6 disclosure statement and the amended plan that are before you  
7 are the result of literally thousands of hours of work by the  
8 Debtors, the Ad Hoc Group, The JPL's and the Unsecured  
9 Creditors Committee. And it reflects the resolution of  
10 numerous complex intercompany and third party issues. And I'm  
11 pleased to say has the support of the Official Unsecured  
12 Creditors Committee, and the Ad Hoc Group and the JPL's. The  
13 JPL's are continuing to analyze some of the Cayman liquidation  
14 aspects, but we believe that that will not present any issues.

15 Clearly, Your Honor, there is still a couple open  
16 issues. The most notable of those is the treatment of Standard  
17 Charter Bank, but I will assure the Court that there are  
18 negotiations ongoing, intensive negotiations ongoing. And we  
19 do not expect that that will be an issue for much longer. And  
20 if it is we think that we clearly have covered off that  
21 possibility in the disclosure statement.

22 THE COURT: Excuse me for a moment. Proceed.

23 MR. ROSENTHAL: Other issues, Your Honor, relate to  
24 the exit facility. So we, and I want to give the Court a  
25 report on that. We do not yet have a definitive exit facility,

1 but we have received commitments from two parties for that. We  
2 have set today as a deadline to submit final best and final  
3 offers. And we expect to have an exit facility term sheet that  
4 we will file by the end of this month by April 30th, and it  
5 will be available on the website for everyone to look at.

6 Your Honor, the focal point of the discussions over  
7 the past six weeks or eight weeks has related to post effective  
8 day management and governance of reorganized Arcapita and to  
9 negotiation of a comprehensive agreement between the Debtors  
10 and the Syndication Company co-investors regarding a number of  
11 things including orderly disposition of jointly held assets.

12 The resolution of these issues was the final piece of  
13 the puzzle that we needed to make the plan of reorganization  
14 tick. The cooperation settlement term sheet that is attached  
15 as an exhibit to the plan, and to a lesser extent the revised  
16 equity term sheet attached as an exhibit to the plan, reflect  
17 far reaching and heavily negotiated agreements between the  
18 Debtors, the UCC, the Ad Hoc Group, the Syndication Company co-  
19 investors and AIM which is the management company that will be  
20 providing management and administrative services after the  
21 effective date.

22 These term sheets establish agreed mechanisms for  
23 post effective day management and governance of reorganized  
24 Arcapita. They set out the essential terms of a management  
25 services agreement whereby key management and administrative



1 services are provided to reorganized Arcapita at reasonable  
2 rates.

3 And most importantly, the agreements with the  
4 Syndication Companies which, as you recall, are the entities  
5 through which the Debtors place their investors as co-investors  
6 in various portfolio deals. Those agreements facilitate the  
7 orderly wind down of the Debtors assets, eliminate any hold up  
8 leverage that the Syndication Companies might otherwise assert  
9 against reorganized Arcapita, the situations where reorganized  
10 Arcapita is a minority holder, minimize change of control risk,  
11 provide previously unavailable minority protections both to  
12 reorganized Arcapita when it's the minority investor and to the  
13 Syndication Companies when they are the minority investor. And  
14 through the concept of structured disposition plans that's  
15 integral to the cooperation agreement, allow reorganized  
16 Arcapita to realize the maximum value for its investment  
17 portfolio, notably in cooperation with the Syndication  
18 Companies.

19 We think that this piece of the puzzle is absolutely  
20 integral to the plan and to the ability of the Debtors to  
21 realize the value. And the result of all this effort is the  
22 amended plan which serves as the blueprint for how this will  
23 all be implemented and how distributions of the value of the  
24 Debtors' assets will be made equitably to the Debtors various  
25 Creditor constituencies.

1 All of the parties worked very hard to get to where  
2 we are today. It took a lot of trying negotiations, a lot of  
3 long hours, a lot of patience. And I certainly appreciate all  
4 the work that the UCC, the Ad Hoc Group and the JPL's have done  
5 in this.

6 So before I turn to disclosure objections, Your  
7 Honor, I thought I'd let Mr. Dunn speak from the Committee's  
8 perspective and then we can address disclosure.

9 THE COURT: All right.

10 MR. DUNNE: Good morning, Your Honor, for the record  
11 Dennis Dunne, Milbank Tweed on behalf of the Official Committee  
12 of Unsecured Creditors. I just wanted to spend a few minutes  
13 giving the Court the Committee's perspective on the plan that's  
14 before Your Honor today and how we arrived at the consensus.

15 At the outset, I wanted to say that I'm very proud of  
16 the efforts the Committee expended on the plan process in  
17 connection with the negotiations with the Debtors. It required  
18 long hours and many trips to Bahrain. Those efforts were  
19 spearheaded by the chair of the Committee: Mark Glogoff of  
20 Barclays Bank who is actually in the Courtroom today. And  
21 those efforts bore fruit. As a result, we've reached consensus  
22 with the Debtors on the terms of the plan.

23 Your Honor will recall that when we were in front of  
24 you after the first plan was filed I said that we had  
25 previously spent most of our time trying to negotiation a

1 distribution waterfall with respect to the allocation of future  
2 value among the various Creditor constituencies. And we did  
3 that principally within the confines of the Creditors  
4 Committee, and with consultation and negotiations with the Ad  
5 Hoc. And you had representatives of the parent bank, as well  
6 as AHL [phonetic] on the Creditors Committee. And we  
7 successfully concluded those negotiations before that first  
8 plan was filed. And the first plan embodied that.

9 The second category was corporate governance, asset  
10 managements, avoidance actions and releases. The plan that was  
11 filed in February embodied the agreement in the first category,  
12 but not the second. The plan before Your Honor today now has  
13 the Creditors Committee support with respect to both bids.

14 As Your Honor is aware, I think that we all recognize  
15 that this case has for the most part been a kind of model of  
16 deal making and consensus building, but there has been kind of  
17 sporadic episodes of contention. One of those episodes  
18 occurred a few months ago when we were before the Court on the  
19 dispute relating to the Committee's Rule 2004 motion to obtain  
20 information regarding the identities of the Debtors' co-  
21 investors.

22 Your Honor recognized at the time that the plan the  
23 Debtors had filed was a placeholder in certain respects and  
24 that we had filed our motion to obtain information to allow us  
25 to assess the offer by Debtors' management to provide the

1 reorganized Debtors with new management services post emergence  
2 through NewCo. That's now referred to as AIM.

3 As Your Honor also stated at the time managements  
4 announced intention to leave the Debtors and establish a new  
5 shop literally upstairs to provide services back to the  
6 Debtors' co-investors created an extremely unusual and delicate  
7 situation; one that was rife with apparent and actual  
8 conflicts. It basically meant that the plan and the  
9 transaction was, in essence, an insider transaction or  
10 affiliate transaction that warranted under our law a heightened  
11 scrutiny. And it was the Creditors Committee that stepped into  
12 that breach to play that role and perform that level of  
13 heightened scrutiny. And as a result, we played the lead role in  
14 negotiating and structuring many aspects of the Debtors' plan.

15 We're pleased to report that with respect to that  
16 second category of issues that were left open, we have reached  
17 consensus on corporate governance, asset management releases  
18 and avoidance actions. There's only one salient aspect of the  
19 plan that remains open that I will address in a moment.

20 After the filing of the first plan in February, we  
21 reached what turned out to be a difficult and contentious phase  
22 of the negotiations, mainly who would manage the assets post  
23 emergence. Would it be a new third party independent asset  
24 manager or would it be the existing managers who will establish  
25 a new and independent company AIM or NewCo. And if the latter,

1 what would be the terms and conditions under which management  
2 would be engaged to oversee the disposition of the assets of  
3 the reorganized Debtors and manage the relationships with the  
4 co-investors?

5 This phase engendered protracted and acrimonious  
6 negotiations between on the one hand the Creditors Committee  
7 and its advisors who are representing both the Creditors and,  
8 in essence, the estate; and, on the other hand, Debtors'  
9 managements who are negotiating for what the terms would be  
10 acceptable for NewCo or AIM in order to provide those services.  
11 After literally dozens of terms of what we refer to as the  
12 cooperation term sheet, I think its Exhibit L in the disclosure  
13 statement, the Creditors Committee was able to reach an  
14 agreement on a framework under which it was sufficiently  
15 comfortable to permit management to continue to oversee these  
16 investments; investments that, by the way, these managers know  
17 better than any third party manager would.

18 At the end of the day, the UCC supports this  
19 arrangement because the Creditors' controls are sufficiently  
20 robust and precise, and the costs are fair to allow us to  
21 support the deal. As a result, the plan before you, Your  
22 Honor, has the support of the Creditors Committee, but we still  
23 need to resolve a major open issue regarding the regulatory  
24 role of the Central Bank of Bahrain. With respect to  
25 reorganized Arcapita, as well as with respect to NewCo or AIM.

1 That issue is still be negotiated between the Creditors  
2 Committee and the CBB itself in its regulatory capacity. And  
3 we are hopeful that we will have a resolution of that in the  
4 near term.

5 In addition and, lastly, I have one kind of  
6 overarching comment. The agreements that have been reached  
7 today are in their embryonic term sheet stage, but all the  
8 principal economic terms have been concluded. But many of  
9 these arrangements are kind of bespoke and complex, and will be  
10 reduced to definitive documentation as is kind of standard in  
11 these types of deals, and will be made public on the plan  
12 supplement date. The UCC will need to approve and, in some  
13 cases, draft that documentation. I will expect to do that and  
14 turn to that after today's hearing.

15 So with those caveats, Your Honor, I'm very pleased  
16 to affirm the Creditors Committees' support for the plan. And  
17 we request that the Court approve the disclosure statement,  
18 authorize the solicitation of the plan and set a confirmation  
19 hearing and schedule. Thank you.

20 THE COURT: All right, let me just ask you one  
21 question about what you said which is can you give me a little  
22 more information or sketch out the parameters of the issue with  
23 the Central Bank of Bahrain.

24 MR. DUNNE: Yes. The Central Bank of Bahrain has  
25 regulatory authority over Arcapita now. Reorganized Arcapita

1 is going to continue to be based in Bahrain. And the issue is  
2 the extent and the scope of their regulatory authority. And it  
3 really boils down, Your Honor, to this issue which is if there  
4 were a future administration by the Central Bank of Bahrain,  
5 they take over the bank at some point a year, two or three  
6 years after the Chapter 11 concludes. What can happen that  
7 could prevent the Creditors here from realizing the bargain  
8 they've cut with Arcapita in the plan.

9 So it really comes down to working out some language,  
10 I believe, with the Central Bank of Bahrain that goes to  
11 respecting the plan and the procedures and mechanisms with  
12 respect to governance and time tables that are set in there.  
13 And I think that we have the shape of an agreement on that and  
14 we just need to wordsmith it some more.

