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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:

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

Debtors.

- - - - - x

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

December 7, 2012
3:09 PM

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

1 Hearing re: Doc. #690 Motion to Authorize/Debtors Motion
2 for the Entry of Interim and Final Orders Pursuant to 11
3 U.S.C. 105, 362, 363(b)(1), 363(m), 364(c)(1), 364(c)(2),
4 364(c)(3), and 364(e) and Bankruptcy Rules 4001 and 6004(I)
5 Authorizing Debtors (A) to Enter into and Perform Under DIP
6 Agreement, and (B) to Obtain Credit on a Secured
7 Superpriority Basis, (II) Scheduling Final Hearing Pursuant
8 to Bankruptcy Rules 4001(b) and (c) and (III) Granting
9 Related Relief

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25 Transcribed by: Dawn South

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good afternoon, please be seated. All right, we're here for Arcapita Bank. Counsel?

MR. WILLIAMS: Good afternoon, Your Honor, Matthew Williams, Gibson Dunn & Crutcher for the debtors. With me is my partner Emad Khalil and my colleague, Josh Weisser.

THE COURT: All right, anyone else anticipate speaking at the hearing enter your appearance.

MS. DELANO: Good afternoon, Cindy Chen Delano with Milbank, Tweed, Hadley & McCloy. With me is by colleague, Albert Pisa. Thank you.

MR. MORRISSEY: Good afternoon, Your Honor, Richard Morrissey from the U.S. Trustee's Office. I'm not sure whether I'm be speaking on not.

THE COURT: All right.

MR. MORRISSEY: It depends how it goes today.

THE COURT: Fair enough.

MR. ROVIRA: Good afternoon, Your Honor, Alex Rovira from Sidley Austin on behalf of Joint Provisional Liquidators.

THE COURT: All right.

MR. ZIMAN: Your Honor, Ken Ziman from Skadden, Arps on behalf of Fortress Credit Corp. Hopefully this will be the last I speak at the hearing.

1 THE COURT: All right.

2 MR. GREER: Good afternoon, Your Honor, Brian
3 Greer of Dechert LLP, Standard Chartered.

4 THE COURT: All right. Anyone else?

5 Proceed.

6 MR. WILLIAMS: Thank you, Your Honor. First of
7 all, Your Honor, again for the record Matthew Williams,
8 Gibson, Dunn & Crutcher for the debtors. Thanks for hearing
9 on shortened notice. We obviously filed the pleadings on
10 Tuesday.

11 I'm happy to report that after a lot of hard work
12 from both the committee, the JPL, even the ad hoc committee,
13 and I'm probably forgetting some people here, my colleagues,
14 but I think we're close and I think we actually have at
15 least for an interim hearing a global resolution here in
16 connection with this novel DIP financing motion.

17 THE COURT: All right.

18 MR. WILLIAMS: And I'd also like to apologize, my
19 partner, Michael Rosenthal, couldn't be here today because
20 he's over in London with a lot of the creditors' committee
21 and some of their professions negotiating in connection with
22 the plan of reorganization.

23 THE COURT: No apology necessary. Always happy to
24 see other folks in the office, as much as I like
25 Mr. Rosenthal as well. Certainly no need to apology for

1 your presence.

2 MR. WILLIAMS: Thank you, Your Honor.

3 And as I said earlier with me is my partner, Emad
4 Khalil. His name may be familiar to you a little bit
5 because we cited one of his (indiscernible - 00:02:16)
6 articles in our brief. Mr. Khalil is kind of our resident
7 expert on sharia compliant financing.

8 THE COURT: All right.

9 MR. WILLIAMS: So if you have any --

10 THE COURT: That makes you a valuable man.

11 MR. WILLIAMS: Yeah, so if you have any questions
12 on the intricacies of the financing I can fake it a little
13 bit, but Mr. Khalil is really the guy you want to speak to.

14 THE COURT: All right, that's a fair disclaimer.

15 MR. WILLIAMS: Thank you, Your Honor.

16 So as I said earlier before Your Honor today is
17 the debtors' motion. We're seeking authority to enter into
18 a murabaha financing with Fortress Credit Corp. If approved
19 the Fortress Credit -- I'm sorry -- the Fortress murabaha
20 would allow us \$25 million of cash on an interim basis, it
21 would allow us up to \$150 million on a final basis.

22 Now, pursuant to the motion as I said earlier,
23 we're not seeking to borrow anything, what we are seeking to
24 do is enter into a murabaha transaction.

25 And in essence, and we lay this out in our motion,

1 a murabaha is really a multi-party commodities transaction
2 with deferred payment terms. It really can be boiled down
3 into four simple steps.

