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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 12-11076-shl

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In the Matter of:

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

Debtors.

----- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

October 19, 2012

11:12 AM

B E F O R E :

HON SEAN H. LANE

U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc. #559 Motion to Approve/Motion for an Order
2 Pursuant to Section 105(a) of the Bankruptcy Code and
3 Bankruptcy Rule 9019, Authorizing and Approving the
4 Settlement with Standard Chartered Bank

5

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

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25 Transcribed by: Melissa Looney

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good morning. Please be seated.

UNIDENTIFIED SPEAKER: Good morning.

UNIDENTIFIED SPEAKER: Good morning.

THE COURT: All right. We are here for Arcapita Bank on a rainy Friday. And I know that we have a settlement on, but we also have a continued matter that I know is of some sensitivity -- time sensitivity and importance to the debtors' estate.

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

THE COURT: All right. Let me get any other appearances.

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

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

MR. GREER: Good morning, Your Honor, Brian Greer of Dechert LLP for Standard Chartered.

THE COURT: All right. Thank you.

MR. ROSENTHAL: Your Honor, we were just in front

1 of you ten days ago, so I'm -- there's not much of a case
2 update. I will tell you that the actions with respect to
3 the EuroLog IPO continue to proceed and we should get some
4 word from -- from London by Monday I think.

5 THE COURT: All right.

6 MR. ROSENTHAL: Your Honor, the first matter is
7 the settlement motion with respect to Standard Chartered
8 Bank. I'll call it SCB.

9 As you know, Standard Chartered Bank has
10 approximately \$100 million owed under two loan facilities,
11 \$50 million approximately under each facility.

12 They have a collateral pledge of the stock of
13 three portfolio companies, which are Wind Turbine (ph),
14 RailInvest and a company called AEID II. AEID II is one of
15 the portfolio companies that's involved in the EuroLog IPO.

16 They also have a pledge of the stock of Arcapita
17 long-term holdings, which as you will recall, is a first
18 tier subsidiary of AIHL, and AIHL itself is a first tier
19 subsidiary of Arcapita Bank.

20 Your Honor, we had -- I think I reported before in
21 a preliminary statement -- we had extensive discussions with
22 SCB regarding their request for adequate protection, their
23 claims. Those discussions took place in the context of the
24 IPO discussions in the context of some discussions related
25 to the debtor in possession financing.

1 And in connection with the IPO discussions and the
2 consent that was filed by the committee, Standard Chartered
3 Bank, and the joint provisional liquidators, we reached an
4 agreement. The agreement that's before the Court with
5 respect to Standard Chartered's adequate protection issues
6 and other issues, some of them related to the debtor in
7 possession financing.

8 The term sheet is attached to the motion. I'd
9 like to briefly go over some of the key points of the --

10 THE COURT: Yeah, please.

11 MR. ROSENTHAL: -- the term sheet.

12 First, Your Honor, the debtors have stipulated to
13 the validity, perfection and enforceability of Standard
14 Chartered's claims and security.

15 The committee has waived the right to challenge
16 the liens, but the joint provisional liquidators have
17 retained a limited right to challenge those liens both
18 before this Court and before the Cayman Court, and that's in
19 the order that you will see.

20 There were some agreements reached, Your Honor,
21 with respect to what cash from portfolio sales could be up
22 streamed to AIHL. As you know Standard Chartered had argued
23 that that cash was subject to not just to their lien, but to
24 a trust claim under Cayman law.

25 So the resolution of that was that to the extent

1 that cash is generated from exits related to our equity --
2 equity side of the investments, not the cash that goes up to
3 the bank for repayment of expenses and the like, but the
4 portion that relates to our equity investments, that that
5 cash can be up streamed from the portfolio company to AIHL.
6 And remember we -- that's where we were -- we're holding all
7 of the equity cash at AIHL. To the extent that the funds
8 are up streamed, Standard Chartered will have an
9 administrative expense claim for those -- for those funds.