15 THE COURT: Right.

16 MR. DUNNE: But we'll see.

17 THE COURT: That's helpful to know. Thank you.

18 MR. ROSENTHAL: All right, Your Honor, as you know  
19 the goal of a disclosure statement is to provide information  
20 sufficient for a hypothetical investor to make an informed  
21 decision about how to vote on the plan. And as you can see  
22 from hundreds of pages before you in the amended disclosure  
23 statement, we provide a wealth of information about history of  
24 the Debtor, the future of the Debtor, the orderly wind down  
25 process, the plan, the co-investor arrangement, the risks in

1 the plan and any other factor that we think is reasonably  
2 necessary for a voting creditor to make an informed decision  
3 about the plan.

4 We filed an initial amended disclosure statement on  
5 the 16th of April. We filed one which was blacklined to the  
6 original version. We filed one late last night or early this  
7 morning and I will go over the changes with you. They were in  
8 response to objections.

9 THE COURT: Yes, I took a look briefly at the one  
10 filed last night, as well as the changes which were blacklined.

11 MR. ROSENTHAL: Correct and we had a small one that  
12 we filed this morning to reflect a change in the cooperation  
13 term sheet to clarify what had been the intent of the parties.

14 THE COURT: All right, well, let me ask you what  
15 makes the most sense in terms of presenting where we are  
16 because I note that many of the objections were filed before  
17 even the first amended plan. And certainly I know there have  
18 been changes that have occurred after that first amended plan.

19 So, and I also know that there really are, at least,  
20 two buckets of comments that were made in the objections. One  
21 which are sort of standard disclosure statement objections and  
22 then two, a whole host of things that relate to plan issues and  
23 even some other things about discovery and either requests to  
24 lift stay which was unusual. So perhaps it makes sense if you  
25 could give me a sort of where are we now on what needs to be



1 addressed and what has been resolved.

2 MR. ROSENTHAL: I know the answers to some, but not  
3 all of your questions. There are actually three buckets, I  
4 believe. One is the bucket of what I would call confirmation  
5 issues. The second is the bucket of what I would call true  
6 disclosure issues. And third is a bucket of what we have  
7 labeled in our responses sort of strategic, either strategic  
8 objections to the plan from parties designed to get information  
9 that might help them in litigation or co-investors for  
10 information that might help them with, not as creditors, but in  
11 their role as co-investors with the Debtors. So, those are the  
12 three buckets.

13 We have resolved fully the claims, the disclosure  
14 objections of HarbourVest and Al Imtiaz. We have through  
15 language insertions addressed many, we think all, of the  
16 disclosure related objections that were raised by the parties.  
17 And we believe that the confirmation objections that were  
18 raised by the parties are properly heard at confirmation, not  
19 at the disclosure statement hearing.

20 THE COURT: All right, can you identify, do me the  
21 favor, the second party that you said whose objections you've  
22 resolved? I have HarbourVest here. And the second party, the  
23 name was?

24 MR. ROSENTHAL: Al Imtiaz.

25 THE COURT: All right, that's what I thought you

1 said, but I wanted to make sure.

2 MR. ROSENTHAL: Now, you know, one of the  
3 difficulties I have, and I was going to ask you how you wanted  
4 to proceed is that we are not sure whether our responsive  
5 language, you know, in the amended disclosure statement  
6 responds to the objections that were raised. We believe that  
7 it does. And in our view it fully responds. You know, we have  
8 not had feedback though from the objectors as to whether they  
9 still have a response. So we can either go line by line on  
10 every single objection, which I don't think is a very efficient  
11 way to proceed.

12 THE COURT: Well, yeah, I have an idea on that. The  
13 way I saw the confirmation objections, I think there are, you  
14 know, really some plan issues that have been identified. And I  
15 think counsel who spend time in Bankruptcy Court, which I think  
16 includes all the folks here, know what plan objections are  
17 really when they see them. So I don't want to spend time  
18 really getting into those with a couple of exceptions just to  
19 identify some things that I have some thoughts on to hopefully  
20 make the next step in the process as productive and efficient  
21 as possible.

22 But, I mean there are things about satisfaction  
23 requirements of the code. And there are all sorts of things  
24 that really are outside the scope of a disclosure statement  
25 objection. So I will tell folks to the extent they're going to

1 get up and object that I really don't want to spend time  
2 talking about those.

3 The only comments and I guess since we're talking  
4 about plan issues that I thought maybe now is a good time to  
5 sort of address some of what those plan objections were and  
6 just a couple observations. So let me do that briefly and then  
7 we'll turn back to the disclosure statement issues.

8 There was a lot about third party releases,  
9 obviously. And that's a plan issue. I see that there's an  
10 identification in the plan of the Metromedia Standard. There  
11 is an identification of what the proposed releases are sought.  
12 I know there's been a tweaking of some of those releases over  
13 time. And so I think that that has moved forward in terms of  
14 narrowing any scope of any objection that will deal with a  
15 confirmation.

16 My only question that I think I'll throw out there  
17 for now that you don't have to answer, but you can address or  
18 just know to address at confirmation is my understanding is  
19 Section, I think its 12(b)(4) which talks about releases, has a  
20 procedure whereby it says with respect to those who do not vote  
21 or vote to reject that they will be released to the fullest  
22 extent permissible by applicable law.

23 And my reading of the case law particularly In re  
24 DBSD, which is a 2009 case from the Southern District of New  
25 York, really talks about parties being bound by exculpation

1 provisions who have assented to them. So I am not sure that  
2 they short of opt-in opt-out. It may be a detail that needs to  
3 be tweaked in terms of allowing folks to essentially opt-out.  
4 And I think there have been plenty of cases that talk about  
5 checkboxes in terms of opting in or opting out.

6 And I do have some concern that if we don't have  
7 anything that memorializes assent that that will be  
8 problematic. So if somebody simply didn't vote that I wonder  
9 if that would satisfy the requirement. But I think again  
10 that's a plan issue, but I thought it would probably be  
11 appropriate to raise that concern now.

12 There were a number of voting issues that were raised  
13 that talked about temporary allowance motions and things of  
14 that sort. And my concern just for sort of the proper running  
15 of things and efficiency is to try to tee up those issues. And  
16 I think the order does that setting some deadlines that are  
17 subject to the Court approval. One thing I do want to avoid is  
18 I've had cases recently where I gotten those sort of motions  
19 that really on the eve of the confirmation hearing and we've  
20 had to have a sort of a mad scramble to resolve them. So I'd  
21 like to avoid that. I think everyone knows what the issues  
22 are.

23 So I think the order does that, but to the extent  
24 that the parties who are likely to face those questions have  
25 any remaining issues with the procedure, I think it's probably

1 appropriate to spend some time just not because the disclosure  
2 issue, just because it's the next step. In somewhat related  
3 fashion there's a lot talking about subordination with respect  
4 to Tide in the Falcon case. And this is something else that in  
5 lifting the stay to proceed with the District Court action, I  
6 believe I said, and certainly tried to make clear, that to the  
7 extent that the estate thought it was appropriate and necessary  
8 to deal with subordination in terms of getting the plan  
9 confirmed that that certainly that is an issue that should be  
10 here as opposed to the merits being there.

11 I don't know what that litigation looks like. It may  
12 be between that and voting issues since there isn't substantive  
13 consolidation that it might make sense to have a confirmation  
14 hearing with Falcon essentially carved out and dealt with  
15 separately. It may not. It may make sense to have essentially  
16 a two-part confirmation hearing where we essentially deal with  
17 all of our subordination issues up front and not have everybody  
18 else waving [indiscernible]. I don't know what the litigation  
19 looks like, obviously. I have some idea from the papers, but  
20 not really.

21 So I'd ask folks to think about that, what's the most  
22 efficient way to deal with it, because I can see the last thing  
23 anybody would want is sort of come in for a confirmation  
24 hearing and sort of have a surprise and a kind of a unwieldy  
25 process. So I think we should at least think about that. And

1 between that and the voting issues, it may be that it makes  
2 sense to put Falcon sort of on its own separate track which  
3 I've seen done in some circumstances.

4 So those were really the plan issues that I think are  
5 worth just, at least, raising today not as appropriate to  
6 necessary to deal for purposes of approving the disclosure  
7 statement, but just as the next step issues. And the only  
8 things that I saw out there that were, they're not plan issues,  
9 but they are not disclosure statement issues where it seemed to  
10 be a request to lift stay and the Cayman Court. And,  
11 obviously, if I have a request for that I need a motion. I'm  
12 not going to consider it until I have a motion. So I'll leave  
13 that the parties who are interested in that to do that.

14 And, finally, was an issue about discovery which I  
15 assume will be worked out in the context of the lead up to  
16 confirmation. If there's any dispute about that, you can  
17 contact Chambers and we'll hammer something out. But I think  
18 we're talking about 28 days here which I would think under the  
19 circumstances is probably sufficient; certainly, I've seen a  
20 whole lot less. But the devils in the details with that, so  
21 I'm not going to get into that any further today subject to the  
22 parties.

23 A lot of these are scheduling kind of issues, so I  
24 encourage folks if it's helpful to get the Court involved at  
25 all. Just pick up the phone, call Chambers, we'll set up a

1 telephone conference and try to hammer through anything that  
2 you haven't worked out by agreement. But just let me know how  
3 the scheduling looks like as we get closer to the actual  
4 confirmation hearing.

5 MR. ROSENTHAL: Fine, Your Honor, thank you for the  
6 input. Just some brief comments. The releases we do believe  
7 that we can support the releases at confirmation under  
8 applicable case law including more recent case law. With  
9 respect to -- but it's important to note that to the extent  
10 that a party does not vote and is deemed to have given a third  
11 party release, that's only to the extent permitted by law. If  
12 it turns out that it's not permitted by law, then there is no  
13 release.

14 THE COURT: I understand and I know sometimes that  
15 kind of language can be used to resolve issues rather than  
16 fight about it and I've certainly seen that in the Government  
17 context from my prior days when I knew that it was not  
18 productive to essentially have a trial about a hypothetical  
19 issue. At the same time generally I like -- I mean if there's  
20 concern about the scope of the release and the mechanism for  
21 the release under applicable law, I think I have an obligation  
22 to address that. But it's premature. I just wanted to  
23 identify the DBSD case which I'm sure you're familiar with  
24 anyway and what my concern is.

25 MR. ROSENTHAL: Procedures order, I mean I think that

1 we have addressed, you know, all of the voting procedures  
2 issues. I think that the date is the 16th we proposed, May 16  
3 for the order. I think we will. We will give parties an  
4 adequate opportunity to come in and seek to allow their claim  
5 for voting purposes that also allows them -- one of the  
6 objections was I objected to classification. It also allows  
7 them to object to the proper classification.

8 We're talking about a confirmation hearing on June  
9 11. I think the Court has time available. And I had thought,  
10 I think that the deadline for parties who want to object to  
11 their classification or seek to allow their vote is May 15th.  
12 So there will be some significant period of time.

13 THE COURT: And let me just confirm June 11th is the  
14 new date. I think you had requested the prior week, but I  
15 confess I think we have some other things that are going to be  
16 almost challenging to work you in on the prior week.