4 First the debtor notifies Fortress that we would
5 ask Fortress to buy commodities on our behalf.

6 Second Fortress goes out and buys the commodities
7 on our behalf.

8 Third, they transfer the commodities to us.

9 And then fourth we on-sell the commodities to
10 somebody else.

11 And in return for Fortress' agreement to transfer
12 the commodities to us we agree to pay in essence what's a
13 profit compensate them for the risk.

14 So the end result of these transfers is we wind up
15 with an immediate cash infusion and we wind up with -- we,
16 the debtors wind up with the obligation to pay Fortress in
17 essence the profit.

18 So it's not interest, it's completely sharia
19 compliant, and for reasons that are observe we needed a
20 sharia compliant loan.

21 THE COURT: All right.

22 MR. WILLIAMS: Sharia compliant murabaha. I'm
23 sorry, Your Honor.

24 To our knowledge at least this is --

25 THE COURT: I'll -- any time you say the word loan

1 I'll take it to mean murabaha.

2 MR. WILLIAMS: I appreciate that, Your Honor, and
3 we put that in a footnote in our motion for that very
4 purpose.

5 THE COURT: I did see that.

6 MR. WILLIAMS: And we tried to -- any time we use
7 loan or borrower we tried to put it in quotes.

8 THE COURT: Old habits die hard, but I understand
9 what you're trying to do in this case --

10 MR. WILLIAMS: Thank you, Your Honor.

11 THE COURT: -- and that it is for important
12 reasons different.

13 MR. WILLIAMS: Thank you, Your Honor.

14 To our knowledge this is the first murabaha DIP
15 financing that's been implemented. Even putting aside the
16 novel structure, I think as Your Honor is aware there are a
17 lot of difficult issues we had to grapple with in this case,
18 in particular the complex collateral package required a lot
19 of due diligence and both business and legal due diligence
20 by our potential counterparty, which is why it look us so
21 long to get where we are today, but I'm happy to say we are
22 were we are today.

23 As I said earlier, hopefully this will be a --
24 it's my hope and expectation to be a consensual hearing.

25 Per Your Honor's scheduling order objections were

1 due yesterday I think at 3 o'clock. Again, this is just an
2 interim hearing. We haven't received any objections. We
3 did have and we've had throughout the case continuing
4 discussions with the creditors' committee which went through
5 last night. I think we filed late last night, and I
6 apologize for the lateness, but just given the timing we
7 wanted to get in front of Your Honor, a supplemental
8 pleading where we dealt with I think a lot of the creditors'
9 committee's concerns, and to be frank some of our concerns.

10 I view all of the changes that were made from the
11 initial filing to the filing we made last night as either
12 clarifications or beneficial to the estate.

13 If Your Honor would like at the end of my
14 presentation I'm happy to walk you through them, I think the
15 pleading speaks for itself, and I'm happy to proceed how
16 Your Honor wishes.

17 THE COURT: You could just give me just for the
18 record just a quick overview probably for the record here
19 today is helpful.

20 MR. WILLIAMS: Okay.

21 THE COURT: But a prompt one, because I do think
22 as you said, it's set forth in the pleading.

23 MR. WILLIAMS: Okay. Thank you, Your Honor.

24 Just quickly the terms in the murabaha, I'll go
25 through -- or the proposed murabaha I'll go through real

1 quickly.

2 As I said earlier the size of the arrogate
3 commitment would be \$150 million. It's broken down into a
4 couple of different component parts. We would have a
5 \$25 million interim availability. Upon entry of the final
6 order that would increase to -- we have an increase of 100-
7 for a total commitment of 125-. And there's another add on
8 piece where Fortress is continuing to do diligence.

9 As I said earlier, this is a complex collateral
10 package, so Fortress is continuing to do diligence on an
11 additional 25-. If we get that we would obviously be up to
12 the full 150-.

13 And then 120 days into the case we've got a step
14 down where we are to prepaid \$25 million of the facility.
15 We have to take the facility down. Whether the facility is
16 at 125- we have to take it down to 100- or if it's at 150-
17 we take it down to 125-. Is it -- did I -- is it 20- or
18 25-?

19 UNIDENTIFIED SPEAKER: Twenty-five.

20 MR. WILLIAMS: Twenty-five, okay. I'm sorry, Your
21 Honor.

22 The maturity, it's a six-month facility with the
23 possibility to extend for an additional six months. The
24 extension would be at the agent's discretion.

25 As I said earlier there's no interest per se, but

1 there's a profit, and the profit is ten percent plus labor,
2 with the labor being a two percent floor.

3 With respect to claims and liens on a facility the
4 -- Fortress would have superpriority claims against all of
5 the debtors under 364(c)(1) of the Bankruptcy Code with a
6 couple of important caveats.

