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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:
GARRETT MOTION INC., et al., Main Case No.
Debtors. 20-12212-mew

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

December 9, 2021
10:03 AM

B E F O R E:
HON. MICHAEL E. WILES
U.S. BANKRUPTCY JUDGE

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Motion by Nomis Bay Ltd and BPY Ltd to compel compliance with
the Debtors amended joint plan of reorganization under chapter
11 of the Bankruptcy Code

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A P P E A R A N C E S (All present by video or telephone):

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ARTHUR J. STEINBERG, ESQ.

GARRETT MOTION INC.

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

2 THE COURT: Good morning, everybody. Are the parties
3 ready on Garrett Motion?

4 MR. STEINBERG: Yes, Your Honor.

5 MR. GLUECKSTEIN: Yes, Your Honor. This is --

6 THE COURT: I think this is the smallest group we've
7 ever had in a matter on this case.

8 MR. GLUECKSTEIN: I think it is, Your Honor. Good
9 morning. This is Brian Gluckstein at Sullivan & Cromwell,
10 appearing with my colleague Alexa Kranzley, for the reorganized
11 debtors.

12 THE COURT: I've read the parties' papers, and I'll
13 listen to anything you have to say. But before we do that, I
14 have some questions that I'd like to ask of each of you if
15 that's all right.

16 First, for the movants. There seems to be a dispute
17 here about whether these follow-up questionnaires were sent to
18 the movants or to affiliates of the movants. Well, maybe this
19 is for both of you. How many affiliates are we talking about
20 here?

21 MR. STEINBERG: Your Honor, this is Arthur Steinberg
22 on behalf of the -- from King & Spalding -- on behalf of the
23 movants. The movants are two separate hedge funds, Nomis Bay,
24 Limited and BPY, Ltd. The response made in the objection was
25 that they meant to send it to someone that was affiliated and

1 they listed it as one entity that was --

2 THE COURT: Who is they?

3 MR. STEINBERG: -- that they thought it was directed
4 to.

5 THE COURT: All right. So --

6 MR. STEINBERG: As we noted in our papers, the notice
7 that we got did not say who it was directed to, and the email
8 that was attached to the objectors' papers had a bcc line, so
9 the specific names were known to the sender but not to the
10 recipient.

11 THE COURT: Well, who received it? Who was the
12 recipient of the email, what human being?

13 MR. STEINBERG: The human being, I think, was my
14 client, but I don't know specifically the name of the client
15 that actually opened the envelope. The client got it. It was
16 in the client's files. It was the reason we referenced it in
17 our opening papers.

18 THE COURT: You've got two separate funds. Your
19 client is whom? Who is the entity -- who is the human being
20 employed by that actually received it?

21 MR. STEINBERG: It came from the files that were
22 managed by Director Peter Poole, who is the director of both
23 the Nomis Bay, Limited fund and the BPY, Limited fund.

24 THE COURT: So it came by email? There are no
25 envelopes or anything like that as to who was --

1 MR. STEINBERG: Correct.

2 THE COURT: And it was just one email?

3 MR. STEINBERG: It was one email.

4 THE COURT: Did the Boothbay affiliates or affiliate
5 that were identified submit questionnaires?

6 MR. STEINBERG: I don't know the answer, though I
7 think debtors' counsel would know.

8 THE COURT: Mr. Glueckstein, know the answer?

9 MR. GLUECKSTEIN: Yes, Your Honor. For the record,
10 Brian Glueckstein, Sullivan & Cromwell. Yes, they did, Your
11 Honor. And if I could address this issue briefly, we addressed
12 this issue in our papers because the movants referenced
13 repeatedly this April 28th email.

14 I do want to note on this at the outset, Your Honor,
15 that this email is a little bit of an ancillary issue because
16 it doesn't relate to the subscription process directly at all.
17 It was a follow-up email. It actually was related to debtors'
18 subsequent obligation, file of resale registration statement on
19 formats (audio interference) one post-emergence.

20 And the point we made in our papers, Your Honor, is
21 that I don't know how Mr. Steinberg's clients got a copy of the
22 correspondence. All we can represent, with respect to this
23 correspondence, is who it was sent to. And as we represent in
24 our papers, our subscription agents sent that email to the
25 contact information that was provided by each holder.

1 So Mr. Steinberg's clients provided contact
2 information and (audio interference) individual and an email
3 address. The Boothbay folks provided an email address to which
4 any follow-up forms, correspondence, et cetera, was to be sent.
5 And we sent that to the folks at Boothbay. It's a different
6 email address, same domain, but different email address. And
7 so we don't know how or whom manned those emails, looked at
8 them, provided copies. Frankly, Your Honor, we would submit it
9 doesn't really matter.

10 But the point from our perspective is that we only
11 sent out that email to holders that were verified through our
12 process as accredited investors. So this is not a situation
13 where we made a mistake or we sent it, and it was sent to them.
14 It didn't specify that it wasn't for them. We didn't send it
15 to them. And how the movants got a copy of it, I don't know.
16 But certainly the point that we wanted to make in our objection
17 is that we do not believe that, to the extent that this is
18 being offered as some sort of reliance or indication that they
19 were not fully aware of the circumstances, is simply untrue.

20 And then the last point I'd make on this, Your Honor,
21 is, in fact, if we look at the timeline here, there's no
22 dispute that this email, however the movants here got a copy of
23 the email, they subsequently became aware on May 4th directly
24 that they had been rejected from the accredited investor
25 portion of their subscription.

1 And then subsequent to that (indiscernible) --

2 THE COURT: (Audio interference) --

3 MR. GLUECKSTEIN: -- notification they sent in this --

4 THE COURT: Mr. Glueck- --

5 MR. GLUECKSTEIN: -- this information --

6 THE COURT: Hang on, hang on, hang on, hang on. I've
7 read all the papers. I don't need them repeated, and I do have
8 some questions. You're going beyond my question at the moment.
9 I'll let you speak, but let me get my questions out first,
10 okay?

11 MR. GLUECKSTEIN: Sure, Your Honor.

12 THE COURT: So as I understand it, the deadline for
13 the subscription and for verifying (audio interference) was
14 April 16th; is that correct?

15 MR. GLUECKSTEIN: Correct, Your Honor. The
16 subscription deadline was 5 p.m. on April 16th to provide all
17 documentation.

18 THE COURT: But Mr. Steinberg, even if this
19 questionnaire was sent to your clients on April 28th, why does
20 that create an estoppel? What reliance could there have been?
21 The deadline was already gone. Even if it put your clients'
22 minds to rest since the deadline had already passed, how is
23 there in an estoppel here?

24 MR. STEINBERG: Well, Your Honor, we actually made our
25 submissions on April 14th. So we were two days before the

1 deadlines, and so that we were timely, and there's no issue
2 about that. The --

3 THE COURT: Excuse me. That (audio interference)
4 answer my question. How does the April 28th email create an
5 estoppel? You either were in --

6 MR. STEINBERG: Oh.

7 THE COURT: -- or out, right? Does that --

8 MR. STEINBERG: Yes. I'll try to answer your
9 question, Your Honor. The confirmation order in this case was
10 entered on April 26th, and the effective date was April 30th.
11 Prior to April 30th, we had never been informed that we were
12 out. The only thing we had gotten was that email, which we
13 believed meant that we were in. The debtor, I think, has taken
14 the position that when they went effective, they had
15 distributed out the series A preferred shares and there was no
16 remedy at that point in time that could have -- could happen to
17 give us our shares.

18 And so the argument is, is that to the extent that
19 they're arguing that April 30th was a firm deadline, and we had
20 never been informed prior to April 30th that we were out and in
21 fact had received this notice that we were in, and therefore we
22 could have taken timely action prior to April 30th to bring it
23 to Your Honor's attention.

24 Part of their argument is that there is no effective
25 remedy in this here because all the shares have been issued,

1 and the estoppel argument is predicated on the fact that if
2 they had timely notified us, and one of our arguments is they
3 obviously knew we were out by that point in time. We would
4 have been able to act, and the fact that we got a notice that
5 said that we were in allowed us to believe that everything was
6 copacetic.

7 THE COURT: The debtors contend that you didn't
8 actually return that questionnaire until four days after you
9 were told that you had not qualified; is that correct?

10 MR. STEINBERG: The deadline for returning that
11 questionnaire was May 8th. And so we actually submitted and
12 returned that questionnaire, I think, on May 7th.