17 MR. ROSENTHAL: At 11:00, at 11:00. Subordination,  
18 Your Honor, we're sensitive to the points you raised about  
19 Falcon. We do think, though, as we're currently standing here  
20 the Tide treatment is tied up with the overall plan, but we'll  
21 certainly take the Court's --

22 THE COURT: Well but it's only with the overall plan  
23 with Falcon, right? I mean is there any -- I was having  
24 trouble seeing how resolution of that would affect any of the  
25 more global resolution chief, but I should make that



1 assumption. Obviously, I rely on the parties who have been  
2 doing all the negotiating.

3 MR. ROSENTHAL: I think they've asserted claims  
4 against Arcapita Bank as well. And the question is how was  
5 that treated and there's a subordination issue there as well.  
6 The ongoing litigation in the District Court I'm not directly  
7 involved with that, but I think it's moving very slowly.

8 THE COURT: Right, well that's why I said to the  
9 extent subordination needed to be addressed here that's fine.  
10 What would you anticipate that would look like in the context  
11 of scheduling of the confirmation hearing and how long do you  
12 think it would take?

13 MR. ROSENTHAL: I actually -- Mr. Millet has been  
14 working on that, but my sense is that it would not take that  
15 long. Part of this, most of this is a legal issue. And I  
16 think that it may have even been briefed to you before when we  
17 were talking about the motion --

18 THE COURT: Yeah I did see a number of briefs that  
19 addressed that. I wasn't sure if that was the sum and  
20 substance and I can't remember whether any of those addressed  
21 the need for further evidence or not. Sitting here today I  
22 can't --

23 MR. ROSENTHAL: I don't believe so, but I'm sure the  
24 Tide side will tell you what they think.

25 With respect to the lift stay, all of the lift stay

1 discovery issues you raised were issues related to SCB. We  
2 hope those go away quickly in any event. But to the extent  
3 that we need to do expedited discovery with respect to SCB,  
4 we're happy to move heaven and earth to do that, and I think  
5 it's highly unlikely we'll need the Court's involvement in  
6 that.

7 THE COURT: All right. So those were my general  
8 thoughts about things other than disclosure statement issues.  
9 It's probably s cart before the horse presentation, but now I  
10 guess we can turn back to the actual disclosure statement  
11 objections.

12 MR. ROSENTHAL: Your Honor, maybe I can start by  
13 handing up to you a three or four page chart we've done of the  
14 most recent revisions.

15 THE COURT: All right that would be helpful. Yes,  
16 please. I mean I put them into, I guess, five different  
17 buckets for what that's worth: post-confirmation governance,  
18 treatment of executory contracts or information about executory  
19 contracts and the process by which they'll be dealt with, third  
20 party releases, the specific objections of Tide in the Falcon  
21 case. And then the other more umbrella less precise category  
22 would be disclosure of more information regarding Debtors'  
23 business and how the plan impacts various stakeholders. And  
24 that has a wide variety of issues. So that's how I was  
25 thinking about it. And there's a lot of overlaps certainly in

1 some of the issues that I know have been dealt with.

2 MR. ROSENTHAL: Well on the general question of -- I  
3 mean I can take those general issues. Post confirmation  
4 governance we've spent a ton of time describing the cooperation  
5 agreement term sheet which is the underpinnings of all the  
6 governance mechanism both from the perspective of how  
7 reorganized Arcapita will be governed and managed and how the  
8 assets will be managed in the orderly wind down which is the  
9 substance of this management services agreement with AIM.

10 We do not have the names -- currently the names of  
11 the board members who will be on the board of directors of  
12 reorganized Arcapita. But as is fairly typical in Chapter 11  
13 plans, those names and their resumes will be filed by the plan  
14 supplement day which is 10 days before the confirmation  
15 hearing. And the procedures and mechanisms for appointing  
16 those members are clearly set out in the equity term sheet and  
17 the disclosure statement which describes it. Because there's a  
18 complicated mechanism that was negotiated with the UCC whereby  
19 until a certain amount has been distributed to Creditors  
20 basically an amount necessary to pay the AIHL Creditors in  
21 full, the board members will be primarily nominated by the AIHL  
22 side of the house, if you will.

23 Once that repayment has occurred, there will be a  
24 shift in who has the ability to nominate members of the board  
25 and it will shift to the bank having the ability, the bank

1 creditors having the ability to nominate majority of the  
2 members of the board. So that is described, we believe it is  
3 sufficiently described in the disclosure statement.

4 With respect to executory contracts we've made a  
5 couple of changes. One at the Committee's request, we've added  
6 that the Committee has a consent right with respect to the list  
7 of assumed executory contracts. The default in this plan is  
8 that there will be, that all executory contracts will be  
9 rejected. In the event that -- there are a couple of  
10 exceptions including the agreements that surround the LaSalle  
11 land that we've talked so much about in this Court which will  
12 be assumed. We intend to assume those. They're part of the  
13 overall deal to maximize value and there is some additional  
14 language that's been added about the fact that those agreements  
15 would be assumed. There will be a slight modification to one  
16 of the agreements to provide that QRE, which is the party that  
17 actually owns the shares that were transferred in the LaSalle  
18 sale transaction, would not get any distributions, be entitled  
19 to get any distributions until the LaSalle interests were sold.

20 But separate from that, the executory contract  
21 assumption list of what we filed I believe no later than the  
22 plan supplement -- yeah in the plan supplement and the UCC will  
23 have a consent right with respect to what goes over that. The  
24 Debtors are in the process of evaluating what, if any,  
25 executory contracts would be assumed. Remember, that this

1 entity on an ongoing basis is basically going to be engaged in  
2 an orderly wind down. It will have few, if any, employees.  
3 Most of the management and advisory agreements will be, have  
4 been contracted to AIM. And so the necessity to continue  
5 contractual relationships is going to be carefully scrutinized.

6 We obviously don't want to reject agreements that  
7 cause change of control issues, loss of value, loss of  
8 important rights that the estates need. But that is a process  
9 that's currently underway between the Debtors and the UCC. I  
10 know that various parties have asked the Court to, have asked  
11 for further information and asked whether their agreements  
12 would be assumed or rejected. I don't believe that we have a -  
13 - we're required to do that by the time the disclosure  
14 statement is sent out. We have a process for presentation of a  
15 list of assumed executory contracts. We have a process in the  
16 order for when cure objections need to be filed. So that's the  
17 typical way that I think this is handled in Chapter 11 cases.  
18 We'll endeavor to notify parties as soon as we know and can  
19 make a determination about whether their agreements will be  
20 assumed or rejected.

21 We addressed the third party releases. You had a  
22 bucket of disclosure of the Debtors' business. Now some of the  
23 issues that HarbourVest, for example, HarbourVest issues  
24 related to are we attempting to affect, impair, impinge on the  
25 rights of HarbourVest. HarbourVest is what we've called in the

1 revised disclosure statement a direct investor. They didn't  
2 invest syndication companies which might have five or 10 or 50  
3 investors as owners. Rather, they formed their own company.  
4 And when they did an investment with the Debtor, it was  
5 alongside the Debtor through their own entity that they  
6 controlled, that HarbourVest controlled. And we've inserted  
7 language in the disclosure statement after discussions with  
8 HarbourVest counsel that clarifies that there's no intent to  
9 impinge on the rights of parties such as HarbourVest.

10 THE COURT: All right.

11 MR. ROSENTHAL: If you look at what I just handed you  
12 and we can go over it quickly, you'll see on the left column  
13 the page numbers of where we've made changes to the disclosure  
14 statement to address categories of issues. The first change  
15 relates to the exit facility. Because we wanted to provide for  
16 sufficient funding to emerge from Chapter 11 and because we  
17 wanted to provide for sufficient funding to take out our DIP  
18 loan and take out Standard Charter Bank if an agreement of that  
19 type can be reached. We had to reflect in the disclosure  
20 statement the range of the exit financing. And the disclosure  
21 was changed from what it had previously been to a range of \$250  
22 million dollars to \$350 million dollars.

23 Second point, Standard Charter had raised a concern  
24 that the new SCB facility would be sharia compliant and you  
25 couldn't do a sharia compliant facility without Standard

1 Charter's consent. We don't believe that that's true, but,  
2 nevertheless, we have deleted the requirement that it had to be  
3 sharia compliant if we had an extended payment to Standard  
4 Charter. You'll see in three places we added additional  
5 disclosure regarding the modification to the LaSalle  
6 transaction documents. That was what I was just talking to the  
7 Court about, the documents that will, the agreements that will  
8 be assumed on the effective date.

9 Number four, we, you know, part of the agreement with  
10 the Ad Hoc Groups is a recognition of the contribution that  
11 they have played in the formulation of the plan and the  
12 cooperation settlement term sheet and so we added some  
13 disclosure there. You'll see on page 20 the language that we  
14 added for LMTI [phonetic] clarifying that the plan doesn't  
15 directly affect the right to investors in syndication companies  
16 with respect to their ownership interest in those companies.

17 THE COURT: Just to get back to the Ad Hoc Group is  
18 that substantial contribution vehicle, is that really what  
19 we're talking about?

20 MR. ROSENTHAL: Yes, but effectuated through the  
21 plan. Actually the last two bullets, you'll see the bullet  
22 where we addressed the LMTI's objection, the last bullet deals  
23 with all of the revisions that we made in coordination with  
24 [indiscernible] regarding HarbourVest. Sorry they came in so  
25 late, but we were negotiating those until about 8:00 or 9:00

1 last night.

2 If you look at the top of the second page, there had  
3 been a number of objections, some objections, not a number;  
4 some objections including HarbourVest which had highlighted  
5 that the benefit that the objectors sought to the retention of  
6 the deal team members that currently oversee these assets. And  
7 we added a disclosure at their request about the benefits of  
8 those deal team members. But at the same time, we added the  
9 disclosure that we were, you know, there could be no assurance  
10 that every single deal team member will actually be engaged on  
11 an ongoing basis. Obviously, there will have to be  
12 satisfactory compensation arrangements and the like negotiated.  
13 And we're sensitive to those concerns, as well as the concerns  
14 that co-investors might have about alternative investment  
15 professionals.

16 The next bullet really relates to the way we describe  
17 the cooperation term sheet particularly as it relates to the  
18 obligation of AIM and reorganized Arcapita for severance  
19 obligations. And that was also the subject of the filing this  
20 morning. Because there is an allocation of those obligations  
21 in the cooperation settlement term sheet, we made disclosure of  
22 that in the disclosure statement and there will be in the  
23 implementing documents -- the implementing documents will  
24 implement that allocation which depends on whether the  
25 employees are senior management members, whether those



1 employees are employees who are subsequently rehired by AIM, or  
2 whether those employees are employees who are terminated and  
3 not rehired.

4 There was when we filed, and I'm still on the second  
5 box. There was when we filed, the amended plan on the 16th.  
6 There was an open issue which we simply could not resolve  
7 before the deadline to file and we resolved the next day. It  
8 related to the claims that the senior managers would release in  
9 connection with the senior manager global settlement. And we  
10 have clarified in this disclosure statement and the term sheet  
11 that they were released. All of their employment related  
12 claims, not just their severance claims; their bonus claims and  
13 all other employment related claims. They're retaining  
14 indemnification claims and they're retaining their claims which  
15 are relatively small; their claims as depositors. In one case  
16 the claim is \$2,000.00.

