IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Medley LLC[1]	Case No. 21-10526 (KBO)
Debtor.	**Hearing Date: August 12, 2021 at 1:00 p.m. (ET)** **RE: Docket Nos. 255, 284, 304, 305, & 307**

JOINT OMNIBUS REPLY OF THE PLAN PROPONENTS TO OBJECTIONS TO THE MOTION OF THE DEBTOR FOR AN ORDER (I) APPROVING ON AN INTERIM BASIS THE ADEQUACY OF DISCLOSURES IN THE COMBINED DISCLOSURE STATEMENT AND PLAN, (II) SCHEDULING THE CONFIRMATION HEARING AND DEADLINE FOR FILING OBJECTIONS, (III) ESTABLISHING PROCEDURES FOR SOLICITATION AND TABULATION OF VOTES TO ACCEPT OR REJECT THE COMBINED DISCLOSURE STATEMENT AND PLAN, AND APPROVING THE FORM OF BALLOTS AND SOLICITATION PACKAGE, AND (IV) APPROVING THE NOTICE PROVISIONS

The above-captioned debtor ("Debtor"),[2] the Official Committee of Unsecured Creditors appointed in this chapter 11 case (the "Committee"), and Medley Capital LLC (collectively, the "Plan Proponents") respectfully submit this omnibus reply (this "Reply") to the objections filed by (i) the United States Securities and Exchange Commission (the "SEC") [Docket No. 304] (the "SEC Objection"), (ii) Andrew R. Vara, United States Trustee for Region 3 (the "U.S. Trustee") [Docket No. 305] (the "U.S. Trustee Objection"), and (iii) Strategic Capital Advisory Services, LLC ("Strategic") [Docket No. 307] (the "Strategic Objection," and together with the SEC Objection and the U.S. Trustee Objection, the "Objections") to the *Motion of the Debtor for an Order (I) Approving on an Interim Basis the Adequacy of Disclosures in the Combined*

[1] The last four digits of the Debtor's taxpayer identification number are 7343. The Debtor's principal executive office is located at 280 Park Avenue, 6th Floor East, New York, New York 10017.

[2] Capitalized terms used but not otherwise defined herein shall have the meaning given to them in the *First Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC* [Docket No. 284] (the "Combined Disclosure Statement and Plan") or in the Solicitation Procedures Motion (defined herein), as applicable.

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Disclosure Statement and Plan, (II) Scheduling the Confirmation Hearing and Deadline for Filing Objections, (III) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Combined Disclosure Statement and Plan, and Approving the Form of Ballot and Solicitation Package, and (IV) Approving the Notice Provisions [Docket No. 255] (the "Solicitation Procedures Motion"), relating to the Combined Disclosure Statement and Plan. In support of the Reply, the Plan Proponents respectfully state as follows:

PRELIMINARY STATEMENT

1. The Plan Proponents are at this time seeking only to obtain interim approval of the Combined Disclosure Statement and Plan for the purposes of solicitation. Confirmation of the Plan is not presently before the Court. As discussed more fully below, the Plan Proponents believe they have addressed most of the issues raised in the Objections through amendments to the Combined Disclosure Statement and Plan and the Solicitation Procedures Order. This also includes filing an amended Liquidation Analysis (the "Amended Liquidation Analysis") that will further demonstrate that administrative claimants would not be paid in full and that general unsecured creditors would not receive any recovery in a chapter 7 liquidation of the Debtor.[3]

2. The Combined Disclosure Statement and Plan provides significant disclosures to support this reality but the Objections fail to acknowledge it. *See* Combined Disclosure Statement and Plan at 3–4, 34–36. A chapter 7 liquidation would be a significantly worse outcome for the Debtor's Estate, and the Plan Proponents' recognition of this fact provided the impetus that brought the Plan Proponents together to develop a consensual plan. Notwithstanding the pages of

[3] The Plan Proponents are filing an amended Combined Disclosure Statement and Plan (the "Amended Combined Disclosure Statement and Plan"), the Amended Liquidation Analysis, and an amended solicitation procedures order (the "Revised Order") concurrently with this Reply.

disclosure dedicated to this issue in the Combined Disclosure Statement and Plan, certain of the Objections continue to misunderstand the ramifications of conversion to chapter 7.

3. This entire case is premised upon maximizing the remaining value of the Debtor's assets. Combined Disclosure Statement and Plan at 3. The Debtor has three primary assets: (i) cash on hand, (ii) the income stream generated by non-Debtor Affiliates from the Remaining Company Contracts, less the costs of operations, which includes satisfaction of all creditors of each respective non-Debtor Affiliate, and (iii) Causes of Action. *Id.* The confusion in the Objections stems from one asset, "the income stream generated by non-Debtor Affiliates from the Remaining Company Contracts."

4. Due to the fact that this income stream is a product of the Debtor's equity ownership in its non-Debtor subsidiaries, the Plan Proponents believe that the income stream would not be realized in a chapter 7 liquidation. As set forth on Exhibit B to the Combined Disclosure Statement and Plan, the Debtor owns, directly in most instances, the equity interests of the non-Debtor subsidiaries. In the ordinary course, certain of those non-Debtor subsidiaries generate revenue through operations, predominately investment management agreements ("IMAs") with clients, which are referred to in the Combined Disclosure Statement and Plan as "Remaining Company Contracts." Those non-Debtor subsidiaries are standalone entities that have their own creditors, and in the case of Medley Capital, employees. Revenue from the Remaining Company Contracts is only realized if the non-Debtor subsidiaries, mainly Medley Capital, provide the administrative and advisory services required under the Remaining Company Contracts. Only after the non-Debtor subsidiaries have satisfied all of their obligations under the Remaining Company Contracts and to their other creditors, can the non-Debtor Subsidiaries make equity distributions to the Debtor.

5. The Plan Proponents have undertaken a complete analysis of possible outcomes under a chapter 7 and chapter 11 liquidation and believe that if the Chapter 11 Case were converted, equity distributions from the non-Debtor subsidiaries to the Debtor will not occur. Rather, the Plan Proponents believe that converting the Chapter 11 Case to a chapter 7 liquidation would likely result in termination of the Remaining Company Contracts and all remaining assets of the non-Debtor subsidiaries would have to be used to satisfy the claims against each non-Debtor subsidiary in accordance with the capital structure of each such subsidiary. The Plan Proponents will provide evidence at the Confirmation Hearing to support this analysis.

6. Accordingly, the best alternative is the Combined Disclosure Statement and Plan that provides for the non-Debtor subsidiaries to wind-down of the Remaining Company Contracts in an orderly manner, resulting in a recovery to unsecured creditors.

7. The remaining arguments raised in the Objections are premature objections to confirmation of the Plan, and do not address the primary issue that is before this Court—whether the Combined Disclosure Statement and Plan provides "adequate information" as required by the Bankruptcy Code. Moreover, none of the Objections seriously contends that the Plan is patently unconfirmable or that a chapter 7 liquidation could provide a superior recovery to unsecured creditors in the Chapter 11 Case. The SEC Objection, for example, questions one of the underlying assumptions of the Combined Disclosure Statement and Plan, which is that Medley Capital's employees and the Company's clients would walk away in an immediate liquidation scenario. *See* SEC Obj. ¶¶ 2–4. However, that is a risk none of the Plan Proponents is willing to take. As the Committee, a Plan Proponent, highlighted in its statement in support of the Combined Disclosure Statement and Plan [Docket No. 297], the Plan is the only viable path forward in the Chapter 11 Case. It will provide a recovery to unsecured creditors through an orderly wind-down of the

Company's business, of which the release, exculpation, and injunction provisions of the Plan are a necessary part. In the end, the SEC holds only an unliquidated contingent claim, which it acknowledges,[4] and all of its issues and concerns have been addressed in the Combined Disclosure Statement and Plan, including a specific provision preserving the SEC's ability to pursue its investigation in Article XI.I. of the Plan.[5]

8. Accordingly, the Objections should be overruled and the Revised Order entered.

REPLY

I. Most of the Issues Raised in the Objections Have Been, or Should Be, Resolved through Revisions Reflected in the Revised Order or the Amended Combined Disclosure Statement and Plan

9. The Plan Proponents are continuing to engage with the SEC, the U.S. Trustee, Strategic, and other parties in interest with respect to the Combined Disclosure Statement and Plan, and have endeavored to address many of the issues these parties have raised in informal comments and in the Objections. To date, the Plan Proponents have addressed the following issues raised in the Objections or informal comments through, among other things, changes to language in the Revised Order or the Amended Combined Disclosure Statement and Plan:

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[4] SEC Obj. ¶ 1.