7 First of all Falcon is not an obligor or a
8 guarantor so therefore there won't be any claims against
9 Falcon.

10 Second, and this was important with respect to SCB
11 who as Your Honor knows we've been having continuing
12 discussions with. Fortress' claims against the three
13 subsidiary guarantors under the SCB facility, that is AEID
14 II, RailInvest and Wind Turbine, those claims will be
15 subordinated to SCB.

16 And with respect to liens, Your Honor, this is an
17 non-priming facility. And when I say non-priming I mean it
18 in every sense of the word. Not only as a technical matter
19 that we're not priming SCB's liens, but we're not going -- I
20 shouldn't say we, I should say Fortress -- Fortress is not
21 going structurally senior to them either.

22 Fortress would have a first lien on all encumbered
23 assets of Arcapita Bank , AIHL and ALTHL. They'd have a
24 junior lien on all assets of the debtor subject to prior
25 liens, including SCB's liens on the equity of AEID II,

1 RailInvest and Wind Turbine, and would have liens against
2 the non-debtor obligor's assets.

3 The carve-outs from those liens, again, would be
4 given that Falcon is not an obligor Fortress wouldn't have
5 any liens against Falcon or the Falcon escrow.

6 AIHL's equity interest in Pointe Part Properties
7 are carved out. That was due to the euro log IPO. We just
8 wanted to make sure that went smoothly.

9 And also with respect to SCB because the deal that
10 was struck was that Fortress would not be going structurally
11 senior to SCB. Fortress does not have a lien on the assets
12 of AEID II, RailInvest or Wind Turbine, they're carved out
13 of the collateral package as well.

14 And finally a point that the committee raised in
15 connection with previous commitment letters, Fortress is not
16 receiving a lien on the avoidance actions or proceeds
17 thereof of the estate.

18 And with respect to mandatory prepayments the DIP
19 provides for mandatory prepayments up to the liquidity
20 provider for the proceeds at certain specified events,
21 including sale of collateral or significant assets of the
22 group, subject to certain expectations. Again, most of
23 which are carve-outs of the proceeds of Falcon mediation and
24 the euro log IPO.

25 There's other typical terms in the DIP as well,

1 you know, I could -- you know, I had a running discussion
2 with my colleagues about how long we're supposed to make
3 that chart that we insert into the -- because I know it's
4 supposed to be concise and I see these five-page charts and
5 I know there's back and forth about it, but -- so there's
6 numerous terms, I think most of them are laid out in the
7 chart. We may have missed one or two, and if we did it's
8 not my colleague's --

9 THE COURT: I think your chart was that, three
10 pages? Is that fair?

11 MR. WILLIAMS: Yeah. But in fairness --

12 THE COURT: No, I guess it's a little bit more
13 than that but it is what it is.

14 MR. WILLIAMS: We cheated because we made the
15 fonts smaller.

16 THE COURT: Smaller. All right. Well --

17 MR. WILLIAMS: So but I did want to say if we
18 missed one or two my colleagues kept telling me that it's my
19 fault, not theirs, because I kept saying it had to be
20 shorter.

21 But there's other typical terms. Reimbursement of
22 the reasonable expenses of Fortress, customary carve-outs
23 for payment of the Bankruptcy Court clerk and fees, U.S.
24 Trustee fees, professional fees and expenses and the like.

25 A couple of other points I'd just like to mention

1 that are not necessarily in the document -- or one important
2 point that's not in the document. With respect to the exit
3 facility, Your Honor will remember that the exit facility
4 was very important to the company, and the ability to
5 convert this facility into an exit facility was and is
6 remains an important issue for the company.

7 We have a side letter with Fortress given the fact
8 that we didn't -- Fortress for reasons that I think are
9 obvious they didn't want to put it into this document, this
10 is not an exit facility, there still are terms to be
11 negotiated. We have a side letter with Fortress that in
12 essence says their commitment under the initial commitment
13 letter doesn't expire, that they're still obligated per that
14 initial commitment letter to convert this into an exit
15 facility to the extent we can reach the appropriate terms.

16 THE COURT: All right.

17 MR. WILLIAMS: As I noted earlier, Your Honor,
18 with respect to the supplement I think the most material
19 document that we filed in the supplement last night was the
20 fee letter, and that was attached as one of the exhibits.

21 And the fees are important here so I'm going to
22 spend a little bit of time with them because we -- we're
23 still trying to make one of the fees sharia compliant.
24 There's really a couple of fees here.

25 First we've got a structuring fee of \$2.5 million.

1 In essence that's two percent of the \$125 million
2 commitment. That entire fee is credited against an up front
3 arrangement fee of \$3.75 million which is in essence three
4 percent of that 125-. And this is all consistent with the
5 previous commitment letter, Your Honor. So all these fees
6 had previously been disclosed any way but we wanted to make
7 sure we had them in the fee letter.