17 The next change, Your Honor, on page 85 clearly we  
18 want to indicate that SCB has not consented to the treatment we  
19 provided for them. And that they may object to the plan;  
20 however, that treatment is certainly available for acceptance  
21 by them if they want to. And, in addition, there are ongoing  
22 negotiations over other treatment.

23 Same thing with the next change; SCB had made the  
24 argument that absent their agreement to treatment, they were  
25 entitled under the Adequate Protection Cash Collateral

1 Provisions relevant to them and that were entered in connection  
2 with the EuroLog transaction that they would have an allowed  
3 administrative expense plan. So we have disclosed that in the  
4 event that we don't have SCB's consent to waive that claim that  
5 that would be an administrative expense claim which would have  
6 to be paid in full on the effective date.

7 Page 127 was a request from the Committee adding  
8 disclosure clarifying that notwithstanding that many of the  
9 administrative functions will be delegated to AIM that  
10 reorganized Arcapita will retain control over treasury  
11 functions. It will have control over its bank accounts.

12 The change on 127 is a change in response to the Tide  
13 comments that the board of Falcon will be made up of the  
14 current officers and directors; although there is a provision  
15 in the equity term sheet that allows in certain circumstances  
16 the new board of reorganized Arcapita to replace those officers  
17 and directors. If that were to occur on the effective, it  
18 would be part of the filings with the plan supplement.

19 Top of page 3, the cooperation term sheet provides  
20 for the continuation of certain causes of actions including  
21 certain avoidance causes of action. It provides for the  
22 release of certain causes of actions including avoidance cause  
23 of action, but it also provides that anything that's not  
24 released would survive. So we wanted to clarify in the  
25 disclosure statement that those causes of action together with

1 any relevant attorney/client privilege would be transferred to  
2 new Arcapita Topco on the effective date.

3 The next box page 168 was a change also to address  
4 SCB's objection. We added disclosure that SCB wanted that they  
5 believe that 1129(a)(10) would be violated if they do not vote  
6 to accept the plans for WindTurbine 892 and Realignvest and Long  
7 Term Holdings. We added the disclosure. We disagree with the  
8 result. We think that there is legal basis for confirming over  
9 the rejection of Standard Charter, but that's a confirmation  
10 issue, Your Honor.

11 Next bullet we added, again, to address an objection  
12 disclosure that Creditors may argue that their claims are  
13 improperly classified. And then we added a disclosure that SCB  
14 retains their rights if we do not reach an agreement with them  
15 and that they intend to object to the entry of the Cayman  
16 order. That's a disclosure item. Again, we hope to have that  
17 resolved well in advance of the Cayman hearing which I want to  
18 talk to you about in a second.

19 And then you'll see a couple changes in the plan  
20 glossary. One relates to something I already discussed with  
21 you which is that the assumed executory contract list would be  
22 jointly determined by the Committee and the Debtors. And the  
23 other is a clarifying change to deal with two of, what the SCB  
24 objection related to their administrative expense claim. So  
25 those are the most recent changes from the April 16th draft to

1 the draft that was since before yesterday.

2 Based on that, I'm unclear really what additional  
3 objections exist.

4 THE COURT: Well I think now is the time to find out.  
5 So there has been substantial additional disclosure since the  
6 filing of most of the objections in both the first amended plan  
7 and as discussed in some detail the second amended disclosure  
8 statement. So in light of that any party that objects to the  
9 disclosure statement, I would like to hear from them as to what  
10 issues remain for me to address.

11 MR. WOOD: Your Honor, Trey Wood on behalf of Tide.  
12 I don't have any disclosure statement objections, but I would  
13 like to be heard on the subordination issue. Do you want to do  
14 that later?

15 THE COURT: Well let's do that later, so you have no  
16 remaining objections to the disclosure statement, but you have  
17 other issues that we should chat about?

18 MR. WOOD: Yes, Your Honor.

19 THE COURT: All right, thank you.

20 MR. SALZBERG: Good morning, Your Honor, Mark  
21 Salzberg Patton Boggs on behalf of Mahoola for Investment or  
22 MFI. Your Honor, we had objected to the third party releases.  
23 We had taken two positions in our objection, and we had  
24 actually filed an addendum to the objection when they filed  
25 their first amended disclosure statement. I understand the

1 Court's concern or the Court's opinion that this is really a  
2 confirmation issue. And so we'll leave some of these arguments  
3 for the confirmation hearing, if necessary.

4 I rise just to echo the Court's comments regarding  
5 the opt-in and the lack of consent as is as the disclosure  
6 statement right now reads, but the other thing that I would ask  
7 Your Honor is that the disclosure concerning the necessity or  
8 the propriety of the third party releases is missing, even from  
9 the second amended disclosure statement. What the Debtors have  
10 effectively done instead of making a factual presentation in  
11 terms of these are the facts, this is why this case is unique  
12 as a Second Circuit used that term in Metromedia is they simply  
13 say see Metromedia, see its progeny. We fall within those  
14 cases. But there's no information. There's no disclosure in  
15 the disclosure statement concerning the third party releases,  
16 why they're necessary and why they're appropriate. Why this  
17 case is "unique" as that term is used in these cases. So if  
18 one were to look simply as a disclosure statement issue, we  
19 still think there should be additional disclosure concerning  
20 the third party releases and why they're appropriate.

21 THE COURT: All right well I've had other cases where  
22 I asked Debtors in a disclosure statement to just explain their  
23 position and add another paragraph and then add the fact that  
24 there are other parties who may or may not agree with them on  
25 that. And it would seem to me probably a fairly easy fix to do

1 here. Mr. Rosenthal, does that make sense to you?

2 MR. ROSENTHAL: That's fine, Your Honor, I think we  
3 have something in there, but we'll --

4 THE COURT: I think you do. I think you're on the  
5 road to that certainly. So I just -- it will probably make any  
6 discovery issues or conversations between now and the plan a  
7 little easier anyway so that people will know what we're  
8 fighting about. So I would think that sounds like something  
9 Debtors are willing to do and that can resolve the disclosure  
10 statement issue.

11 MR. SALZBERG: Yes, thank you, Your Honor.

12 THE COURT: Thank you. All right anyone else who  
13 wants to be heard on disclosure statement issues?

14 MR. GREER: Good morning, Your Honor, Brian Greer of  
15 Dechert LLP for Standard Charter Bank. I hear Your Honor loud  
16 and clear about talking about confirmation objections and plan  
17 objections. And we'll save that for another day, but we did  
18 think it was important to highlight them in this objection so  
19 that the Court was aware that there are some serious issues  
20 facing this plan at confirmation. And it's our view that this  
21 plan will be dead on arrival in light of our objection both in  
22 this Court and in the Cayman Court.

23 Talking about the Cayman Court, I think Mr. Rosenthal  
24 was going to talk to Your Honor about the scheduling of that  
25 hearing. We had mentioned an hour disclosure objection that we

1 would need relief from the automatic stay to address our Cayman  
2 law issues. And when we filed our objection, we were under the  
3 impression that the Cayman hearing was going to occur after the  
4 confirmation hearing in this Court. Now it's my understanding  
5 based on the Debtors' reply that that hearing is going to occur  
6 on May 31st, is that right Mike?

7 MR. ROSENTHAL: Yes, Your Honor, I can give the Court  
8 some background when Mr. Greer is done.

9 THE COURT: Well let me ask if there's any objection  
10 to allowing Standard Charter Bank to proceed and make whatever  
11 arguments it wants to make in the Cayman Islands Court. Mr.  
12 Rosenthal, do you have a view about that? What I'm hearing is  
13 that there's some concern about Standard Charter potentially  
14 being in violation of the automatic stay, to make certain  
15 arguments in front of the Cayman Court, and I don't know what  
16 the Debtors' position is on that.

17 MR. ROSENTHAL: Your Honor, the Debtor this was --  
18 the Debtor doesn't believe that that would be a problem. The  
19 Committee has a different view, but the Debtor doesn't believe  
20 that's correct.

21 THE COURT: Well my question is whether there's some  
22 sort of stipulation about what can happen in the Cayman Islands  
23 Court that would resolve this issue. So it sounds like it's  
24 not an issue from the Debtors' point of view. Let me hear from  
25 the Committee.

1 Well let me make this offer and then you can tell me  
2 whether you want to address it now or avail yourself of this  
3 possibility. What I could do it's clearly not a disclosure  
4 statement issue. So what I could do is say that I'll  
5 anticipate the parties will have a discussion and hopefully  
6 reach an agreement about what the best way and appropriate way  
7 to proceed in the Cayman Islands Court. And then if you can't,  
8 then I would expect to get a motion to lift stay to tee up the  
9 legal issue for me to decide.

10 MR. FLECK: Your Honor, good afternoon Evan Fleck  
11 on behalf of the Committee. That's fine. I'm sorry I was  
12 trying to address a different concern from a different party on  
13 the disclosure statement. But that is the Committee's position  
14 that exactly as you articulated that a motion should be filed  
15 and presently we would expect to oppose that motion, but  
16 Standard Charter has its rights to seek stay relief.

17 THE COURT: Well I guess what I'm asking is rather  
18 than have the motion filed and then have the conversation --

19 MR. FLECK: No absolutely, Your Honor, we would --

20 THE COURT: -- so that, that's fine.

21 MR. FLECK: We've had very constructive dialogue with  
22 Standard Charter Bank. We don't have a resolution now and I  
23 think at this point we're planning to have a confirmation  
24 issue. But we absolutely would welcome a discussion with them  
25 on this issue as well.



1 THE COURT: All right so why don't we do that. Have  
2 a discussion, if you work something out I'm happy to obviously  
3 to get an agreement placed in front of me, but if not I'll  
4 expect to get a motion to address the issue and that you need  
5 to do that, I guess. There's enough time to really tee it up,  
6 though.

7 MR. GREER: One point I'll just note on the lift stay  
8 point, I mean this issue has been joined by the Debtor. This  
9 plan is subject to Cayman Court approval. We are a Creditor of  
10 the Cayman entities. I don't think the stay applies at all,  
11 Judge.

12 THE COURT: I understand. All right anything else?

13 MS. BANNIGAN: Good afternoon, Your Honor, Megan  
14 Bannigan from Debevoise & Plimpton appearing for HarbourVest  
15 Partners, LLC.

16 HarbourVest is a significant investor in Arcapita  
17 Portfolio Companies some of which are major investments. As  
18 noted by Mr. Rosenthal, we have resolved our disclosure  
19 statement objections. We appreciate the hard work this week on  
20 resolving those issues. And we just have two issues, Your  
21 Honor, very briefly highlight for going forward.

22 The first as also noted already -- well first of all,  
23 I'll note that our interest, we believe our interests are  
24 completely aligned with the Debtor and with the Creditors  
25 Committee with respect to maximizing the value of the assets

1 going forward. One very important point we see is that the  
2 existing deal team remain in place. We're working on a  
3 mechanism. We think that is the best way to maximize value to  
4 keep the people who are most familiar in place.

