

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 12-11076-shl

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5 In the Matter of:

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

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9 Debtors.

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13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York

16

17 January 9, 2013

18 4:52 PM

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20 B E F O R E :

21 HON. SEAN H. LANE

22 U.S. BANKRUPTCY JUDGE

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1 Hearing re: Doc. #759 Fifth Motion to Extend Exclusivity
2 Period for Filing a Chapter 11 Plan and Disclosure
3 Statement/Debtors' Motion to Further Extend Exclusive
4 Periods to File a Plan or Plans of Reorganization and to
5 Solicit Acceptances Thereof.

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25 Transcribed by: Pamela S. Skaw

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

2 GIBSON, DUNN & CRUTCHER LLP

3 Attorneys for Debtors

4 200 Park Avenue

5 New York, NY 10166-0193

6

7 BY: MICHAEL A. ROSENTHAL, ESQ.

8 MATTHEW KELSEY, ESQ.

9

10 MILBANK, TWEED, HADLEY & McCLOY LLP

11 Attorney for Official Unsecured Creditors' Committee

12 One Chase Manhattan Plaza

13 New York, NY 10005-1413

14

15 BY: DENNIS F. DUNNE, ESQ.

16 NICHOLAS C. KAMPHAUS, ESQ.

17

18 KIRKLAND & ELLIS, LLP

19 Attorney for Ad Hoc Committee

20 601 Lexington Avenue

21 New York, NY 10022

22

23 BY: JONATHAN S. HENES, ESQ.

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DECHERT LLP
Attorney for Standard Charter Bank
1095 Avenue of the Americas
New York, NY 10036-6797

BY: BRIAN E. GREER, ESQ.

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P R O C E E D I N G S

THE COURT: Good afternoon and please be seated.

First off, my apologies for keeping you all waiting. I was in the middle of a discussion on some other courthouse matters and so my apologies for that.

MR. ROSENTHAL: No problem, Your Honor. Good afternoon. Michael Rosenthal and my new partner, Matt Kelsey --

THE COURT: Pleasure.

MR. ROSENTHAL: -- Gibson, Dunn & Crutcher.

THE COURT: All right. Well, we are here for exclusivity.

MR. DUNNE: You want appearances?

THE COURT: Yes, sir.

MR. DUNNE: For the record, Your Honor, Dennis Dunne from Milbank, Tweed, Hadley & McCloy on behalf of the official committee of unsecured creditors and I'm joined here by my colleague, Nicholas Kamphaus.

MR. HENES: John Henes, Kirkland & Ellis on behalf of the ad hoc committee.

MR. GREER: Good afternoon, Your Honor. Brian Greer of Dechert LLP for Standard Charter Bank.

THE COURT: All right.

MR. ROSENTHAL: First, Your Honor, Happy New Year.

THE COURT: Happy New Year.

1 MR. ROSENTHAL: I hope you had some time to relax.

2 THE COURT: And you as well.

3 MR. ROSENTHAL: Too short. Typically, Your

4 Honor --

5 THE COURT: It always is.

6 MR. ROSENTHAL: Yeah. Typically, I provide the
7 Court with an update regarding our Chapter 11 cases but
8 because we basically spent the last three or four weeks in
9 intensive discussions about the plan and we're here for
10 exclusivity, I think we should just get on to the main
11 event.

12 THE COURT: All right.

13 MR. ROSENTHAL: As you know, Your Honor, we've
14 requested a brief extension of exclusivity. We've requested
15 until the 14th of this month. We can talk about that later.

16 You've entered a bridge order that continues
17 exclusivity until the conclusion of this hearing or some
18 other date --

19 THE COURT: Right.

20 MR. ROSENTHAL: -- that you've mentioned. And I
21 have to mention to you that it did not go unnoticed your
22 change to the order to extend the date until the conclusion
23 of this hearing only.