[5] Article XI.I. of the Combined Disclosure Statement and Plan provides as follows:

> Notwithstanding any language to the contrary contained in this Combined Disclosure Statement and Plan and/or the Confirmation Order, no provision of the Plan or the Confirmation Order shall (i) preclude the SEC from enforcing its police or regulatory powers; or (ii) enjoin, limit, impair, or delay the SEC from commencing or continuing any claims, causes of action, proceedings or investigations against any non-debtor person or entity in any forum.

Moreover, the Debtor, at the SEC's request, provided the SEC with significant additional information in support of the Liquidation Analysis subsequent to the filing of the SEC Objection.

Objecting Party	Asserted Issue	Amended Language / Plan Proponents' Response
U.S. Trustee Obj. ¶¶ 4, 17	Proposed Plan Supplement filing deadline is not seven days before the proposed voting deadline as required by local rules	Moved the Plan Supplement filing deadline to September 13, 2021, seven days before the Voting Deadline. *See* Revised Order ¶ 14.
Strategic Obj. ¶ 1	Language in Combined Disclosure Statement and Plan suggests Strategic cannot vote even though no claim objection has been filed	Added language clarifying that Strategic has the right to vote to accept or reject the Amended Combined Disclosure Statement and Plan. *See* Revised Order ¶ 25.
U.S. Trustee Obj. ¶¶ 22–24; SEC Obj. ¶ 6	Exculpation is not limited to estate fiduciaries and is overly broad	Incorporated changes to the exculpation provisions in the Amended Combined Disclosure Statement and Plan, including removing the Notes Trustee as an exculpated parties, clarifying that the executives to be exculpated are being exculpated solely in their capacity as officers of the Debtor, and providing that the exculpation only applies to post-Petition Date actions. *See* Amend. Plan, Defs., Article XI.D.
U.S. Trustee Obj. ¶ 30; SEC Obj. ¶ 6	Plan injunction in Article XI.E. has the effect of providing Debtor with a discharge	Added language making clear that the Debtor will not receive a discharge under section 1141(d) of the Bankruptcy Code. *See* Amend. Plan, Article XI.E.
Strategic Obj. ¶ 2(a)	Insufficient information proposed compromise	Provided additional disclosure regarding the determination that the compromise proposed in the Plan is in the best interest of the Debtor's Estate. *See* Amend. Plan, Article II.R.
Strategic Obj. ¶ 2(e)	Insufficient information is provided regarding the claims asserted by the SEC	Provided additional disclosure regarding the SEC's asserted contingent and unliquidated claim. *See* Amend. Plan, Article XI.I.

Objecting Party	Asserted Issue	Amended Language / Plan Proponents' Response
U.S. Trustee Obj. ¶¶ 31–32	Plan Articles X.A. and X.D. provide for automatic disallowance of claims based on nonsubstantive issues (late, duplicative, amended, etc.) without having to object	Deleted Article X.D. of the Plan. Revised Article X.A. provides that late-filed claims are still automatically disallowed without further action by the Liquidating Trustee (as a failsafe intended to protect the vast majority of creditors from the prejudice of a late claim inadvertently not being objected to), but leaves open the possibility of moving for and obtaining leave to permit the filing of a late claim. *See* Amend. Plan, Article X.A.
U.S. Trustee Obj. ¶ 39	Debtor and Liquidating Trustee should be jointly and severally liable for statutory U.S. Trustee fees	Added language clarifying that the Debtor will remain jointly and severally liable for such fees. *See* Amend. Plan, Article XV.C.
SEC Obj. ¶ 5	Debtor and the Committee have not provided financial projections and back-up for the Liquidation Analysis	Debtor provided the SEC with financial projections and significant additional information in support of the Liquidation Analysis subsequent to the filing of the SEC Objection
SEC Obj. ¶ 6	Plan should provide for maintenance of the Debtor's books and records pending SEC investigation	Added books and records preservation language. *See* Amend. Plan, Article XI.I.
Informal comments from independent directors of MDLY, the Debtor's parent	Clarify that ownership of Company Tax Refund is not determined under Plan	Included reservation of rights language with respect to ownership of the Company Tax Refund. *See* Amend. Plan, Article II.S., VII.P.

10. The Plan Proponents are continuing to address certain of the other issues raised in the Objections and will seek to resolve them consensually prior to the Solicitation Procedures Hearing. Nevertheless, to the extent issues are unresolved, the Plan Proponents submit that such unresolved issues either pertain to Plan confirmation or are questions relating to the Liquidation Analysis that the Plan Proponents have amended to address the issues raised in the Objections.

II. The Combined Disclosure Statement and Plan Contains Adequate Information and Should Be Approved for Solicitation

11. As set forth in the Solicitation Procedures Motion, the Plan Proponents believe that the Combined Disclosure Statement and Plan—including the approximately 40 pages of disclosure in Articles II (Background), III (Confirmation and Voting Procedures), VI (Certain Risk Factors to Be Considered Prior to Voting), and VII (Means for Implementation of the Plan)—satisfies all requirements of section 1125 of the Bankruptcy Code concerning the information that must be provided in connection with solicitation of a chapter 11 plan. In addition, to address the reasonable requests of the SEC, the U.S. Trustee, and other parties in interests, including those raised in the Objections, the Plan Proponents will file the Amended Combined Disclosure Statement and Plan, which will provide further disclosures and clarifications.

12. Pursuant to section 1125 of the Bankruptcy Code, a plan proponent must provide parties voting on the plan with "adequate information" to make an informed judgment as to the plan. Section 1125 of the Bankruptcy Code defines "adequate information" as follows:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical reasonable investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the Court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information.

13. "Adequate information" requires only that the disclosure statement provide information that is "reasonably practicable" to permit an "informed judgment" by creditors and interest holders entitled to vote on a plan of reorganization. *See In re Lower Buck Hosp.*, 571 Fed.

Appx. 139, 142 (3d Cir. 2014). Indeed, "overburdening a proponent's disclosure statement with information significant and meaningful to lawyers alone may result ultimately in reducing the disclosure statement to an overlong incomprehensible, ineffective collection of words to those whose interests are to be served by disclosure." *In re Stanley Hotel, Inc.*, 13 B.R. 926, 933–34 (Bankr. D. Colo. 1981) ("Thus, compounding a disclosure statement for the sake of a lawyer's notion of completeness, or because some additional information might enhance one's understanding, may not always be necessary or desirable, and the length of a document should not be the test of its effectiveness."); *see also In re Applegate Prop., Ltd.*, 133 B.R. 827, 829–30 (Bankr. W.D. Tex. 1991) ("[A] disclosure statement need not meet the extensive disclosure requirements of the securities laws for registration statements and the like.").

14. As set forth in the Solicitation Procedures Motion, courts have identified lists of information for inclusion in a disclosure statement and the Combined Disclosure Statement and Plan provides this information in the applicable categories. *See* Mot. ¶¶ 33–34. However, as the Third Circuit and other courts have noted, all of the information suggested in such lists is not always necessary and adequate disclosure should be determined on a case-by-case basis. *See Oneida Motor Freight, Inc. v. United Jersey Bank (In re Oneida Motor Freight, Inc.)*, 848 F.2d 414, 417 (3d Cir. 1988) ("From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case."); *In re Phoenix Petroleum Co.*, 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) ("[I]t is . . . well understood that certain categories of information which may be necessary in one case may be omitted in another; no one list of categories will apply in every case.").

15. Specifically, as it relates to arguments raised in the Objections, including the Strategic Objection, (despite the fact, discussed in detail below, that many of the arguments relate

to Confirmation and not approval of adequate disclosures), the Combined Disclosure Statement and Plan provides information addressing the following topics:

a. The standard applicable to settlements in chapter 11 cases and whether the compromise reached and proposed by the Plan is in the best interests of the Estate (Introduction pp. 1–4, Articles I.D. and II.N.–R.);

b. The rationale as to why the agreed, orderly wind-down provided under the Plan is superior to an immediate liquidation under chapter 7 of the Bankruptcy Code (Article III.G., Exhibit A – Liquidation Analysis); and

c. A discussion of potential allowance of claims (which would include the currently contingent and unliquidated SEC claims) and impact upon unsecured creditors (Article VI.G.).

Accordingly, the Combined Disclosure Statement and Plan contains all of the information necessary for Holders of Claims entitled to vote on the Plan to make an informed judgment and should be approved for solicitation.