8 If Fortress up sizes the facility, as I said
9 earlier, there's this additional option for an additional
10 \$25 million, there's an additional three percent on that
11 upsize, so that would be \$750,000.

12 And there's an exit fee. Now, notably the exit
13 fee is not in the letter that we filed. The exit fee is
14 referenced in our commitment letter, and in essence the exit
15 fee I look at it as in essence a make hole to the extent
16 that the DIP is taken out with alternative DIP financing
17 during the case. And in essence what it provides is -- and
18 again, this was in the commitment letter -- they would be
19 entitled to a fee equal to \$10 million minus all of the fees
20 they've been paid on account of the DIP and any profit they
21 have been paid on account of the DIP with two important
22 caveats.

23 First is that there would be no exit facility --
24 I'm sorry -- there would be no exit fee for the extent that
25 we convert them to the exit facility pursuant to the plan.

1 And second, to the extent they're paid off in cash by the
2 plan and not an alternative DIP providers they wouldn't get
3 that fee.

4 And the reason, Your Honor, it's not in the letter
5 is not because we're not seeking approval of it today,
6 again, it's been filed previously, it was in the commitment
7 papers. The reason is because we've been working very hard
8 to make that fee sharia compliant, and notwithstanding, you
9 know, Mr. Khalil's efforts we're still working on that.
10 We're confident we'll get there, I think we'll get there
11 probably some time if not today over the weekend. But given
12 the fact that we need to get -- understandably need to get
13 these fees approved I wanted to describe it to the Court
14 today, and we wouldn't be seeking approval of that fee
15 today.

16 THE COURT: All right. So it's not in today, but
17 you're essentially giving me and everyone else notice --

18 MR. WILLIAMS: Yes.

19 THE COURT: -- that it is --

20 MR. WILLIAMS: Yes.

21 THE COURT: -- being requested.

22 MR. WILLIAMS: Exactly. And I would note that it
23 was in the original commitment letter and it was spelled out
24 in a commitment letter obviously in a manner that wasn't
25 sharia compliant. We're just in the process of converting

1 that into something that will work for both the company and
2 for Fortress.

3 THE COURT: Procedurally how do you plan to deal
4 with that?

5 MR. WILLIAMS: What I'd like to do -- and given
6 the fact that I think we're going have a couple of -- I
7 don't want to say turns -- but I think we're going have some
8 ministerial edits to the documents. Once we're done with
9 the letter as well as the fee we would file revised
10 documents with black lines, and we would file the fee letter
11 with the Court with this -- whether it's in the fee letter
12 or whether it's actually in the DIP document for sharia
13 compliance purposes it may be important for it to be in one
14 or the other. We'd be filing those revised documents with
15 the Court once we're (indiscernible - 00:15:53).

16 I think, and I don't want to speak for my
17 colleagues, but we can get that done -- the fees, when do
18 you think we'll realistically have them?

19 MR. KHALIL: Very early next week.

20 MR. WILLIAMS: Very early next week. Certainly
21 prior to closing, Your Honor.

22 And so what we'd like to do, you know, to the
23 extent Your Honor would be amenable to, we'd have to order
24 entered today, we'd file the revised documents, and that's
25 how we'd like to proceed to the extent --

1 THE COURT: All right.

2 MR. WILLIAMS: Just quickly I think the motion
3 goes to -- and I think Your Honor well knows about the
4 necessity for the DIP. We filed a number of declarations
5 both with the commitment fee and with this motion regarding
6 the debtors' liquidity needs.

7 We've also filed declarations, and Your Honor will
8 recall in connection with the commitment letter motion the
9 extensive marketing process that was done with the
10 assistance of the committee in connection with the DIP --
11 I'm sorry -- with the murabaha which is why we wound up
12 where we are today. The debtors think that this is the best
13 deal that we could have gotten.

14 We're happy that both the committee and SCB and
15 everybody has been supportive. This process hasn't been
16 easy, but we do need the liquidity. I don't think anybody
17 disputes the need that we need the liquidity. And I don't
18 think anybody disputes that this is certainly the best offer
19 out there.

20 So with that, you know, I'm happy to answer any
21 questions that Your Honor has.

22 THE COURT: All right. What I have is I have
23 comments to the proposed interim order, so we'll get to
24 that.

25 MR. WILLIAMS: Okay.

1 THE COURT: And I think you've answered my
2 questions subject to hearing from other folks who may have
3 an interest in commenting.

4 MR. WILLIAMS: Thank you, Your Honor.

5 THE COURT: So, thank you.

6 MS. DELANO: Good afternoon, Your Honor.

7 THE COURT: Good afternoon.

8 MS. DELANO: Cindy Chen Delano of Milbank, Tweed,
9 Hadley & McCloy on behalf of the statutory committee of
10 unsecured creditors.

