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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12900-scc

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In the Matter of:

PATRIOT COAL CORPORATION, et al.,

Debtors.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

August 15, 2012
11:06 AM

B E F O R E:
HON. SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

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Doc# 10 Debtors Motion for Authorization to (i) Enter into, Perform under, Roll Over, Adjust, Modify, Settle, Terminate and Engage in Certain Derivative Contracts and (ii) Pledge Collateral under Certain Derivative Contracts

Doc# 16 Debtors' Motion for Authority to (i) Enter into and Perform under Coal Sale Contracts in the Ordinary Course of Business and (ii) Establish Certain Procedures with Respect thereto filed by Damian Schaible on behalf of Patriot Coal Corporation.

Doc# 136 Debtors Motion for Approval of Procedures for the Rejection of Executory Contracts and Unexpired Leases and for the Abandonment of Personal Property

Doc# 140 Debtors Motion for Approval of Expedited Procedures for (i) the Sale of Certain Assets Free and Clear Of Liens, Claims and Encumbrances and (ii) the Abandonment of Certain of the Debtors Property filed by Damian Schaible on behalf of Patriot Coal Corporation.

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Doc# 141 Debtors Application for Entry of an Order (i) Authorizing the Retention and Employment of AP Services, LLC and (ii) Designating Kenneth A. Hiltz as Chief Restructuring Officer as Of July 17, 2012 filed by Damian Schaible on behalf of Patriot Coal Corporation.

Doc# 132 Application of the Debtors for Authority to Employ and Retain Blackstone Advisory Partners LP as Investment Banker to the Debtors Nunc Pro Tunc to the Petition Date filed by Damian Schaible on behalf of Patriot Coal Corporation.

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Please have a seat. Mr.
3 Huebner, good morning. How are you?

4 MR. HUEBNER: I'm well, Your Honor. Good morning.
5 Welcome to your new courtroom. It's our first time here.

6 THE COURT: It's very exciting to be here.

7 MR. HUEBNER: We're used to hearing "Pause, please,"
8 from this podium.

9 THE COURT: Yes, well, you'll hear, it's a great
10 personal thrill to actually be in this courtroom, having spent
11 so much time here before Judge Gerber. You'll hear "Pause,
12 please"; "stop look and listen"; "slicing and dicing".

13 MR. HUEBNER: Exactly.

14 THE COURT: You could probably give me a glossary.
15 But if I accomplish as much and as well as Judge Gerber has had
16 in this courtroom, then I'll -- half as much, then I'll be a
17 great success.

18 I have a number of parties on the phone in listen-only
19 mode: Mr. Brass, from Jefferies & Co; Mr. Carroll, from FTI
20 Consulting; Ms. Chan, from Aurelius Capital; Mr. Diamond, from
21 DK Partners; Ms. Eisele, from AlixPartners; Mr. Gorton from
22 Stites & Harbison; Mr. Levine, from Brown Rudnick; Mr.
23 Levings -- it says client Willkie Farr, Bank of America; Mr.
24 Persinger, from the Law Office of M. Thomas Persinger, on
25 behalf of Southland Company; Ms. Thompson, from Barclays

1 Capital; Mr. or Ms. Tiwana, from CRT Capital. And that's it.

2 MR. HUEBNER: Terrific.

3 THE COURT: Is there anyone else on the phone who
4 wishes to note their appearance?

5 Okay, go ahead.

6 MR. HUEBNER: Well, Your Honor, if that's the crowd we
7 get for an uncontested hearing on second days, it's hard to
8 imagine what --

9 THE COURT: Exactly.

10 MR. HUEBNER: -- the real hearings will look like.

11 Although I have to say, keeping Brown Rudnick on a listen-only
12 feature is something very admirable. We'll try to have that
13 going forward.

14 For the record, Your Honor, I'm Marshall Huebner of
15 David Polk on behalf of the debtors. I'm happy to report, Your
16 Honor, that we are continuing our run of working out all issues
17 with all known parties. I'd like to, if I may, turn the podium
18 over to Mr. Schaible, who actually did most of that work --

19 THE COURT: Okay.

20 MR. HUEBNER: -- to walk Your Honor through the first
21 days, second days, that are left.

22 THE COURT: All right. Now, I have a binder of
23 proposed black-lines, all right? So we'll work from that.

24 MR. SCHAIBLE: Thank you, Your Honor. For the record,
25 Damian Schaible of Davis Polk, on behalf of the debtors. As

1 Your Honor knows, and as Mr. Huebner just mentioned, today is
2 the continuation of our second-day hearing, seeking final
3 relief under certain of our first-day hearings that we
4 adjourned in order to be able to try to work our resolutions
5 with various parties. And also, we've set for today, several
6 procedural motions that were not heard on an interim basis.
7 And then we have two retention applications.

8 As Mr. Huebner mentioned, and I'm happy to walk
9 through them if helpful to you, a number of objections were
10 received. Several were filed; a number of informal objections
11 or concerns were received. And gratefully, we were able to
12 work through all of them. I want to thank, in particular, the
13 creditors' committee, who worked very, very long, and very
14 quick, and very efficiently with us, to address a number of
15 concerns that they had.

16 And I'm happy to be able to report that the versions
17 of the orders that you have black-lines in your binder, Your
18 Honor, are, as far as we know, fully consensual. All of the
19 filed objections have been resolved. I'm advised that the
20 creditors' committee is supportive, although I'll let Mr.
21 Rogoff speak.

22 THE COURT: Okay.

23 MR. SCHAIBLE: And our DIP lenders as well, we
24 addressed a number of concerns that they had.

25 THE COURT: All right. The black-lines were not filed

1 on the docket, though?

2 MR. SCHAIBLE: They were not.

3 THE COURT: Okay. We should think about, going
4 forward, to the extent that there are more than typographical
5 error corrections, filing the black-lines on the docket.

6 MR. SCHAIBLE: We'll do that.

7 THE COURT: In the event that the resolutions reached
8 may raise new issues --

9 MR. SCHAIBLE: Right.

10 THE COURT: -- with other parties, and they'd have the
11 opportunity to look at it. I have some questions. I don't see
12 anything in these that really create those kinds of issues.
13 But going forward, I think that might be a better procedure.

14 MR. SCHAIBLE: Understood and appreciated. We'll do
15 that, Your Honor.

16 THE COURT: All right. So should we start with the
17 derivative contracts?

18 MR. SCHAIBLE: Yes, Your Honor. I'm not sure if
19 you -- we gave you sort of a summary before. And I know you're
20 familiar with them. I don't know if you need --

21 THE COURT: We can go right to the black-line --

22 MR. SCHAIBLE: Perfect.

23 THE COURT: -- to looking at the black-lines. The
24 only provision that jumped out at me is on page 5 of the black-
25 line, the second to last decretal paragraph, which says,

1 "Ordered that notwithstanding any of the foregoing, the debtors
2 will obtain the consent of the committee or further order of
3 the Court prior to entering into any derivatives contracts
4 that, in either case, is outside the ordinary course of the
5 debtors' business." So --

6 MR. SCHAIBLE: This, Your Honor, was intended to
7 address -- in the motion, I think you'll remember, we discussed
8 hedging various different types of commodities.

9 THE COURT: Right.

10 MR. SCHAIBLE: That's because many companies in our
11 industry do, in fact, hedge various commodities. As it turns
12 out, we, in the ordinary course, and most often, really only
13 hedge one commodity, which is diesel fuel. And I think the
14 creditors' committee, quite rightly said to us, do you have any
15 immediate plans to hedge anything other than diesel fuel. And
16 we said, actually, no. And they said okay, great. Why don't
17 you make these procedures merely cover, essentially diesel
18 fuel. And if you want to do other things, then come talk to us
19 about --

20 THE COURT: Well, here's my question, is that what
21 this suggests is that you identify something that's outside the
22 ordinary course of your business, and then you're permitted to
23 proceed by getting the consent of the committee and not a court
24 order. And I don't know how you can do that.