III. The Objections Attempt to Litigate Plan Confirmation Issues Prematurely and Fail to Demonstrate that the Plan Is Patently Unconfirmable

16. Most of the issues raised in the Objections are not objections to the adequacy of the disclosures provided in the Combined Disclosure Statement and Plan, but instead are premature objections to the confirmation of the Plan. However, the Solicitation Procedures Hearing is limited in scope to the relief requested in the Solicitation Procedures Motion, namely interim approval of the Combined Disclosure Statement and Plan as containing adequate information and approval of procedures for solicitation. Courts rarely consider confirmation objections at the disclosure statement hearing, and only where the facial deficiencies of the proposed plan render it "patently unconfirmable," such that a confirmation hearing would be futile because the plan's defects could not be cured. *See, e.g.*, *In re Am. Capital Equip., LLC*, 688 F.3d 145, 153–55 (3d Cir. 2012) ("Ordinarily, confirmation issues are reserved for the confirmation hearing, and not addressed at

the disclosure statement stage," unless a plan is "patently unconfirmable," which means that "(1) confirmation defects [cannot] be overcome by creditor voting results and (2) those defects concern matters upon which all material facts are not in dispute or have been fully developed at the disclosure statement hearing.") (internal quotations omitted); *see also In re Phoenix Petroleum Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("The question whether a plan meets requirements for confirmation is usually answered at confirmation hearings."); *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) ("[C]are must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing."). No such objection has been raised with respect to the Combined Disclosure Statement and Plan.

A. Objections to the Scope of the Releases, Exculpations, and Injunctions Are Premature Plan Objections

17. Even if the SEC and the U.S. Trustee were correct with respect to their objections regarding the scope of releases, exculpations, or injunction (which they are not), none of these issues relate to the matter of disclosure, which is the subject of the Solicitation Procedures Hearing and the Revised Order. Such alleged infirmities in a proposed plan, even if they are proven, could easily be remedied prior to the Confirmation Hearing. *See, e.g.*, Hr'g Tr. at 67:12, 14–15, *In re Molycorp, Inc.*, No. 15-11357 (CSS) (Bankr. D. Del. Jan 8, 2016) (noting that potential issues with releases should be dealt with at confirmation as "[r]eleases are a confirmation issue"); *see also Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 214 (3d Cir. 2000) (noting that specific factual findings were necessary to determine whether nonconsensual third party releases are appropriate). As recognized by Judge Sontchi in *In re Energy Future Holdings Corp.*, objections to such things as the breadth of a release provision do not render a plan "patently unconfirmable" because they can be resolved at the confirmation hearing in one of two ways: either by the proponent of a plan presenting evidence sufficient to show that the provisions in

question are appropriate or, lacking such a showing, by a simple modification to the plan. *See* Hr'g Tr. at 57:3–8, *In re Energy Future Holdings Corp.*, No. 14-10979 (CSS) (Bankr. D. Del. Sept. 21, 2015) ("To say that releases is an issue for confirmation doesn't make the plan patently unconfirmable. It can either be addressed in one of two ways and we'll figure that out when we get to confirmation. And I think that really goes to the heart of all of the confirmation, certainly patently unconfirmable confirmation objections.").

18. Notably, the Plan does not provide for non-consensual third-party releases. The proposed releases are releases by the Debtor only, and are governed by the Debtor's business judgment. *See* Tr. of Hr'g, 5:25–8:1, *In re Akorn, Inc.*, Case No. 20-11177 (KBO) (Bankr. D. Del. Sept. 4, 2020) (applying business judgment standard in upholding debtor's plan releases).

19. The Plan Proponents will present sufficient evidence at the Confirmation Hearing to support the release, exculpation, and injunction provisions in the Combined Disclosure Statement and Plan, and litigation of such issues is not appropriate in the context of the Solicitation Procedures Hearing. Accordingly, the Objections related to the release, exculpation, and injunction provisions of the Combined Disclosure Statement and Plan should be overruled.

B. Objections to the Liquidation Analysis Are Premature and, in Any Event, Are Already Addressed in the Combined Disclosure Statement and Plan

20. The Liquidation Analysis is provided as part of the Combined Disclosure Statement and Plan to satisfy the requirements for confirmation of the chapter 11 plan, namely with respect to the requirements of section 1129(a)(7) of the Bankruptcy Code, which requires that each holder of a claim or interest in an impaired class has either accepted the plan or will be no worse off under the plan as such holder would be under a hypothetical chapter 7 liquidation. The Plan Proponents will submit sufficient evidence at the Confirmation Hearing to support the valuations and estimates provided in the Liquidation Analysis and demonstrate that the Combined Disclosure Statement

and Plan satisfies section 1129(a)(7). Therefore, the arguments raised in the Objections with respect to the Liquidation Analysis are premature and should be overruled.

21. Notwithstanding the challenges to the Liquidation Analysis asserted in the Objections, the Combined Disclosure Statement and Plan provides sufficient disclosure to answer the questions raised by the SEC and the U.S. Trustee in their respective Objections. In addition, the Plan Proponents have prepared the Amended Liquidation Analysis to further address issues raised in the Objections.

22. As the Combined Disclosure Statement and Plan explains, upon evaluating options in light of Sierra's decision to market the assets that are the subject of the Sierra IAA (which, along with the Administration Agreement between Sierra and Medley Capital, are the most significant of the remaining Company Contracts) and in light of the Wells Notices delivered to the Company by the SEC, it became clear that the best option for all parties in interest, including the Debtor's creditors, Sierra, Medley LLC and Medley Capital (and Medley Capital's employees) was an orderly wind-down of all of the Debtor's assets, including a smooth transition of the assets of Sierra to a new manager. Combined Disclosure Statement and Plan at 3–4. Absent such an agreed, orderly transition and wind-down, the revenue estimated in the Liquidation Analysis from the Sierra IAA or revenue from the other Remaining Company Contracts would not be available. As set forth in the Combined Disclosure Statement and Plan, Sierra has a right to terminate the Sierra IAA on an expedited basis if Medley Capital and SIC Advisors were unable to continue to perform under the agreement.[6] *Id*. It is worth emphasizing that Medley Capital, while it is the Debtor's main operating subsidiary and employs all of the Company's employees and incurs substantially

[6] The same analysis is equally true for all other existing IMAs—the non-Debtor subsidiaries face the choice of either being paid for an orderly transition or risking additional claims against them if the non-Debtor subsidiaries cease to perform and liquidate.

all of the costs necessary to operate the enterprise, is a standalone entity. *Id.* at 3. Medley Capital (and each of the other non-Debtor subsidiaries) has its own creditors, including employees and its contractual arrangements with other subsidiaries of the Debtor, as Medley Capital is the investment advisor that performs the actual business work for the Company. *Id*. The funds that are generated through Medley Capital's advisory and administration work under these contracts are only earned if the advisory work is performed, and such funds are distributed to Medley LLC as equity distributions and as such are only appropriate after accounting for costs and reasonable future expenditures. Accordingly, the distributions from Medley Capital that will be part of the orderly liquidation wind-down contemplated by the Combined Disclosure Statement and Plan will only be available if Medley Capital is able to continue performing its advisory and administration work under the applicable agreements, particularly as it relates to Sierra. The same analysis applies to each of the non-Debtor subsidiaries.

23. The insinuation from the SEC that Medley Capital's employees might continue to provide services and Sierra might continue to conduct business with the Debtor and Medley Capital absent the negotiated wind-down is mere speculation. The Plan Proponents cannot (and under the disclosure requirements of the Bankruptcy Code, are not expected to) predict the future; rather, they must simply provide information based upon what is known to them at the time. *See In re Walker*, 198 B.R. 476, 479 (Bankr. E.D. Va. 1996) (holding that, in evaluating the sufficiency of a disclosure statement, "[a] debtor cannot be expected to unerringly predict the future, but rather must provide information on all factors known to him at the time that bear upon the success or failure of the proposals set forth in the plan"). While every plan assumption contains some risk, the Debtor, after consultation with the other Plan Proponents and Sierra, made the decision as a sound exercise of its business judgment that the continuation of the relationship between the

Debtor, Medley Capital, and Sierra depends upon the agreement among the parties as set forth in the Plan. The Plan Proponents are not willing to wager creditor recoveries on a speculative alternative to the Plan when, based upon their business judgment, such alternative would eliminate any possibility for unsecured creditors to receive a recovery on their claims.

24. Accordingly, the objections based upon the Liquidation Analysis should be overruled.

IV. Responses to Other Arguments Raised in the Objections

A. Payment of Independent Director Fees is Provided Pursuant to the Terms of the Cash Management Order

25. The U.S. Trustee objects to the payment of the Independent Director Fees in Article IV.B. of the Plan. However, pursuant to the final order [Docket No. 83] (the "Cash Management Order") authorizing the Debtor to continue its prepetition cash management system, such intercompany obligations are afforded administrative expense priority and, as such, must be paid as part of the Plan. *See* Cash Mgmt. Order at 9.