24 THE COURT: Well, it -- there are a couple things.
25 One is we've had circumstances in the past where a hearing

1 then gets moved and next thing you know, you're magically in
2 an emergency of your own creation. So that was the --
3 that's the impetus behind that and if I extend it any
4 further, then it loses the nature of a bridge order. So
5 that's -- we actually have had one where I think, early on,
6 I think I entered one for a particular date and then the
7 hearing had to get moved and we -- then there was a second
8 bridge order so I thought --

9 MR. ROSENTHAL: Well --

10 THE COURT: -- I'd save us all the pleasure of
11 that particular fire drill.

12 MR. ROSENTHAL: Well, let me state unequivocally
13 that the debtors have been and are prepared to file a plan
14 and a disclosure statement immediately. In fact, I have
15 people back at the office -- if you give us a hint that you
16 will not extend further or whatever, they're prepared to
17 push an ECF button --

18 MR. DUNNE: No, what my concern is, and I don't
19 understand there to be any opposition to this, so I don't
20 have a problem and -- what I -- on the one hand, I
21 appreciate folks desire to keep things on a short leash and
22 that often is very important and that principal has come up
23 a number of times in this case and I don't quibble with
24 that.

25 But, at the same time, force -- I never know when

1 I'm going to get an objection to something. And so it
2 becomes problematic if the extensions are so short as to the
3 bridge order becomes the relief itself and so we've sort of
4 fudged a little bit here or there, to use a non-technical
5 term, and I don't have any problem with how anything's gone
6 thus far.

7 But if we expect that it was going to be something
8 that's going to take some more time, I didn't want to
9 continue to have sort of a fire drill mentality for it but
10 rather to tee it up as we needed to.

11 MR. ROSENTHAL: I understand completely, Your
12 Honor. There is no question that the debtors believe that
13 an extension -- that retention of exclusivity is in the best
14 interests of its estate.

15 This is why we have a plan and disclosure
16 statement ready to be filed. We believe, however, that
17 there is cause for the short extension of exclusivity under
18 the Adelpia Communications factors.

19 And we also believe that given sort of the
20 distinct nature of this case the debtors are in the best
21 position right now to put a plan on the table that takes
22 into consideration the competing positions of the AIHL
23 estate, the bank estate and other constituencies and that
24 opening up the plan process, at this point, would be
25 counterproductive and, in addition, to being time consuming

1 and expensive.

2 I think, Your Honor, in fact that there's not a
3 party in this room who believes that exclusivity should be
4 terminated. We're going to take to you about the date and,
5 in light of your comments just now, whether January 14th is
6 the right date.

7 So, the real question here is why is an extension
8 of exclusivity necessary. You know, as you know, we delayed
9 the filing of the plan and we've been requesting --

10 (Sneeze)

11 THE COURT: Bless you.

12 MR. ROSENTHAL: -- extensions over the past three
13 or four weeks, all with the full support of the committee
14 because we'd like, if possible, to include in the plan a --
15 input from the committee regarding the allocations that they
16 believe are appropriate between the bank creditors and the
17 AIHL creditors.

18 And while the plan that we have developed, the
19 debtors have developed, has a -- it takes into consideration
20 what we believe are a myriad of reasonable settlements of a
21 number of litigation issues and a reasonable allocation of
22 value between the estates, we haven't yet had full input
23 from the committee or the ad hoc group as to what they
24 believe those allocations should be.

25 In fact, the committee itself has not agreed,

1 among its members, what the allocations should be. And I
2 don't think it's for lack of trying, as Mr. Dunne will tell
3 you. They have been meeting constantly, I think, since
4 before the holidays. He just told me that other than
5 Christmas day and maybe New Year's day, they either had, you
6 know, in person or telephonic meetings among the committee
7 members.

8 And while it's not absolutely necessary that a
9 debtor's plan incorporate a consensual resolution of
10 allocation issues, at the same time, we think it's important
11 and actually will shorten the confirmation and chapter 11
12 process if we do, when we file a plan, if we have the
13 ability to get significant input from the committee on what
14 they think's appropriate.

15 As you know, Your Honor, the committee's composed
16 of six members and three are only bank creditors and three
17 are Morabahoc (ph) creditors that have claims against the
18 bank and AIHL. And then the ad hoc group consists of AIHL
19 creditors.

20 So what we know is happening is that there's a
21 discussion behind closed doors about the various issues that
22 we've all identified and we've all been talking about for a
23 long time that is the debtors and the committee and more
24 recently the ad hoc group to try to negotiate, if you will,
25 consider all the possibilities.

1 That's just not yet completed as I understand it
2 and we know the Court is perturbed with the short piecemeal
3 extensions --

4 THE COURT: Well, perturbed may be too strong but
5 I'm just trying to avoid having a situation where the issue
6 of process becomes a concern and so that's really my primary
7 goal and so that's just -- I wanted to put that on the table
8 for thinking about the exclusivity issue moving forward.