5 Second is that as also noted HarbourVest is not a  
6 [indiscernible] to the cooperation settlement term sheet, other  
7 their third party investor with their own contractual rights.  
8 We also look forward to continuing discussions over the next  
9 few weeks to determine if HarbourVest can either sign on to the  
10 term sheet or work for an agreement to, otherwise, implement  
11 the disposition committee mechanism which requires  
12 HarbourVest's consent.

13 THE COURT: All right.

14 MS. BANNIGAN: Thank you very much.

15 THE COURT: Thank you.

16 MR. ROSENTHAL: Your Honor, may I respond to that?

17 THE COURT: Sure.

18 MR. ROSENTHAL: We have made changes to the  
19 cooperation term sheet that are included in what you have that  
20 take into consideration those issues that HarbourVest raised.  
21 And basically the change is that in situations where we don't  
22 have a direct investor like a HarbourVest and where the  
23 syndication companies and reorganized Arcapita are the only  
24 owners of the transaction Holdco that owns the operating  
25 company. They can agree to change the articles anyway they

1 want. They're the owners of it.

2 In situations where you have syndication companies,  
3 reorganized Arcapita and a direct investor like HarbourVest  
4 either we can talk to HarbourVest and have an overall  
5 comprehensive agreement to do it through a change of the  
6 articles or we can have an agreement simply between the  
7 syndication companies and reorganized Arcapita that deals with  
8 their interest and leaves HarbourVest whatever rights it has.  
9 So we made a change --

10 THE COURT: It doesn't purport to change HarbourVest  
11 --

12 MR. ROSENTHAL: Does not -- expressly does not  
13 purport to change any rights that they have.

14 THE COURT: All right, thank you.

15 MR. KLEINER: Good morning, Your Honor, Doug Kleiner  
16 from Vinson & Elkins for Al Imtiaz Investment. Also I have in  
17 the Courtroom my colleagues Ari Berman & Laurel Fensterstock.  
18 We filed a disclosure statement objection that had two  
19 principle points. One was relating to the releases and we  
20 noted in our objection that that was really a preview of a  
21 confirmation objection. And, obviously, we're content to fight  
22 that another day. But we do want to note we share Your Honor's  
23 concern maybe even a greater concern that to the greatest  
24 extent permissible by law, the scope of the releases was  
25 actually more harmful than helpful because it really puts off

1 to another day the uncertainty about what actually was or  
2 wasn't released. But that's not for today, but I wanted to  
3 note that we actually very strongly share that concern.

4 Our second objection related to the portfolio  
5 investments of Arcapita and we had objected on disclosure  
6 grounds saying that there wasn't sufficient information about  
7 the assets and what was going to become of them. Since that  
8 time three things have happened really. One is we've been in  
9 discussions with the Debtors that have been cooperative as to  
10 the nature of our investment. Two, the additional language  
11 that you've heard about today describing the extent to which  
12 rights would not be affected was provided in the disclosure  
13 statement. And, third, by far the largest change is that the  
14 cooperation agreement term sheet was filed and that set forth a  
15 lot of detail of what was going to happen. So from a  
16 disclosure standpoint, we've been satisfied.

17 What we do want to make clear, though, as investors  
18 in the syndication companies, we've not been involved in the  
19 discussion about the cooperation agreement. And it's not at  
20 all clear to us that that outcome is one that we're satisfied  
21 with, although it may be one that we will be. We intend to, at  
22 least, talk constructively with the Committee and with the  
23 Debtors going forward about our participation in that process,  
24 if that's appropriate. And, hopefully, we'll be able to work  
25 on a resolution where the cooperation agreement is agreeable to

1 all the investors in the syndication companies.

2 At this point, though, we're not there yet and so we  
3 may very well be back in front of you with objections at  
4 confirmation based on the inappropriate confirmation agreement.  
5 But as noted as a disclosure matter, we've been satisfied.

6 THE COURT: Fair enough. Thank you. All right  
7 anyone else who I have not heard from who wishes to be heard on  
8 disclosure statement issues? All right with that, let me hear  
9 from the Committee.

10 MR. FLECK: Thank you, Your Honor, once again Evan  
11 Fleck for the Committee. I have one clarifying change to the  
12 disclosure statement specifically it relates to Exhibit D the  
13 equity term sheet. Mr. Rosenthal referred to it earlier. We  
14 think that the equity term sheet does provide comprehensive  
15 disclosure with respect to the population of the Topco board,  
16 reorganized Arcapita, and related matters.

17 There has been an agreement between the Committee and  
18 the Ad Hoc Group that with respect to the category of board  
19 members that's referred to as the AIHL directors that the  
20 Committee members will be appointing those directors will do so  
21 in consultation with the Ad Hoc Group. That's acceptable to  
22 the Committee. We understand that's acceptable to the Debtors.  
23 And, in fact, our cooperation and plan term sheet provides that  
24 the Committee will determine such matters, so I think we're all  
25 in agreement though that that change is acceptable and wanted

1 to make that clarification. I think we'll work with Debtor  
2 just to have that so stated in the disclosure statement.

3 THE COURT: All right, thank you.

4 MR. ROSENTHAL: That's certainly acceptable to us.  
5 Your Honor, before close the disclosure statement hearing, I  
6 don't want to delay the process because we have some very hardy  
7 fast deadlines. But at the same time, I don't want to get to  
8 confirmation and have a confirmation issue. So the Debtors  
9 would be willing to change the third party release to an opt-  
10 out. We think we can do it overnight which would require a  
11 little different disclosure in the disclosure statement, but  
12 it's typical. I mean we've all done it in other cases, and  
13 would require a little change to the plan so that if you voted  
14 for the plan you were deemed to give the release unless you  
15 opted out. So I make that offer.

16 I don't want to delay the process. And the reason I  
17 don't want to delay the process, we have a May 31st hearing  
18 before the Chief Judge of the Cayman Court. That hearing was  
19 somewhat difficult to obtain and, more importantly, is the only  
20 hearing the Judge has between May 31st and sometime in August.  
21 While we could go before another Judge, this Judge has heard  
22 every single matter in this case, is the Chief Judge, and we  
23 believe should be the Judge that hears this application. And  
24 it's for that reason that we have or one of the reasons that we  
25 have the 28 day voting period that ends on May 29th that allows

1 us to have a certification of a vote in time for the May 31st  
2 hearing.

3 All of that begins by enabling us to send out the  
4 disclosure statement and the rest of the solicitation package  
5 by sometime early next week. We've arranged for that and we  
6 can do it by changing -- even if we change the ballots. But  
7 there's a timing issue and I wanted the Court to be aware of  
8 that. What we're trying to do just to give the Court some  
9 comfort on the notice that we're providing to people and the  
10 opportunity to vote, we've made provision in the order that  
11 solicitation packages can be sent by e-mail. And we have a  
12 tremendous number of e-mail addresses for the parties. And if  
13 they are not sent by e-mail, we intend to send them by DHL,  
14 some overnight messenger. Now our overnight messenger still  
15 takes a couple days, because most, if not all of them, are  
16 going internationally. But our intent is to get these packets  
17 in front of voting creditors as quickly as possible.

18 THE COURT: All right. Hold on one minute. All  
19 right I had a couple of comments on the order and your comment  
20 about e-mail service made me think of them, but I helpfully  
21 left it in the other room, so give me a minute. But in the  
22 meantime I just had a, just too sort of complete the circle  
23 here. As to the changes in releases I certainly I am always a  
24 fan of trying to resolve problems. And that's why I raise it  
25 in the first place because obviously sent it is truly a

1 confirmation issue. But I thought that it might be helpful to  
2 raise today, so certainly I'm a big fan of that.

3 I certainly understand the need to keep that hearing  
4 date with the Cayman Islands Court. I don't think I've heard  
5 anything to the contrary from any party here today. Happily,  
6 we have enough time to tee up a motion to lift stay if that's  
7 necessary dealing with the Cayman Islands Court. We'd be in a  
8 different circumstance obviously if that were hearing more  
9 Tuesday, for example. So I think we're all right on that.

10 I have a couple of comments in the order and we'll  
11 get to them in a minute. What I am going to ask the parties to  
12 do and this really isn't a disclosure statement issue, but I'm  
13 going to ask the parties we do need to talk about subordination  
14 and sort of what that proceeding looks like in a minute, so I  
15 don't want to leave today without having that conversation.  
16 And one or two other two things to talk about I just wanted to  
17 ask the Committee, it sounds like given that this, this is sort  
18 of part of the global resolution of things that the proposed  
19 sort of recognition of the Ad Hoc Group's contribution in terms  
20 of, I guess, picking up various costs is something the  
21 Committee supports in terms of the substantial contribution  
22 analysis.

23 MR. DUNNE: We do, Your Honor.

24 THE COURT: All right, now the reason why I mention  
25 that is certainly one could make the argument that since



1 there's a specific provision of the code that deals with how  
2 you should handle that, that it should be done that way. Other  
3 folks will say well you can do it in the plan. That's a very  
4 interesting issue. But it sounds like parties have the view  
5 that it's not necessary to pick either road because they  
6 satisfy both. So I would ask that you get that information to  
7 me so that I can make an appropriate finding to the extent that  
8 that's a request and we don't have to have very interesting  
9 legal issue to resolve.

10 And I think those were all of my comments other than  
11 to the order. So let me first approve the disclosure statement  
12 hearing; I'm sorry the proposed disclosure statement subject to  
13 the two things that Mr. Rosenthal has identified. One is some  
14 additional disclosure about the Debtors' view about releases  
15 which now will change in light of the proposed change to the  
16 releases. And under Section 1125(b) an acceptance or rejection  
17 of plan may not be solicited after commencement of the case  
18 under this title unless it's transmitted to such holder of an  
19 interest, a written disclosure statement. And that is approved  
20 after notice of hearing by the Court containing adequate  
21 information. And 1125(a) of the Bankruptcy Code defines  
22 adequate information as information of a kind and its  
23 sufficient detail as far as reasonably practicable in light of  
24 the nature and history of the Debtor and the condition of the  
25 Debtors' books and records, etc. etc. that would enable such a

1 hypothetical investor of the relevant class to make an informed  
2 judgment about the plan.

3 I think the disclosure statement here is quite  
4 [indiscernible]. I think it more than satisfies the  
5 requirement of adequate information. I think that the parties  
6 here have very sensibly addressed the issues in sort of  
7 different buckets in having resolved the waterfall issues and  
8 moved onto the important governance issues; I think all of  
9 which have been more than adequately disclosed here.

10 So for all those reasons, I will grant the request to  
11 approve the disclosure statement consistent with the provision  
12 of the code, as well as applicable case law in this district  
13 including In re Ionosphere Club Inc. 179 B.R. 24 Bankr. SD of  
14 New York 1995, and In re Momentum Manufacturing Corp. 25 F.3d  
15 1132 2nd Circuit 1994. I find that the information provided is  
16 adequate which is a case by case determination, and I think it  
17 is more than appropriate for the circumstances of this case  
18 here.