B. The Objections Related to the Notes Trustee Fees Should Be Addressed at the Confirmation Hearing

26. The Objections regarding the Notes Trustee Fees[7] are also inappropriate at this time. Although the Plan Proponents believe that the Combined Disclosure Statement and Plan already includes sufficient disclosure regarding the timing, amount, and payment of the Notes Trustee Fees to satisfy section 1125 of the Bankruptcy Code, the Plan Proponents revised the Plan to address concerns raised by the Objections. Specifically, the revised Plan now provides:

[7] U.S. Trustee Obj. ¶ 33–37; SEC Obj. at 2, n.2; Strategic Obj. ¶ 2(c).

a. The Notes Trustee Fees will be not be paid on the Effective Date, but instead in accordance with the Wind-Down Budget and the Liquidating Trust Agreement; and

b. The Notes Trustee shall provide no less than ten (10) days' notice to the U.S. Trustee of the submission of documentation for payment of the Notes Trustee Fees to the Liquidating Trustee before such amounts are paid and shall, upon request, provide copies of such documentation (which may be redacted as reasonably necessary) to the U.S. Trustee.

To the extent such revisions to the Plan do not resolve the Objections, the Plan Proponents believe the issue should be reserved for the Confirmation Hearing.

27. As with the concerns raised with respect to the release, exculpation, and injunction provisions, the provisions relating to the payment of Notes Trustee Fees in no way render the Plan unconfirmable. Payment of the fees and expenses of an indenture trustee may be approved as an exercise of the Debtors' business judgment under section 363(b) of the Bankruptcy Code. *See, e.g., U.S. Tr. v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.),* No. 02 Civ. 2854 (MBM), 2003 WL 21738964, at *11 (S.D.N.Y. July 28, 2003) (determining that "subsections 503(b)(3)(D) and (b)(4) of the Bankruptcy Code do not bar a bankruptcy court from allowing a debtor in possession to reimburse a creditor for professional fees – provided, of course, that the standard for allowing transactions under § 363(b) has been met"). In *Bethlehem Steel*, the district court rejected the argument that individual creditors can only have professional fees reimbursed as an administrative expense. *Id.* at *11. The court ultimately upheld the debtors' decision to pay the creditor's fees and expenses because it was "a good business reason" and would help develop a reorganization plan. *Id.* at *12.

28. Similarly here, the entry into the Combined Disclosure Statement and Plan constitutes an appropriate exercise of the Debtor's business judgment. The concerns identified in

Lehman, the primary case cited in the U.S. Trustee Objection,[8] pertained to payment of the fees and expenses of official committee members in their role as such and are not applicable here. Bankruptcy Judge Michael Wiles of the Southern District of New York addressed this precise point of *Lehman's* relevance to the payment pursuant to a chapter 11 plan of an indenture trustee's fees and expenses under a trust indenture. In ruling on an agreement to pay an indenture trustee's fees and expenses in *In re Aegean Marine Petroleum Network, Inc.*, Case No. 18-13374-mew (Bankr. S.D.N.Y. April 1, 2019), Judge Wiles rejected a similar objection asserted by the United States Trustee in that case:

> [T]he difference [from *Lehman*] is they're not coming to me saying, we made a post-petition agreement to do things differently from what the Bankruptcy Code says, and we put it in the plan, and you should ignore what the Bankruptcy Code says because we've agreed among ourselves to modify it. That's what bothered Judge Sullivan. [The debtors here] come to me with a pre-bankruptcy contract that says that they get their fees paid by the Debtors. . . . There is nothing in the [Bankruptcy] Code that says that a contract -- a valid pre-bankruptcy contract for an indenture[] trustee to get its fees must be dishonored in bankruptcy or cannot be paid or cannot be assumed or cannot be reinstated or cannot be made part of a modified deal after the case. Not that I know of.[9]

29. As such, the Objections should not bar this Court from approving the Combined Disclosure Statement and Plan for solicitation.

C. The Objections to Certain of the Liquidating Trustee and Claim Objection Provisions Are Premature but, Nevertheless, Have Been Addressed in the Amended Combined Disclosure Statement and Plan

30. The SEC Objection and the U.S. Trustee Objection also raise concerns with certain provisions regarding the Liquidating Trustee and objections to claims. Among other things, those

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[8] *Davis v. Elliot Mgmt. Corp. (In re Lehman Bros. Holdings Inc.)*, 508 B.R. 283, 290–94 (S.D.N.Y. 2014).

[9] *See* Tr. of Hr'g, 24:10–25:5, *In re Aegean Marine Petroleum Network, Inc.*, Case No. 18-13374-mew (Bankr. S.D.N.Y. April 1, 2019) [Docket No. 563], a copy of which is attached hereto as **Exhibit A**.

Objections contend that (a) the Plan Supplement should detail the Liquidating Trustee's compensation and provide for the Liquidating Trustee's professionals' retention and compensation;[10] (b) the automatic disallowance of late, duplicative, or amended claims without having to file an objection is inappropriate;[11] (c) the Debtor and the Liquidating Trustee should be jointly and severally liable for the statutory U.S. Trustee fees;[12] and (d) that the Liquidating Trustee should maintain the books and records of the Debtor.[13] None of these issues in any way relate to the adequacy of the information contained in the Combined Disclosure Statement and Plan, certainly none in any way renders the Plan patently unconfirmable.

31. As noted above, the revised Plan and the Liquidating Trust Agreement[14] will largely address these issues. The Liquidating Trust Agreement will contain provisions regarding the retention and compensation of the Liquidating Trustee's professionals.[15] The Amended Combined Disclosure Statement and Plan also (a) removes Article X.D., which provided for the automatic disallowance of duplicate, amended, or satisfied claims, (b) amends Article XV.C. to provide that the Debtor and the Liquidating Trustee shall be jointly and severally liable for the payment of the statutory U.S. Trustee fees, and (c) amends Article XI.I. to state that the Liquidating Trustee shall maintain the Debtor's books and records until (i) the Bankruptcy Court authorizes the destruction

[10] U.S. Trustee Obj. ¶ 18.

[11] U.S. Trustee Obj. ¶ 31.

[12] U.S. Trustee Obj. ¶ 39.

[13] SEC Objection at ¶ 6.

[14] The Liquidating Trust Agreement will be filed as part of the Plan Supplement. At the request of the U.S. Trustee, the Plan Supplement will be filed on September 13, 2021, rather than on September 17th as contemplated in the Solicitation Procedures Motion.

[15] Regarding the Liquidating Trustee's compensation, such information is considered competitive information and is typically not disclosed. This should not be a concern, as the Committee is holding a competitive selection process to choose the Liquidating Trustee. Moreover, there will be ongoing involvement of a post-confirmation Oversight Committee that will be active and that, under the Plan, has been given significant power and responsibility.

or abandonment of the books and records, (ii) the SEC has completed its investigation, or (iii) the Liquidating Trustee has completed its duties and responsibilities under the Liquidating Trust Agreement and has provided the SEC notice and has made reasonable arrangements for the transfer of any relevant documents or records for the SEC. Accordingly, the objections as to the Liquidating Trustee provisions and claim objection procedures should be overruled.

CONCLUSION

32. For the reasons set forth herein, the Plan Proponents respectfully request that the Court overrule the Objections, enter the Revised Order granting the relief requested in the Solicitation Procedures Motion, and grant such other and further relief as the Court deems just and proper.

[*Remainder of Page Intentionally Left Blank*]

Dated: August 11, 2021

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Exhibit A

Transcript of Hearing held April 1, 2021, *In re Aegean Marine Petroleum Network, Inc.*, Case No. 18-13374-mew (Bankr. S.D.N.Y.)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 18-13374-mew
- x
In the Matter of:

AEGEAN MARINE PETROLEUM NETWORK INC.,

Debtor.
- x

United States Bankruptcy Court
One Bowling Green
New York, NY 10004

April 1, 2019
11:02 AM

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

ECRO: JONATHAN

HEARING re Fee Applications

HEARING re Oaktree substantial contribution application continued

Transcribed by: Sonya Ledanski Hyde

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TAYLOR B. HARRISON
JASON B. SANJANA
BRYAN V. UELK
BRITON P. SPARKMAN

P R O C E E D I N G S

THE COURT: My apologies. The truth of the matter is that on Friday, I was wondering why you hadn't gotten me a confirmation order until Allison said, Kirkland's wondering if you had any problems with the confirmation order they sent. I didn't even know you had sent it in. So I apologize for that delay.

MR. HAYES: Well, apologies for any miscommunication on our end.

THE COURT: It's entirely my fault. I missed the email.

MR. HAYES: Well, I -- on that note, I'll have you know that we are -- the company is ready to close imminently. And this is one of -- one of the last open issues is resolution of the condition precedent and the plan for payment of the committee professionals' fees and expenses. And so we view the scope of today's hearing as pretty narrowly in terms of determining what are the reasonable fees and expenses so that we can get that number and make sure that we can pay in order to go effective. And Mercuria is ready to pay the reasonable and documented fees and expenses once that number is determined.

So what we hope to leave today's hearing with is -- are those numbers so that we can -- so that we're prepared to close.

THE COURT: Let me make sure I understand the numbers that are being sought. As I understand it, U.S. Bank seeks $432,133.50, which includes $323,000 of legal fees, 98,000-plus of administrative time, and a few miscellaneous items. Is that right?