9 MR. ROSENTHAL: So the committee came to us and
10 they said, we -- we said we're ready to file a plan. The
11 committee came and said we're -- we still are having
12 discussions. You know, we think it would be helpful to the
13 process to have a further extension. We want to -- we want
14 to be able to aid the process and file a plan that has as
15 much support as is possible. And it's for that reason that
16 we requested until the 14th.

17 Now the 14th was not a date picked out of thin air
18 but it was not our ideal date. The date was driven by the
19 fact that when the members of the ad hoc group agreed to
20 become restricted, we had them sign non-disclosure
21 agreements, which provided that no later than the 14th, we
22 would disclose any material, non-public information that we
23 had given them and so we were under the gun. We didn't want
24 to have to disclose information on the 14th pursuant to
25 those NDAs when we hadn't yet filed a plan because those

1 disclosures would be made in the disclosure statement.

2 Now I was told an hour before I came over here
3 that the ad hoc group and the committee has had discussions
4 about whether a date beyond the 14th is more appropriate
5 given where they are on their discussions and so they have
6 proposed that, you know, sort of as this final extension
7 that we extend the exclusivity deadline to file a plan until
8 the 23rd, January 23rd, which is a Wednesday.

9 THE COURT: All right.

10 MR. ROSENTHAL: Now, again, I don't want to go on
11 record insisting that we extend until January 23rd. On the
12 other hand, if the longer period increases the likelihood
13 that we will get meaningful input from the committee and the
14 ad hoc group and more clarity from them on their view of the
15 allocation issues, we think it's in the best interests --

16 THE COURT: All right.

17 MR. ROSENTHAL: -- of the (indiscernible -
18 00:09:35)

19 THE COURT: Well, let's do this. Let me just --
20 let's just button down the current motion that we have here
21 and then we'll talk about the future.

22 So is there anybody who wants to chime in on the
23 request to the 14th, which is unopposed and I will, unless
24 somebody wants to tell me otherwise, I will take silence as
25 agreement here in the rare circumstances where it will be

1 construed as something to the contrary.

2 MR. DUNNE: Your Honor, we're certainly -- the
3 committee certainly supports an extension to the 14th as
4 well as to the 23rd.

5 I'm prepared, if Your Honor wants to hear it, to
6 give you a sense of what the committee's been doing over the
7 last three, four weeks though Mr. Rosenthal hit it, hit most
8 of the high points, but I can come and give you a little
9 more positive --

10 THE COURT: Yeah, that would be helpful and,
11 again, it sounds like there's no one here who opposes the
12 request to the 14th. Actually, let me, just for the purpose
13 of the record, if there -- anybody is in that camp, let me
14 know now. I don't see anybody who is. So I will take that
15 as a "no" and in light of the lack of opposition, the
16 explanations I've received and the little bit of predictive
17 powers what I expect to receive, I'll approve the request to
18 the 14th. So we can sort of segway then to discussions
19 about where to go from here, so --

20 MR. DUNNE: Great. Thank you, Your Honor.

21 Let me spend a few minutes talking about what the
22 committee's been doing over the past month or so and why we
23 think, in light of all the facts and circumstances of the
24 case, an extension to the 23rd actually is appropriate.

25 As Mr. Rosenthal referenced, we have AIHL

1 creditors on the committee and we have bank creditors and
2 they're more or less evenly split. But we've used those two
3 factions as proxies for the larger creditor groups in an
4 attempt to arrive at an appropriate allocation of value
5 between the competing creditors.

6 And that basically occurs in two steps. The first
7 step is relatively easy. You build up a waterfall of how to
8 distribute value out of the Arcapita estates based on legal
9 and contractual entitlements, structural seniority, and the
10 debtor's books and records. That's phase one.

11 Phase two, which is where we've been living for
12 the past several weeks, is reviewing and assaying all the
13 legal doctrines that could move value around,
14 notwithstanding the legal and contractual entitlements based
15 on the debtor's books and records, where the contracts rest,
16 and the like.

17 And to give you a sense of that, what we're
18 talking about there and what the advisors to the committee
19 have done is kind of review and weigh probable litigation
20 outcomes of substantive consolidation. Recharacterization
21 of purported inter-company claims as capital contributions,
22 as equity.