11 In connection with the post-petition financing
12 process the committee and its advisors have been working
13 closely with the debtors and the proposed lenders to insure
14 that the debtors could obtain financing on terms that are
15 the best possible terms with maximum benefit to the debtors.

16 With respect to the current motion to authorize
17 the debtors' entry into the financing agreement with
18 Fortress, the committee and its advisors have continued to
19 engage in multiple conversations and have provided multiple
20 comments to the financing documents.

21 And at the moment, although the committee does not
22 disagree in principal, with the interim relief sought today,
23 you know, we have provided a number of comments to the draft
24 DIP and murabaha agreement as Mr. Williams will call it and
25 other financing documents that we believe would benefit the

1 debtors and their estates.

2 So as you've heard from Mr. Williams several of
3 these comments have made their way into last night's filing,
4 some of them have not.

5 So what we would like to do today is not object to
6 Fortress' provision of the interim post-petition financing
7 today, but instead we're hopeful that we'll continue working
8 on the documents over the course of the weekend and early
9 next week and that any of our issues can be resolved on a
10 consensual basis --

11 THE COURT: Before the final hearing.

12 MS. DELANO: -- but, you know, we are reserving
13 the right for the final.

14 So with that --

15 THE COURT: All right.

16 MS. DELANO: -- thank you, Your Honor.

17 THE COURT: Thank you. All right.

18 MR. GREER: Good afternoon, Your Honor, Brian
19 Greer of Dechert LLP of Standard Chartered Bank.

20 I'd like to thank the debtors and Fortress for
21 working with us to make sure that this financing in the
22 interim order were consistent with our order that was
23 entered. I believe the protections for Standard Chartered
24 were accurately summarized by debtors' counsel.

25 I would like to adjust two other points. Section

1 11 of the interim order does provide that nothing in the
2 order amends, alters, modifies the adequate protection and
3 the priority of claims granted to Standard Chartered in
4 connection with the SCB order that was entered by the Court.

5 And then with respect to the DIP budget we did
6 notice that our first adequate protection payment was
7 scheduled for the end of December, but in fact that'll be
8 paid one business day after closing of the interim facility.

9 And we also noticed that there was estimate for
10 our expenses at the end of, you know, March 2013. That
11 amount is an estimate that was provided by the debtors, but
12 under our order we're not subject to any cap other than
13 reasonableness.

14 THE COURT: All right.

15 MR. GREER: Thanks, Your Honor.

16 MR. ROVIRA: Good afternoon, Your Honor, Alex
17 Rovira from Sidley Austin on behalf of the Joint Provisional
18 Liquidators of AIHL.

19 Your Honor, subject to the Cayman Court's approval
20 the Joint Provisional Liquidators do not object at this
21 point to the debtors' DIP financing.

22 They did want to note, however, that their non-
23 objection today is without prejudice to their ability to
24 object to the allocation of costs between the estates, which
25 is still being worked on between the parties.

1 THE COURT: All right.

2 MR. ROVIRA: Thank you, Judge.

3 THE COURT: Fair enough, thank you.

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

6 First I'm going to put in the usual reservation of
7 rights for the final as everyone else I'm sure wants to do
8 as well.

9 There are a couple of minor provisions in the
10 interim order which may be problematic, but again, the U.S.
11 Trustee is not voicing any opposition at this time, but
12 hopefully we'll be able to resolve those issues, and they
13 are minor, Your Honor, just so I make that clear.

14 THE COURT: All right. Is there any benefit to
15 identifying them now or have you been having that discussion
16 in an ongoing way?

17 MR. MORRISSEY: Your Honor, just to give you an
18 example, and I don't have the provision. There's a
19 provision there that's a little unclear -- oh, thank you --
20 near the end that covers environmental issues, that it's not
21 clear whether the parties here are trying to exempt
22 themselves from liability under the environmental laws or
23 not. In one place it seems that they are, another place it
24 seems that they aren't, and I thought that should be cleared
25 up so that --

1 THE COURT: Clarified, all right.

2 MR. MORRISSEY: -- for the final, but it's that
3 sort of thing.

4 THE COURT: All right.

5 MR. MORRISSEY: A more general comment, Your
6 Honor, although this is a first-time murabaha loan here in
7 the Bankruptcy Court as far as we're all aware it does have
8 many of the hallmarks of a conventional DIP loan as well.
9 And obviously we can't lose sight of the fact that the
10 proposed order here has to comply with the Bankruptcy Code
11 and it should have all of the bells and whistles that we see
12 in typical DIP financing orders, and I think this one does
13 for the most part.

14 I think that although the murabaha facility that
15 particular mechanism is new to us, many of the provisions in
16 the -- actually most of the provisions in the proposed order
17 are not new to us, and I think therefore it's not something
18 that's totally far.