MR. CURCHACK: Yes and no, Your Honor. It -- that is correct through the time that those bills were prepared. Since the last hearing, we have incurred additional fees thanks to the preparation for today and dealing with the objection, so that number is slightly higher. But we have -- I have with me a supplemental bill for approximately $22,000 that would be on top of that.

We figured we would -- assuming we reach agreement as to the substance of the matter today, we will work out the specifics of those numbers, obviously, with the Debtor and Mercuria.

THE COURT: Then Deutsche Bank, as I understand it, seeks $65,000 -- $65,478.40 for trustee fees and another 390,011.92 for legal fees. Is that correct?

MR. SOMERSTEIN: Yes, Your Honor. Mark Somerstein, Ropes & Gray for Deutsche Bank Trust Company Americas. As Mr. Curchack indicated with respect to U.S. Bank, I've also prepared a supplemental statement which we could hand up and hand -- distribute to the parties. We've incurred an additional $44,500 since the last hearing, Your

Honor.

THE COURT: And on the committee members, it's the same two indentured trustees but also MX, which as I understand it was seeking 123,856.68. is that correct?

MS. VANLARE: Yes, Your Honor. Jane Vanlare, Cleary, Gottlieb, Steen & Hamilton on behalf of American Express. That's right. And as with the other committee members, we have an additional invoice that -- for the interim time period that's, I believe, close to $9,000, just over $9,000, which we can also submit.

THE COURT: Okay. Thanks. And that's it. There are no other applications in front of me, correct?

MR. HAYES: That's correct, Your Honor.

THE COURT: Okay. Now, I understand that there's arguments about whether Section 2C is the only provision that applies to these, whether it's an appropriate way of looking at it, but it, by its terms, preserves a reasonableness objection. Is there any objection to these fees on reasonless grounds? I should look at Mr. Matsumoto for that.

MR. MATSUMOTO: Good morning, Your Honor. Brian Matsumoto for the Office of United States Trustee. Your Honor, we didn't do the normal review that we normally do on these fee applications. One is because we believe that the 503(b) would apply. One of the other considerations here is

that I don't know -- I don't think with respect to Cleary, but with the indentured trustees, their fees include prepetition services I think as -- going back as early as May of 2018, which normally obviously is not even reviewed as administrative expenses in a bankruptcy case.

Here, again, depending on what provision or certainly as they currently seek to be treating these fees as admin expenses, they're essentially elevating prepetition fees to bootstrapping it then into a post-petition admin expense.

THE COURT: Okay. But you got notice of the amounts that were being sought.

MR. MATSUMOTO: Yes.

THE COURT: And you knew that arguments are going to be made in front of me, that I should judge them applying the terms of Section 2.C.

MR. MATSUMOTO: Right.

THE COURT: And under 2.C, do you have an objection on reasonableness grounds or is your only objection that this should be done in a different way?

MR. MATSUMOTO: No objection on reasonableness grounds except to the extent, as I said, the bifurcation between prepetition fees and post-petition. I mean, normally our reasonableness review is limited to post-petition fees.

THE COURT: Okay.

MR. MATSUMOTO: And I wouldn't want the characterization that we would treat prepetition expenses as reasonable post-petition expenses.

THE COURT: Mh hmm. And I understand your -- yes, please.

MR. FRIEDMAN: Just on reasonableness, Your Honor, from counsel to Mercuria Ronald Friedman from Silverman Acampora, we did have a -- what I would call a limited objection on reasonableness, and we're prepared to go through with each one of the parties. There is certain -- as ordinary analysis of time, there's some transitory timekeepers. We know there's certain expenses were on the invoices as well as certain duplication of efforts and a couple of multiple partner meetings that we thought may have been, you know, slightly unreasonable. But certainly willing to have a conversation with each one of the parties, Your Honor.

THE COURT: And when you say limited objections, give me an idea of what that amounts to per applicant here.

MR. FRIEDMAN: Relative to the Cleary Gottlieb invoice, Your Honor, for example, they build in 0.25-hour increments, and ordinarily the review is done in a different way. We discarded that for a period of time. I believe that you're looking at a, you know, somewhere between a 20

or 30 percent, you know, analysis on that one.

Relative to the Deutsche Bank invoice --

THE COURT: 28 or 30 percent. Why? Just because you don't like the quarter-hour increments?

MR. FRIEDMAN: No, no, no. Again, I discounted the quarter-hour increments --

THE COURT: Okay.

MR. FRIEDMAN: -- and 20 to 30 percent was -- it was in prep time before the committee was even formed that was invoiced to the tune of, I think, about 6 or 7,000. I have it all itemized, Your Honor, but point is that there was some prepetition time. We believe there was some duplicate time of timekeepers. There were certain people attending to confirmation hearing and other hearings telephonically, other people attending in person. I'm not sure that that was reasonable. Certainly maybe it wasn't necessary, but maybe it wasn't reasonable. We want to be able to have that conversation with each one of the applicants, and we thought that was the purpose of today's hearing. And so we have done that analysis with each one of them.

But if you're asking for the scope, Your Honor, it's a percentage across the board. If we look at it, it's different for each timekeeper because U.S. Bank, for example, had local counsel with Mr. Curchack at Loeb & Loeb

as well as Maslon firm that had been admitted pro hac vice. And thereafter, it appeared that at each hearing, there was a Loeb & Loeb person as well as a Maslon person, and many times there was a Maslon person on the phone as well, all with different time entries. And we just thought that that was something that we should be able to have a conversation about, and I'm confident that we would be able to have a resolution on that. Same thing related to Ropes & Gray, Your Honor.

MR. SOMERSTEIN: Your Honor, Mark Somerstein for Deutsche Bank. Your Honor, today's -- my phone was on all weekend. Today's not the day for discussions. Today is the day for trial. So I would love to hear, in addition, as Mr. Qureshi points out, the invoices were provided. The invoices were provided to the U.S. Trustee, the company, and Mercuria on the 27th, so it's been more than just when the filings were made this weekend, Your Honor. In all candor, they didn't have the supplemental, but it's a page and a half. I'm happy to show it to you now.

THE COURT: Okay. Now, to a very large extent, the issues that the parties have posed are procedural issues about the theory on which fees and expenses are paid. Mr. Matsumoto, I know you have an objection you've just said about paying prepetition items, but if these were all described as substantial contribution applications, would

you object to them?

MR. MATSUMOTO: I believe that even under substantial contribution (indiscernible) doesn't contemplate the prepetition expenses. Those (indiscernible).

THE COURT: I understand. What about the post-petition ones?

MR. MATSUMOTO: Post-petition, I don't -- again, I did not analyze them for that purpose because it was my understanding the parties weren't certain as to substantial contribution. But my initial plans and review of matters did not seem to indicate anything that was not normal committee duties that would be normally performed that would substantiate a substantial contribution (indiscernible).

THE COURT: Well, the indentured trustees and MX were directly involved in the negotiations of the restructuring -- first restructuring support agreement and then the proposed new deal with Oaktree and then the revised deal with Mercuria, weren't they? They took the lead on all those things, didn't they?

MR. MATSUMOTO: Once again, that negotiation certainly presented jurisdiction of the fiduciary obtained by the estate, which is the committee's counsel to the extent that individual members had their own professionals overseeing and participating. Once again, the normal rules are committee members pay their own expense. I mean, they

had estate fiduciary negotiating and review of those provisions. Adding on additional professional fees is not what the code contemplates. Code doesn't contemplate that committee members can hire their own financial advisors, their own accountants, and their own attorneys to participate along with the retained fiduciary committee.

So yes, I have no idea -- I was not involved in any of the negotiations. I don't know to what extent the professionals accompanied or solely represented individual committee members in the discussions. But pursuant to the bankruptcy code, that's something that committee members have to decide on their own, as to whether or not -- how and to what extent they have representatives assisting them in the function of their duties.

THE COURT: So not only do you think procedurally the objections should have been worded differently, but you would object as a substantive matter to the allowance of these amounts as substantial contribution payments.

MR. MATSUMOTO: Yes. Well, Your Honor, my understanding is they don't seek to qualify for substantial contribution. But yes, to the extent that they're saying the invoice that they provided establishes substantial contributions, I don't -- I don't necessarily agree with that and certainly I would oppose any characterization of the normal functions of representating a committee member as

satisfying the substantial contribution standard.

THE COURT: Okay. The plan has a whole host of provisions on the indentured trustees and not just the provision about committee members. And it says that the indentures are terminated, except that certain responsibilities will continue. And then it says that they'll pay all the fees and expenses. Why should I be thinking of that solely in terms of a request on behalf of committee members as opposed to just the deal that Mercuria and the other party struck with the indenture trustees as to what they would and wouldn't continue to have responsibility to do and what they would and wouldn't have the right to get under their indentures?