10 Now, there are -- there are -- there's an
11 exception to that. Standard Chartered has agreed that the
12 proceeds of the IPO can be up streamed. But they -- what
13 they haven't agreed is that the -- any proceeds from the two
14 other portfolio companies, they specifically have a pledge
15 over, RailInvest and Wind Turbine, we'll have to have a
16 further discussion with them about what would happen to
17 those proceeds if an exit occurs with respect to those
18 entities. We don't currently have any exit plan with
19 respect to those entities.

20 As part of this agreement, Your Honor, the debtors
21 have agreed to reimburse Standard Chartered's expenses and
22 the debtors have agreed that as adequate protection for
23 Standard Chartered's interests that we will pay an initial
24 payment equal to the accrued unpaid profit interests/you
25 know, these are Islamic instruments to Standard Chartered

1 when the debtors get approval of an interim or final DIP.

2 THE COURT: And that's essentially in lieu of
3 interests?

4 MR. ROSENTHAL: That's correct. That's correct.
5 And that will be credited against, you know, any profit or
6 interest that's fully credited against amounts that would be
7 owed under those two (indiscernible - 00:05:58). To the --
8 and then they will also receive a payment of what represents
9 approximately \$500,000 a month on an ongoing basis, which
10 is, again, equivalent to in U.S. terms, interest.

11 THE COURT: Okay.

12 MR. ROSENTHAL: Now, there are -- there are some
13 limits on this, which were part of the negotiations. So
14 first, these amounts are not payable until we receive
15 interim or final -- the -- the adequate protection amounts
16 -- until we receive interim or final approval of a DIP.

17 And second, the committee has retained a limited
18 right to challenge the adequate protection payments.

19 And I'm going to try to simplify this. In the
20 event that the EuroLog IPO occurs the committee has no right
21 to challenge the adequate protection payments. In the event
22 the EuroLog IPO does not occur, however, the committee has
23 the right to challenge 50 percent of that initial payment of
24 accrued profit/interest and 100 percent of any other -- any
25 other payments. So we bifurcated the treatment depending on

1 what happens with the IPO.

2 There is in this term sheet, Your Honor, basically
3 an agreement by Standard Chartered that it will not object
4 to any DIP financing that's consistent with the agreement.
5 And the primary issue there, I mean, it's -- it's relatively
6 detailed in the -- in the term sheet, but the primary issue
7 there is that we -- we have negotiated and Standard
8 Chartered has negotiated for in effect a first on the Wind
9 Turbine assets and stock, a first on the RailInvest assets
10 and stock and a first on the AEID assets and stock. And so
11 they do not want to have -- they do not want to have a DIP
12 lender come in and try to prime them with respect to that.
13 And so that's -- that's basically the DIP agreement.

14 In exchange, SCB, as you know, consented to the
15 EuroLog IPO documentation and filed a -- filed a consent --
16 a consent with the Court.

17 There are a couple other agreements that I want to
18 mention in this -- in this term sheet and they also relate
19 to the DIP.

20 One of the last things that we talked about is a
21 -- an agreement between the committee, the debtors and
22 Standard Chartered about the sizing of the DIP.

23 Remember this was all in connection with
24 negotiations about the EuroLog IPO. So we were -- we were
25 trying to come up with a way to put into the term sheet

1 agreements with respect to the sizing of the DIP and how to
2 take into consideration proceeds that we got from the IPO,
3 whether those proceeds resulted in an administrative claim
4 for Standard Chartered or whether those proceeds did not
5 result in an administrative claim.

6 And the basic -- the basic provision in this term
7 sheet is that the debtors will size the DIP without
8 considering the IPO to the extent that IPO proceeds come in
9 and those proceeds are not subject to an administrative
10 claim in favor of Standard Chartered, i.e., they don't
11 relate to the AEID II equity then those proceeds would be
12 used to reduce the -- reduce the DIP commitment or if all
13 had been drawn under the DIP loan to repay -- to repay the
14 DIP loan that amount.

15 We, with respect to that portion of the proceeds
16 that related -- that gave rise to an admin claim for
17 Standard Chartered, we've agreed to use those proceeds
18 first, but because the admin claim would have to be paid in
19 full in cash on exit, we would not reduce the DIP commitment
20 by that -- by that amount.