19 So with all that said I did want to have a brief  
20 discussion about and I think counsel for Tide had asked to have  
21 a brief discussion about subordination, so it sounds like now  
22 is the time to do that.

23 MR. WOOD: Thank you, Your Honor, Trey Wood on behalf  
24 of Tide. Your Honor, we did object and we do object to the  
25 subordination issues being tied to confirmation on the current

1 time table that's being proposed. And that is we're having to  
2 try the subordination as I understand between now and the 11th.

3 THE COURT: Well let me explain my view about the  
4 Tide controversy in general. Certainly, I know that in lifting  
5 the stay to go to District Court that's something that your  
6 client asked for. And I realized in doing that that it might  
7 result in a time table that was not particularly friendly to  
8 the Debtors and this case. I thought it was appropriate given  
9 the level involvement that the District Court had had up to  
10 that point. But I think the ying to the yang there is that to  
11 the extent that there are bankruptcy issues that are  
12 appropriate to address here they were going to be addressed. I  
13 think I should have made that invitation at the same time I  
14 granted the motion for relief from stay.

15 My recollection of the briefing on the lift stay  
16 papers which included very almost complete, maybe not quite,  
17 but pretty extensive discussions of the subordination question  
18 was that it's largely a matter of law. And in any event, it's  
19 very important for the estate to address that question and  
20 resolve it. So in light of that, I do think it is appropriate  
21 to resolve it. There are provisions of the code, there's a  
22 provision in the code that explicitly permits subordination to  
23 be addressed at the plan confirmation stage. And in the plan  
24 rather than in the separate adversary proceeding, so I think  
25 it's appropriate. So and certainly it doesn't come as any

1 surprise, because I think we had that discussion extensively at  
2 the time that I lifted the stay.

3 So I think like the decision in the Old Testament of  
4 Solomon splitting the baby, it is not exactly an artful  
5 beautiful solution, but I think it's an appropriate one. Every  
6 party gets a little bit of what they want, but I think  
7 consistent with the facts and circumstances of the case. So  
8 I'm going to allow the subordination issue to go forward,  
9 particularly because I'm not hearing something that would be of  
10 concern. That is Judge this is going to be a four week trial  
11 and we're going to have to fly in witnesses. We've got expert  
12 testimony. Litigation takes all sorts of different forms and  
13 I've seen nothing based on the fairly extensive briefing that I  
14 received that implicates anything like that.

15 So I'm going to allow it to go forward. What I would  
16 like the parties to do is work out the parameters of it so that  
17 we can figure out what it looks like and everybody is on the  
18 same page and there's no confusion about what it is we're doing  
19 and what order we're doing it in. And certainly, again, to the  
20 extent that parties thought it was appropriate to split out the  
21 subordination issue, but I'm hearing from Mr. Rosenthal and I  
22 understand where he's coming from that to the extent it affects  
23 not only Falcon, but other Debtors that you can't simply take  
24 that issue and put it to the side without and move forward with  
25 all the other cases.

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MR. WOOD: Well, Your Honor, I don't think it affects the other cases. Falcon's plan is not Tide. And the allowance or disallowance or subordination of our claim and Arcapita is not going to prevent Arcapita's plan to be confirmed.

THE COURT: But isn't there a claim against another Debtor in addition to Falcon?

MR. WOOD: Arcapita, but the allowance or disallowance of subordination of our claim and Arcapita will have no impact on confirmation. In fact, we haven't objected to confirmation. And there's no subordination of our claim under the plan and Arcapita.

THE COURT: Well are you telling me that -- well let me hear from the Debtors on that.

MR. WOOD: Your Honor, can I be heard on the complexity of the litigation because in this instance it is, it's very complex. And our claim has been pending for eight months and they've had ample time to object and seek subordination in that eight months. There's no reason we need to do this in 30 days, Your Honor.

THE COURT: Yeah we have a plan, we have a lot -- there are of moving pieces in this case. And there's been a lot of progress made. And given the coordination with the Cayman Islands Court, as well as the cost of staying in Bankruptcy, I think parties here have moved with all deliberate

1 speed to get these cases from where they filed to the  
2 confirmation hearing. So I don't think that this is in any  
3 way, shape, or form a manufactured emergency. I think it's  
4 something that there have been a lot of issues that have been  
5 raised, addressed, and moved on to other issues. So we've seen  
6 the gamut so I don't think your client, to the extent it makes  
7 your client feel any better, is being singled out in any way,  
8 shape, or form. It's just another issue that needs to be  
9 addressed for confirmation.

10 MR. WOOD: To be clear, Your Honor, we are not  
11 objecting to the time table for the Arcapita confirmation, just  
12 the Falcon time table. And the complexity is, Your Honor,  
13 under 510 at max, the maximum we can be subordinated is to  
14 claims that are equal or senior to us. It's our position in  
15 the Falcon case there are none or very little claims that are  
16 senior. And so, essentially, what this Court is going to do at  
17 confirmation is have a complex hearing on the allowance or  
18 disallowance of the entire case, to all the claims. Because  
19 we're going to present evidence that our claims are either  
20 senior to or equal of or that no claims -- there's three  
21 groups: the employee claims, there's the Hopper claims, and  
22 then there's the investor claims.

23 Our position is that none of those claims are either  
24 equal to or senior to our position. And so it's going to be a  
25 very complex and normally we would seek significant discovery.

1 Because we're going to have to show to this Court that our  
2 claim is, in fact, either senior to or they're not equal to us.

3 THE COURT: See I understand Debtors' can straighten  
4 me out and I would like to hear from them at this point that  
5 the argument is that the nature of Falcon's, Tide's claims is  
6 what makes it something that is appropriate to be subordinated.  
7 So let me hear from the Debtors on that. Sir, if you could  
8 just stay at the podium, because we may have a little back and  
9 forth here, so don't wander too far off.

10 MR. MILLET: Good afternoon, Your Honor, Craig Millet  
11 again for the Debtors. That's correct, Your Honor, the nature  
12 of Tide's claim clearly makes it subject to Section 510(b).  
13 The only issue is where exactly does it fall vis-à-vis the  
14 other claims. We agree that's purely a legal issue. It has  
15 been substantially briefed before the Court, and we do believe  
16 that we could easily get that briefing done and allow any party  
17 to respond and have that legal issue considered at the  
18 confirmation hearing. The Court will rule how it rules based  
19 upon those legal issues. But where Tide's claims are, the  
20 facts as to Tide's claim are not in dispute. Every issue or  
21 every fact as to Tide's claim is clear. Now I don't know about  
22 the other --

23 THE COURT: Well essentially I guess the analogy, and  
24 I'm sorry I didn't mean to cut you off, is that it's much  
25 likely a legal analysis for a motion to dismiss. We're not

1 fighting over facts. We're fighting over, and assuming all  
2 this seems to be true and essentially we can use the complaint  
3 that was filed in the District Court to understand what the  
4 scope of the claim is. I don't have to parse that or entertain  
5 any argument that that somehow is inappropriate. Rather,  
6 you're saying on its face this is how it should be treated  
7 under the Bankruptcy Code.

8 MR. MILLET: That's correct, Your Honor, no matter  
9 how much the claim is irrelevant. Another clarifying point to  
10 the claim as to Arcapita Bank, that too is subject to  
11 subordination. Now Mr. Wood said that that's not being subject  
12 to subordination. Under the cases, in fact, relied upon by  
13 Tide in the prior briefing to the Court if subordination is  
14 appropriate as to one entity, it's appropriate as to all. So  
15 that issue is in play in the Arcapita Bank case as well as  
16 [indiscernible].

17 THE COURT: All right.

18 MR. WOOD: Your Honor, the fact issue is there any  
19 other claims in Falcon --

20 THE COURT: Well whatever claims have been filed and  
21 the bankruptcy have been filed in the bankruptcy, I don't have  
22 to look very far to figure that out. I mean I'm going from my  
23 memory. I did not to prepare for this hearing go back and re-  
24 read the stay pleadings. But my distinct recollection is that  
25 the Debtors' argument is consistent with what is said here



1 today which is it's the nature of the claim. I don't have to  
2 look behind the claim. I don't have to engage in any dispute  
3 about what the claim really is about or how much it really is  
4 worth. I can take it at face value and consistent with that, I  
5 can make a determination about whether it's to be subordinated  
6 or not.

7 I have no view, present view sitting here today  
8 whether it can be subordinated or not. I'm just trying to  
9 frame what the legal issue is. You may be correct that it's  
10 inappropriate to subordinate it. But what I understand is that  
11 the inquiry that and the request is going to be made of me is  
12 take the claim at face value and make a determination based on  
13 the case and the relevant law whether it could be subordinated.  
14 If I can't do that based on the undisputed facts well then I  
15 won't subordinate it. Right, so I understand that's what the  
16 Debtors are asking. It sounds like in the Debtors' view  
17 there's no need even for an evidentiary hearing. There really  
18 is just essentially a stipulated group of facts that would, I  
19 can consider.

20 MR. WOOD: The distinction, Your Honor, is they're  
21 asking you for more. They're asking you not only can it be  
22 subordinated, but they're asking you to make a factual finding  
23 that it can be subordinated to specific claims in this case,  
24 and that's the issue that the Court can't decide.

25 THE COURT: Well I think, again I'll ask the Debtors

1 to clarify. My understanding was it's a, you're looking at  
2 classes of claims and you're subordinating where does it fit.  
3 So I'm not going claim by claim. That's not how the bankruptcy  
4 classification system works.

5 MR. WOOD: That's what they're asking you to do,  
6 though, in this plan.

7 THE COURT: I would be stunned and amazed if that was  
8 because inconsistent with the bankruptcy law.

9 MR. MILLET: Not at all, Your Honor. We're not  
10 asking for that at all. We're asking simply to deal with the  
11 cases that we previously cited with the Court, allow us to at  
12 least ask the Court, and the Court will decide how it decides.  
13 But we're talking about Tide's claims. And as to Tide's claim  
14 we think the law is very clear. What Mr. Wood I think is  
15 talking about is he wants to object in effect to where these  
16 other claims fit and he wants to talk about those claims, but  
17 that's not the point. This point is where Tide's claim fits.  
18 If there's some objection to classification of his other claims  
19 that hasn't been made, that's not before the Court. I suppose  
20 we'd have to address that if it's raised.

21 THE COURT: Well and any party can object to -- that  
22 was one of the objections made by Tide and I think pursuant at  
23 the hearing which I think was appropriate because the  
24 Bankruptcy Code says any party can object to claims. And I  
25 think the disclosure statement is long enough as it is without

1 repeating the code. But, again, my understanding is we're  
2 talking about classes of claims. And what the idea is that --  
3 again, I have no view about the merits. I'm just trying to  
4 frame what the legal issue is. My understanding is the  
5 argument is that Tide's claim, as a matter of looking at it,  
6 should be subordinated to essentially really the other claims  
7 in the case. And I don't have to parse what those other claims  
8 are. They're whatever class of claims they are.