25 MR. SCHAIBLE: Well --

1 THE COURT: If something is out of the ordinary
2 course, you need court approval for it, even if the committee
3 consents.

4 MR. SCHAIBLE: What we could do is -- again, we
5 believe that all of the different types of -- all the different
6 types of commodities that we might hedge would be in the
7 ordinary course of our business.

8 THE COURT: Okay. But that's not what this says.

9 MR. SCHAIBLE: Right, understood.

10 THE COURT: Okay? It's either the debtor makes the
11 initial determination is something in the ordinary course, or
12 is it not.

13 MR. SCHAIBLE: Right.

14 THE COURT: What this says is that you can decide that
15 something's outside the ordinary course, and as long as the
16 committee consents --

17 MR. SCHAIBLE: Understood.

18 THE COURT: -- you don't need a court order. And
19 that's --

20 MR. SCHAIBLE: That make sense.

21 THE COURT: -- that doesn't work.

22 MR. SCHAIBLE: What if we were to change the language
23 to say that it is in the ordinary course of the debtors'
24 business, but not consistent with the debtors' past practice.
25 So then it still has to be in the ordinary course of our

1 business, which believe all of commodity hedging would be, but
2 not consistent with our past practice, that would be what we'd
3 have to seek the committee's consent on.

4 THE COURT: Okay. Let me hear from Mr. Rogoff.

5 MR. ROGOFF: Good morning, Your Honor. Adam Rogoff,
6 Kramer Levin, proposed counsel for the creditors' committee. I
7 apologize for standing up, but I thought I could hopefully add
8 something to the discussion.

9 We understood the debtors' motion to basically be
10 asking for authorization today to enter into a variety of
11 potential derivatives contracts, including things that are
12 outside the ordinary course. So as we understood their motion,
13 it effectively asked the Court for the broad authority on
14 derivatives contracts.

15 What we had asked have happen --

16 THE COURT: See, I didn't -- I mean, maybe I just
17 missed it. What I thought was what Mr. Schaible said was the
18 contrary, the converse of that, which was that they believe
19 that all of this is ordinary course for their business, and
20 therefore what they're really asking for is a comfort order.

21 Now you've just said that you thought that generally
22 they're getting my okay to engage in these transactions outside
23 the ordinary course. So --

24 MR. SCHAIBLE: We, in doing -- we're happy to clarify
25 that we're not.

1 THE COURT: You're not what?

2 MR. SCHAIBLE: We're not getting relief to enter into
3 things that are outside of the course of business.

4 THE COURT: That's what I thought.

5 MR. SCHAIBLE: I'm happy to clarify --

6 THE COURT: Okay. I thought it was a comfort order.
7 So if it's a comfort order, then the predicate for it is the
8 debtors' determination that it's doing something in the
9 ordinary course. And if that's so, then you don't need a court
10 order.

11 MR. ROGOFF: I think, then, we may have a little bit
12 of a disconnect, which we may want to just sidebar on.

13 THE COURT: Okay.

14 MR. ROGOFF: Because in doing our diligence on this
15 order, we were advised and became comfortable that a very
16 limited type -- not limited in number but limited in type of
17 hedges, is what is historically done in past practice. I
18 believe it was heating oil, for example. But explosives were
19 not something that were traditionally hedged.

20 And so, to the extent that certain types of hedges and
21 derivatives contracts weren't consistent with their past
22 practices, we interpreted the motion, the original motion, to
23 give them permission to do that, in other words, to ask Your
24 Honor for permission to hedge an explosive. But we didn't want
25 that happening without further consent of the committee; or if

1 for some reason we didn't consent to hedging of an explosive,
2 coming back to Your Honor. And that's what our understanding
3 of this --

4 THE COURT: Okay.

5 MR. ROGOFF: -- language was intended to do.

6 THE COURT: But then --

7 MR. SCHAIBLE: I think -- I'm happy to talk offline --

8 THE COURT: I think you probably can be in agreement
9 on this. What struck me was that the words on the page say
10 that you can get the consent of the committee and not
11 necessarily a court order to do something outside the ordinary
12 course.

13 MR. SCHAIBLE: Right. Right. So I think that adding
14 that language was not helpful and caused either confusion or
15 actually a wrong answer. And we're happy to take that out.
16 And in fact, I think I can solve both of your problems if we
17 change the language, as I suggested to say, that
18 notwithstanding any of the foregoing, we obtain the consent of
19 the committee or further order of the court for any
20 transactions that are in the ordinary course of our business,
21 but not consistent with the debtors' past practice.

22 So in other words, we're only getting relief to do
23 things that are in the ordinary course of our business -- and
24 we believe that explosives and the other things that were set
25 forth in the motion would be in the ordinary course of our

1 business. But I agree that they are not consistent with our
2 past practices, and we're agreeing not to do them now --

3 THE COURT: Mr. --

4 MR. SCHAIBLE: -- unless we talk to the committee.

5 THE COURT: -- okay. Mr. Smolinsky is going to join
6 the fray. But let me say, I think there are better words that
7 you can use besides "not consistent with the debtors' past
8 practices." I mean, what you're saying is that generally you
9 engage in hedges. This is a hedge, but it may be a new --

10 MR. SCHAIBLE: Commodity.

11 THE COURT: -- commodity that's being hedged. So I
12 don't know if it's not -- I think it would be better to say,
13 "and that it's not inconsistent with past practices." But Mr.
14 Smolinsky, what were you going to add to this discussion?

15 MR. SMOLINSKY: Yes. Joseph Smolinsky, of Weil,
16 Gotshal & Manges for the first out DIP agents. I hate to jump
17 into this. But Mr. Schaible's comment about not being
18 consistent with past practice, I think that is the definition
19 of out of the ordinary course. And so I don't want the record
20 to suggest --

21 THE COURT: Here's what we're going to do. We're
22 going to move on to the next one, and Mr. Huebner, you can join
23 the fray and be the tiebreaker and the mediator. And I'm quite
24 confident that if you folks spent about ten, fifteen minutes,
25 you'll solve this problem. Because I think it's solvable. All

1 right? And I apologize for nitpicking, but --

2 MR. SCHAIBLE: It's very easy to fix, Your Honor.

3 THE COURT: Okay. So let's move on. So that brings
4 us to the sale -- coal sale contracts, correct?

5 MR. SCHAIBLE: Yes, Your Honor.

6 THE COURT: Okay. All right. On that one, I actually
7 did not have any questions or concerns.

8 MR. SCHAIBLE: Okay, thank you.

9 THE COURT: Does anyone else have anything they wish
10 to add with respect to the black-line order that's been
11 submitted, authorizing the debtors to enter into and perform
12 under coal sale contracts, in the ordinary course of business?

13 MR. ROGOFF: Good morning, again, Your Honor. Adam
14 Rogoff. We spent a fair amount of time on the orders,
15 including this one, going through they carefully with the
16 debtors. We do appreciate their reflecting the changes that
17 were suggested by the committee, in all the orders this
18 morning, and in particular this one.

19 What was important from the committee was the
20 representations that the debtors have made underlying this
21 particular motion that the thresholds that they're utilizing
22 are consistent, in their view, with the ordinary course of
23 business. We did not understand this motion to be asking them
24 to do something that is inconsistent and outside the ordinary
25 course of business. That applies not only for this motion for

1 some others that we'll get to this morning.