19 So I don't want to -- I don't think we should
20 exaggerate the newness of this particular --

21 THE COURT: Well, it's a different transaction but
22 the order and what it accomplishes mimics sort of the more
23 traditional method.

24 MR. MORRISSEY: Yes, Your Honor.

25 And with that I have nothing further unless the

1 Court wants to ask anything.

2 THE COURT: No, I don't. Thank you.

3 MR. MORRISSEY: Thank you.

4 THE COURT: All right, anyone else wish to be
5 heard?

6 All right, I was just going to point out a few
7 comments -- questions that I had just to -- for the orders.

8 And looking at the version that -- I guess the
9 last version I received going page 5 at the end of the
10 recitals before we get into, "It is found, determined,
11 ordered and adjudged that...", I just wanted for this order
12 and the other order in the stack to add the fact after upon
13 the arguments of counsel the interim hearing language that
14 says something to this effect, based on the debtor'
15 representations to the Court and the record in these cases.

16 And that just goes to my -- nothing unusual in
17 this particular order, but there's also some findings that I
18 -- i.e. probably ill-suited to make based on my own
19 particular expertise, such as the commodities transactions
20 here particularly, so I just want to make that clear for
21 purposes of the order. So that's one.

22 I see that there is on page 6 a reference to
23 purchases and sales of commodities shall be entitled to
24 protections of 363(m), and that is something that's a little
25 bit -- because we have the purchase and sales of

1 commodities, and I assume that that language, which I don't
2 ordinary see in standard DIP orders is something that
3 reflects the unusual nature of this transaction here.

4 MR. WILLIAMS: Yes, Your Honor.

5 THE COURT: All right. So I think I understand
6 therefore why it's in there and that that doesn't do any
7 harm to the Bankruptcy Code, but do to extent there's any
8 discussion of things that are unique here for purposes of
9 the final order I'll let the U.S. Trustee and other parties
10 discuss those between now and then.

11 And I see that on page 9 (b) at the top it talks
12 about the purchaser indemnifying investment agent for any
13 and all actions in connection with the commodity
14 transactions. Again, I think that that's -- I think if I
15 understand correctly that's also a result of the nature of
16 the transaction here being different than something I would
17 ordinarily see.

18 MR. WILLIAMS: Yes, that's correct.

19 THE COURT: All right. And on page 11 number
20 small triple (i) talks about the non-refundable payment to
21 the investment agent, security agent, et cetera, et cetera,
22 and I know this is on an interim basis so I don't usually
23 see the term non-refundable used in an interim order. So I
24 thought perhaps you could explain to me what -- what the
25 basis is for that particular provision. And I realize it's

1 the payment to the investment agent. So I mean sort of keep
2 track of -- it's 8(b)(iii).

3 MR. WILLIAMS: Yes, Your Honor. I think the issue
4 here was that with respect to the fees of Fortress if Your
5 Honor will recall in connection with the commitment letter
6 they did not get, at least in my experience with in essence
7 an exit facility you would get your commitment fee paid when
8 you commit. Here Fortress agreed to push that commitment
9 fee out. In essence it's getting its fees paid now as
10 opposed to when it committed a month and a half ago. Its
11 expended a lot of time and effort during that time period.
12 So that was the reason.

13 THE COURT: All right.

14 MR. WILLIAMS: I think that Fortress -- obviously
15 the debtors would be fine taking it out, the order has to be
16 acceptable to the DIP lenders, and this was something I can
17 tell Your Honor that we pushed back on and we did not --

18 THE COURT: Yeah. All right. I thought that's
19 what your answer was going to be, I just wanted to make sure
20 I understood it correctly. And I originally looked at it
21 because I thought there were fees paid and then I realized
22 those fees were paid for a different transaction with a
23 different party when we had various potential financing
24 transactions that were floating around in this case before
25 this one, so I think that that's originally the reason it

1 came on my radar screen was for -- because I was thinking of
2 those earlier payments and that wasn't implicated here. So,
3 all right, that's helpful to know. Thank you.

4 There's a carve-out here. I don't know what an
5 appropriate carve-out is on page 13, but I assume that's a
6 discussion that you either have had or will have with the
7 U.S. Trustee's Office.

8 On page 20 it's 14(c) I believe, and it's the
9 paragraph that says -- with the line that says, "Until the
10 payment in full of the DIP obligations any party other than
11 the security agent that has or obtains a lien or security
12 interest in the collateral shall not exercise any rights or
13 remedies with respect to the first lien collateral."