23 Appropriate allocation of overhead expenses, or
24 DIP facility borrowings, avoidance actions, particularly
25 with respect to certain large obligations that may be in the

1 denominator of the claim pool at one entity or another.
2 Arguments with respect to where the new sale proceeds, which
3 Your Honor will recall, where should they appropriately have
4 been booked, notwithstanding the fact of where do they
5 reside legally today. And that gives rise to constructive
6 trust arguments and the like as well as set-off claims.
7 What does it ultimately net out to in terms of movement of
8 value, one way or the other?

9 We wish, Your Honor, that we were standing here
10 today and say that we had an agreement among the committee
11 members. We do not. It's not for want of trying. We're
12 close. I think that all the committee members share a
13 desire to get to a consensus and I'm cautiously optimistic
14 we will over the next few days. But there has been robust
15 debate and deliberation and airing of view within the
16 confines of the committee over these various vectors that
17 move distributions one way or another.

18 Another positive development over the past several
19 weeks has been the participation of the members of the ad
20 hoc committee represented by Kirkland & Ellis and Mr. Henes,
21 whose members have signed up NDAs and have received and
22 reviewed non-public information.

23 And -- so that-- our goal now is to reach a deal,
24 not just within the committee and use the committee as proxy
25 for what the non-committee member creditors actually would

1 react or view the terms of the plan. We have the ad hoc
2 group that we hope that will have buy-in and reach agreement
3 with us as well.

4 Said another way, we're hoping to accomplish in
5 one step what's typically done in, or often done, in two
6 steps. Very often the debtors and the committee would agree
7 on a plan. We'd go public with it and then see, and gauge
8 the ad hoc committee's reaction. We're trying to do this
9 all at once, which I think is optimal and preferable. But
10 it takes slightly longer to do that but I think that we're
11 on the cusp of getting there.

12 And this leads me to why I think the 23rd is an
13 appropriate date. I think we'll find out over the next, you
14 know, few days, whether we can get to a deal. As I said,
15 I'm optimistic that we will and then we can spend the
16 balance of that time refining that proposal and revising the
17 draft plan of reorganization that the debtors have prepared
18 to reflect that. And it would also avoid imposing again on,
19 Your Honor, next week to ask for another week or so in order
20 to work through all those documents and do all the word-
21 smithing that's necessary to file it.

22 And the 14th was driven, in large part, by that
23 was the cleansing date in the non-disclosure agreement for
24 the ad hoc committee members and I think it's a testament to
25 their view, and Mr. Henes can address this directly, that

1 they've seen progress as well and they see good faith
2 negotiations, which is why they're willing to extend that
3 date as well.

4 And so I think we're all kind of targeting getting
5 a plan on file by January 23rd.

6 THE COURT: All right.

7 MR. DUNNE: Thank you, Your Honor.

8 THE COURT: Thank you.

9 MR. HENES: Good afternoon, Your Honor.

10 THE COURT: Afternoon.

11 MR. HENES: Happy New Year.

12 THE COURT: Happy New Year.

13 MR. HENES: Jon Henes, Kirkland & Ellis on behalf
14 of the ad hoc committee.

15 Everything that's been said today is completely
16 accurate. We had that cleansing day. We've been -- our
17 members have been restricted for some time now and what has
18 happened and especially over the last few weeks is we've
19 become more involved.

20 Then we've gotten more involved and we've gotten
21 more information and our members have now been able to see
22 that information, look at the different allocations, the
23 waterfall, those types of issues and engage in discussions.

24 And because of that, and because we see a lot of
25 progress moving forward and we agree with Mr. Dunne that we

1 will hopefully be able to get to a deal by the 23rd, our
2 members are willing to push out their date on the cleansing
3 period to the 23rd and would support the extension of
4 exclusivity until then.

5 And our hope is that we'll continue these
6 discussions that have been going on and, you know, fruits
7 will be bearing and we'll have a plan that everybody can
8 support and make it easier for Your Honor as we get to
9 confirmation.

10 THE COURT: All right. Anybody else want to weigh
11 in on the issue of exclusivity? What I would like to avoid
12 doing, just from a process standpoint is, you all know your
13 case best and there's very good counsel here, who's been
14 able to resolve some very significant legal issues in this
15 case to date and to make progress in other significant legal
16 issues.