2 And that was an important factor that the committee
3 ultimately got comfortable with in consenting to or not
4 objecting to the order this morning. So I just wanted to note
5 what that thought process was on behalf of the committee.

6 THE COURT: All right. This one's fine with me. I'd
7 be happy to enter it.

8 MR. SCHAIBLE: Thank you, Your Honor.

9 THE COURT: All right. The next one is the rejection
10 of executory contracts and unexpired leases and for the
11 abandonment of personal property. And if you would turn to
12 page 5 of the black-line.

13 MR. SCHAIBLE: Yes, Your Honor.

14 THE COURT: What's now become numbered paragraph 1
15 which sets forth who gets notice of what. And what I think
16 this does is establish categories of notice down in little nine
17 in the hole (ix) with respect to any real property subject to
18 the leases proposed to be rejected that is associated with --
19 and then it lists a bunch of acronymic licenses; and then with
20 respect to any property -- on the next page -- identified in
21 the notice as having any permit issued by the State of West
22 Virginia, DEP, and so on.

23 And my concern is that as we all know, these
24 environmental and regulatory issues are extremely complicated.
25 And different agencies may take a different view of situations

1 in which their regulatory authority, their rights, are
2 implicated. And by slicing and dicing this, this finely, I
3 don't want to be creating a problem that somebody comes in and
4 says you should have given me notice and you didn't.

5 MR. SCHAIBLE: Right.

6 THE COURT: So my question is why can't we do it with
7 a broader brush, and err on the side of over-noticing folks,
8 particularly with respect to any sort of abandonment that's not
9 abandoning a fax machine --

10 MR. SCHAIBLE: Understood. And Your Honor, I think
11 the good news is, we did do that. We actually, frankly, did
12 that before we added a lot of this language. And the way I'd
13 like to have Your Honor think about it, or at least I'd like to
14 talk through the notice provision; I believe strongly that we
15 had already provided in general terms, to provide notice to
16 anyone who possibly could actually have an interest in it,
17 including all of the various regulatory agencies.

18 Understandably, certain regulatory agencies are used
19 to seeing certain specific language. And notwithstanding what
20 I believe is already covering the waterfront, and I can talk
21 you through that, they wanted additional specific language very
22 specific to them and what they're used to seeing, in order to
23 provide them comfort. So if I can direct Your Honor to, again,
24 in paragraph 1, we already -- we are providing notice to the
25 known counterparties to any contracts and leases, any

1 additional parties known to be entitled to notice pursuant to
2 the terms of what we're rejecting, all parties known to the
3 debtors as having a direct interest in expendable property, the
4 Office of the U.S. Trustee, the creditors' committee, and then
5 very importantly, all the way at Romanette (xi) on the next
6 page, "to the extent otherwise required by any law."

7 So in other words, to the extent that we're required
8 to provide notice -- so in other words, it's all the
9 counterparties, anyone else who has a direct interest in what
10 we're abandoning or rejecting, the creditors' committee, the
11 U.S. Trustee, and then anyone else that we're required under
12 law to provide notice to.

13 I firmly believe and have spent a lot of time
14 explaining, and I have not had disagreement, that everything
15 else that comes in between Romanette (v) or maybe Romanette
16 (vi) including the DIP lenders, and Romanette (xi), is actually
17 duplicative of one of those other points, most importantly,
18 Romanette (xi). And I have not gotten any disagreement to
19 that. It's just notwithstanding all of that, the various
20 regulators, largely, who are in this language, like to see
21 their own specific language.

22 So I guess I would ask Your Honor to take comfort in
23 the representation that I'm happy to make that in --

24 THE COURT: Have all the regulators signed off on
25 this?

1 MR. SCHAIBLE: All of the regulators that we heard
2 from, yes. So the DOJ, on behalf of all of the federal
3 regulators, environmental and otherwise have signed off on it.
4 And the regulator that we heard -- the other state regulator we
5 heard from, West Virginia, signed off on it as well. And
6 actually, the DOJ required notice effectively to all of the
7 state regulators in Romanette -- the SMACRA provision is the
8 permits that are issued, effectively, under state law.

9 THE COURT: My question is, if something is not known
10 to be environmentally contaminated, who gets notice?

11 MR. SCHAIBLE: Anyone who's required to receive notice
12 under law. So it would be whoever -- to the extent permitting
13 authorities were required under law, to provide them notice of
14 the disposition of the property, we would be providing the
15 notice of the disposition of the property.

16 THE COURT: I just -- I hear you. But I'm not smart
17 enough to be able to come up with a scenario in which something
18 might fall between the cracks.

19 MR. SCHAIBLE: I understand.

20 THE COURT: I don't want to be in a situation where
21 the debtor's asking for relief and someone doesn't get notice
22 because of the way this is drawn. I don't know if -- you know,
23 there might be a municipality. There might be a county. I'm
24 making this up. There might be a water authority.

25 MR. SCHAIBLE: Right.

1 THE COURT: There might be a conservancy group. I
2 just want to be sure that even in a situation in which the
3 magic words "known to be environmentally contaminated" aren't
4 triggered, that anyone with an interest has an opportunity to
5 come in and say: they say it's not known; we're worried that
6 it is. We should have had notice.

7 MR. SCHAIBLE: I guess I would say a couple things.
8 First, we've made clear with the federal and state
9 regulators -- if you look at the additional language on page 11
10 and carrying over to page 12 -- we've made clear already that
11 no rejections are going to, in violation of any law, release or
12 enjoin any regulators from doing anything.

13 THE COURT: Right.

14 MR. SCHAIBLE: This paragraph makes clear that
15 notwithstanding any rejection we were to do, we're effectively
16 not --

17 THE COURT: Right. But that's the law.

18 MR. SCHAIBLE: -- getting off the hook.

19 THE COURT: Well, of course. I mean, that's the law.

20 MR. SCHAIBLE: On anything -- right.

21 THE COURT: Right.

22 MR. SCHAIBLE: So I guess that, I think, mitigates the
23 issue in some respects. And then the other thing I would say
24 is, again, by the addition of the proviso (xi), which says, "to
25 the extent otherwise required by any applicable law," so a

1 municipality, county, whatever applicable law, we'll provide
2 the notice.

3 What we're dealing with really is a balancing between
4 being able to actually functionally and rationally provide the
5 notice that's required, and providing, as Your Honor pointed
6 out, broad notice. And I truly believe that this provision is
7 not only consistent with rejection procedures provisions in
8 myriad cases, it's actually broader in terms that many of them
9 don't have this, and otherwise, just to be clear, as required
10 by law.

11 So I really don't view this in any way as a limiting
12 provision. I view this as a very expanding provision. And
13 we've addressed the concerns of every party that we've heard
14 from. And these were put out on very, very broad notice.

15 THE COURT: Okay. You've convinced me. Thank you.

16 MR. SCHAIBLE: Thank you, Your Honor.

17 THE COURT: Does anyone else wish to be heard? Mr.
18 Smolinsky?

19 MR. SMOLINSKY: Your Honor, again, Joe Smolinsky for
20 the first out DIP agent. We are very much aligned with the
21 debtors in trying to make the process of rejecting and
22 abandoning property as efficient as possible.

23 I just wanted to note, there's a provision in the
24 order which say that to the extent there's an inconsistency
25 between the DIP documents and the DIP order and this order, the

1 DIP documents govern. Well, that's normally just a protective
2 measure. In this particular instance, there are heavily
3 negotiated procedures relating to rejection of leases. And
4 therefore, this order would be read in conjunction with the DIP
5 documents in the event that the debtors decided to reject any
6 leases. So we'll work efficiently to make sure --

7 THE COURT: So now that raises a new issue. So what
8 does that mean as a practical matter?

9 MR. SMOLINSKY: As a practical matter, there is --

10 THE COURT: If the DIP documents don't require all of
11 this notice, but this order does, and that's --

12 MR. SCHAIBLE: We would still provide the notice.

13 MR. SMOLINSKY: It's not specifically a notice issue.
14 It's --

15 THE COURT: Okay.

16 MR. SMOLINSKY: -- in the DIP documents, there are
17 step-in rights where we would have the ability to cure and take
18 over the lease.