14 And this sort of runs into third-party
15 injunctions, and those can get a little tricky in Bankruptcy
16 Court.

17 Obviously I know I'm well within my jurisdiction
18 and authority to talk about in this bankruptcy case the
19 parties that I have who are financing where they fit into
20 the scheme of priorities and also to things of that sort,
21 but when we talk about some other party who I don't have in
22 front of me not being able to do essentially -- exercise any
23 rights or remedies, making various declarations,
24 accelerations, whatever it is, that's where I get a little
25 bit more nervous at it.

1 So I'm going to -- there's two ways to do this.
2 One is to take it out for an interim order and then think
3 about whether it's necessary for a final order. The other
4 is maybe you have some explanation that can explain what we
5 need to do here.

6 MR. WILLIAMS: Well, I would have my colleague --
7 I would have a suggestion, at least. If -- to the extent --
8 and I would have to ask the DIP lender as well -- but in the
9 concern is that the Court doesn't have jurisdiction over
10 potentially foreign parties, or you know, obviously as Your
11 Honor said there's foreign assets, non-debtor assets, I
12 think we could put -- I think, although I'd have to check
13 with the DIP lender -- we could say to the extent that the
14 Bankruptcy Court has jurisdiction over such entities and --

15 THE COURT: Well, I don't think you need to check
16 with them to add the phrase to the extent permitted by
17 applicable law, that may be -- that may -- that's the most
18 obvious way to fix that problem, and obviously if applicable
19 law didn't allow me to do it it wouldn't really matter what
20 any other party in the case would think because the Court of
21 Appeals would tell me that I didn't have authority and that
22 would pretty much be the end of it.

23 So that was the other sort of potential workout
24 and that may be the -- that may be the most appropriate
25 thing to do for the interim hearing.

1 MR. WILLIAMS: Fortress' counsel is shaking his
2 head so I think that would work, Your Honor.

3 THE COURT: All right. So let's do that. And to
4 the extent permitted by applicable law.

5 In 21 -- I'm sorry -- in 20 and 21 there's the
6 506(c) issue and dealing with a Chapter 7 liquidation in
7 bankruptcy, and I assume that that's a discussion that
8 either has happen or will happen with the U.S. Trustee's
9 Office about that. So we can I think leave that in for the
10 moment in an interim order.

11 So moving on to 23 there is -- and I've had this
12 discussion, this is a very traditional problem I think --
13 there's language in here about certain things staying in
14 place regardless of whether some order is reversed,
15 modified, vacated, or stayed, and I never want to be in a
16 position of telling the Court of Appeals that they may do
17 something and that it doesn't count, because I don't have
18 the ability to do that.

19 So that -- so that paragraph (c) and (d), both of
20 which have the same things saying notwithstanding some court
21 reviewing this saying you can and can't do this that
22 everything will continue I have -- I have trouble with that.

23 So there -- I don't know if you have a suggestion
24 on how to resolve that problem. That's a much more
25 traditional problem and I think I've had discussions in

1 other cases with counsel about -- about my unwillingness to
2 tell any appellate court what they can and can't do and what
3 it actually means before they do that.

4 MR. WILLIAMS: I'll tell you my personal view,
5 which is I think an appellate court is going to do what it's
6 going to do. I think, you know, if I were the DIP lender I
7 would want this paragraph in here, and I can understand why.

8 THE COURT: No -- no, I understand that, but --
9 and everyone here wears a different hat, so I understand the
10 DIP lender will ask for it, and I understand because they'll
11 ask for it you will say exactly what you just said.

12 But as a bankruptcy judge I'm wearing a different
13 hat obviously, and since this has my name on it and they
14 will probably -- though they may never see the lawyer for
15 the DIP lender, but they may -- and again, this is sort of
16 hypothetical because everything here is consensual today,
17 but -- and I've had this I think same discussion in at least
18 one other case -- I'm not willing to put my name on it where
19 I'm telling a reviewing court what they can and can't do.

20 And as I say to folks, to the extent that it makes
21 them unhappy that I want to take something like that out I
22 can give you the solace of knowing that even if I left it in
23 I'm sure there are plenty of judges who would tell me that's
24 really nice that you put it in but it's -- it violates the
25 law so it's out and I'm going to do what I'm going to do and

1 you're -- here's what the ruling is and here's what you're
2 going to have to do.

3 So -- so I don't think it's actually probably
4 worth the ink that we spent on it and it may not be worth
5 the length of time in this discussion, but since I'm signing
6 it those things make we very uncomfortable.

7 MR. WILLIAMS: I hear, Your Honor. If maybe we
8 can discuss that with the DIP lender --

9 THE COURT: That would be helpful.

10 MR. WILLIAMS: Okay.

11 THE COURT: And again, I think the comfort is that
12 I could put in all sorts of things and nobody is going pay
13 attention to them any way if they violate what my
14 jurisdiction is.

15 But it does come across as a bit of hubris on my
16 part to go signing things like that, and I don't want to be
17 -- I don't want to be doing that for that reason, among
18 others.