17 So I have no doubt that the time that's been
18 granted thus far has been fruitful and that the time going
19 forward would be fruitful.

20 Again, I never know quite when a wheel will come
21 off the bus and somebody will say, no, we object to
22 additional time and, for reasons that may vary for
23 everything under the sun. So what I'd like to do is make
24 sure I understand, sort of, have a kind of a plan going
25 forward and if for some reason the 23rd like the 14th before

1 it and like the date before that, ends up getting to be sort
2 of a milestone as opposed to an ultimate destination.

3 So, with today being the 9th, what I would assume
4 then is if for some reason folks found themselves in a
5 different circumstance and wanted to further extend
6 exclusivity, whether either by agreement or otherwise, I
7 just wanted to get a sense of when that motion would be
8 filed so that I don't find myself in a situation of
9 essentially granting an extension, even though I haven't
10 heard a motion.

11 So I would think that if I'm going to get a
12 motion, today's the 9th, I would think I would get a motion
13 in the next day or two, and then we'd have to have it -- I
14 think we could have it on, we'd need to have it on for next
15 week, or -- one second.

16 (Pause)

17 MR. ROSENTHAL: Your Honor, we have a hearing on
18 the 16th.

19 THE COURT: That's what I was thinking. We have
20 one on the 16th. I was just having discussion about do we
21 have any other ones coming up after that?

22 MR. ROSENTHAL: We --

23 THE COURT: -- like the 20th?

24 MR. ROSENTHAL: -- do not. I think --

25 THE COURT: The 20th --

1 THE CLERK: Oh, I don't --

2 THE COURT: The 20th? We have a hearing on the
3 20th?

4 THE CLERK: Sorry, February the 20th.

5 THE COURT: No, I think it's February 20th. So
6 that's -- so we have the 16th. So my thought would be file
7 a motion for the 24th and we hear it on the 16th and you get
8 me a bridge order to push it out that far. Like the last
9 conservation we had, I don't expect that I'm going to get
10 any opposition because of all of you folks being here today
11 and very helpfully explaining where you are and why you find
12 yourself where you are.

13 So, but what I would say is, I just want to ask
14 folks now and if you want to take a moment to talk about it,
15 whether you think the 23rd is -- has the serious possibility
16 of being a fire drill, that is, an interim date. Normally,
17 I get requests for exclusivity that are much more in the
18 nature of months, or two weeks, so it's not normal to have
19 them for shorter periods.

20 So, and we've been there a few times, so before
21 you file that motion, I would ask that you sit down and chat
22 about it. Again, I understand that it's often very helpful
23 to have something to push against and -- but at a certain
24 point, it begins to lose its utility if it's -- if we all
25 sort of know where the train's headed anyway.

1 So I'm more inclined to say something like two
2 weeks makes sense, just because then we can have a more
3 early process if we find ourselves beyond then, but I know
4 it's tied to NDAs and disclosures and things of that sort
5 but what I would ask is that you think about it before you
6 officially request the 23rd, just because I would prefer not
7 to have -- go down a real short term road again because I
8 think it has --

9 MR. ROSENTHAL: That's fine, Your Honor. So if I
10 understand correctly the -- if I could ask the Court to so
11 order on the record so we -- for the 14th --

12 THE COURT: Yes.

13 MR. ROSENTHAL: The 14th.

14 THE COURT: The 14th is granted. Again, there was
15 no opposition. I think it's been more than adequately
16 demonstrated that it's appropriate to extend it out to that
17 date. There's been very meaningful progress that's occurred
18 and is occurring and everybody is doing everything short of
19 actually physically holding hands to communicate that to me.
20 So I have no problem with the 14th whatsoever.

21 My only question is whether going forward whether
22 a more traditional period than nine days --

23 MR. ROSENTHAL: Right.

24 THE COURT: -- which is, sort of a, kind of in the
25 nature of a legal bandaid makes some sense just because that

1 way you can all -- we don't have to keep doing this drill.
2 And that way, if there's another motion to be filed, it can
3 be filed, served and noticed on a more normal period so if
4 folks do, at a certain point, decide that they want to take
5 a different view then they have whatever process that they
6 would need.