19 THE COURT: Okay.

20 MR. SMOLINSKY: And so I don't want this order to be
21 read that it undermines those rights --

22 THE COURT: Okay, that --

23 MR. SMOLINSKY: -- that we have --

24 THE COURT: -- much I have no issue with. My issue is
25 that that there be full notice to all affected parties and

1 possibly affected parties, because in many of these situations
2 there's a determination that someone -- there could be a
3 determination that someone's not affected, and they disagree
4 with that, and they want to come in and be heard.

5 MR. SCHAIBLE: Right. And we're not affecting that.

6 MR. SMOLINSKY: I understand. I thought this was our
7 last chance to make a comment on the order.

8 THE COURT: That's fine.

9 MR. SMOLINSKY: I have no problem with the notice
10 issues.

11 THE COURT: Okay. All right. Okay.

12 MR. SCHAIBLE: And I think we can save you having to
13 get up for each order. I think all of the orders provide that.
14 So --

15 MR. SMOLINSKY: That was my only comment. I just
16 wanted to make sure Your Honor was aware of the --

17 THE COURT: Right. Okay.

18 MR. SMOLINSKY: -- rights under the DIP agreement.

19 THE COURT: All right.

20 MR. SCHAIBLE: The next order is the de minimis asset
21 sales order, Your Honor. You'll notice very familiar language
22 in this. And you'll notice a very familiar theme.

23 There are three tiers. And the normal usual de
24 minimis tier does have more limited notice, which we believe to
25 be perfectly appropriate. But we are still providing extensive

1 notice to governmental authorities. The tier 2 and tier 3 are
2 the larger tiers for sales. Again, we think that this is
3 all -- comports well with common practice in this court.

4 THE COURT: Okay. I did not have any questions or
5 concerns on this. Does anyone else wish to be heard with
6 respect to the expedited procedure?

7 MR. SCHAIBLE: I'd actually -- I'd actually like to be
8 heard for a second to correct myself.

9 THE COURT: Okay.

10 MR. SCHAIBLE: There's no tier 3.

11 THE COURT: Okay. All right. Mr. Rogoff?

12 MR. ROGOFF: Good morning again, Your Honor. On this
13 one we did spend a fair amount of time working with the debtor
14 on getting comfortable. We do understand that the assets that
15 would be covered by this are nonessential assets, those that
16 are not going to be core to operating the business or
17 necessary. And then based upon working with the debtor, with
18 that understanding, and the revisions that were made to the
19 order, we have no objection.

20 THE COURT: Okay. All right. Anyone else?

21 All right, Mr. Schaible, I'll approve that one.

22 MR. SCHAIBLE: Thank you, Your Honor.

23 THE COURT: I think that brings us to the retention
24 application for AP Services and Mr. Hiltz.

25 MR. SCHAIBLE: Yes, Your Honor. So --

1 THE COURT: Okay.

2 MR. SCHAIBLE: -- as Your Honor, knows, Mr. Hiltz is
3 being retained as CRO, an Alix -- or AP Services is being
4 retained as financial advisor to the debtors. We've worked
5 this order and the engagement letter and the terms thereof
6 through with the U.S. Trustee's Office, which I understand has
7 no objection to entry of this order or the next order we're
8 going to discuss. And we've also worked the same through with
9 the creditors' committee, and we understand that they also have
10 no objection.

11 THE COURT: All right. Ms. Schwartz, did you have
12 anything on this application?

13 MS. SCHWARTZ: No, Your Honor.

14 THE COURT: All right. Thank you. All right. It's
15 approved.

16 MR. SCHAIBLE: Thank you, Your Honor.

17 THE COURT: All right. And that gets us to the
18 Blackstone retention. And I have a couple of questions on the
19 order. The first one is paragraph 10 on page 6. It says,
20 "Notwithstanding anything to the contrary in this order, the
21 U.S. Trustee retains all rights to object," et cetera, "on all
22 grounds, including but not limited to the reasonableness
23 standard, provided for in Section 330 of the Bankruptcy Code,
24 and solely with respect to an objection by the U.S. Trustee,
25 the Court retains the right to review the interim and final

1 applications pursuant to 330."

2 MR. SCHAIBLE: Yes, Your Honor.

3 THE COURT: So you're limiting my right to review
4 under 330?

5 MR. SCHAIBLE: I would have to speak with Blackstone,
6 but I would be perfectly happy not to limit your rights.

7 THE COURT: Ms. Schwartz?

8 MS. SCHWARTZ: I didn't personally negotiate this
9 order, Your Honor, but I do understand what the provision
10 means. And it appears that -- is there counsel here from
11 Blackstone? What I think it means, Your Honor, is that the
12 agreement was that the only party that would have 330 rights
13 would be the U.S. Trustee, and that in that context, since
14 we're the only one with 330 rights, that Your Honor's
15 jurisdiction under 330 would be limited to the U.S. Trustee's
16 objection. I think that was probably what was agreed with
17 Blackstone.

18 MR. SCHAIBLE: It was. And clearly the intent was
19 that Blackstone, as you know, Your Honor -- that Blackstone is
20 looking for comfort that anyone else in the world can't come
21 and argue that 330. But to the extent that what Your Honor is
22 talking about is sua sponte concerns from the Court --

23 THE COURT: Well, that's what the statute says.

24 MR. SCHAIBLE: Right.

25 THE COURT: It says that I, on my own motion, I can --

1 MR. SCHAIBLE: So I --

2 THE COURT: I'm not -- this doesn't reflect any
3 intention on my part to do this. It's just the language --

4 MR. SCHAIBLE: Understood.

5 THE COURT: -- leapt out at me, that I just find it
6 unusual that an order would purport to tell me what rights I
7 retain to review applications.

8 MR. SCHAIBLE: We understand.

9 MS. SCHWARTZ: I could tell you probably what the
10 history of that is, Your Honor. That there have been courts
11 that have held that where the retention is on 328, that the
12 court doesn't have any jurisdiction to look back at the 328.
13 But because the U.S. --

14 THE COURT: I understand.

15 MS. SCHWARTZ: -- yes. I think from the U.S.
16 Trustee's perspective, the U.S. Trustee was concerned primarily
17 with her rights, making sure that she --

18 THE COURT: Right. And the debtor -- and --

19 MS. SCHWARTZ: -- and that the Court --

20 THE COURT: -- Blackstone was concerned that it's not
21 just a free for all. Mr. Huebner?

22 MR. HUEBNER: If I -- with apologies to my -- let me
23 just help for one second.

24 Your Honor, and I'm going to look at Blackstone to see
25 if this works for everybody. The bottom of page 5 on paragraph

1 9 contains language that I think everybody agrees is the
2 business deal. And I don't think, at least so far, Your Honor
3 has noted it's objectionable, which is that the fee
4 applications will be reviewed pursuant to 338 (sic) and not
5 330, and that only the U.S. Trustee is going to have the 330
6 rights. And so I think that's probably what's very standard.