MR. MATSUMOTO: Your Honor, I believe that's subsumed within the argument that we make that 1129(a)(4) and 1123(b)(6) or whatever other provisions that might be in both to incorporate planned provisions or payments under the plan that are -- that are violated or not permitted.

THE COURT: Well, if the indenture were viewed as an executory contract -- I'm not saying that it is, and it hasn't been described that way -- but if it were and if the terms were kind of both modified and assumed at the same time, to say these ongoing responsibilities you have continued to perform and, as part of that, we'll pay your fees. That wouldn't be a 503(b) issue, would it?

MR. MATSUMOTO: Not as Your Honor framed it. I'm not quite sure I fully understand Your Honor's characterization of these expense --

THE COURT: But that's sort of what they're -- I mean, it's -- a lot of these things for committee members, for example, there's no independent contract that entitles them to fees. The indentures have contracts that entitle them to collect their fees, right?

MR. MATSUMOTO: Yes, Your Honor. And normally -- we've had discussions with similar indenture trustees and other similar parties --

THE COURT: And I know you have charging liens, but do you also have agreements that debtors will pay those fees?

MR. SOMERSTEIN: Yes, Your Honor, we do.

THE COURT: Yeah.

MR. SOMERSTEIN: And, Your Honor, I think you're hitting the nail on the head. But really, the overarching point here, Your Honor, is the trustees agreed to forego exercising the charging liens in exchange for the direct payment. So it just -- we just don't get these -- we believe that the U.S. Trustee's objection here is completely off base, and I'll reserve an opportunity to make a record because we understand that this issue is important to the U.S. Trustee could go beyond Your Honor's ruling today.

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MR. QURESHI: And, Your Honor, for the record, Abid Qureshi, Akin Gump on behalf of the Committee. If I could just point out that American Express also has a contract with the Debtor that provides for their payment fees.

THE COURT: Okay.

MR. MATSUMOTO: And, Your Honor, as far as I know, the position of the program currently, I believe that we haven't necessarily addressed the specifics in this case, but our position is that if the effect of any -- of the plan incorporates these obligations as part of the plan itself, if it in fact contradicts other sections of the code, then we believe that it's improper. Ultimate --

THE COURT: Well, I understand your argument. But, you know, in Lehman, what they did was -- in Judge Sullivan's words, they did a direct workaround. The committee members -- as committee members, no other argument that I could see in support of their claim for their attorney's fees were trying to work around the statute and say, well, we're going to use different provisions of the plan. And Judge Sullivan said you can't do that.

I understand that, but we pay lots of people's fees. We pay DIP lender's fees. We recognize the fact that certain contracts ordinarily provide for the payment of fees. Banks don't lend money unless you pay their lawyers.

So we don't treat that as if a substantial contribution application needs to be filed or anything like that to justify that as an administrative expense. It's a cost of the contract.

So the indentured trustees maybe ought to be thinking a little harder about how they're going to conceptualize this. It's not enough to just say it's not 503(b) because I don't have a very clear explanation to what it is if it's not.

But it is an unusual situation. They're not seeking fees only as committee members. They've got contracts that cover their prepetition and post-petition fees that are independent of the bankruptcy that say that the Debtor is supposed to pay them. And in effect -- in effect, what the Debtor is saying under the plan is, I'm going to do that. I'm going to honor that provision of the contract. You're not going to withdraw. You're going to continue to perform your responsibilities, at least to the extent of making the distributions to noteholders that the plan calls for, and I'll honor the payment obligations. Isn't that a little different?

MR. MATSUMOTO: Your Honor, we're not attempting to vitiate contractual obligations that may exist. In fact, Your Honor, I believe in conversations with committee professionals -- I mean individual members, professionals,

and indentured trustees would oftentimes ask, and frankly, I'm not sure I've ever gotten a direct response, why don't we go about the settlement? Whatever your fees are, the charging liens or related fees -- for example, in this case, as Your Honor articulated, the various fees, I think they total just slightly under $1 million. Settlement with respect to the unsecured creditors committee could be $41 million as opposed to 40, and the charging liens can apply. Whatever contractual obligations exist pursuant to, you know, that applies to the individual noteholders and so forth can be enforced and, in fact, are enforced in other cases where either the plan does not contemplate its fees from -- for individual committee members, presumably the charging lien is not invalidated. It still exists.

And in fact, again, part of the lack of response and so forth seems to be a preference. They want the -- they want (indiscernible) the Court. By allowing the Court to incorporate it as part of the plan and approve it, they don't even have to account to their noteholders. I mean, if you look at the response with respect to the indentured trustees, they essentially acknowledge that there are two provisions. They characterize it as two separate provisions.

THE COURT: If the plan said we are going to assume, reinstate, whatever word they chose to make, our

obligation to pay the fees and expense of the indentured trustee, that wouldn't be a 503(b) issue, would it?

MR. MATSUMOTO: Well, I'm sorry, Your Honor. I don't think I have a response at this point. I would have a problem with the idea of essentially elevating -- for example, part of that fee, the prepetition fees, by reinstating it, then essentially elevating a prepetition expense --

THE COURT: That happens whenever -- that happens any time anybody assumes a contract, doesn't it?

MR. MATSUMOTO: Yes, but --

THE COURT: You got to -- you got to take the whole thing or nothing, or you can take it with such modifications as the other party is willing to agree to.

MR. MATSUMOTO: Well --

THE COURT: That's why, you know, I'm not sure that executory contract is necessarily correct description because I'm not sure the indentures are acting for the Debtors once -- trustees are acting for the Debtors as opposed to the noteholders, but that's kind of what this is like. This is like I've got this obligation. I owe you money. I want you to continue to perform this function. I'll pay the fees, and you agree to do that function but with clarification in the plan as to just what your obligations are and aren't.

So I'm just not sure I see why that's a 503(b) issue. It's an -- it's -- whether it's a modified version of the contract, whether it's a new contract, whatever it is. It's basically saying you're going to do this, and I'm going to pay you this. And it's in the plan, and nobody objected to it.

MR. MATSUMOTO: Once again, Your Honor, there are contracts that exist prepetition. And once the bankruptcy occurs, some of those prepetition contracts may or may not be enforceable or presumably if they run contrary to the code, the code governs. And here, what you're -- the bulk of the fees, as far as I can tell -- although I went through the prepetition amount, the bulk of the fees occurs with respect to their post-petition services as to the committee members. And there are statutory provisions that specifically address that.

I mean, I understand what Your Honor is saying. There are a lot of contracts or provisions and so forth, and putting aside the issue as to whether or not that contract is --

THE COURT: And I approve lease assumptions all the time, and part of the cure obligation is to pay the landlords prepetition and post-petition legal fees. And it doesn't go through 503(b)4, right? It doesn't have to be a substantial contribution application. In fact, there's no

pretense there that the landlords' attorneys are doing anything for the benefit of anyone other than the landlord.

MR. MATSUMOTO: Your Honor, I believe the code provision contemplates the cure provision just as the code specifically addresses, members' professional fees, which are treated -- I think, in fact, that there was this concern that committee members -- I mean, again, part of the issue --

THE COURT: Well, if a landlord were a member of the committee, you wouldn't say that that membership terminated its ordinary rights to have whatever cure obligations paid to it on the assumption of the lease.

MR. MATSUMOTO: Agreed, Your Honor. Let me be -- if a landlord were placed on the committee, sure, statutes would not be issued. It would -- it would still be applicable, but at the same -- at the same time --

THE COURT: Well, here's what troubles me. You know, the premise of your argument based on Lehman is that this is a pretense, essentially. This is an end run around to get a substantial contribution or a committee fee payment without a committee fee payment. And your argument is that Judge Sullivan said you can't do that.

But as to the indenture trustees, it seems to me it's more complicated than that. They certainly haven't given up on the argument that they're entitled to Article

2.C of the plan, but they've got a separate provision that's -- there's a whole lot of provisions in the plan that say, in effect, some obligations under the indenture are terminated. What it actually says is the indentures will be deemed terminated, but certain obligations will survive on both sides. Certain obligations as to -- and rights of the indentured trustees and certain obligations of the Debtor.

Now, if that had been a proposed treatment as an executory contract to which somebody had objected, then maybe I could have an argument as to whether it's really an executory contract. If it had been a proposed reinstatement provision and somebody wanted to object as to whether it was unequal treatment, I maybe could've considered that. I have no objections to this provision.

So why do I -- why do I -- am I required to ignore all these other provisions of the plan and these contractual obligations that it seems to me are being honored, and treat this as if it's entirely a 503(b) issue? It seems to me different from Lehman in that regard. Isn't it?

MR. MATSUMOTO: Your Honor, respectfully, I don't agree that Lehman doesn't apply. From our standpoint, the import of Lehman was, in fact, to honor the provisions of the bankruptcy code specifically with concerns that individual committee members would be able to finance their representation of the committee that they should normally

bear. And this goes specifically to those -- to that concern. I mean, what would stop -- again, under Your Honor's theory, they can hire as many professionals as they want as members. They can hire financial advisors. They can hire any number of professionals and burden the estate with that obligation. And I believe the code want to avoid that.