21 So that's the basic agreement, Your Honor. No one
22 has objected to the settlement agreement. The only revision
23 we have to the proposed order is to make clear that the
24 joint provisional liquidators can challenge the Standard
25 Chartered liens either in the Cayman Court or in the

1 Bankruptcy Court.

2 I'm prepared to approach with a redline of the
3 order, Your Honor, if no one --

4 THE COURT: That would be helpful.

5 MR. ROSENTHAL: -- has comments.

6 THE COURT: Thank you.

7 (Pause)

8 THE COURT: Thank you.

9 MR. ROSENTHAL: This language has been -- you see
10 on page -- I guess it's not page --

11 THE COURT: Was this paragraph 5?

12 MR. ROSENTHAL: -- it's paragraph -- paragraph 5.
13 So this language has been agreed by all of -- all of the
14 parties and represents the -- including Standard Chartered.
15 So --

16 THE COURT: All right. All right. Thank you.
17 Nice simple settlement.

18 MR. ROSENTHAL: It is.

19 MR. FLECK: Good morning, Your Honor. Evan Fleck
20 on behalf of the committee. The official committee has no
21 objection to the settlement. In fact, the committee is a
22 party to the settlement.

23 There are a lot of issues being resolved pursuant
24 to this agreement that's before the Court today and
25 Mr. Rosenthal did a fine job going through the principle

1 points.

2 But for the committee's purposes, this settlement
3 was very much about the IPO, even though the issues that are
4 being resolved are some pretty far afield from the IPO, some
5 are close and some are directly related to the IPO, but the
6 committee had formed a view after significant diligence and
7 cooperation with the debtors and the JPLs and SCB that the
8 IPO was and is the best way to monetize those assets.

9 And therefore, along the way from our initial
10 hearing before the Court where Your Honor approved a process
11 subject to consent of the parties, the committee formed that
12 view and was working very diligently with the other parties
13 to make sure that happened.

14 The debtors had elected to give Standard Chartered
15 Bank a consent right with respect to that settlement, with
16 respect to the IPO, Your Honor. And so part of the process
17 that took place, specifically over the course of a weekend,
18 was to get Standard Chartered Bank's consent for the IPO
19 that the committee had decided was and is the best way to
20 monetize those assets. So for the committee's purposes,
21 they are inextricably linked.

22 Ultimately a deal was reached and that deal is
23 above the lowest point in the range of reasonableness.

24 So we are supportive of the settlement. I think
25 there's a cautionary tale at least for our purposes on a

1 committee side about having non-fiduciaries having consent
2 rights to transaction, but they had it. We all decided that
3 this was a good deal and we're standing by the deal today
4 and ask the Court to approve it.

5 THE COURT: All right.

6 MR. FLECK: Thank you.

7 THE COURT: Thank you.

8 Anyone else wish to be heard on the settlement?

9 All right. I will approve the settlement. I
10 think it easily passes the lowest range of reasonableness
11 under 9019. And it's very obvious to me that it involves a
12 very careful balancing of many things of interest to the
13 debtors' estate, to the committee and to other interested
14 parties, including the IPO, including debtor in possession
15 financing, and as well as having to address Standard
16 Chartered's rights in the context of the case.

17 So I'm happy to approve it and the additional
18 language in paragraph 5 makes perfect sense to me, so thank
19 you.

20 I appreciate the parties' efforts to work out the
21 careful balancing act that's been achieved here.

22 MR. ROSENTHAL: Thank you, Your Honor. And for
23 the Court's information, this also has to be approved by the
24 Cayman Court. There is an application that has been filed
25 that is -- that is currently set for Monday --

1 THE COURT: All right.

2 MR. ROSENTHAL: -- before the Cayman Court.

3 THE COURT: I figured that was the case.

4 MR. ROSENTHAL: Your Honor, the second item -- the
5 last item on our agenda really concerns the debtors'
6 commitment letter motion.