7 THE COURT: Right.

8 MR. HUEBNER: Which is like I -- we all hereby agree
9 that this is a 328 retention.

10 THE COURT: Yes.

11 MR. HUEBNER: Assuming that Blackstone is comfortable
12 that that language suffices to give it comfort that this is, in
13 fact, a 328 level retention, and that only the U.S. Trustee, as
14 a party, is able to come and say later, I didn't sign on to any
15 of that, I want to now attack your monthly fee --

16 THE COURT: Right.

17 MR. HUEBNER: -- that was approved nineteen months
18 ago, and you've been working under --

19 THE COURT: Right.

20 MR. HUEBNER: -- they do reserve that right. I don't
21 know that they're going to exercise it.

22 THE COURT: Right.

23 MR. HUEBNER: I think as long as --

24 THE COURT: So we don't need paragraph 10.

25 MR. HUEBNER: -- as long as paragraph 9 is okay, I'm

1 guessing that the clause that purports -- just the part that
2 bothers Your Honor --

3 THE COURT: Right.

4 MR. HUEBNER: -- which is the "solely in respect to
5 the Court retains," I think could probably come out.

6 MS. SCHWARTZ: Your --

7 MR. HUEBNER: But maybe we should take a minute.
8 Because this is someone else's retention. Would it be
9 possible, since we need to sidebar --

10 THE COURT: Yes.

11 MR. HUEBNER: -- on the other matter --

12 THE COURT: Certainly.

13 MR. HUEBNER: -- rather than doing this --

14 THE COURT: I'm willing to be -- I'm willing to hear
15 further from you on this point. That language just seemed to
16 me --

17 MS. SCHWARTZ: Usually what the language says, Your
18 Honor, it says but the Court retains all rights under 330. It
19 doesn't say solely with respect to the U.S. Trustee.

20 THE COURT: Right. That's my point.

21 MS. SCHWARTZ: So we're not going to agree to it not
22 being in there. If they take out, "solely with respect to the
23 U.S. Trustee," that'll work.

24 THE COURT: All right. I think this goes in the
25 category of if I leave you to talk to each other --

1 MR. SCHAIBLE: Yes, understood, Your Honor.

2 THE COURT: -- you'll be able to figure it out.

3 MR. SCHAIBLE: Understood.

4 THE COURT: So let me keep nitpicking. And I
5 apologize.

6 MR. SCHAIBLE: No, please.

7 THE COURT: But it's better to be safe than sorry. So
8 paragraph 12, there is -- it reflects an amendment to the
9 fourth sentence in the last paragraph of page 5 of the
10 engagement letter. And it says that Blackstone has been
11 retained solely to act as financial advisor to the company.

12 So if you find that sentence, what that amendment does
13 is, I think it takes out language that purported to relieve
14 Blackstone of fiduciary duties, or to make clear that
15 Blackstone didn't have fiduciary duties. Right? Is that --
16 I'm looking at the right sentence? So it's page 5 of the
17 Blackstone engagement letter. And it's about the fifth line
18 from the bottom.

19 It says, "The company further acknowledges and agrees
20 that Blackstone has been retained to act solely as financial
21 advisor to the company." Right?

22 MR. SCHAIBLE: Yes.

23 THE COURT: And then it deletes language that says,
24 "and agrees that Blackstone" --

25 MR. SCHAIBLE: Yes.

1 THE COURT: -- "and does not in such capacity act as a
2 fiduciary for the company or any other persons." So that's
3 been taken out.

4 MR. SCHAIBLE: Yes, Your Honor.

5 THE COURT: Okay.

6 MS. SCHWARTZ: Your Honor, I'll just -- if we're going
7 to talk about this order, I just want to check one thing in the
8 order with respect to that engagement letter. Because usually
9 the order will say "fiduciary duty, if any". So let me just
10 make sure that that's --

11 THE COURT: Okay. I'm actually -- this just -- it
12 raised a different issue for me. And this is a funny issue,
13 but it's actually occurred in other cases that I've seen where
14 this is an application of the debtors for authority to employ
15 and retain Blackstone as investment banker. And now you're
16 telling me in the engagement letter that they've been retained
17 solely to act as financial advisor. And I've had folks in
18 large cases like this explain to me extensively that there's a
19 difference between an investment banker and a financial
20 advisor.

21 So I again apologize for being a nitpicker, but I
22 think it's important, to the extent that we later have any
23 concerns about scope, duties, fees, et cetera, that we have
24 absolute clarity on what it is that Blackstone is being
25 retained to do and what we're going to call them besides very

1 experienced at what they do.

2 MR. SCHAIBLE: Right. Understood.

3 THE COURT: So could we get some -- add that to the
4 list of things that you're going to clarify.

5 MR. SCHAIBLE: Sure.

6 THE COURT: Okay? Next point. Paragraph 13.

7 "Monthly fee, restructuring fee, equity raise fee and DIP
8 financing fee, shall be deemed earned and payable when payable,
9 upon the terms specified in the engagement letter."

10 So I understand the concept of earned. But nothing is
11 payable until there's court approval or -- right?

12 MR. SCHAIBLE: Yes. Yes, Your Honor.

13 MS. SCHWARTZ: And, Your Honor --

14 THE COURT: Okay. So does that all work? I mean,
15 there's nothing -- we're clear --

16 MR. SCHAIBLE: Yes.

17 THE COURT: -- on that point. Nothing is payable
18 until it's authorized to be paid.

19 MR. SCHAIBLE: I believe that's correct, Your Honor.

20 THE COURT: Can you double check that point --

21 MR. SCHAIBLE: Sure.

22 THE COURT: -- okay?

23 MS. SCHWARTZ: And, Your Honor, the order does provide
24 that to the extent that there's anything inconsistent between
25 the order and the engagement letter, et cetera, the order would

1 control. So we'll make sure that the order --

2 THE COURT: Right. Okay. All right. Final point --

3 MS. SCHWARTZ: Because lots of times, there's things
4 in the engagement letters that are not consistent with the
5 order.

6 THE COURT: Right. Okay, final point in the new
7 paragraph 14. It says, "Notwithstanding anything to the
8 contrary in this order and the engagement letter, the
9 calculation of the equity raise fee shall specifically exclude
10 credit bids, claim offsets, debt recaps, exchanges or other
11 noncash benefits, provided by a debt holder or lender."

12 The equity raise fee -- let me state it differently.
13 The 6.5 million dollar restructuring fee is incremental to the
14 equity raise fee, so that if the plan -- if there's a plan and
15 it includes an equity raise, there's two components of a fee.
16 One's not subsumed within another.

17 MR. SCHAIBLE: Right. Although there's a credit.
18 Fifty percent of any equity raise fee is credited against the
19 restructuring fee.

20 THE COURT: Okay.

21 MR. SCHAIBLE: Except for that, they are separate
22 fees. And the creditors' committee was concerned that the
23 language of the equity raise fee description in the engagement
24 letter was not clear that an equity raise fee would not apply,
25 to the extent that existing stakeholders essentially were --

1 THE COURT: Okay.

2 MR. SCHAIBLE: -- taking equity. And that was not
3 what was intended. And so we were happy to clarify that in
4 this language.

5 THE COURT: All right. Well when you meet and confer
6 now, just run through some different scenarios with respect to
7 timing and who's involved in each of the transactions, just to
8 be sure that the words reflect what your deal is.

9 MR. SCHAIBLE: Understood.

10 THE COURT: I just don't want to have any problem at
11 the end of the day.

12 MR. SCHAIBLE: Understood, Your Honor.

13 THE COURT: All right? Anyone else on the Blackstone
14 retention?

15 Okay. It's a quarter to 12. I'm not going anywhere.
16 I'll just go across to chambers, and you can let me know when
17 you finished, and we can go back on the record and put the new
18 language on the record. All right? Thank you very much.

19 MR. SCHAIBLE: Thank you, Your Honor.

20 MS. SCHWARTZ: Thank you, Your Honor.

21 (Recess from 11:44 a.m. until 12:13 p.m.)