9 MR. MILLET: Exactly.

10 THE COURT: All right do Debtors also believe that to  
11 the extent that I feel looking at the facts in the law that I  
12 don't have enough information, putting aside whether I'm  
13 correct or not. But hypothetically speaking if I look at it  
14 and say hey either relevant facts or I don't have, then I  
15 simply would just say I can't grant the request on this record  
16 and it's therefore not subordinated. You're not going to ask  
17 me at the hearing to essentially take evidence or go down the  
18 evidentiary path for purposes of the subordination inquiry.

19 MR. MILLET: That's correct. We'd ask that you agree  
20 that it's not subordinated, but without prejudice to present  
21 those at a later time. But we won't ask the Court to take up  
22 an evidentiary hearing at the confirmation hearing on that  
23 issue. We believe that we can show the Court that those facts  
24 are not relevant to the subordination issue. If the Court  
25 finds the facts are, we're going to have to figure out a way to

1 deal with that other than at the confirmation hearing.

2 THE COURT: All right, so Tide is certainly free to  
3 make that argument about that there are facts that aren't in  
4 front of me or are disputed and that they're relevant. And I  
5 may agree with you, I may not. But what I understand is that  
6 there's really a surgical strike here which is based on  
7 undisputed facts and law that the claim should be subordinated.  
8 So what I'd like the parties to do is to work out essentially  
9 the procedural vehicle for getting this in front of me. I know  
10 I do have a lot of briefing. And I expect I'll see some things  
11 that look very familiar. But one of my main concerns would be  
12 what are those undisputed facts that I should rely upon. And  
13 certainly they're discussed in the briefing; a lot of them are  
14 discussed in the briefing I had already received in the stay  
15 motion. But I think the parties could probably sit down and  
16 stipulate as to what the relevant facts are and figure that  
17 out.

18 So why don't you, if you do me this favor is have a  
19 conversation, figure out what you think the appropriate  
20 schedule is for getting me pleadings on the issue. Of course I  
21 know you could all dump it in the confirmation, but it would  
22 seem to make sense to do it separately. And just work out a  
23 schedule and send a stipulation to Chambers and I'm happy to  
24 sign off. That way it will keep me in the loop. And I can  
25 make sure to build in sufficient time to give everything

1 appropriate consideration. I think I have a couple of large  
2 things the week before, so certainly anything that you can get  
3 to me the sooner the better, but I'll trust counsel to work  
4 that out.

5 MR. MILLET: That be fine, Your Honor, happy to do  
6 that.

7 THE COURT: All right, thank you.

8 MR. WOOD: Just for the record, I understand the  
9 Court's overruling my objection on procedural issue?

10 THE COURT: I think I am but I want to make sure --  
11 there were a number of procedural objections that were  
12 presented to me, so what's the particular objection that you're  
13 pursuing?

14 MR. WOOD: Is that it is our belief that we've been  
15 denied due process due to what's normally afforded to us  
16 through the claim objection process.

17 THE COURT: Yes I am because there's actually a  
18 specific provision of the Bankruptcy Code that permits -- well  
19 really it's not a disclosure statement issue, first off. It's  
20 really a plan confirmation issue. But Bankruptcy Rule 7001(8)  
21 says that a plan disclosure statement can appropriately seek  
22 subordination of a claim. So I think there's a particular  
23 provision of the Bankruptcy Code that allows this to proceed by  
24 means of confirmation as opposed to separate adversary  
25 proceeding.

1 MR. WOOD: Your Honor, and I'm happy to reserve this  
2 for plan confirmation objection if that's the Court's  
3 preference, but I would refer the Court to three cases that  
4 interpret 7001(8) to require at least a contested matter to be  
5 initiated. And that is the L&H Holdings U.S. Inc. case. It's  
6 a Delaware 2001 I believe bankruptcy case 264 B.R. 336. The --

7 THE COURT: Well let me just -- I'm getting a little  
8 frustrated here in that I made my intentions very clear in  
9 lifting the stay that to the extent there was an issue of  
10 subordination that needed to be dealt with by this Court that I  
11 was happy to entertain it. And I thought it was appropriate to  
12 entertain it if it really was a part and parcel of the plan.  
13 And I didn't hear any of this at that point. And certainly  
14 I've had more than a few occasions in the not too distant past  
15 where the same objection has been raised and to sort of  
16 eliminate all doubt an adversary proceeding has been filed.

17 In those cases where the parties have had an adequate  
18 opportunity to brief the issue, and this will really be the  
19 second time the issue has been briefed, not the first so it  
20 really comes as no surprise to anybody. I found that the sort  
21 of belt and suspenders really was not in anybody's interest.  
22 It was essentially a waste of time because the complaint and  
23 the answers that were ultimately filed I don't think anyone  
24 ever cited to them at all.

25 So if to resolve a procedural objection the Debtors

1 want to file an adversary proceeding and tee it up that way, I  
2 suppose we can do that. I'm not sure that that's going to  
3 change a single thing. If it can be specifically done, I think  
4 it can be specifically done by confirmation. But if an  
5 adversary proceeding is something that resolves the procedural  
6 objection of an issue that the parties have known out there for  
7 many, many months I suppose we can do that. I'm not sure what  
8 it accomplishes frankly if what the Debtors are asking for is  
9 the specific determination based on the facts and circumstances  
10 in front of me. But do you see any advantage to that?

11 MR. WOOD: Yes, Your Honor, it would give us the due  
12 process rights that we're entitled to through the claim  
13 objection process. But, Your Honor, if I understand the Court  
14 --

15 THE COURT: The claims objection -- no an adversary  
16 is not a claims objection process. They are two distinct  
17 things --

18 MR. WOOD: Correct, Your Honor, our position is that  
19 they have to at least initiate a contested matter through a  
20 claim objection process.

21 THE COURT: All right.

22 MR. WOOD: Thank you, Your Honor.

23 THE COURT: Thank you. Let me ask Debtors if in  
24 order to address any potential procedural objection they have a  
25 view about what the best way to tee this up is. Again, I think

1 the issue has been out there and I think parties are actually  
2 asking me to resolve in the context of a stay motion that was  
3 filed by Tide. But let me hear from the Debtors.

4 MR. MILLET: Your Honor, we still strongly believe  
5 this is a confirmation issue. In fact, the confirmation  
6 process is a contested matter. So it fits even with the cases  
7 that Mr. Wood was beginning to cite, we don't see any advantage  
8 to initiating an adversary action which is simply costly and  
9 lengthy and we think we should proceed this way.

10 It's not a claims objection issue. There will be a  
11 claims objection made for purposes of voting because we believe  
12 Tide's claim is inflated. But that again will come within the  
13 temporary allowance procedures that are prescribed in the  
14 order. This is a separate issue as to subordination and we  
15 believe it can be taken up as a matter of law at confirmation  
16 hearing.

17 THE COURT: All right I am going to overrule the  
18 objection to how subordination will be resolved or, at least,  
19 how it will be resolved to the extent that it's been defined  
20 here today. And that was the reason that was the first thing I  
21 did was try to understand what the nature of the proceeding  
22 would look like. And to the extent that there are contested or  
23 disputed facts that I don't know how to resolve, I will be in a  
24 position to grant relief. But I understand the Debtors'  
25 request does not require me to delve into that.



1           So, again, I'd ask that you work out an appropriate  
2 stipulated order on scheduling. To the extent that Tide wishes  
3 me to memorialize my view about procedure, I think you can put  
4 it in that order just to make it very clear for the record how  
5 we're going to proceed and the fact that I've overruled an  
6 objection as to a request to proceed in some other fashion.

7           All right so I think that resolves the issues that  
8 were raised by the parties pleadings in connection with the  
9 disclosure statement and I think that leaves exclusivity.

10           MR. ROSENTHAL: Your Honor, did you want to discuss  
11 the order.

12           THE COURT: Oh yes it changes the order; thank you  
13 very much. So I spoke too soon. I had a couple, I don't have  
14 a lot. Turning to page 2 at the bottom of page 2, it mentions  
15 a transfer of a claim related to certain facilities: define the  
16 plan, will not be recognized for voting purposes unless that  
17 transfer occurred prior to the filing of Chapter 11. And I  
18 just was hoping you could give me an explanation of what the  
19 facts are as to that.

20           MR. ROSENTHAL: The Syndicated facility claims are  
21 claims under a UK law governed document. And that it also  
22 incorporate sharia principles. That document provides that  
23 claims can only be transferred on particular dates, when a  
24 maturity date; particular times that claims can be transferred.  
25 So we have taken the position throughout the case that

1 transfers that occurred before the filing of the case in  
2 accordance with the requirements of the document were permitted  
3 transfers. And we would recognize the holders of those claims  
4 as holding participations in the Syndicate facility.

5 THE COURT: So, essentially, it's a way of saying  
6 here's the record date for purposes of recognizing those  
7 interests.

8 MR. ROSENTHAL: Correct. And no transfer comply  
9 after the effective date could comply with those provisions.  
10 So what we've said to holders is, to potential purchasers is  
11 you can, you're free to buy claims. I mean that's part of the  
12 claims, you know, process that we know, but we're not going to  
13 treat you as a record holder for voting. You have to work out  
14 your agreement on voting or whatever it is, the economics of  
15 that with the actual record holder and that's what this  
16 language is intended to do.

17 THE COURT: All right thank you, that's very helpful.  
18 On page 3, it mentions serving the plan by e-mail and I'm happy  
19 to have the plan served by e-mail in addition to other manners  
20 of service so that folks can say well in addition to whatever  
21 other manners of service, you can't say you didn't get notice  
22 because we also served you by e-mail. I'm not aware of any  
23 circumstances where the Court has allowed that to be the  
24 exclusive means of service. So I'd ask that the e-mail just be  
25 an additional means of service.

1 MR. ROSENTHAL: That's fine, Your Honor. What we  
2 were -- we originally thought because there is a, because we  
3 were concerned about a delay in receiving, in transmitting the  
4 documents, that we would send all of them by DHL, but the cost  
5 was, is very significant. So if it would be -- I don't think  
6 we have a problem with serving it by an alternate means as  
7 well, but hopefully you would be okay with the e-mail which is  
8 instantaneous and then we would serve it by regular mail.

9 THE COURT: Well whatever an appropriate and  
10 recognized manner of service under the circumstances would be  
11 in addition to e-mail is how I would define it. So I'll leave  
12 that to you to parse in the first instance. I haven't thought  
13 about essentially the rules in foreign service and any of that  
14 stuff. But I just don't want e-mail to be the only manner of  
15 service.

16 And, again, I know we're moving and there are  
17 opinions out we're moving closer and closer to folks using e-  
18 mails exactly that way. I know there was a recent decision  
19 about service of a class action through Facebook or some other  
20 interesting manner of service. I confess that I'm not  
21 sufficiently comfortable with a notion of being a trailblazer  
22 here for e-mail being the exclusive manner of service. So  
23 whatever, so I say serve it as is appropriate and then e-mail  
24 can be an additional manner of service and certainly one that  
25 you can rely upon if someone claims to not actually have gotten

1 notice.