I mean, part of the problem was there is a fiduciary representing committee members.

THE COURT: But the difference is they're not coming to me saying, we made a post-petition agreement to do things differently from what the bankruptcy code says, and we put it in the plan, and you should ignore what the bankruptcy code says because we've agreed among ourselves to modify it. That's what bothered Judge Sullivan.

They come to me with a pre-bankruptcy contract that says that they get their fees paid by the Debtors. And I have plan that says I'm going to do it. The Debtor says they're going to do it. And like I say, I see about ten different possible conceptual descriptions of why that's being done in the papers, and it might behoove the indentured trustees to think real hard about exactly how they characterize it in the future.

But what does seem to me to be going on is something different from an end run around 503(b)4. There

is nothing in the code that says that a contract -- a valid pre-bankruptcy contract for an indentured trustee to get its fees must be dishonored in bankruptcy or cannot be paid or cannot be assumed or cannot be reinstated or cannot be made part of a modified deal after the case. Not that I know of.

And the idea that it has to be cabined into 503 as a committee member and can't be thought of any way -- any other way just doesn't seem right to me.

MR. MATSUMOTO: Well, Your Honor, I don't believe the the approach and the argument that we're advancing eliminates their obligations as and indentured trustee. I mean, they assert, in fact, reserve the right specifically to exercise their charging lien, which is normally -- and our position, and certainly the position that we take --

THE COURT: That's a backup right. They also have a contractual right to have the Debtors pay their fees. The charging lien is how they protect themselves in the event the Debtors don't do it.

MR. HAYES: Your Honor, if I may step in briefly, I think also if it's helpful, another way to think about it is these are amounting that Mercuria has agreed to pay as non-Debtor, so coming from non-Debtor sources. So I think that's just another way of avoiding getting into the 503(b) issue.

MR. CURCHACK: Your Honor, Walter Curchack on

behalf --

THE COURT: Yeah.

MR. CURCHACK: -- of U.S. Bank. Just to follow up on that as another distinction from the Lehman case, where Judge Sullivan refers to the dilution of the distribution to other unsecured creditors, that the payment of that $26 million would have been. In this case, in fact, to recognize the U.S. Trustee's objection would be -- have the opposite effect. Would reduce the distributions to the unsecured creditors because of the fact Mercuria agreed to pay these fees.

THE COURT: Well, you know, you say Mercuria agreed to pay them. The plan actually says the Debtors will pay them. I know -- I know in economic impact, that means Mercuria will pay them, but it does say the Debtors.

MR. CURCHACK: Actually, Your Honor, the Debtors or the reorganized Debtors with respect to --

THE COURT: Right.

MR. CURCHACK: -- 4Q, so --

THE COURT: Right.

MR. MATSUMOTO: Look, Your Honor, again, the point that I mentioned before is that notwithstanding all of these sort of hairsplitting interpretations, I've always wondered -- and as I said, I've never really gotten a clear answer as to a lot of these issues as -- I mean, avoiding all the

issues about whether or not there's a contract being assumed or not assumed, if the settlement were to incorporate whatever fees are -- for example, as I said, in this case, if the settlement were $41 million as opposed to $40 million --

THE COURT: Well, I'll tell you one reason. It's because the unsecured creditors pool doesn't go only to the noteholders. It goes to other people too, so it still wouldn't exactly work.

MR. MATSUMOTO: Well, once again, Your Honor, in this case, you still also have the American Express, which is not a noteholder whose fees are also being applied.

THE COURT: So if I were to say to indentured trustees around the country, you cannot get your fees paid even under your indenture and even if the plan says you get your fees paid under the indenture, you can only get them if you show that you made a substantial contribution to the case as a whole, which means not just representing your own constituency but doing something else, why wouldn't every indentured trustee quit on the first day of the bankruptcy case and say to the Debtors, you know what? You want an indentured trustee, go make a new post-bankruptcy agreement that will provide -- I guarantee you 100 percent -- that will provide for the payment of all of that new indentured trustee's attorney fees and expenses, just as every

indenture does, and then I'd be approving it just the same way I do for DIP lenders or other people who say, I'm not going to do certain kinds of commercial relationships with you unless you cover those costs.

So what am I accomplishing if I adopt your view other than to force debtors to kind of put new indentured trustees in place in all their cases?

MR. MATSUMOTO: I'm not sure that's necessarily the result that would occur. It seems to me, again, they do have the charging lien separate --

THE COURT: I'm pretty sure it would occur. If I tell indentured trustees, you may not get your fees if you are the pre-bankruptcy trustee, even though a brand-new one I'll give the fees to, well, then, you know, U.S. Bank and Deutsche Bank would be trading off cases. They'll be saying, okay, here. You replace me on this one, and I'll replace you on that one. And we'll be in exactly the same position. What's the point?

MR. MATSUMOTO: I don't understand why the charging lien would be invalidated. I mean, by preventing the payment --

THE COURT: But they've got fiduciary responsibilities, arguably, to their noteholders. So, yeah, they can stay in place and apply their charging lien and take it out of the pockets of their noteholders, or they can

resign and let the Debtors scramble around to find a new indentured trustee who the Debtors will have to pay without it coming out of the pocket of the noteholders. And if you're the indentured trustee, and if you're going to be accused of having to do what's in the best interests of the noteholders, what are you going to do?

MR. MATSUMOTO: Well, Your Honor --

THE COURT: You're going to resign. I just -- I just don't see -- you know, as I said, I understand that the theory on which this is being done maybe hasn't been laid out all that well, but the concept, which is that the only way an indentured trustee should be allowed to get its payment is through a substantial contribution application just doesn't seem to make sense to me.

MR. MATSUMOTO: Well, that's essentially what the code provides. And --

THE COURT: Okay. I disagree as to -- the code doesn't say you can't pay anybody's attorney's fees unless they make a substantial contribution. Indentured trustees serve a commercial function. And as I say, the Debtors probably would have to scramble to find somebody else to do the job if these people didn't continue. They'd have to pay the fees anyway. So I just can't see that bankruptcy code says that 503(b)(4) is the only way you can do that.

MR. MATSUMOTO: Well, according to Your Honor's

approach, in fact, you have non-estate fiduciaries, professionals who are now being compensated by -- essentially by the estate, notwithstanding the characterization as Mercuria -- Mercuria is essentially funding the estate. And ultimately, it's literally coming through as funds that are made available for estate purposes.

Here, now we have unlimited professionals who can bill the estate. They have no -- they're not estate fiduciaries. They don't have any conflicts of check. They're not obligated by any conflict of determination. And they perform all these professional functions and still get compensated by the estate. And I believe the code wanted to specifically narrow the estate obligations to pay those fees. Notwithstanding, as I said, the obligation for the indentured trustees to be paid is embodied in their charging lien regardless of -- and that's not affected by the code. (Indiscernible) distributions for the unsecured has to be taken into account. And from our standpoint, at least as we see it at this point, they've been --

THE COURT: Okay.

MR. MATSUMOTO: They've been considered the settlement amount to take into account these things, that way avoiding concerns about non-estate fiduciaries billing -- essentially billing the estate and charging the estate

for all of these fees and functions that are really not subject to the oversight of the bankruptcy process, I mean, the transparency that normally -- that's contemplated by the code is for naught. Here, for example, the provisions that they -- the indentured trustees refer to their separate provisions under the plan, they'll -- the provision under, I believe 4Q essentially provides for essentially no oversight. And that's why, from our standpoint, the – session that deals with committee fees and professional was intended to be a companion provision but one that governed -- - that governed all of the professionals, whether or not they're indentured trustees or not.

Having said that, I would still -- we're still not happy about that plan provision. For one, it didn't give the Court any oversight over it except unless there was an objection. Further, it was only on five days' notice. It wasn't on widespread notice. And so what's being asked for here is essentially non -- no oversight by any other creditors or party in interest, and really no oversight by the Court. And yet these obligations are being imposed and not the minimal obligations. We are talking about here almost $1 million, which according to their procedure, the Court would never be able to review or seek, and certainly unless arguably there was an objection.

So I don't believe that's that what the bankruptcy

code intended. I think the bankruptcy code wanted, you know, these oversights to occur. I mean, to have the Court review these fees and certainly even to, perhaps, be concerned about potential conflicts that may exist upon this non-estate fiduciaries and professionals who are being compensated. I don't -- at the same level as the administrative expenses.

THE COURT: Somebody who knows the Trust Indenture Act and the securities laws etc. better than I do, please help me answer this question. If the indentured trustees had resigned on the first day of this case, what would the Debtors have been obligated to do?