22 THE COURT: Thank you. Please have a seat.

23 MR. SCHAIBLE: Hi, Your Honor. Sorry, we were --

24 THE COURT: No problem.

25 MR. SCHAIBLE: -- trying to be efficient. In order to

1 try to be efficient I worked on the derivatives question that
2 Your Honor had, and Marshall -- Mr. Huebner worked on the
3 Blackstone issues.

4 THE COURT: Okay.

5 MR. SCHAIBLE: So we'll take them in turn. On the
6 derivatives, you raised a perfectly fair point. And rather
7 than getting into what people believe or disbelieve would be
8 ordinary course or is ordinary course or is not ordinary
9 course, the motion is fairly clear about the relief that we're
10 seeking. It's to be able to do hedges that we believe are in
11 the ordinary course of our business, in these certain types of
12 commodities.

13 THE COURT: Right.

14 MR. SCHAIBLE: And what happened is, as I stated, we
15 had further conversations with the creditors' committee where
16 they said essentially two things. First of all, we just
17 haven't done the work to confirm whether we agree with you that
18 all these other things are ordinary course of your business or
19 not, and therefore, we don't need to get into it. What do you
20 need to do now?

21 And we said, what we need to do know is diesel fuel.
22 So what we're happy to do is, just to avoid any ambiguity and
23 confusion on the record or otherwise, I would like to rewind
24 all the discussion about past practices and ordinary course of
25 business, officially. And what I'd like to just have this

1 provision say is, "Notwithstanding any of the foregoing, the
2 debtors will obtain the consent of the committee or further
3 order of the Court prior to entering into any derivatives
4 contracts transactions or ancillary transactions with respect
5 to commodities other than diesel fuel."

6 So to be clear, we are going to do only diesel fuel
7 unless we talk to the committee and they say it's okay for us
8 to do other than diesel fuel, or if --

9 THE COURT: Read me the language again?

10 MR. SCHAIBLE: Sure. "Notwithstanding any of the
11 foregoing, the debtors will obtain the consent of the committee
12 or further order of the Court prior to entering into any
13 derivatives contracts transactions or ancillary transactions
14 with respect to commodities other than diesel fuel."

15 THE COURT: So if you enter into a contract with
16 respect to a commodity other than diesel fuel, you can do that
17 with the consent of the committee, right?

18 MR. SCHAIBLE: That's right.

19 THE COURT: If you've made a determination that it's
20 in the ordinary course?

21 MR. SCHAIBLE: That's correct. And it's otherwise
22 covered by our motion, which provided other limitations. We
23 talked about specific types of hedges.

24 THE COURT: Oh, right. That's beside the point. But
25 I'm not relinquishing the requirement that you get court

1 approval for a transaction out of the ordinary course.

2 MR. SCHAIBLE: We agree -- understand that.

3 THE COURT: Right.

4 MR. SCHAIBLE: And, Your Honor, I think that the
5 motion says somewhere around four or five times that this only
6 for stuff within --

7 THE COURT: Right.

8 MR. SCHAIBLE: -- the ordinary course of business.

9 THE COURT: Yes. Which is why this language didn't
10 work.

11 MR. SCHAIBLE: Understood.

12 THE COURT: So --

13 MR. SCHAIBLE: The language was --

14 THE COURT: -- okay.

15 MR. SCHAIBLE: -- in-apropos. There's no question
16 about that.

17 THE COURT: All right. So Mr. Rogoff, Mr. Smolinsky
18 and Ms. Schwartz, you're all okay with that formulation?

19 MR. SMOLINSKY: Yes, we're all in agreement.

20 THE COURT: Okay.

21 MS. SCHWARTZ: No objections.

22 THE COURT: Okay.

23 MR. ROGOFF: Fine, Your Honor.

24 THE COURT: All right. Okay.

25 MR. SCHAIBLE: Thank you, Your Honor.

1 THE COURT: That's good.

2 MR. SCHAIBLE: And now I'm going to turn it over to
3 Mr. Huebner --

4 THE COURT: Okay.

5 MR. SCHAIBLE: -- to explain the investment bankers.

6 MR. HUEBNER: Your Honor, for the record, Marshall
7 Huebner of Davis Polk. Your Honor, I think, as I counted them,
8 there were three paragraphs where Your Honor had questions.
9 We've now addressed all three in ways that I believe work for
10 everyone in the courtroom.

11 THE COURT: Okay.

12 MR. HUEBNER: I hope it'll work for the Court as well.
13 Turning first to paragraph 10, Your Honor, you quite rightly
14 pointed out that it could -- in fact it's arguably the only
15 reading was a restriction on your own discretion in the future.

16 THE COURT: Right.

17 MR. HUEBNER: Which is not something you were
18 interesting in seeing. What we proposed to do, Your Honor,
19 since we quite agree with that comment -- I think it was an
20 inadvertent thing based on trying to resolve the U.S. Trustee's
21 objections, is immediately after the words at the bottom of 10,
22 three lines up, it says, "and solely with respect to an
23 objection by the U.S. Trustee," we would add the words, "or on
24 the Court's own motion," making it clear that obviously in
25 addition to their reserved right, the Court of course, being

1 the Court, has the reserved right as well to question things,
2 including under 330.

3 We don't expect it, because it is a 328 retention, and
4 that's what the order says, and that's what Blackstone
5 bargained for. But this is a concern you raised. Blackstone
6 is agreeable, understandably --

7 THE COURT: Okay.

8 MR. HUEBNER: -- to accommodate. And I think that
9 fixes 10.

10 Paragraph 12, Your Honor, where you sort of noted just
11 sort of this is kind of now a funny sentence. It's a funny
12 sentence. The real answer is, the whole meat of the sentence
13 was the second half --

14 THE COURT: Yes, exactly.

15 MR. HUEBNER: -- which was already deleted.

16 THE COURT: Right.

17 MR. HUEBNER: After doing a few balloons I said, this
18 sentence should just come out. It just -- it doesn't do
19 anything anymore.

20 THE COURT: But I think that that doesn't solve it.
21 Because the engagement letter --

22 MR. HUEBNER: Says "financial advisor".

23 THE COURT: -- says financial -- okay. Go ahead.

24 MR. HUEBNER: I'm going to get there in a minute.

25 THE COURT: Okay.

1 MR. HUEBNER: Right. The writ small problem is, this
2 is now sort of the hanging sentence that seems to make a sort
3 of declaration. Like all I'm doing is helping you. Great.
4 Why is that called out in an order, and why is that there? So
5 this sentence should come out.

6 We're now left with the fact that some investment
7 banking firms --

8 THE COURT: Wait. The sentence is coming out of --

9 MR. HUEBNER: I'm sorry.

10 THE COURT: -- the engagement letter?

11 MR. HUEBNER: To be precise for the record, what the
12 order will now read is as follows. The fourth sentence in the
13 last paragraph on page 5 of the engagement letter, beginning,
14 "The company", is hereby deleted. So the order will --

15 THE COURT: Got it.

16 MR. HUEBNER: -- as opposed to deleting the second
17 half of the sentence --

18 THE COURT: The whole sentence come out.

19 MR. HUEBNER: -- we'll delete the entire sentence.

20 THE COURT: Okay.

21 MR. HUEBNER: Now onto the conceptual question of
22 they're called financial advisor, then they're called
23 investment banker. You're quite right. And my guess is
24 Blackstone will henceforth be very careful, as will their sort
25 of lawyers helping them with this stuff, to pick one phrase or

1 the other. The reality is, the most important thing is the
2 substance. Right?