7 MR. ROSENTHAL: So what I would understand then is
8 that within the next -- well, we'll get together within the
9 next day or two before the end of the week. We'll file
10 another motion, which will have a bridge order attached to
11 it, so -- to go beyond the 14th and we'll set that motion
12 for the 16th.

13 THE COURT: For the 16th, correct. Correct.

14 MR. ROSENTHAL: And then whatever date --

15 THE COURT: Right.

16 MR. ROSENTHAL: -- we come up with whether it's
17 the --

18 THE COURT: Yeah, again, I think when you begin to
19 get under two weeks, you begin to have, just have process
20 problems and procedural problems and notice problems. And
21 again they don't really exist until they exist because if
22 everyone's --

23 MR. ROSENTHAL: Right.

24 THE COURT: -- on the same page, then one says
25 it's fine, dandy and -- but then, if that doesn't happen,

1 then it becomes a problem. So, yeah, just talk to each
2 other and figure it out.

3 I don't think it's in the interest of your clients
4 at a certain point to run too many of these fire drills
5 anyway so I would say that something -- two weeks would seem
6 to be sort of an appropriate minimum, in terms of the bite
7 size chunks to take. But talk to each other. Every case is
8 different. Every circumstances is different and I'm not
9 going to pretend that I know better the status of the
10 negotiations and what best serves the case as well as you
11 folks do, because I don't.

12 So, but I would ask that you just chat about it in
13 light of the conversation we've had here today and we'll
14 take it from -- take it from there.

15 MR. ROSENTHAL: Just so the Court knows, I mean, I
16 think we're all getting pressure both ways. We're getting
17 pressure to do, you know, to do a deal and to conclude the
18 negotiations, you know, and have input and I know the
19 committee's working hard. You know, I'm getting pressure
20 from my client, why don't we file a plan?

21 THE COURT: No, I'm --

22 MR. ROSENTHAL: So no one wants to delay this.

23 THE COURT: -- sure that's -- no, I'm sure that's
24 right but I think you can take back to your respective
25 constituencies that at a certain point the judge is not a

1 fan of too many real short extensions. At a certain point,
2 we don't want to go there and get bogged down in that --

3 MR. ROSENTHAL: Absolutely.

4 THE COURT: -- particular problem. So, again, I
5 think I understand where you all are coming from and I don't
6 begrudge anybody anything that's been done to date, I just
7 -- I do have some other things towards the end of the month
8 that are some significant matters and I also don't want to
9 find ourselves in a time crunch trying to squeeze the case
10 in because we can do something like this when we think
11 everybody's on the same page. And, again, it's not a
12 problem --

13 MR. ROSENTHAL: Uh-huh.

14 THE COURT: -- until it is and I have had a two-
15 day long contested exclusivity hearing in the not too
16 distant past in another large 11, which was followed by
17 another contested exclusivity hearing so -- and no one saw
18 those coming either. But then they became a knock down drag
19 out war and I certainly don't wish that upon this case
20 because I think those things can be very -- everyone has
21 their legal rights but they also can be a bit distracting
22 from the ultimate goals in the case and be destructive that
23 way.

24 But, having seen that, I -- you know, it's not a
25 problem until it's a problem so I'd like to at least make

1 sure we have a bit more of a ramp in case we have to gear
2 that up.

3 MR. ROSENTHAL Fine, Your Honor.

4 THE COURT: So I will enter the order today
5 extending exclusivity to the 14th. You'll chat with
6 everyone and in the next day or two file that motion to be
7 heard on the 16th. So, you'll give me the motion, the
8 bridge order and a motion to shorten time and then we'll see
9 each other on the 16th.

10 MR. ROSENTHAL: Thank you, Your Honor.

11 THE COURT: All right.

12 MR. ROSENTHAL: Thank you very much.

13 THE COURT: Anything else we should chat about
14 here today?

15 All right. Thank you very much and Happy New
16 Years, you all.

17 (Whereupon these proceedings were concluded at
18 5:18 PM)

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

I, Pamela A. Skaw, certify that the foregoing transcript is a true and accurate record of the proceedings.

**Pamela
A Skaw**

Digitally signed by Pamela A Skaw
DN: cn=Pamela A Skaw, o, ou,
email=digital1@veritext.com,
c=US
Date: 2013.01.14 16:35:41 -05'00'

Veritext
200 Old Country Road
Suite 580
Mineola, NY 11501
Date: January 14, 2013