13 THE COURT: And the debtors say that they told you
14 four days before that that you had not qualified.

15 MR. STEINBERG: They did tell us on May 4th. That was
16 after the April 30th effective date.

17 THE COURT: The --

18 MR. STEINBERG: To the extent that one argues that the
19 effective date did not change our ability to get a remedy and
20 that they were required to give us the shares, then I don't
21 think that there's an estoppel argument because we were then
22 told on May 4th that that was the case. To the extent that
23 they're going to hang their hat on April 30th as being a date
24 that has significance as to whether we get a remedy or not,
25 then the estoppel comes into play.

1 THE COURT: Mr. Steinberg, my question is very simple.
2 You can make your arguments in a minute, but my question --

3 MR. STEINBERG: Um-hum.

4 THE COURT: -- is it correct that you returned the
5 questionnaire several days after you were told by the debtors
6 that you had not qualified?

7 MR. STEINBERG: That's correct.

8 THE COURT: Correct? I didn't hear your answer.

9 MR. STEINBERG: I said, that's correct.

10 THE COURT: So the debtors also argue that the movants
11 only submitted materials just before the April (audio
12 interference) deadline. So when were the materials (audio
13 interference)?

14 MR. STEINBERG: When were the materials delivered? On
15 April 14th, two days before.

16 THE COURT: April 14th?

17 MR. STEINBERG: Yes.

18 THE COURT: I see that they're signed April 12th, and
19 there was correspondence saying money was wired April 15th.
20 How were they delivered on the 14th?

21 MR. STEINBERG: I don't know the answer to that. I do
22 have my colleague Scott Davidson on the line, and perhaps he
23 knows the answer to that question.

24 MR. DAVIDSON: Good morning, Your Honor. I believe
25 that the materials were submitted to the nominee on the 14th,

1 and they may have been then transferred over on the 15th. But
2 I believe from what the client told us that it was done on the
3 14th, at least to the nominee.

4 THE COURT: Mr. Glueckstein, who made the decision
5 that these two applicants did not qualify, and when was that
6 decision made?

7 MR. GLUECKSTEIN: Your Honor, that decision was
8 made -- the review of the accreditor investor applications was
9 done in the first instance by a third party registered broker
10 dealer who the debtors retained, North Capital Private
11 Securities, who reviewed the entirety of all of the packets.
12 Any of the rejections were then provided through the
13 subscription agent to the debtors' counsel.

14 And so all of the professionals in terms of the
15 debtors' counsel, North Capital, and subscription agent had
16 seen those materials. That review took place by North Capital
17 from April 16th, which was the subscription deadline, at 5 p.m.
18 That is the key deadline here. And that's reflected in the
19 offering procedures. That review took place over the
20 subsequent week, at which time our capital structure was
21 finalized on the 23rd of April.

22 THE COURT: Your papers say that there were some
23 people who were contacted about follow-up information. Were
24 any of those people contacted after April 16th?

25 MR. GLUECKSTEIN: No, Your Honor. That reference

1 was -- we disclosed that largely in response to arguments being
2 made by the movants, that there was some discretion retained
3 generally in the rights offering procedures. The only contact
4 of that sort that -- there were certain brokers who submitted
5 their information long in advance, in very early April, where
6 we saw there were documents missing and things of the like,
7 where there was plenty of time to allow a resubmission if
8 documents weren't uploaded, et cetera.

9 There was nobody who was contacted with respect to
10 these sorts of failures of the accredited investor verification
11 process after April 16th. And as counsel represented, our
12 records show, Your Honor, that we received these movants'
13 subscription forms from their nominee, Bank of America, on
14 April 15th at 3:42 in the afternoon.

15 THE COURT: April 15th at what time? 3:42, did you
16 say?

17 MR. GLUECKSTEIN: 3:42 p.m. Correct, Your Honor.

18 THE COURT: All right. And did your consultant North
19 recommend that these two applicants had not qualified?

20 MR. GLUECKSTEIN: Correct, Your Honor.

21 THE COURT: Right. So nobody else was involved in
22 that decision or?

23 MR. GLUECKSTEIN: Their role as experts as register
24 broker dealers was to review that and provide those analyses to
25 us. We at Sullivan & Cromwell became aware of that. We have

1 reviewed that information certainly at or around that time and
2 certainly subsequently. But the call in the first instance was
3 made by North Capital with respect to all of the applicants
4 that were submitted.

5 THE COURT: And were any of its decisions overruled?

6 MR. GLUECKSTEIN: No, Your Honor. These were not --
7 there was nothing that, from the perspective of certainly us as
8 counsel, that were particularly close calls.

9 THE COURT: Right. Mr. Steinberg, you've argued that
10 the debtors could have waived problems, and in doing so, you
11 argue as though the debtors really were -- it was entirely up
12 to the debtors, entirely in their discretion, that it made no
13 difference and they were taking no risks if they allowed
14 somebody in who technically had not proven they were entitled
15 to participate.

16 Let me ask both of you, is that really correct? What
17 were the risks here if the debtors had said, well, this is good
18 enough?

19 Mr. Glueckstein?

20 MR. GLUECKSTEIN: I'm sorry, Your Honor. Was that
21 question directed to me, the debtors?

22 THE COURT: I want both of you to answer, but first,
23 I'd like you to answer, yes. From the debtors' point of view.

24 MR. GLUECKSTEIN: I'm sorry, Your Honor. Would you
25 mind repeating that question? I missed the beginning of it.

1 THE COURT: The movants have argued that the debtors
2 could have waived problems, and they argue as though it was
3 entirely up to the debtors, that there were -- that it was only
4 a matter for the debtors to decide, that there was no risk to
5 the debtors in accepting the papers as they were, and that
6 nothing could have gone wrong if the debtors had accepted it.
7 And if somebody later decided that technically these people
8 hadn't shown they were entitled to participate, then my
9 question is, is that right? Would --

10 MR. GLUECKSTEIN: We disagree with that strongly, Your
11 Honor. We certainly had the obligation to review and make
12 decisions, but this goes to the core of the argument, Your
13 Honor. As the Court knows, this piece of the rights offering
14 was set up as a private placement to take advantage of the safe
15 harbor protections of Rule 506(c) of Regulation D. And I know
16 Your Honor has reviewed our papers in detail, but this goes to
17 the core issue.

18 The obligation, Your Honor, is on the debtor to take
19 reasonable steps to verify that every single investor who is
20 subscribing to this rights offering meets the criteria to
21 qualify the debtor for the safe harbor in Rule 506(c). And so
22 the reason why these rules exist is, and there's extensive
23 guidance that's provided by the Securities and Exchange
24 Commission around the types of submissions that it deems to be
25 acceptable.

1 If one of the ways, as was done here, is for the
2 debtor to rely on a third party representation that the
3 investor is, in fact, an accredited investor. And I'm happy to
4 go into that in as much detail as the Court would like, but
5 this goes to the core of the argument.

6 THE COURT: My --

7 MR. GLUECKSTEIN: And so Your Honor, if we were to
8 simply say we are going to accept something that we do not
9 believe meets the criteria for 506(c), then the debtor is
10 opening itself up to the risk that the SEC would disagree that
11 we qualify for the safe harbor provision. And that could have
12 serious consequences, both in terms of potential rescission of
13 the rights offering and penalties, civil penalties, under
14 federal securities law. So we completely disagree with the
15 premise, Your Honor, that we could waive the requirement, that
16 we got sufficient verification that these investors were
17 accredited investors.

18 And at the end of the day, whether they are or are not
19 accredited investors actually does not matter. The question
20 here is whether or not the supporting documentation that was
21 required under the rights offering procedures met the standard
22 that's set out under Rule 506(c). And so we did not have the
23 ability to ignore or waive those deficiencies in those
24 circumstances.

25 THE COURT: All right. Mr. Steinberg, do you agree

1 that if the debtors had accepted these and if somebody later
2 had decided that they were wrong, that there would have been
3 potential consequences of the kind Mr. Glueckstein has
4 mentioned, rescission of the rights offering, civil penalties,
5 et cetera?

6 MR. STEINBERG: I think, Your Honor, I mostly agree
7 with what Mr. Glueckstein said in the way that the question was
8 phrased, which is that they didn't have the right to waive the
9 securities requirements to satisfy the Section 506(c) Reg D
10 requirement. They couldn't just overrule what the statute
11 says. So I agree with that notion.