3 THE COURT: Right.

4 MR. HUEBNER: And the U.S. Trustee and the debtors,
5 frankly, because we're paying for all these fine folks, are
6 very focused on making sure that there's no duplication of
7 services. And the reality is we have the Alix folks doing some
8 things and the Blackstone people doing other things, which are
9 very -- most obviously centered on what I think most people
10 think of as investment banker services.

11 THE COURT: Right. Let me give you the hypothetical
12 that I'm worried about. And I don't think this is intentional,
13 and I don't think anyone's trying to pull a fast one, but I
14 want to be very precise. I don't want it to be the case that
15 later in the day -- I'm going to make up a hypothetical --
16 there's an acquisition or there's some transaction that's not
17 currently in the contemplation of anybody right now. I don't
18 want it to be the case that we would point to this engagement
19 and say, oh, look, Blackstone was engaged to provide financial
20 advisory services, and their fees and backend fees were tied to
21 that, but there's now been an investment banking transaction,
22 and so they're entitled to ask for another fee. I'm largely
23 making that up, but that very fact pattern has been known to
24 occur.

25 MR. HUEBNER: Right.

1 THE COURT: So --

2 MR. HUEBNER: So the good news is, I actually think on
3 the substance, we actually think the letter is clear. And in
4 fact, where there is the possibility, as Mr. Schaible described
5 before, of a potential overlap between the restructuring fee
6 that is earned in connection with many types of emergence, and
7 specific other fees where -- you know, it's much harder to
8 raise equity than debt. It's much harder to raise unsecured
9 debt than secured debt. So where there are separate fees for
10 those special transactions that are performed, the letter is
11 actually express and detailed about where and how there is
12 crediting.

13 And so we think, at least as we sit here today, that
14 both within the Blackstone letter, which was, in fact, pretty
15 extensively negotiated, and to their credit, they accepted a
16 fair amount of chiseling from the debtors and those working on
17 the debtors' behalf -- that the letter is clear what they do
18 and don't get paid for.

19 And more importantly, or certainly what the U.S.
20 Trustee's primary concern was that -- the other fact pattern,
21 which is two different advisors both work on the same thing and
22 both claim that they were the financial advisor for that deal.
23 The compensation structures are actually very, very different.
24 And so we think that --

25 THE COURT: Right. I think the large -- after you

1 read the title of the motion, investment banker disappears.

2 MR. HUEBNER: Right.

3 THE COURT: Uh-oh. Ms. Schwartz has that yes, but I
4 have something else to say look, on her face.

5 MR. HUEBNER: I was going to add her point in a
6 second.

7 MS. SCHWARTZ: I'll finish -- I just want to make sure
8 Your Honor --

9 THE COURT: Okay.

10 MS. SCHWARTZ: -- I get an opportunity to be heard.

11 THE COURT: Okay.

12 MR. HUEBNER: So on that point, unfortunately, or
13 fortunately for some of us -- fortunately for Ms. Gasparani,
14 she's far away on vacation. One of the things that we did do
15 was work very closely to address the concerns about
16 duplication. Ms. Schwartz would just like to double check with
17 her office, since normally two financial advisors is something
18 that they try to ensure doesn't happen. On the merits and the
19 substance, we are very comfortable that Blackstone is in the
20 model of a traditional investment banking firm, and that's what
21 we're using them for.

22 We don't have two overlapping financial advisors. But
23 since, for worse or for better, the word "financial advisor"
24 is, in fact, throughout their retention letter --

25 THE COURT: It is. I mean, that --

1 MR. HUEBNER: -- she just want to verify with the
2 office, as I understand it, that that doesn't present any
3 residual concerns.

4 THE COURT: Right. And I don't, off the top of my
5 head, nor would it be appropriate for me to speculate, on what
6 other Blackstone engagement letters say as to whether or not
7 they actually characterize themselves as an investment banker.
8 But notwithstanding the fact that we deleted that other
9 sentence, which --

10 MR. HUEBNER: Right.

11 THE COURT: -- had a peculiar emphasis, this still is
12 an engagement letter that says that they're being retained as
13 "the financial advisor".

14 MR. HUEBNER: Correct. Correct.

15 THE COURT: So if we were starting from scratch, the
16 motion, it would seem, would say that they're -- that the
17 retention is for Blackstone as a financial advisor.

18 MR. HUEBNER: Or it wouldn't surprise me if their
19 future letters actually called themselves investment banker, to
20 help with the optics on all of these issues.

21 THE COURT: One or the other.

22 MR. HUEBNER: Either way, happily, the substance, we
23 think, is correct and accurate, and it was this vestigial
24 sentence that raised the issue which is -- you know, it is
25 replete --

1 THE COURT: Well, but is that -- the vestigial
2 sentence is what made me notice the issue at all. But now that
3 we've gone through the --

4 MR. HUEBNER: Correct.

5 THE COURT: -- engagement letter, it's replete --

6 MR. HUEBNER: It is, correct.

7 THE COURT: -- with --

8 MR. HUEBNER: Absolutely agree, Your Honor.

9 THE COURT: Right.

10 MR. HUEBNER: And they should match. The last of the
11 three fixes --

12 THE COURT: I mean, I'm not one to elevate form over
13 substance. I just don't want there to be an ambiguity at the
14 end of the day that we all didn't think about.

15 MR. HUEBNER: Shall I hit the last point first, or
16 would others like to speak?

17 THE COURT: Wait. So I've got Mr. Rogoff and Ms. --

18 MS. SCHWARTZ: I should just address this issue.

19 THE COURT: Okay, go ahead. Mr. Rogoff, do you want
20 to weigh in on this?

21 MR. ROGOFF: I was just going to make one very
22 discrete statement. Your Honor hit an issue that we think is
23 not an issue. But just for the record, there are no other fees
24 being earned or payable to Blackstone other than those that are
25 identified with specificity in this letter. If there were some

1 hypothetical transaction down the road, we're not going to be
2 surprised with a transaction fee that's different from anything
3 else than this agreement. That's the committee's
4 understanding.

5 THE COURT: Okay.

6 MS. SCHWARTZ: Andrea Schwartz for Tracy Hope Davis,
7 the United States Trustee. Judge, as you know, I did not
8 negotiate this retention or review it, et cetera. However, I'm
9 fairly familiar with the institutional issues of lack of
10 duplication and multiplication of professionals, particularly
11 more than one counsel for a case, more than one financial
12 advisor, et cetera.

13 One of the ways that the U.S. Trustee has tried to
14 address that has been -- although I don't think it's been -- I
15 don't see it, necessarily, I think, in this order -- is to have
16 the actual services that a professional is going to provide set
17 forth in the order. It's not in this order.

18 THE COURT: It's in the engagement letter.

19 MS. SCHWARTZ: Right. I understand that.

20 THE COURT: Right.

21 MS. SCHWARTZ: But when you look at the services that
22 Blackstone is going to provide, it's clear that they're not
23 solely coming on as an investment banker. Because if you look
24 at the different things they're doing, they're doing financial
25 advisory services. So the fact that Your Honor picked up the

1 fact that the engagement letter said "financial advisor", and
2 the application said "investment banker", actually is a
3 substantive issue, because it has to go to what are the
4 services that are being provided.

5 That said, the gentlemen have advised the Court that
6 they've had multiple conversations with my colleague, Ms.
7 Gasparini with respect to this very issue of duplication of
8 services, and that she had represented to them that she was
9 comfortable that there was no duplication of services.