7 As you recall, this was originally up for hearing
8 on the 9th and we had a substantial amount of discussion
9 with the Court at the -- at the hearing on the 9th and the
10 hearing was ultimately adjourned until today.

11 I want to start, Your Honor, by saying thanks for
12 your patience and guidance on this. I think the parties
13 heard loud and clear the -- the issues the Court identified
14 and have been trying to work hard to resolve those issues.

15 I have some encouraging news, but I don't yet have
16 an agreement.

17 THE COURT: All right. What's the news?

18 MR. ROSENTHAL: The encouraging news is that we
19 have received, as late as 1 or 2 o'clock in the morning, a
20 proposal from Silver Point, which you know, is the lender
21 that had given us the commitment agreement, which made some
22 substantial concessions that we are -- that we are
23 reviewing.

24 We have not reached a final determination but we
25 are -- we are certainly encouraged by -- by what we saw in

1 this letter. We've had discussions with the committee.
2 We've all decided that we have to go back to our clients and
3 think about it a little more. It's not -- it's not that --
4 it's not that we have decided to -- not to accept it right
5 now it's just -- it's --

6 THE COURT: Haven't had enough time to --

7 MR. ROSENTHAL: -- on very short notice.

8 THE COURT: -- digest it.

9 MR. ROSENTHAL: At the same time, there has been a
10 -- an increased level of interest from alternative providers
11 since that hearing on the -- on the 9th and others have --
12 have also sent proposals, some as late as -- as last night
13 as well.

14 Throughout this process, as you know, we've been
15 trying to consult with the committee and the joint
16 provisional liquidators on -- on these proposals and we --
17 and we continue to do so.

18 We think that this is clearly moving in a positive
19 direction, Your Honor. We're not in a position, as I said,
20 to make a decision now.

21 We would ask the Court to adjourn this hearing
22 until sometime next week so we can have further -- further
23 discussions and hope to -- hope to get to the point where we
24 can have -- as the Court said, a commitment that's actually
25 a commitment that we can present to the Court for approval.

1 THE COURT: All right. Let me hear from any other
2 interested party on this issue.

3 MR. DUNNE: Good morning, Your Honor. Dennis
4 Dunne from Milbank, Tweed on behalf of the committee.

5 I echo Mr. Rosenthal's comments. There have been
6 a number of positives that have occurred since the last time
7 we were in front of Your Honor.

8 The debtors on one hand have refined their notion
9 of what they need, when they need it in terms of DIP
10 borrowings. We've received a termsheet from Silver Point
11 this morning that was very positive and, you know, I -- I
12 know the committee appreciates Silver Point's efforts to
13 kind of refine their proposal over the last week to address
14 Your Honor's comments.

15 My -- my client is reviewing that as we speak, and
16 as Mr. Rosenthal said, there are -- there are other lenders
17 out there who are also submitting proposals and doing their
18 diligence.

19 So with that I think the process to date is
20 working, you know, as it should given that we don't have an
21 immediate need to borrow right now.

22 THE COURT: All right. Well then let me -- well,
23 first let me -- anybody else who wants to be heard on this
24 issue?

25 All right. Then, I -- I guess the question is one

1 of timing. What do you suggest in terms of timing? We can
2 set a date next week. Does it matter where in the week that
3 date is?

4 MR. ROSENTHAL: Your Honor, I -- I think we would
5 like to set a date next week, sometime around the middle of
6 the week, I believe. I think it -- I think it's important
7 to keep -- to keep a short time frame -- a short leash on
8 all the parties so we can get to a -- to an agreement.

9 I think that we are -- as the Court knows, we have
10 a November -- mid-November hearing and we'd like to be in a
11 position at a minimum to present a motion for interim
12 authority with respect to a DIP by that November hearing,
13 because we're going to -- we're going to need the funds by
14 then.

15 THE COURT: All right. I have two possible dates.
16 One is the 25th and one is the 23rd.

17 Given the concern here, my -- my first impression
18 is the 23rd. And that -- because this is an issue of
19 importance that is time sensitive, so that's what I'm going
20 to go with unless somebody tells me that there's some
21 benefit to the 25th and that the 23rd is -- consider right
22 now it's -- it's too short?