12 The issue, though, is not whether they have the right
13 to overrule it. I think it's whether we made a proper
14 submission and if there was an ambiguity in their mind as to
15 whether a example that -- whether we had made their submission
16 when there was no form and the Rule itself says these are only
17 examples and that they're not the only ways that you can
18 satisfy it. Then the issue is did they satisfy the
19 requirements under the securities law by doing the good-faith
20 review to make sure that what was submitted was correct.

21 And that is the essence of our argument, which is
22 that, based on our submission, that they had to act in good
23 faith to clarify any ambiguity. It wasn't as if we didn't give
24 a proper submission. We think we did. But if they were not
25 sure whether the person who submitted it was an independent

1 accountant, they could have easily confirmed that.

2 If they were not sure whether that statement meant
3 also that they had reviewed the accredited investor status over
4 the last three months, if they wanted to shoehorn within a
5 nonmandatory example, just to say that I satisfied the example,
6 then the burden was on them in accordance with the procedures
7 to act in good faith, not to act arbitrary and not to act
8 unilaterally. And that's the essence of our argument.

9 THE COURT: If your client wanted the debtors to treat
10 the one-paragraph representation that was submitted as a
11 statement and verification by a certified public accountant,
12 then why didn't your client identify in that certification that
13 the person signing it was a certified public accountant?

14 MR. STEINBERG: I think my client didn't realize that
15 that was the sine qua non for rejection of an application. I
16 think obviously they thought that that was the buzzword that
17 was needed to do it --

18 THE COURT: The other --

19 MR. STEINBERG: -- then that would have included it.

20 THE COURT: How many other private placement offerings
21 have your clients participated in?

22 MR. STEINBERG: I was told that it was at least ten.

23 THE COURT: And --

24 MR. STEINBERG: But Mr. Davidson's on the phone, and
25 he can confirm it if there's a specific number.

1 THE COURT: Did they provide the same form of
2 certification in those instances that they provided here?

3 MR. STEINBERG: Their statement to us in the context
4 of the declaration that we made was that they had never been
5 rejected on the accredited investor status, either because of
6 their qualifications or their submissions. I'm not sure
7 whether the submissions made here were exactly the same
8 submissions there. I assume that was the case, but I did not
9 ask the question. Mr. Davidson spoke to the client directly
10 and he might be able to answer that more specifically.

11 MR. DAVIDSON: This is Scott Davidson. I don't have
12 any more specifics than that.

13 THE COURT: The person who signed the representation
14 in this case, is that a person who has done it in the other
15 cases, as well?

16 MR. STEINBERG: He's the director of both funds, and
17 he said that that was the situation in the case. So whether he
18 did it or was aware of it being done on behalf of the funds, I
19 don't know whether we asked for that distinction.

20 THE COURT: But did he --

21 MR. STEINBERG: But he was aware of what --

22 THE COURT: Did he sign similar representations in
23 connection with other private offerings?

24 MR. STEINBERG: I don't know the answer to that.

25 Mr. Davidson, do you know the answer?

1 MR. DAVIDSON: No, I do not.

2 THE COURT: Under the rule, the point of allowing a
3 representation by a certified public accountant is to accept
4 the representation by somebody who's actually looked into the
5 finances of the persons who qualify. Here, the representation
6 was made by your clients that they qualified because their own
7 investors had qualified. Even if somebody knew that the person
8 who signed this was a certified public accountant, where is
9 there any representation that as a certified public accountant,
10 he had personally looked at the (audio interference) at the
11 (audio interference) who are investors in your funds?

12 MR. STEINBERG: I think the representation that was
13 made was that, according to the subscription agreements, they
14 only accept investors who have accredited statuses, and all the
15 current investors have been cleared that they've made the
16 eligibility requirements. That is what was written to the
17 debtors, and that is what I think they thought was necessary to
18 establish the accretor investor status.

19 THE COURT: Well, let's break this down. Your client
20 said that it qualified because its own investors qualify.
21 Isn't that right?

22 MR. STEINBERG: Correct.

23 THE COURT: Okay. So certification by a certified
24 public accountant, that they've looked at the finances of the
25 person who allegedly qualifies as an accredited investor and

1 believes that that person qualifies, can be sufficient. But in
2 this case, all your client said, without identifying himself as
3 a CPA, was that it's your policy only to accept from accredited
4 investors. There's no statement that as a CPA, your client
5 looked at and verified to his satisfaction personally the
6 financial circumstances of each of your investors, right?

7 MR. STEINBERG: That is correct, but the client also
8 filed this as the appointed fund administrator. So he did have
9 some greater visibility than just being an account.

10 THE COURT: And the Rule also says that in the case of
11 a representation by a CPA, that it's supposed to be based on an
12 inquiry within the prior three months, and that's a language
13 that's repeated in the annex to the subscription papers. That
14 wasn't stated in what was submitted either, was it?

15 MR. STEINBERG: That's correct, Your Honor. It
16 wasn't, but the Rule is a nonexclusive example, and the Rule
17 itself says these are nonexclusive examples of what
18 (indiscernible) --

19 THE COURT: I understand that. There's lots of
20 different kinds of financial information you can accept. But
21 your argument basically is that when the Rule says that, as an
22 example, you can accept the certification from a certified
23 public accountant, that he within the last three months has
24 made a reasonable inquiry into the finances of the person who
25 qualifies as an accredited investor and believes that they

1 qualify. Your argument is that nonexclusivity means that all
2 that language in there about three months and about making a
3 reasonable inquiry themselves means nothing, and that as long
4 as it's a CPA, that is good enough. If that was good enough,
5 then why would all the rest of that language be in the Rule?

6 MR. STEINBERG: I think that that is -- that that
7 language in that Rule gives you an example of what would be
8 good enough by saying it's a nonexclusive example. It means
9 that there could be other things that would also be good
10 enough.

11 The real issue here is that, with what was described
12 given by a person that they weren't sure wasn't an independent
13 accountant or would otherwise qualify, and to the extent that
14 they weren't sure whether that inquiry of making the -- within
15 the three months as to whether the investors were accreditor
16 investor status, whether that required the company to make a
17 call to determine whether what she submitted would be fitting
18 within the example, considering that this was an element of
19 plan consideration and this was a choice that people made under
20 the plan as to whether to take a cash out or take the bundle of
21 securities.

22 So before you take the bundle of securities or a
23 portion of the bundle of securities away, when someone has made
24 this type of inquiry, this type of submission, if you're not
25 sure if there's ambiguity here, then the issue is whether the

1 good faith element under the subscription agreement required
2 them to do something more than simply rejecting it, and that's
3 it.

4 THE COURT: Well, let me turn to that for a second.
5 Your motion asked me to enforce the plan and the confirmation
6 order, and part of your argument is that the debtor acted
7 wrongly by not calling you, telling you there was a defect, and
8 giving you an opportunity to cure. As to that argument, what
9 provision of the plan or my confirmation order required the
10 debtors to do so? And in fact, didn't they say quite
11 explicitly that they had no obligation to do so?

12 MR. STEINBERG: No. I think, Your Honor, the
13 confirmation order says that if there's any dispute as to
14 whether someone was eligible or not, that the bankruptcy court
15 ultimately would be the arbiter to make that decision. And the
16 issue isn't whether there was a defect here. We're arguing
17 first that there was no defect, that this was a proper
18 submission, and that in the event -- and it may not have fit
19 squarely within the example, but it was a proper submission.

20 If it wasn't a proper submission, if the debtor was
21 unsure whether that was the case, its obligation under the
22 Rules is to do the reasonable inquiry to get comfortable. It's
23 not the absolute guarantor of the fact, but it needed to do
24 something in order to fulfill its compliance that it had made
25 the requisite inquiry to ensure that you had a accreditor

1 investor status. It wasn't to reject somebody because they
2 didn't fit within a nonmutual example.

3 THE COURT: The papers, if I recall correctly, said
4 quite explicitly that the solicitation agent had no obligation
5 to notify people of any defects. How can I (audio
6 interference) require them to do what the explicit terms of the
7 paper said they had no obligation to do?

8 MR. STEINBERG: Well, implicit in your question is
9 whether there was a defect, right? Our argument is, first,
10 that there was no defect.

11 THE COURT: Just stop.

12 MR. STEINBERG: The papers also --

13 THE COURT: Part of your argument is that they didn't
14 notify you of what they believed to be a problem. Okay. Are
15 you abandoning that argument? If you're not, then answer my
16 question.