19 And I think -- I think I know the answer to the
20 last issue I have on 27. This talks about binding effect
21 and it says it binds the Chapter 7 or Chapter 11 trustee but
22 that they have no obligation to extend financing to such
23 folks. But let me hear your justification for that
24 particular language.

25 MR. WILLIAMS: Sure. Why they wouldn't have to

1 find a Chapter 7 case?

2 THE COURT: Well, you might say if you're a
3 Chapter 7 trustee -- and again, the case is progressing
4 nicely and we all hope it never gets there -- but that
5 you're binding a Chapter 7 trustee without giving a
6 Chapter 7 trustee any benefits.

7 MR. WILLIAMS: The problem, Your Honor, would be
8 if the Chapter 7 trustee wasn't bond by this I'm not --
9 especially in a case like this if a Chapter 7 trustee
10 weren't bound by this order I don't think we would be able
11 to get the DIP financing. I don't think that the DIP lender
12 would be willing to take that risk. I -- on this one I
13 certainly wouldn't be willing to take that risk if I were
14 the DIP lender.

15 THE COURT: Well, I think the argument is that
16 it's sort of a historical thing, that is they're taking the
17 case up to the point where they get the case and that
18 includes the financing which allows the case to go forward
19 but it doesn't obligate you to give any financing beyond
20 that, so.

21 MR. WILLIAMS: Yeah, and as any colleague Josh
22 Weisser just pointed out to me as well, the value that the
23 DIP lender is putting in now is ultimately financing the
24 case, that any Chapter 7 trustee is going to get the value
25 of the assets that haven't financed up to that point.

1 THE COURT: All right. So that's fine.

2 So the -- those are the changes I had, so I think
3 there's really just the one on page 5 that needs to be made.
4 There's the one of to the extent consistent with applicable
5 law. And there are those two paragraphs talking about
6 vacating and reversals and things of that sort on page 23
7 and 24.

8 MR. WILLIAMS: So, Your Honor, if I may then if we
9 could have maybe five, ten minutes to speak with the DIP
10 lender?

11 THE COURT: Absolutely.

12 MR. WILLIAMS: Okay.

13 THE COURT: Absolutely. Now, I know there's also
14 another order in this binder that I received which is the --
15 and I'm trying to figure out if that's -- all right.

16 MR. WILLIAMS: If it is a mistake -- if there is
17 it was a mistake on our part.

18 THE COURT: Yeah. No, I think -- I think that
19 that's a prior order, I didn't see a signature page so I
20 wasn't sure if that was something I was being requested, but
21 it's the prior order.

22 MR. WILLIAMS: So -- yes, so, Your Honor, if you
23 would give us maybe ten minutes we'll talk to the DIP
24 lender.

25 I would say, and I don't mean to impose upon the

1 Court, but from -- from the debtors' perspective to the
2 extent we could get the order signed before Monday.

3 THE COURT: No, we've made provisions to get it
4 signed this afternoon.

5 MR. WILLIAMS: Thank you, Your Honor.

6 THE COURT: So --

7 MR. WILLIAMS: Because it's important for what
8 we're doing in Cayman as well.

9 THE COURT: No, I understand that's the nature of
10 these interim orders.

11 MR. WILLIAMS: I appreciate it.

12 THE COURT: So if you can just chat now I will be
13 in chambers and then I guess there's two ways to do it, you
14 can either just mark something up and give it to us and
15 we'll make the changes and then just get it entered, or if
16 you have the capacity do it here in an email, just whatever
17 -- whatever is the most time efficient way to do it.

18 MR. WILLIAMS: We'll talk about that during the
19 break as well, Your Honor.

20 THE COURT: All right. Anything else we should
21 chat about today?

22 MR. WILLIAMS: Not from my perspective, no.

23 THE COURT: All right.

24 MR. WILLIAMS: Thank you, Your Honor.

25 THE COURT: Thank you very much.

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(Whereupon these proceedings were concluded at 4:17 PM)

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I N D E X

RULINGS

Page Line

Motion to Authorize/Debtors Motion for the
Entry of Interim and Final Orders Pursuant to
11 U.S.C. 105, 362, 363(b)(1), 363(m), 364(c)(1),
364(c)(2), 364(c)(3), and 364(e) and Bankruptcy
Rules 4001 and 6004(I) Authorizing Debtors (A)
to Enter into and Perform Under DIP Agreement,
and (B) to Obtain Credit on a Secured
Superpriority Basis, (II) Scheduling Final
Hearing Pursuant to Bankruptcy Rules 4001(b)
and (c) and (III) Granting Related Relief

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

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

AAERT Certified Electronic Transcriber CET**D-408

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Date: December 12, 2012