23 MR. DUNNE: What time on the 23rd? I ask only
24 because we have our -- our weekly call with the committee in
25 the morning of the 23rd.

1 THE COURT: I can do it in the afternoon.

2 MR. DUNNE: And that would be the time when we
3 would be seeking affirmative direction from the --

4 THE COURT: Yeah, that's fine. I can do it in the
5 afternoon.

6 MR. DUNNE: That would work.

7 THE COURT: I have a calendar at 10:00 on the 23rd
8 and we could set this for 2:00. As I said, I also have time
9 in the afternoon of the 25th if people feel that that's more
10 appropriate given their schedules.

11 So I will defer -- if you want to take a brief
12 moment to chat about what -- what would make sense in the
13 context of the case.

14 MR. ROSENTHAL: Yeah, I think the -- the debtors
15 are fine with the 23rd, Your Honor. I mean, as you know,
16 this is a 24-hour case, 7-day a week case anyways.

17 THE COURT: That's --

18 MR. ROSENTHAL: So --

19 MR. DUNNE: That's fine with the committee.

20 THE COURT: Or -- so let's make it the 23rd at
21 2 o'clock.

22 MR. MORRISSEY: Your Honor --

23 THE COURT: Mr. Morrissey?

24 MR. MORRISSEY: Yes, Your Honor, I have no problem
25 with the date or the time.

1 The question I had is just for clarification,
2 whether the hearing is set to go forward regardless of
3 whether it's Silver Point or one of the alternative sources
4 of funding that Mr. Rosenthal alluded to a moment ago.

5 THE COURT: Well, let me ask Mr. -- I had
6 understood, I think at an earlier conference that the intent
7 was to use this for funding and that -- but that does raise
8 some notice issues. So let me ask Mr. Rosenthal what
9 guidance he can provide on that issue.

10 MR. ROSENTHAL: Yes, Your Honor. That's -- that
11 is what we would intend, that we would go forward on
12 funding. If it's Silver Point, it's Silver Point. If it's
13 not Silver Point, we would hope to go forward with -- with
14 the selected -- with the selected DIP provider.

15 We have an agreement with the committee and the --
16 and I think the JPL that we will not -- none of us will
17 raise a question that the -- that for procedural reasons it
18 should not go forward.

19 THE COURT: All right. And -- and my
20 understanding is that any approval would be requested on an
21 interim basis, which I think may -- may help Mr. Morrissey's
22 concerns; is that correct?

23 MR. ROSENTHAL: Yes. And this would not be -- I
24 -- I don't see us going forward with approval of an actual
25 DIP motion on -- on Tuesday. There is none on file.

1 There's just a motion to approve a commitment -- a
2 commitment letter. So I think if we had a commitment letter
3 whether it's from Silver Point or another provider and we
4 were prepared to go forward, it's that --

5 THE COURT: All right.

6 MR. ROSENTHAL: -- it's that letter that we would
7 go forward on.

8 THE COURT: And am I right in saying that if as
9 things change over time, something changed so that we were
10 talking about on Tuesday was a difference in kind -- in
11 other words, we're no longer talking about something that
12 looks like a commitment letter, we're talking about some
13 other kind of package that might require notice that you
14 essentially would -- would talk to all the interested
15 parties, including the UST and obviously the committee, and
16 then work out whatever appropriate notice would be required
17 under the circumstances?

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

19 THE COURT: All right. Mr. Morrissey, does that
20 address your concerns?

21 MR. MORRISSEY: Yes, it does, Your Honor. Thank
22 you very much.

23 THE COURT: Certainly.

24 MR. GREISSMAN: Good morning, Your Honor. Scott
25 Greissman, White & Case for Silver Point. I had not noted

1 my appearance earlier and I apologize.

2 THE COURT: Noted.

3 MR. GREISSMAN: I just wanted, again, to thank the
4 Court for scheduling a further hearing on really very short
5 notice.