17 MR. STEINBERG: No, no. I'm not abandoning that
18 argument. I'm saying to you that there are two arguments that
19 are here. The first argument is that there was no defect. The
20 second argument that is that if they believe that there was an
21 ambiguity, if there was confusion on the submission, then their
22 burden was, under the procedures which said that they had to
23 act in good faith, was to make further inquiry to determine
24 whether we were compliant or not.

25 THE COURT: My question is, where the papers said that

1 if what they believed there to be a defect, that they had no
2 obligation to notify you, how could I find that good faith
3 required them to do what the explicit terms that the papers
4 said they had no obligation to?

5 MR. STEINBERG: I think if someone didn't submit a
6 check, if someone was untimely in their submission, if someone
7 didn't give any supporting documentation at all, that clearly
8 meant that they weren't required to call them up and say, hey,
9 you forgot to write a check. Hey, you missed the deadline, or
10 hey, you didn't give any supporting documentation letter at
11 all.

12 I think when someone gives the supporting
13 documentation letter, and they have an issue as to whether -- I
14 mean, let's say if it came down solely as to whether this was
15 signed by an accountant or not, they had the obligation to call
16 to find out if there was -- if they were going to reject it on
17 that basis. They have the obligation to call before they
18 reject it to confirm that whether that was the case or not.

19 You have two provisions in the overall agreement. You
20 have an agreement that says you're not required to cure a
21 defect, and you have a requirement that they are supposed to
22 act in good faith, you need to make both of those provisions
23 congruent in the context of the facts of this case. And our
24 argument is --

25 THE COURT: Asking you --

1 MR. STEINBERG: -- that when you've made a --

2 THE COURT: You're not (indiscernible) --

3 MR. STEINBERG: I'm sorry, Your Honor.

4 THE COURT: -- congruent. You're asking me to
5 overrule an explicit term and to say that good faith required
6 what the document explicitly said was not required.

7 MR. STEINBERG: No, Your Honor. I'm not saying that
8 you should overrule one term. I think if we did not submit a
9 check, I think if we did not submit any submission letter, then
10 there was no obligation to call us and say, you forgot to do
11 something. When someone has made what they thought was a
12 complete submission and thought that they had complied with the
13 Rule, where the Rule itself says that there are not specific
14 forms to check out or there are specific examples, and only
15 those examples that need to comply, then something more needed
16 to be done. That's the argument.

17 THE COURT: If your client believed in May that it was
18 being wrongly excluded or had been wrongly excluded from this
19 offering, why didn't you raise this issue with me in May? Why
20 is this coming up in a motion filed in November, six months
21 later?

22 MR. STEINBERG: I think, Your Honor, this matter
23 wasn't something that we dealt with until we got contacted by
24 counsel for these clients. And we didn't get contacted until
25 the end of October. That law firm, who was a St. Louis law

1 firm, did have exchanges of correspondence with the client and
2 with Sullivan & Cromwell in May, and did have it at the end of
3 May, and they were told that in response to their
4 correspondence is that they don't have a remedy.

5 And that counsel was my cocounsel on another matter.
6 And he said, I have this issue that I wanted to raise with you.
7 This is what we were told. Do you think that there's a remedy?
8 Do you think there's a process? And so that was the basis of
9 how we got involved, and that's why it's being brought at this
10 point in time.

11 There is nothing in the procedures that have deadlines
12 of when this is supposed to be raised. Obviously, at the time
13 that the lawyers were still arguing with each other, they were
14 being told by Sullivan & Cromwell that you have no remedy.
15 That it was too late already. Effectively, that it was too
16 late because by April 30th, on the effective date, it was too
17 late. And it was clearly, at that point in time, no one knew
18 that there was an issue.

19 THE COURT: You've argued that what you seek is just
20 an enforcement of what I previously ordered, but what I
21 approved was an offering that was of a very specific size. And
22 what I approved was that a group of backstop buyers would have
23 the rights to buy any of the stock that wasn't validly
24 subscribed for under the private placement.

25 The remedy you're seeking now doesn't seem like you're

1 seeking to get the stock back from the back (audio
2 interference) buyers. You haven't sued them. The remedy that
3 you're asking for, essentially, is that I retroactively approve
4 a bigger offering than the one that I actually approved and
5 that I command the issuance of more stock than I actually
6 approved. How is that a motion to enforce what I already
7 ordered?

8 MR. STEINBERG: I think Your Honor ordered that if my
9 client had made the appropriate documentation or was able to
10 establish that it should have gotten the shares, the
11 confirmation order, I think, said that we would get those
12 shares and that it was part of the implementation of the plan.
13 The debtor is raising an issue that says that I can't
14 effectively do that now.

15 I don't know whether they escrowed or they have any
16 available shares that could otherwise comply with it. They
17 used the word substantial. They don't say all. They also
18 describe that there's a procedure upon which they themselves
19 couldn't get the permission from the largest holders, which are
20 two or three people, to issue these shares. These were the
21 people who actually got the shares. And so there was a remedy,
22 even though they told us that there wasn't the case. But I do
23 think the persons --

24 THE COURT: You're --

25 MR. STEINBERG: -- who have sued was --

1 THE COURT: -- (indiscernible) attention to my
2 question. You're basically talking about whether in theory a
3 company can, with the requisite approvals, issue additional
4 preferred stock. But what happened in this case was
5 stockholders who qualified who were in the right to
6 participate, and there was a backstop, so any shares that were
7 (audio interference).

8 Mr. Glueckstein (audio interference) but please
9 verify, that all the shares that were part of the plan offering
10 that weren't subscribed for in the private placement by people
11 you recognized were sold to the backstop buyers; is that
12 correct?

13 MR. GLUECKSTEIN: That is correct, Your Honor. And as
14 we outlined in our papers, and as the Court will recall, the
15 debtors needed the cooperation of those parties and of the plan
16 sponsors to make a lot of things happen in a very short period
17 of time to allow emergence at the end of April.

18 And so, yes, Your Honor, when I said earlier our
19 capital structure was finalized on April 23rd, that is the date
20 by which the accredited investors who had been verified,
21 because they had submitted proper documentation, were allocated
22 their shares. The remainder of the shares that were available
23 in the offering that was approved by the Court were then
24 allocated to backstop parties in accordance with the terms of
25 the backstop agreement that also was approved by the Court.

1 So what I represented to counsel, and it's been said
2 now multiple times by Mr. Steinberg, that we represented that
3 there was no remedy -- of course, we don't believe there should
4 be a remedy -- but putting that aside, I stand by my
5 statements. The company does not have the ability, absent
6 getting authority, the requisite approvals to issue additional
7 shares to provide these investors additional shares that they
8 seek. All of the shares that had been authorized to be issued,
9 and that were in fact issued in accordance with the rights
10 offering pursuant to the plan, were sold so that the company
11 had the liquidity it needed to emerge from bankruptcy and make
12 the payments contemplated under the confirmed plan.

13 THE COURT: Mr. Steinberg, if things had happened the
14 way you think and if the debtors had accepted your offering, it
15 wouldn't have meant that more preferred stock was issued than
16 actually was issued. It would have meant that some of what the
17 backstop buyers bought would have been bought by your clients
18 instead.

19 So if what you're really seeking to do is to enforce
20 the terms of the plan, it seems to me you would have to be
21 trying to get that stock back from the backstop buyers. They
22 also had rights under the plan and under the orders that I
23 approved. But is that remedy even really available to you? I
24 mean, your clients have sat around for six months while the
25 backstop buyers put their money actually at risk. Your clients

1 sat around with the luxury of waiting to see whether it turned
2 out to be a good bet or not.

3 MR. STEINBERG: Well, Your Honor, I think our remedy
4 is with the party that we were privy with, which is the
5 debtor itself. We made a choice to either get a cash out or to
6 get securities that come from two different offerings. We only
7 got the securities that came from one offering. That was the
8 choice that we had to make at the time. And if we had chosen
9 the cash out offer, we would not have been able to get the
10 securities offerings. We made our choice assuming that we
11 would have both.

12 Even now, there is the ability for the debtor to try
13 to effectuate the remedy. It chooses not to seek to get the
14 consent. But if they had gotten the consent from these
15 backstop owners, they would be able to do that remedy. If they
16 can't effectuate the remedy by giving us the securities, then
17 they could obviously pay damages for not giving us the
18 securities.