10 THE COURT: Right.

11 MS. SCHWARTZ: The only issue that I have and that I
12 requested to be able to confirm with my office, is the fact
13 that in this case -- and it may be form over substance, and it
14 may not be -- but in this case, you had an application for Alix
15 coming in as financial advisor, and you had an application for
16 Blackstone coming in as investment banker. Now, the U.S.
17 Trustee is going to have to sign off on two financial advisors
18 and investment bankers, and I want her to know that, in fact,
19 that's what she's doing --

20 THE COURT: Okay, look.

21 MS. SCHWARTZ: -- before we do it.

22 THE COURT: I hear you. Here's the thing. I actually
23 don't have a concern --

24 MS. SCHWARTZ: Okay.

25 THE COURT: -- about duplication. Of all the things

1 that I've raised, I don't have a concern about duplication.
2 I'm highly confident that what -- AP Services and Blackstone
3 are not going to overlap except to the extent required, so that
4 folks can coordinate. What I do have an issue with is the fact
5 that the order says that the debtors are authorized to employ
6 and retain the advisor as their investment banker. So there's
7 just a little bit of a disharmony --

8 MS. SCHWARTZ: Right.

9 THE COURT: -- that maybe is just words. I understand
10 that it creates an issue for you having two FAs. I think your
11 office will be able to --

12 MS. SCHWARTZ: I think from a substantive standpoint,
13 as these gentlemen have represented it --

14 THE COURT: Right.

15 MS. SCHWARTZ: -- and I have no reason to doubt it.
16 I've looked at it. I didn't look as closely to the Alix
17 application, but --

18 THE COURT: Right.

19 MS. SCHWARTZ: -- I know this is an -- we do this all
20 the time. So I just --

21 THE COURT: So I just --

22 MS. SCHWARTZ: -- wanted, before I say fine, I've got
23 to at least let the U.S. Trustee know --

24 THE COURT: Right.

25 MS. SCHWARTZ: -- that that's, in fact, what's

1 happening.

2 THE COURT: What I'm trying to avoid, which I think
3 there's a low percentage chance of it happening, but it's
4 better raise it than not, is at the end of the day that we --
5 that this inconsistency between being called an investment
6 banker and being called a financial advisory, is given some
7 significance --

8 MS. SCHWARTZ: Right.

9 THE COURT: -- by someone in some context for fees or
10 otherwise. And I appreciate the clarification that there's no
11 open-ended ability to seek an additional fee. Hypothetically
12 you could have a situation where someone would say, oh, I acted
13 as a financial advisor, that's what I got paid for; look, see
14 what the engagement letter says, and then at the end of the
15 day, they say, but now I'm going to apply for an enhancement,
16 because I also provided investment banking services.

17 MS. SCHWARTZ: I think Your Honor knows --

18 THE COURT: We can take care of this.

19 MS. SCHWARTZ: -- I know well of that. And also,
20 Blackstone's here. So Blackstone clearly --

21 THE COURT: Right.

22 MS. SCHWARTZ: -- hears Your Honor and what she's
23 saying. So I would --

24 THE COURT: Right. I think at bottom, Mr. Huebner is
25 absolutely correct, that there's no duplication. We just have

1 to do some little wordsmithing to make the words comport with
2 reality.

3 MR. HUEBNER: Yes. And so that the record is
4 perfectly clear, which may be helpful both to Ms. Schwartz and
5 to Your Honor, Mr. Huffard, who is the senior managing director
6 of Blackstone --

7 THE COURT: Who suffered through this entire thing.

8 MR. HUEBNER: -- has been in the back saying, just
9 tell them we are the investment banker. We agree, that's what
10 we're doing. So I don't think anybody expects --

11 THE COURT: Okay. But that's -- I'm sorry. But the
12 engagement letter that you're asking me to approve says that
13 they're the financial advisor.

14 MR. HUEBNER: Correct. No, his point was that if it
15 would solve everybody's problems to do a global search and
16 replace in the letter of "financial advisor" to "investment
17 banker", they're happy to do that, because in fact, many firms
18 would have this letter but would use those words instead. So
19 if we could just -- if that would be people's pleasure and the
20 Court would like that --

21 THE COURT: That would be a very elegant and easy fix
22 and would help the formal issue that the U.S. Trustee's Office
23 has.

24 MR. HUEBNER: Well, Mr. Huffard is both elegant and
25 easy, and so we will make that change, and we're done.

1 Your Honor, the last issue that you raised which was
2 also correct, was in paragraph 13, where the words "and
3 payable" were arguably in conceptual tension with the
4 requirement earlier in the application and the order in
5 paragraph 9, where of course, they're actually payable pursuant
6 to fee applications. So those words should come out and they
7 have.

8 In lieu of reading the "... fees shall be deemed
9 earned and payable, when payable upon the terms specified in
10 the engagement letter," it should instead say, assuming that
11 Your Honor finds this language acceptable, "shall be deemed
12 earned when and upon the terms specified in the engagement
13 letter." This paragraph should not address "payable", because
14 in fact the payable concept is in paragraph 9 --

15 THE COURT: Exactly.

16 MR. HUEBNER: -- pursuant to fee applications.

17 THE COURT: Exactly.

18 MR. HUEBNER: And so assuming that that works for the
19 Court --

20 THE COURT: Yes. It does.

21 MR. HUEBNER: -- then I think we have a letter. And
22 maybe the simplest thing to do is simply change "financial
23 advisor" to "investment banker". And it looks like he's seeing
24 a bunch of head nods. And then we're totally done.

25 THE COURT: Okay.

1 MR. SCHAIBLE: Although, just to be clear for the
2 record -- I'm sorry. Nothing about changing from financial --
3 the words "financial advisor" to "investment banker" changes,
4 affects, or changes in any way the list of tasks that they're
5 going to do.

6 THE COURT: That's fine.

7 MR. HUEBNER: Correct.

8 MR. SCHAIBLE: What we did was, I think, the right
9 thing, which was we and the U.S. Trustee's Office --

10 THE COURT: Okay.

11 MR. SCHAIBLE: -- looked at the list --

12 THE COURT: Okay. But let's -- we're going to do
13 this, let's do it right. Instead of just having the computer,
14 if you will, search for the word and do the replacement, let's
15 actually read it and --

16 MR. HUEBNER: Yes.

17 THE COURT: -- just make sure that by switching those
18 words, we're not creating any other --

19 MR. HUEBNER: Sure. No, from the company --

20 THE COURT: -- spell check type issues.

21 MR. HUEBNER: We will clearly do it manually and
22 carefully, Your Honor.

23 THE COURT: Okay.

24 MR. HUEBNER: From the company's perspective, they
25 only know that Blackstone is on a fixed monthly. So their view

1 is load them up with as much work as possible, because it
2 doesn't cost us extra. They don't care what the title is.
3 They just want to make them do as much as they can.

4 And with that, Your Honor, I think --

5 MS. SCHWARTZ: We'd just like to see it before it's
6 submitted.

7 THE COURT: Yes. So --

8 MR. HUEBNER: Absolutely.

9 THE COURT: -- let's talk about nuts and bolts. So
10 you're going to have to send me a new version of the
11 derivatives order, right?

12 MR. HUEBNER: That I believe we have a laptop -- we'll
13 send them down later to you.

14 THE COURT: Just e-mail them down to chambers. On
15 this one, circulate it with the interested parties and then
16 send it to me with a representation that everybody's fine, and
17 we'll enter it quickly.

18 And with that, at 12:30, we can conclude our
19 uncontested hearing.

20 MR. SCHAIBLE: Thank you very much.

21 THE COURT: And I do -- I appreciate your patience
22 with me. All right, thank you.

23 IN UNISON: Thank you, Your Honor.

24 (Whereupon these proceedings were concluded at 12:31 PM)

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I N D E X

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

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

Penina Wolicki

PENINA WOLICKI

AAERT Certified Electronic Transcriber CET**D-569

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Date: August 16, 2012