2 MR. ROSENTHAL: Fine so we'll revise that provision  
3 to deal with that.

4 THE COURT: On page 4, there's mention on paragraph  
5 12 about not being required to transmit solicitation packages  
6 that are returned undeliverable, has moved, no forwarding  
7 address unless you're informed of writing of that person's new  
8 or correct address. I would just add something to say or  
9 otherwise learned the course of reasonable diligence of  
10 additional information. In other words if someone picked up  
11 the phone and said here's our new address, I'm sure you would  
12 send it out anyway. So if you would memorialize that  
13 reasonable diligence concept that would be helpful.

14 On page 5, paragraph 15 the second full line talks  
15 about the Court finding that the voting purposes objection  
16 deadline allows sufficient time. There's a couple of things in  
17 here where the deadlines are set and then there's some extra  
18 language saying what the setting of the deadline means. I'm  
19 just inclined to take those out. So take that sentence out  
20 just because I'm on sort of kick of trying to make these things  
21 shorter. So obviously if the Court sets a deadline it's a  
22 deadline. So if somebody decides not to comply with it, they  
23 do so at their --

24 MR. ROSENTHAL: So just delete that sentence and  
25 start the Court finds?

1 THE COURT: Yes.

2 MR. ROSENTHAL: Fine.

3 THE COURT: And not because I really have an  
4 objection to the concept, but I'm just again trying to -- in  
5 the same way we don't incorporate provisions in the code in  
6 disclosure statements.

7 On page 6, paragraph 16 there is a reference to  
8 things being temporarily allowed as set forth in a timely filed  
9 proof of claim or proof of interest. And my only question is  
10 whether this paragraph would purport to exclude an equity  
11 holder on the basis of fair to file a proof of interest or if  
12 I'm misreading it. And certainly I know there's usually sort  
13 of a record list for equity holders.

14 MR. ROSENTHAL: Equity holders are not voting on the  
15 plan so they're not a voting party.

16 THE COURT: All right well what's the proof of  
17 interest here that's referenced, what's that relate to then?

18 MR. ROSENTHAL: So this is for the Falcon interest  
19 class. There are three voters in that class, as I understand  
20 it.

21 THE COURT: And did that file proofs of interest? I  
22 guess I'm just trying to figure out -- my concern is always  
23 anything that would provide for disenfranchise somebody from  
24 voting based on failure to do something. And if that's the  
25 case, I want to make sure it's actually required to do it. So

1 maybe you can just shed some light on that. Or I don't know if  
2 you want to break it out more specifically as to those folks.

3 MR. ROSENTHAL: I think we can add some language to  
4 address this Falcon question. And just say that they would be  
5 entitled to vote or some provision.

6 THE COURT: All right well if you do me a favor and  
7 take a look at it again. If it provides that they can be  
8 somehow excluded, I just want to make sure it's for something  
9 that they were otherwise required to do.

10 MR. ROSENTHAL: Yes. We're not trying to pull a  
11 gotcha on anybody.

12 THE COURT: No I didn't think so. So I just --  
13 again, some of these things I obviously don't have the  
14 backstory that you all do.

15 Bottom of paragraph 17 on page 7 and also on  
16 paragraph 18, it talks about the whole allowance process for  
17 voting. And so paragraph 18(d) says any order temporarily  
18 allowing claims or interest must be entered on or before the  
19 voting deadline unless otherwise ordered by the Court. I  
20 prefer to use the word directed for the second order there.  
21 Just that way if we set it at hearing, and it happens to be  
22 outside the timeframe we don't need then to also scramble  
23 around and issue other orders to make it clear that it falls  
24 within this.

25 MR. ROSENTHAL: So unless otherwise directed by the

1 Court.

2 THE COURT: Exactly. And so similarly for the end of  
3 paragraph 17 after it says for voting purposes at the very end  
4 just put a comma and say unless otherwise directed by the  
5 Court. And that way if we set a schedule hearing then it  
6 automatically resolves any timing questions so we don't have to  
7 worry about an order.

8 MR. ROSENTHAL: Fine.

9 THE COURT: Page 8 at the bottom of paragraph 20 I  
10 would delete that last sentence about something being  
11 considered or not considered and it's untimely in the same  
12 veins earlier conversation.

13 MR. ROSENTHAL: Just the sentence that starts  
14 temporary allowance motions?

15 THE COURT: Correct. Then in the same vein page 12,  
16 paragraph 35 is, again, about someone failing to comply with  
17 deadlines which obviously they do so at their peril.

18 MR. ROSENTHAL: We'll delete that paragraph.

19 THE COURT: Page 13 which is subparagraph (d) to  
20 paragraph 36, I think that that's also in the same vein of  
21 someone failing to file a timely cure objection, so I think we  
22 can take that out. And those were my comments on the order.

23 MR. ROSENTHAL: So take out subparagraph (d)?

24 THE COURT: Correct.

25 MR. ROSENTHAL: Okay. The one thing I want to point

1 out to the Court, I want to talk about the entry of the order,  
2 but I want to point out paragraph 38. I don't know if you  
3 focused on it, but if you look at 38 romanette II in the whole,  
4 that's something a little unusual.

5 THE COURT: Paragraph 38, what -- I have up to  
6 paragraph 36 for notice of revised proposed order which I think  
7 is dated April 24th.

8 MR. ROSENTHAL: Do you have the page with the  
9 signature line on it?

10 THE COURT: Yes.

11 MR. ROSENTHAL: May I approach?

12 THE COURT: Sure.

13 MR. ROSENTHAL: I don't believe --

14 THE COURT: Well I have it as, the blackline version  
15 is 35, so I don't know we seem to have three paragraphs seem to  
16 have gone to the Bermuda Triangle. All right so paragraph 38  
17 it starts the Debtors and GCG are authorized.

18 MR. ROSENTHAL: Correct. The first is just a  
19 statement that they can disseminate translations because much  
20 of this is going to the Middle East and it will be Arabic. The  
21 second relates to some presentations that we have been  
22 discussing, making in the Middle East with the Committee,  
23 actually. Primarily because the Middle Eastern investors and  
24 Creditors are totally unfamiliar with the process in the United  
25 States and generally are not, you know, are -- need some



1 guidance about what this is. They're going to get a package of  
2 documents that's two inches thick or an e-mail, so we intend to  
3 --

4 THE COURT: It sounds like an eminently sensible  
5 idea.

6 MR. ROSENTHAL: Thank you, Your Honor.

7 THE COURT: Thank you.

8 MR. ROSENTHAL: Now in terms of timing we are going  
9 to revise the ballots and the disclosure statement. But we  
10 would like to come up with a procedure where we need to get the  
11 order signed as quickly as possible because it has to go to  
12 Garden City Group to be, to start the process running.

13 THE COURT: Well just call the Chambers and keep me  
14 informed. I am not out of town for any purposes that I know of  
15 in the near future. So certainly just let us know, let us know  
16 it's coming. And I'm sure it won't be a problem turning around  
17 very quickly.

18 MR. ROSENTHAL: Fine, Your Honor. One additional  
19 point is that we would like because we -- if you turn to  
20 paragraph 34. I think it deals with the filing of a response  
21 to any confirmation objections. Because the Court we had  
22 originally thought the date would be the week before, and I  
23 think we said June 3rd, we propose June 3rd as our response  
24 deadline. We would like to move that deadline, Your Honor, to  
25 June 7th.

1 THE COURT: That's the response?

2 MR. ROSENTHAL: Response to objections to  
3 confirmation.

4 THE COURT: My concern is not having enough time to  
5 get ready for the confirmation hearing on the 11th. I have the  
6 American Airlines disclosure statement hearing that week, as  
7 well as a very robust Chapter 13 founder. So I can't confess  
8 I'm going to get to it at a particular date. But what I would  
9 like is I understand that there are unusual service issues here  
10 and time is actually particularly beneficial where you have  
11 folks overseas. So why don't you make it sometime the  
12 afternoon of the 6th and that will give me to Friday to take a  
13 look at it. That would be helpful.

14 MR. ROSENTHAL: Fine, Your Honor, will do. Thank you  
15 very much.

16 THE COURT: All right, and I think we still need to -  
17 -

18 MR. ROSENTHAL: We need to do exclusivity.

19 THE COURT: Yes.

20 MR. ROSENTHAL: Your Honor, if we turn the order and  
21 return it to you this afternoon, can the Court enter it today?

22 THE COURT: I'm here all week, so yes that would be  
23 just fine.

24 MR. ROSENTHAL: The documents may be a little behind,  
25 but they're catching up.

1 THE COURT: That's fine.

2 MR. ROSENTHAL: We just need to get the process  
3 started.

4 THE COURT: Yes, as I said I'll be here. I have  
5 another matter scheduled at 3:00 so that would be just fine.

6 MR. ROSENTHAL: So, Your Honor, we have this is our  
7 motion to extend the solicitation, the period for solicitation  
8 of acceptances. We have had discussions with the Committee and  
9 this order is presented to the Court with the Committee's input  
10 and approval. The request in the order is to extend the  
11 exclusive solicitation period through the conclusion of the  
12 confirmation hearing. There's a proviso, however, that to the  
13 extent that re-solicitation might be required and that re-  
14 solicitation is either related to something the Committee did  
15 because they have the ability to file certain revisions to the  
16 equity term sheet in the overall agreement. This related to  
17 that, that exclusivity would continue or if the Committee  
18 consents that exclusivity would continue until the continued  
19 confirmation hearing on that re-solicited plan.

20 THE COURT: All right, anyone wish to be heard on the  
21 request to extend exclusivity? All right, so resounding  
22 silence in the room. I will grant the request to extend the  
23 exclusive periods for cause under Section 1121(d). There are  
24 numerous factors identified in the cases and I think as is  
25 clear by the presentations earlier today there has been

1 substantial progress made to reorganization. And these are  
2 very large and complex cases. And the Debtor has already filed  
3 a viable plan, although certainly there are some objections on  
4 the way. So given all the factors identified in the cases, I  
5 think they're amply satisfied.

6 MR. ROSENTHAL: Thank you, Your Honor.

7 THE COURT: Thank you. Anything else we should  
8 discuss here today?

9 MR. ROSENTHAL: Nothing. We appreciate your time.

10 THE COURT: All right, we will await a revised copy  
11 of the order and we should be able to get that in today.

12 MR. ROSENTHAL: Thank you, Your Honor.

13 (Proceedings concluded at 1:52 PM)

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I N D E X

RULINGS

DESCRIPTION	PAGE
HEARING re Motion to extend exclusivity period for filing a Chapter 11 plan and disclosure statement/Debtors' motion to further extend exclusive solicitation period [Doc. #911].	75
HEARING re Motion to approve Debtors' motion for an order (I) approving the disclosure statements and the form and manner of notice of the disclosure statement hearing, (II) establishing solicitation and voting procedures, (III) scheduling a confirmation hearing, and (IV) establishing notice and objection procedures for confirmation of the Debtors' joint Chapter 11 plan (related document(s) 827) [Doc. #828].	49

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CERTIFICATE

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

AAERT Certified Electronic Transcriber CET\*\*D-531

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