19 And when you talk about sitting around, my client put
20 up cash to buy these securities. It did not want to take its
21 cash back. It wanted to have this issue resolved. The prudent
22 issue for the debtor, knowing that there was this dispute, was
23 to hold back on those securities and not distribute them. This
24 is three-tenths of one percent of the securities that were
25 issued in order to finance this plan. So this wasn't the issue

1 that was driving the funding of the plan or not.

2 But what was being posited as here is that whether or
3 not we have the right to do it, assuming we had the right to
4 get these shares, the debtors distributed them out anyway on
5 April 30th. And then by then, before we even knew that there
6 was an issue, while they knew that there was an issue, because
7 they notified everybody that they thought wasn't an accredited
8 investor. They said they notified them, and that's the April
9 28th letter. They said that they knew their capital structure
10 as of April 22nd so that they knew we weren't part of it.

11 They were not telling us at the time when it was an
12 issue that we could have acted upon, and we're saying that even
13 that you still can act upon it now, and if not, you could
14 compensate us for that. And we didn't speculate as to saying,
15 well, now the stock is more valuable so now it's worth our
16 time. We, for months and months, wanted to have this resolved
17 and didn't want to take the check back because we wanted to get
18 what we had bargained for, which was two bundles of securities,
19 not one bundle of securities instead of a cash option. And
20 that was the plan consideration that was bargained for by the
21 equity groups to try to have a consensual plan. We didn't get
22 what we had bargained for. And you are the right person to try
23 to seek that remedy from.

24 THE COURT: Your damages argument is based on the
25 average price of the common stock over the past six months, if

1 I understand it. Is that correct?

2 MR. STEINBERG: Yes.

3 THE COURT: So your argument is that you should have
4 had either stock or an instrument that could be converted into
5 that stock six months ago, but you could have bought the common
6 stock on the market six months ago, couldn't you?

7 MR. STEINBERG: No, not these preferred shares. These
8 are preferred shares. I don't think there's a market for --

9 THE COURT: But you --

10 MR. STEINBERG: I'm not sure. I'm not sure. Yeah,
11 let me take that back. These were preferred shares, not common
12 stock. And I'm not sure -- I'm not sure -- and I think we were
13 trying to measure what we think the value of the preferred
14 stock is. I don't know whether we could have bought it or not.

15 THE COURT: His arg -- I think his argument that --

16 MR. STEINBERG: I don't know whether these are
17 (indiscernible).

18 THE COURT: You've got to shut up when I talk, okay?
19 Your damages argument is based on the common stock price, isn't
20 it?

21 MR. STEINBERG: Let me just check, Your Honor.

22 MR. DAVIDSON: If I may, Your Honor? I'm sorry. This
23 is Scott Davidson. I mean, we may not have specifically said
24 it, but I think that the damages are based on the series A
25 preferred shares, not the actual stock price.

1 THE COURT: Okay. That's not what you said in your
2 reply. You specifically talked about the average common stock
3 price over the past six months, didn't you?

4 MR. DAVIDSON: I mean, we didn't say common, but we
5 should have specifically said preferred shares when we just say
6 stock.

7 MR. STEINBERG: Yeah. We say the -- it's paragraph 27
8 of our reply. "Even if the reorg cannot provide the investors
9 with the amount of series A preferred they were entitled to
10 receive, they should be directed to make us whole over the
11 (indiscernible) months, the share price of the debtors' stock
12 average price." So, again, I don't think we were precise, but
13 I don't think we meant to say common.

14 THE COURT: But if your argument is that you should
15 have been able to buy it on a particular day in April or May,
16 isn't your damages the difference between what you thought you
17 should have paid and what the value was in April or May, not in
18 subsequent months?

19 MR. STEINBERG: I think we were trying to give
20 approximates so that the Court can estimate what the damages
21 are. If there's a different calculation that would give us --
22 that the Court believes is the appropriate damages as compared
23 to what the subscription price was, then I think that would be
24 the remedy that we would have if we couldn't get the shares.

25 And Your Honor, I apologize if you thought I was

1 talking over you. I was not meant to do that. It's just hard
2 on this type of situation --

3 THE COURT: That's fine.

4 MR. STEINBERG: -- to realize when you're looking for
5 me to just stop talking.

6 THE COURT: It's frustrating for me. That's the
7 disadvantage of these hearings. And it's happened with both of
8 you that I can't get a word in edgewise, whereas in court I can
9 put my hand up and go ahead and ask my question. It's very
10 frustrating --

11 MR. STEINBERG: Okay.

12 THE COURT: -- at times because of the way --

13 MR. STEINBERG: Again, my apologies.

14 THE COURT: No, that's all right. Everybody needs to
15 get a phone that allows the judge's voice to be heard.

16 All right. Those are my questions.

17 Let me ask you, on behalf (audio interference) Mr.
18 Steinberg, if you have anything you want to add to what we've
19 already said or what's in your papers.

20 MR. STEINBERG: Your Honor, I do want to just
21 emphasize a couple points. I know that your questions did
22 elicit a lot of the arguments that we wanted to make, and I was
23 trying to make those arguments in response to your questions.
24 But let me see if I can just be relatively brief and try to
25 emphasize the points that I'd like Your Honor to focus on.

1 One is that the amount of the shares at issue, and
2 that we are three-tenths of one percent of the preferred
3 shares, so this is not a situation which moves the needle very
4 much and often allows for common sense solutions to bridge the
5 gap to try to reflect what is a legitimate concern made by what
6 we believe that our clients have argued.

7 The second thing is, is that the argument really does
8 come down as to whether we submitted appropriate documentation
9 at the time that said that we were an accredited investor, and
10 the argument that we had to do what the examples say are the
11 requirements is not true. When we make the argument that they
12 were looking for buzzwords or catch phrases, it was because
13 we're trying to say that they were trying to marry us up to a
14 nonexclusive example. But that wasn't the only way of
15 approaching this.

16 And one of the reasons why we were asking for
17 discovery was whether there was really the appropriate effort
18 that was made to scrutinize our application, and really who did
19 it, what was done, and even when Sullivan & Cromwell came into
20 the picture and looking at the situation, was it before April
21 30th or after April 30th?

22 And then certainly the letter that we submitted, which
23 has a phone number, which has the name of the party who was
24 submitting it, if one only Googled the name of the entity that
25 submitted it, the horseshoe entity, they'd see that it was a

1 fairly large entity that provides accounting services to hedge
2 funds, as well, too. So either they could have done it by a
3 phone call or by a will to know that there was more that could
4 be done to try to close the loop here.

5 The argument is that we -- what we want to make is
6 that if there was a submission, as compared to -- we know that
7 there are distinctions between if you didn't give a check and
8 if you didn't timely submit. They don't require the necessity
9 on the debtor to say, hey, you forgot to include your check.
10 But we did include the check. We did do it in a timely basis.
11 We did everything we can, and we submitted a letter. And if
12 they weren't sure that the person who submitted the letter was
13 a independent accountant, then the issue is whether they had
14 that obligation to act in good faith before they rejected it.

15 And if they wanted to reject it, when they knew they
16 were going to reject it, should they have told us in time so
17 that we could have appeared at the confirmation hearing and
18 raised the issue or appeared before the effective date and
19 raised the issue so that Your Honor wouldn't be struggling with
20 some of the questions that you're asking now.

21 We think that the good faith element means something,
22 and it especially means something in the context of this case,
23 where there was an option to take cash versus securities. And
24 if you're only going to get seventy percent of the securities
25 that you thought you bargained for, it created a different

1 equation. And once you've made the securities selection, you
2 couldn't take the cash selection, or stated the other way, once
3 you've made the cash selection, you couldn't take the
4 securities selection.

5 So we thought we were getting up on those securities.
6 We thought there was no issue that we would be accredited
7 investors. We had been accredited investors numerous times
8 before, and we had gotten a letter, whether they thought it was
9 directed to us or not, before April 30th, saying that they
10 thought we were an accredited investor.

11 And the other thing that I just wanted to point out is
12 that the notion that they didn't have time to get it right
13 because of the crunch in trying to consummate this deal, that I
14 don't think is a valid excuse. Either they had to do -- to get
15 it right, or they didn't. And if they had to get it right,
16 then the fact that they had this crunch of time, which was
17 somewhat of an artificial deadline that they imposed on
18 themselves, is not an excuse to deprive us of the plan
19 consideration that we were entitled to get.