6 Silver Point has put a lot of time and effort into
7 revising the commitment in a way that we think conforms with
8 the Court's directives. And it's really not -- these are
9 not complicated revisions. These are mostly excises for the
10 problematic provisions. And so we are very hopeful that it
11 does not take the parties a great length of time to evaluate
12 the revised commitment.

13 THE COURT: All right. Well, thank you. I
14 appreciate that. And this case -- there are times in these
15 cases that just require a certain amount of short turn
16 around, so this -- I think we're in one of those periods
17 right now. So --

18 MR. GREISSMAN: Thank you, Your Honor.

19 THE COURT: -- thank you.

20 All right. So we'll set it for Tuesday the 23rd
21 at 2:00.

22 Is there any sort of deadline before that in terms
23 of an update either among the parties or to me in terms of
24 anything that I have to think about that makes sense sitting
25 here this morning?

1 Obviously I -- I will have the prior papers, but I
2 -- those are sort of dead in the water as far as I -- as I
3 see it. So I don't know if you intend to -- I mean, I
4 mention it because it sounds like what Mr. Dunn said is that
5 there's a committee call in the morning so you may not have
6 sufficient clarity until that call, it's possible, to file
7 anything. But I didn't know what the parties had in mind.

8 MR. DUNNE: Well, on that point, I think that we
9 would be in a position Monday afternoon to be able to advise
10 the Court where we think we're going to be and we would
11 know --

12 THE COURT: All right.

13 MR. DUNNE: -- as the advisors how we're going
14 into that call Tuesday morning with the recommendation that
15 the debtors support to do X or to not. And so I think it
16 would be fair to give you an update given all that.

17 MR. ROSENTHAL: I agree, Your Honor. And -- and
18 that way you can prepare for whatever's --

19 THE COURT: All right.

20 MR. ROSENTHAL: -- coming forth.

21 THE COURT: Yeah, that's -- that's sort of what
22 I'm getting at.

23 All right. So I'll expect to -- how about we say,
24 Monday at 5:00. Does that make sense --

25 MR. ROSENTHAL: Fine.

1 THE COURT: -- that you'll file something and just
2 give me a quick update as to -- as to what I should be
3 thinking about going into Tuesday.

4 MR. ROSENTHAL: Do you want us to file something
5 or give --

6 THE COURT: Well, you can call -- my concern is
7 that to the extent there's any amount of notice that's
8 helpful. I guess it may depend on what we're talking about.
9 If we're talking about changes, it might be just a short
10 notice saying the debtors, you know, intend to move forward,
11 here's an outline of -- of the changes and here's who's on
12 board, who's not. Just for purposes of --

13 MR. ROSENTHAL: Of the record.

14 THE COURT: -- you know, notice and due process in
15 the case, because I think that's always to be desired.

16 MR. ROSENTHAL: Fine. Fine.

17 THE COURT: So let's do that. If there's any
18 question that things -- things go -- I wouldn't say
19 sideways, but don't sort of flow in a way that that makes
20 sense, call chambers and we'll figure out what does make
21 sense going forward.

22 MR. ROSENTHAL: Thank you, Your Honor.

23 THE COURT: All right?

24 MR. ROSENTHAL: That's fine.

25 THE COURT: Anything else that we should chat

1 about before we adjourn 'til Tuesday at 2:00?

2 MR. ROSENTHAL: No, Your Honor.

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

4 (Whereupon these proceedings were concluded at 11:38
5 AM)

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I N D E X

RULINGS

Page Line

Motion to Approve/Motion for an Order

Pursuant to Section 105(a) of the Bankruptcy

Code and Bankruptcy Rule 9019, Authorizing

and Approving the Settlement with Standard

Chartered Bank

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9

Motion to Authorize/Debtors' Motion for

Entry of an Order Authorizing the Debtors

to Enter into a Financing Commitment Letter

and Incur Related Fees, Expenses and

Indemnities - Adjourned

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Deadline to Give Update to the Court

Regarding Tuesday's Hearing

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

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

**Melissa
Looney**

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