20 They said in their papers why they thought they had a
21 time deadline, and they cite to a particular transcript, and on
22 (audio interference) 5 of our reply, we put up the quote that
23 they were referring to, which says, we'd like to hold to a date
24 because we're concerned about the cycles. So they weren't
25 effective during the appeal period, and they did in the context

1 of having an unopposed plan.

2 And this issue, which would have created a potential
3 issue for Your Honor to deal with, what was not told to us,
4 even though that they knew about it. They just didn't tell --
5 they told the people who were in it that they were in it, and
6 the people who weren't in it, they didn't tell about it until
7 after the effective date, when they then presumably argue that
8 there was no basis to change the result. And that isn't right
9 in the context of someone who actually made a submission. And
10 the submission did try to address the issues that would
11 otherwise be called for by Reg D, Section 506.

12 This is not meant to say that the debtors shouldn't be
13 scrupulous in trying to look at these investors, and there are
14 ramifications if they don't. It just means that the debtors'
15 requirement is not to guarantee that they are but to do
16 reasonable diligence to ensure compliance. And if that's the
17 case, reasonable diligence to ensure compliance meant doing the
18 calls that they tried to do in May that they could have done in
19 April.

20 And they never question the fact that we probably are
21 accredited investors. They just say that even if we are
22 accredited investors, we didn't do it within the words of the
23 nonmutually exclusive example. And we believe that that's not
24 the test that was envisioned or the test that should be applied
25 in this case.

1 And when we look at the -- they said that they didn't
2 have enough time, and the reason why we said that we thought
3 you could take discovery here if this was a relevant issue,
4 first, we don't think it's a relevant issue because if you have
5 the obligation, you have the obligation. But if you look at
6 it, the solicitation period took place over a month period of
7 time. So a lot of the people presumably had responded before
8 we did, and presumably they were rejecting applications before
9 we did.

10 So when the music stopped on April 16th, how many of
11 the hundred -- or the ninety-eight, because we would be two --
12 how many of the ninety-eight were left? How many of the
13 ninety-eight that were left where they hadn't made the
14 determination yet were people who didn't submit a check? How
15 many of the people came in after ninety-eight? And why
16 couldn't they have done the diligence and the follow up within
17 that period of time, whatever the time period was? Ninety-
18 eight people to call, and we think that number is dramatically
19 less than ninety-eight, could be done in one day or two days.

20 And it's not a matter of they had the option to not do
21 it because there was something and there was a statement that
22 says if you were deficient, there's no obligation on you. We
23 believe that there was an obligation to scrutinize the
24 submissions that were there and to act in good faith so that if
25 you had questions about it, as to whether there was compliance,

1 that you needed to act and you had plenty of time, presumably,
2 to act. And the fact that even if there was a time crunch, it
3 was a self-created time crunch, and he certainly could have
4 parked a very small amount of shares until he had the extra
5 couple of days to make that -- what was then --

6 THE COURT: Let me ask you about that. Now, under the
7 terms of the backstop arrangement that I approved, did the
8 right of the backstop buyers vest as to any shares that weren't
9 validly subscribed as of April 16th? You are arguing that the
10 debtors basically could have clarified this situation and
11 qualified your client after April 16th by asking some more
12 questions. My question to you is, would that have been
13 contrary to rights that had vested already in the backstop
14 buyers?

15 MR. STEINBERG: I don't know the answer to that, but
16 I'm not sure I would have phrased the question that way. I
17 would have said that they were confirming that we had
18 qualified, as compared to saying that they were trying, because
19 we would have just given them further information to confirm
20 the information that we already gave. So either we submitted,
21 and they were clarifying it or not.

22 But I don't think in any event that, if there was an
23 issue about it, that we would have been able to raise it.
24 Their rights didn't vest to get the money as of April 16th
25 because certainly the procedures are that if there's an issue

1 that's involved about it or not before it goes to the backstop
2 parties that you would resolve it. So by definition, if you
3 were going to resolve it, they didn't have rights to say that I
4 had it before there was even an issue raised that we could have
5 presented to Your Honor to resolve.

6 THE COURT: So it's, in effect, giving you an
7 extension of time to provide the required documentation, isn't
8 it?

9 MR. STEINBERG: I don't mean to be argumentative, Your
10 Honor, but the way you phrased it is not the way that I would
11 phrase it. It's not to give the documentation that was
12 required. It's to provide supplemental information to confirm
13 that the information that we've already provided was adequate
14 for the purposes of the exercise, which was to determine
15 whether we were an approved accredited investor.

16 So we think that we gave the information to do that,
17 even if it didn't technically fit within the exact wordings of
18 a nonmutual exclusive example. But if they weren't sure if
19 that was the case and they felt more comfortable that it needed
20 to fit within it, or they felt more comfortable if it fit
21 within the nonmutual example, then their obligation in order to
22 run this procedure properly, to give us the plan consideration
23 that we bargained for, was that in good faith to make that
24 phone call.

25 And it wasn't that we were taking somebody else's

1 rights away. We were confirming the rights that have you
2 vested in us when we opted for this option under the plan.

3 Just let me just try to briefly -- briefly, Your
4 Honor, I just need to look in my notes. I think I've made the
5 point, but I just wanted to say it again. The horseshoe was
6 either an independent accountant or not. I don't think it
7 needed to say it was an independent accountant. They've not
8 raised the issue that horseshoe otherwise didn't qualify as
9 being an independent accountant. And the fact that we either
10 checked with them -- they either checked within the ninety days
11 or didn't check within the ninety days wasn't apparent from
12 looking at the application.

13 If they could, that application could have been
14 interpreted to say that they could have done that, and then
15 that just then leaves the burden as did the burden here lie
16 with the debtor who went off of the equity investors of choice,
17 which involved the bundle of securities. Did they have the
18 burden before they summarily rejected it without giving someone
19 an option to be able to talk to them about it, to confirm that
20 their rejection of the application was correct?

21 I don't know whether North Capital had one person
22 doing all of this or had ten people do this. And I don't know
23 whether -- or the one person that looked at my clients'
24 applications had the same criteria that everybody else did.
25 And I have no idea when anything percolated up to sell them in

1 Cromwell to take a look at this situation. I do know that if
2 you have this issue and you're raising this issue, then we were
3 entitled to know about it, and to be able to, if we couldn't
4 convince them, convince Your Honor in a more timely fashion.

5 And to the extent that Your Honor is raising an issue
6 as to why we waited six months, I don't think anybody is
7 prejudiced by the six months. We were told by June 4th that
8 there was no remedy that we were entitled to, which I don't
9 think was the right answer, and certainly what I think is being
10 told now is that we didn't have a remedy by the time we were
11 first told that we didn't qualify.

12 Anyway, Your Honor, I think that just in conclusion,
13 the shares were promised as a form of consideration under the
14 plan. They a critical element of why the clients chose the
15 shares option instead of the cash out option. The client
16 should receive the consideration promised to it under the plan.
17 Thank you for your time.

18 THE COURT: Mr. Glueckstein, when were the shares
19 actually issued and (audio interference) when did the closing
20 take place -- the issuance take place?

21 MR. GLUECKSTEIN: Yes, Your Honor. So the closing of
22 the plan was on April 30th, and all of the shares were issued
23 on that date. In response to Your Honor's question a few
24 moments ago, the backstop was set up that the backstop parties
25 had an obligation to purchase and fund, and obviously the

1 debtor -- this was all done because we needed the funding to
2 emerge from Chapter 11. All unsubscribed shares, right.

3 So the subscription deadline of April 16th was the
4 meaningful date. That was why the procedures, the voluminous
5 procedures include language in bold that any corrections or
6 resubmissions, any error, had to be corrected prior to the
7 subscription expiration date. That's in page 10 in bold, all-
8 cap font, right.

9 And so once that happened, the funding notices were
10 sent out to all the validated accredited investors on April
11 23rd. So the shares that were not subscribed by accredited
12 investors outside of the backstop parties, then funding notices
13 went to the backstop parties. And they funded on April 28th
14 and purchased those shares that were then issued on April 30th.

15 So it is correct, Your Honor, that all of shares, all
16 of the series A shares that were contemplated to be issued
17 pursuant to this offering were in fact paid for and issued at
18 emergence on April 30th of 2021.

19 THE COURT: Okay. Is there anything else you want to
20 add to what's already been said and what you said in your
21 papers?

22 MR. GLUECKSTEIN: Just a few points, if I may, Your
23 Honor. And I don't want to belabor it because we've covered a
24 lot of ground this morning, and I know Your Honor is familiar
25 with the papers. But Mr. Steinberg has repeatedly said that we

1 needed to get this right. And I would submit, Your Honor, that
2 we did get this right.

3 The process that was set up through the rights
4 offering procedures worked. Again, the obligation here is on
5 the debtor, right, to ensure that they are only issuing shares
6 to accredited investors who qualify so that we as the issuer
7 have the ability to get the safe harbor protection of Rule
8 506(c). And one method of complying with that safe harbor,
9 which is utilized all the time, and what is contemplated in the
10 rights offering procedures that were approved and went out to
11 everybody, including these investors, is for the debtor, or the
12 issuer here, to reasonably rely on confirmation from the
13 investors.

14 And one way of doing that is from a written
15 confirmation from the third parties with specific information
16 that the SEC considers appropriate. So we've had a lot of
17 discussion this morning about the one-sentence letter that was
18 submitted on behalf of these investors. And Your Honor,
19 certainly, these are sophisticated investors. They claim that
20 they have participated in other rights offerings. We know,
21 just by the record that's before the Court on this motion, that
22 their affiliate at Boothbay was validated because they
23 submitted a letter that actually complied with what the SEC has
24 said is appropriate under Rule 506(c)(2)(ii)(C).

25 And so the question here -- and we go into these in

1 our papers. I'm not going to belabor it here. But what we've
2 heard from Mr. Steinberg this morning is what their motion said
3 when we first read it, which is they are looking for this Court
4 to allow them a do-over.

5 The procedures are very clear that they needed to
6 satisfy the requirements of Rule 506(c). And Your Honor asked
7 Mr. Steinberg earlier this morning, well, they submitted a
8 written letter. And all of the enumerated contents of the
9 letter that are set out in the Rule, doesn't that language have
10 meaning? And Your Honor, I submit it goes even further than
11 that. It certainly does. Here, yes, we agree. We're not
12 taking issue with the fact that the Rule says that these are
13 nonexclusive ways which they can validate.

14 But what happened here is the movants submitted a
15 written letter. They chose to submit a written letter. That's
16 the method by which they submitted supporting documentation as
17 required under the rights offering procedures. And once they
18 do that, the SEC is clear, as reflected in guidance that is
19 available on the SEC's website at question 260.08 of their
20 compliance and disclosure interpretations, that if you rely on
21 one of the specific verification methods, the requirements of
22 that method must be satisfied.

23 But in any event, Your Honor, the movants' submission
24 here is not a close call because we know, and we cite this in
25 footnote 10 of our objection, the SEC itself has said in its

1 adopting release for Rule 506(c) that self-certification is
2 insufficient. And so whether or not the investors had to
3 comply with the letter of the law 506(c), and we submit that
4 they did once they chose to submit a letter, we know that what
5 they wrote down here does not comply.

6 And so from the debtors' perspective, as we talked
7 about earlier, it would have been highly problematic for the
8 debtor to have accepted this submission and would have put its
9 rights offering at issue. So again, we submit that the process
10 here, in fact, worked. We weeded out investors who were not
11 able, in their submission, the four corners of their
12 submission, to certify to us that they are, in fact -- allow us
13 to verify that they're an accredited investors.

14 And so Your Honor, Mr. Steinberg's second argument
15 that says, well, we should have picked up the phone and called
16 them, and somehow us not doing so violated some obligation of
17 good faith. And certainly we ran a process, and we believe
18 that that process was executed well on a tight timeline, but
19 Mr. Steinberg continues to ignore the language that exists in
20 section 9 of the procedures that says, as Your Honor cited to
21 earlier, that we have no obligation to notify them or cure any
22 defects. Not just not to cure any defects, but to notify. We
23 have no obligation to do that.

24 The subscription deadline in the rights offering
25 procedures contemplated finality. We needed finality shortly

1 after the April 16th subscription deadline so that we could set
2 our capital structure, know who was buying shares in what
3 amounts, so that funding notices could be sent out. Those
4 funding notices needed to be sent out so that the debtor could
5 receive the funds, the shares could be issued, and this debtor
6 could emerge from bankruptcy, which, of course, was the whole
7 point of all of this.

8 And so Your Honor, I respectfully disagree with any
9 suggestion that us not calling them somehow violates some
10 principle of good faith. And certainly I have no basis to make
11 the sorts of distinctions Mr. Steinberg is positing that if
12 somebody didn't fund, maybe we didn't need to call them, but we
13 needed to call his client because they submitted documentation
14 that was inadequate. Certainly from our perspective, we didn't
15 have the ability to pick and choose. We would have needed to
16 go back to everybody. And that inherently would have extended
17 the timeline of the rights offering and vitiating the idea of
18 finality that permeates throughout the rights offering
19 procedure.

20 So Your Honor, from our perspective, it's unfortunate
21 that these investors did not submit the documentation that was
22 required. But once they failed to do so, as we made clear in
23 the rights offering procedures, they forfeited their
24 opportunity to participate in that portion of the rights
25 offering. Those shares were issued to backstop parties in

1 accordance with the documents, and these investors were issued
2 their shares that they subscribed to and paid for under the
3 1145 rights offering, along with the other investors who
4 similarly submitted that documentation.

5 So unless Your Honor has any other specific questions
6 for me, we'll otherwise rest on our papers, Your Honor.

7 THE COURT: All right. Do both sides think I have
8 enough information to rule on the papers, or do you think that
9 a trial is necessary?

10 MR. STEINBERG: Your Honor --

11 MR. GLUECKSTEIN: Your Honor --

12 MR. STEINBERG: -- I think you can rule, but I did
13 want to make just two very brief points in response to what Mr.
14 Glueckstein just said, just so that Your Honor has it if Your
15 Honor is prepared to rule.

16 One is that the Boothbay letter is one sentence as
17 well, too, and without knowing what the other accredited
18 investor letter says, I'm not sure they're more lengthy than
19 what was submitted by my own client.

20 And two, the argument about that they couldn't pick
21 and choose between people who didn't submit a check or were
22 late in their timely filing, the rejection letters had three
23 criteria. And some of the criteria are self-evident, right.
24 If you didn't give a check, if you didn't give a submission
25 letter, there is nothing that you can argue that's an ambiguity

1 that you did or you didn't do it.

2 If you actually submitted a letter which you thought
3 was conforming, and at the end of the day, you were an
4 accredited investor, then the issue is whether you needed to do
5 something more as compared to just saying you couldn't do
6 anything. And I was positing that there is a difference
7 between where it's self-evident that you didn't comply and
8 where otherwise you made an attempt to comply which didn't
9 technically fit within a nonexclusive example but otherwise
10 could be very well satisfactory to assert your accreditor
11 investor status. Thank you, Your Honor.

12 THE COURT: And what do both sides think? Can I rule
13 on the papers, or do we need a trial, or do we need --

14 MR. GLUECKSTEIN: Your Honor, certainly from the
15 debtors' perspective -- this is Brian Glueckstein -- we believe
16 Your Honor can rule on the papers. The question here from our
17 perspective is straightforward, whether their submission was
18 appropriate or not, and we think the rights offering procedures
19 are clear on their face.

20 The question was raised earlier about discovery. We
21 made clear to Mr. Steinberg's colleague in a meet and confer
22 earlier this week that we believe the Court could rule on the
23 papers and that certainly we did not believe it made sense to
24 prematurely conduct discovery about facts that we believe are
25 not material to the Court ruling.

1 Obviously, if the Court were to disagree, we could go
2 in a different direction, but certainly from the debtors'
3 perspective, as we communicated to the movants, we believe the
4 Court can and should rule to deny the motion.

5 MR. STEINBERG: And Your Honor, if you have any
6 questions that you think would be outcome determinative, that
7 you think further clarifications on some of the questions that
8 you have made would be helpful, then we would entertain that
9 possibility. But if Your Honor thinks that you've heard what
10 you need to do to decide, then I think you should decide.

11 THE COURT: Well, I'm asking you what your position
12 is. What do you think I should do? What's your position? Do
13 you think this requires discovery and a trial or that the
14 information that I have is sufficient?

15 MR. STEINBERG: I think if it would be helpful for
16 Your Honor for us to answer the question about whether the
17 client has submitted this type of form before or how often it's
18 been an accredited investor, if you think that's relevant to
19 the inquiry, then we would like the opportunity to produce that
20 in a declaration. And if you think that that is not material
21 for your determination, then I think you have enough probably
22 to rule.

23 MR. GLUECKSTEIN: Your Honor, if I could just respond
24 to that, if I could. I think that that starts us down a
25 slippery slope. We'd have to have a lot of information about

1 these other offerings. Certainly, there's 506(b) offerings
2 where perhaps certification is at times appropriate. This was
3 specifically a 506(c) offering. So we might have an issue with
4 supplemental submissions here that are suggesting things are
5 apples to apples when they're not. We do believe the Court
6 should just rule on the papers that we have.

7 THE COURT: All right. Let me make some comments. It
8 seems to be two different issues that are being raised,
9 although the movants are trying to somehow mold them into one
10 issue.

11 One is whether the submission as it was made was
12 sufficient to qualify the movants. And the second is, even if
13 it wasn't, whether the debtors had some obligation in good
14 faith to notify the movants or to seek clarification from the
15 movants or to give them an opportunity to come to me before the
16 issuance of the stock on April 30th and whether they violated
17 that obligation.

18 On that second argument, I am inclined to agree with
19 the debtors. The procedures that I approved gave certain
20 shareholders the rights to participate in the private placement
21 but only if they were qualified to do so. And while Mr.
22 Steinberg has emphasized the rights that that gave to
23 shareholders, or qualifying shareholders, the procedures that I
24 approved also came with an obligation, and that was that people
25 who wanted to participate on that basis had to show that they

1 were eligible to participate on that basis in accordance with
2 the applicable rules.

3 And while the movants have gone out of their way to
4 stress that it was in their mind the burden of the debtors,
5 essentially, to disqualify anybody who claimed that they were
6 entitled to participate and to follow up with anybody whose
7 papers were deficient or possibly incomplete, that's not the
8 system that I approved. It's not the system that's I think
9 usually used when people do private placements.

10 So the idea that the debtors should have requested
11 additional information, other than what was already submitted
12 by the deadline of April 16th, seems to me to be really a
13 request for me in hindsight to say that the debtor should have
14 extended the deadline. And even though somebody hadn't
15 qualified by April 16th, to give them the chance to submit
16 additional information to qualify after the fact, and no matter
17 how much the movants try to characterize that differently, that
18 is what it is, because the burden by September 16th wasn't just
19 to sign a form. It wasn't just to submit money. It was to
20 submit evidence of your entitlement. All of those things were
21 deadlines by April 16th.

22 And so the real question is, did the movants comply?
23 I'm not an expert in what people usually say in the private
24 placement context. The debtors have argued that this is not
25 good enough. The movants have argued that it is. If I had to

1 rule on the papers in front of me, I would go with the debtors,
2 because it seems to me that, as the debtors have said, self-
3 certification is not good enough.

4 What the movants submitted here was a letter by
5 somebody who didn't identify himself as having any particular
6 capacity or professional training or expertise, who only
7 certified that it was the policy of his fund to only allow
8 investors who are accredited investors and therefore that the
9 funds themselves were accredited investors. There was no
10 representation that the person was a certified public
11 accountant or that he occupied any other position that would
12 have given him the ability to make representations to the
13 debtors that could be relied upon under the applicable rules.

14 More importantly, there was no representation that he
15 purported to speak as a certified public accountant about the
16 finances of the people whose qualification was being asserted
17 as the ground for qualification of the funds, namely the
18 investors. Absolutely there was no indication in that letter
19 that the person who signed it had done any investigation or had
20 any knowledge himself of the personal financial circumstances
21 of the investors in those funds. All he said was that was
22 their practice and policy. Nor was there any indication that
23 any investigation had been done with the prior three months.
24 It was really very thin.

25 Now, on the other hand, I'm not an expert on what

1 usually passes in these circumstances and whether language like
2 that ever, or commonly, is accepted in the case of funds. So
3 I'm not sure that I can rule as a factual matter without a
4 little bit more evidence as to whether that absolutely was as
5 deficient as I'm kind of inclined to believe that it was.

6 I'm also concerned that even if it was sufficient, I'm
7 not sure what remedy would be available or appropriate if the
8 movants were right. If what was contemplated under the plan
9 was that movants and others would have the chance to qualify,
10 and if they didn't do what they needed to do to qualify by
11 April 16th, then other people would have the right and the
12 obligation as well to buy those shares.

13 The movants are trying to dance around the fact that
14 other people bought the shares. But it seems to me that as a
15 result, the remedy that they're seeking is not really to put
16 everybody in the position that they would have been in, but
17 instead to require something that is quite different from what
18 I approved, to require that the debtors issue more shares than
19 I had approved and/or to pay damages that would, in effect,
20 come out of the pockets of indirectly all of the shareholders.

21 So issuing more shares, in effect, it dilutes
22 everybody else who already bought them. The only real way to
23 put anybody in the same position is they would have been in if
24 the movants were right, would be to make the backstop buyers
25 give back some of what they purchased. But they're the ones

1 who aren't alleged to have done anything wrong here. They put
2 their money up. They've been the ones taking the risks on this
3 investment for six months. Nobody has briefed this question,
4 but I strongly doubt that that remedy, after this much time,
5 would really be available as a matter of equity. But nobody
6 has really, as I said, briefed me on that question.

7 And I'm also concerned, to the extent that the movants
8 argue for damages, that they've said in their reply papers that
9 they want to measure damages based on what's happened with the
10 average price of the common stock, although they've argued
11 maybe they would take a different approach. But they could
12 have bought the common stock if that's what they wanted. And
13 if their money wasn't used as part of the subscription, they
14 could have covered their losses by buying common stock on the
15 date that they found out that they were locked out of the
16 subscription.

17 So the idea that they can sit around and not come to
18 me, even though they had other counsel, and not come to me for
19 six months and then argue that, well, based on what we're able
20 to see that happened in the market over six months, that we
21 want all that much money without having put our money at risk,
22 even though we could have, I'm really dubious as to whether
23 that would be an appropriate measure of damages.

24 And it seems to me, if your argument is, in effect,
25 that you lost the opportunity to buy preferred stock that was

1 convertible to common stock that might have increased the value
2 over time, the real difference is what you would have paid if
3 you had subscribed and what the value actually was at that
4 date, not what it later became. And if you're going to measure
5 the value by the value of the common stock into which the
6 preferred stock was convertible, then you'd have to look at the
7 common stock price at the time of issuance, not the common
8 stock price later.

9 So those issues haven't been fully briefed, but I'm
10 very dubious about them. It seems to me that in order to
11 actually make a ruling about whether the movants were
12 qualified, then I should allow the movants to take the
13 deposition of the person from North who reviewed the
14 application and who made the decision, and I should allow the
15 debtors to take the deposition of the person who signed their
16 certification for the movants and the person who received the
17 April 28th email or anybody else that the movants think
18 allegedly relied on that email in allegedly thinking that they
19 had qualified, whoever that might be.

20 Also, to the extent the movants have said that this
21 certification has been good enough in other circumstances, I
22 want them to provide opportunities for discovery by the debtors
23 as to what other private placements the movants have
24 participated in and what certifications they made in those
25 cases.

1 Then you can either rebrief the issue based on what
2 you found out, or we can have a trial as to whether this was
3 sufficient or not, although as for the reasons that I've
4 stated, it seems to me the movants have an uphill battle on
5 that point.

6 How long do you think you need to do that discovery?

7 MR. STEINBERG: Your Honor, would it be appropriate if
8 we have a opportunity to talk with our client and perhaps even
9 talk to each other, the other side, and then communicate with
10 your chambers about that at the beginning of next week?

11 THE COURT: All right. Mr. Glueckstein?

12 Mr. Glueckstein, does that sound all right?

13 MR. GLUECKSTEIN: I'm sorry, Your Honor. Yes, I think
14 that does sound fine. I think it would make good sense to
15 allow the parties to digest Your Honor's comments and perhaps
16 confer and then come back to the Court.

17 THE COURT: All right. We'll wait to hear from you,
18 then, to set a schedule.

19 MR. STEINBERG: Thank you, Your Honor, for your time
20 this morning.

21 MR. GLUECKSTEIN: Thank you, Your Honor.

22 THE COURT: All right. Thank you. If there's nothing
23 else, then we are adjourned.

24 (Whereupon these proceedings were concluded at 11:30 AM)

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

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



River Wolfe

eScribers
352 Seventh Ave., Suite #604
New York, NY 10001

Date: December 10, 2021

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