MR. SOMERSTEIN: Unless Mr. Curchack, who has been doing this a little bit longer than I have -- Mark Somerstein, Ropes & Gray for Deutsche Bank Trust Company Americas Trustee -- then the Debtor would've had to find a replacement, Your Honor.

THE COURT: Is that obligation under other federal statute, or --

MR. SOMERSTEIN: It's under the indenture. And I -- Mr. Curchack probably has more familiarity to the Trust Indenture Act provision, but I believe that it's embodied in the Trust Indenture --

MR. CURCHACK: Well, Your Honor, the Trust Indenture Act requires a trustee. And in most cases, for

example, in these cases, the trustee has to have a certain level of capital, has to be a certain kind of an institutional trustee. So there are specific limits on who can be a trustee in the first place. Beyond that, whose responsibility it is does somewhat differ from indentured to indentured since some say the first step is the trustee has to find a successor and then the holders have to appoint one. But ultimately, all of them end up that there has to be one, and it's the Debtor's responsibility, or the issuer's responsibility.

MR. SOMERSTEIN: That's the most common formulation. The most common formulation is the trustee would resign, and the company would appoint, the issuer would appoint.

MR. MATSUMOTO: Your Honor, again, I'm certainly not (indiscernible) the state expert, but it seems to me that if the fulcrum security (indiscernible) unsecured notes, I question as to what obligation the Debtor has, you know, to ensure that a trustee (indiscernible).

Your Honor mentioned that --

THE COURT: Well, the fulcrum security was the unsecured notes here, or, you know, the unsecured obligations at the parent company level.

MR. MATSUMOTO: I'm not sure -- in this case, I don't think the unsecureds are appropriately secured.

MR. CURCHACK: Your Honor --

THE COURT: I'm puzzled at that. You know, that's -- they're not -- depending on what happens with the litigation trust, they're getting $40 million. They're getting a partial recovery. People below them only get money if the litigation trust recoveries are enough to pay them in full. So doesn't that make the unsecured creditors, which include these noteholders, the fulcrum group?

MR. MATSUMOTO: I thought the fulcrum security were the secured creditors who had priority over the unsecured creditors. I mean, they -- they're all --

THE COURT: They're all at the subsidiary level, right? I don't think there are any unsecured creditors at the parent company level.

MR. MATSUMOTO: At the subsidiary level, the unsecureds would be paid in full.

THE COURT: Right. And so are the -- yeah. So the fulcrum is the group that basically isn't being paid in full but is getting some recovery. And I think that is the unsecured group.

MR. CURCHACK: Well, Your Honor, Walter Curchack again. I just -- just to sort of follow up on where you're going with this, the issue of having indentured trustee is important, in fact, even before the bankruptcy case. I mean, the whole continuity and the presence of indentured

trustees is fundamental to the debt economy, the debt market, for the entire economy. Without indentured trustees, because of the TIA as well as just ordinary custom and practice, it would be very difficult to manage public debt issues. So there has to be an indentured trustee.

THE COURT: Certainly I think I have seen plans that include payments to noteholders that don't separately provide for the payments of the indentured trustee's fees and expenses and -- or they make their recoveries out of their charging liens.

MR. CURCHACK: That's correct, Your Honor, and it's generally a function of the economics of the transaction and the nature of the plan consideration. If, for example, there's no cash being distributed to the noteholders, it's hard for them to pay the IT.

THE COURT: I guess, Mr. Matsumoto, I understand your objection, but it does not seem to me that this is the same as the situation in Lehman. These people are not seeking payments of their fees and expenses just because they're committee members. And they're not seeking to make an end run around the changes that were made in the code to kind of stop the automatic payment of committee members' fees and expenses. And the indentured trustees are people who have contractual rights to the payment of their fees and expenses.

Now, maybe that's not an absolute right under the bankruptcy code. Certainly if the Debtors wanted to ignore and reject those responsibilities or treat them as prepetition obligations, then that's how they would be treated. But I don't think it's an evasion of Section 503(b)(4) for parties to make a commercial agreement to honor a contractual obligation when doing so is not a subterfuge but instead has a real benefit to the Debtors in the sense that they don't have to find somebody else to do this job. They can just use who's there right now.

So to me, the issue in Lehman was somebody was evading the only statutory way that they could have gotten the fees that they wanted. I just don't see that here. Now, whether somebody in the future wants to object that a provision of this kind is an assumption of an executory contract that's not really an executory contract or a new contract that calls for too much to be paid, or a form of plan treatment that gives the indentured trustees a higher recovery on their claims that other people want to get, I don't know. Nobody made those objections here. Everybody was fine with it.

So your objection is that it's an evasion of the only statutory way to get this. I don't think that's correct. There are other ways in which a plan can provide, I think, and not the ways that the Lehman court was

describing. It's not just that the plan can't have other terms in general, for example. Whether it's an assumption or a new contract or a reinstatement, however you want to conceive of it, it's just commercial deal. It's no different from fee payments that I approve in lots of other deals. So I just don't have a problem with it.

MR. MATSUMOTO: So, Your Honor, I know you don't necessarily agree. In this case, we may disagree as to where fulcrum security is, but as you know, there are many plans from which the (indiscernible) unsecureds are completely (indiscernible) and what exists under a plan is essentially a (indiscernible). Amounts are allocated to be distributed to the unsecured creditors. If Your Honor -- under Your Honor's ruling, the Debtor could still, nevertheless, in that case, when there's only a (indiscernible) plan that's issued to unsecured creditors, the Debtors could still provide for the payment of individual committee members' professional fees out of essentially what are estate assets.

THE COURT: First of all, I'm talking about the indentured trustees. I'm not -- and I'm making a ruling that would be the same whether they were or were not members of the creditor's committee, okay?

Second, if in the case you posited, a Debtor wanted to pay the indentured trustees, I suspect you and

lots of other people, including secured creditors or whoever the actual real fulcrum security was, would probably be objecting and would probably succeed.

But that's my problem. I'm telling you that I see other grounds on which this obligation can be paid and are not evasive grounds. They're not just invoking the fact that 1129 generally refers to the approval of these, as though that were an authorization to pay anybody's fees you want. They're not relying on a board provision in 1123 that says they can do other things that are consistent with the code. They're not relying on an argument that they can do something consistent with the code when what they're really doing is trying to evade a code provision, which is what Judge Sullivan said in Lehman.

They're saying, I'm getting my fees paid as my contract calls for. Whether -- and like I say, whether that's reinstatement, assumption, a new contract that kind of incorporates some obligations but not others, it's not an evasion of 503(b)(4), and it's in the plan, and nobody objected to it, so I'm going to allow it. Okay?

And maybe in the future you'll have other objections, and maybe the indentured trustees will do some real work to think through how they want to characterize these provisions in the future so that a poor judge like me doesn't have to struggle with it. But I don't have an

objection here. And as long as I'm convinced that it's not just an evasion of 503(b)(4), I'm not going to say that 503(b)(4) is elusive.

MR. MATSUMOTO: I understand, Your Honor. I would like to request a stay pending appeal.

THE COURT: No, I don't think so. I think it's too important for this to move on, and I actually think if you did appeal that particular issue, if you were to succeed and if those payments were to be undone, I don't think they would really -- that staying the entire restructuring is necessary. Okay.

MR. MATSUMOTO: Understood, Your Honor.

THE COURT: Okay. Thanks.

MR. MATSUMOTO: Thank you.

THE COURT: Now, as to AmEx, I hear Mr. Qureshi saying that they too have a contract, but that's the first I heard it -- I'm hearing of it.

MR. QURESHI: Your Honor, again for the record, Abid Qureshi, Akin, Gump, Strauss, Hauer & Feld on behalf of the committee.

It is correct that they do have a contract. And you're right, this is the first time we've raised that. That is not --

THE COURT: What's the nature of the obligation that's owed to AmEx here?

MR. QURESHI: Your Honor, I will defer to American Express's counsel on that point. Ms. Vanlare is here, and she can address that. But before I hand the podium over to her, if I could, a couple things with respect to American Express.

Like with the indentured trustees, this is in no way, shape, or form any kind of effort to circumvent 503(b) or to evade any other provision of the bankruptcy code. The reality here, Your Honor, is that when the terms of the RSA were negotiated, this was a point. The fees of the committee members who were acting in their capacity as estate fiduciaries, and this was a negotiated point. Now, I hear the United States Trustee say --

THE COURT: But the RSA doesn't even -- all the RSA says is that the plan will provide for the reimburse -- the plan will provide for it.

MR. QURESHI: Right.

THE COURT: It doesn't guarantee that there won't be an objection to that provision. It doesn't say even what standards will govern it. It doesn't even preclude the possibility that it will be judged on a substantial contribution basis. It just says the plan will provide for it.

MR. QURESHI: It -- all of that is correct, Your Honor, but what happened in the RSA negotiations is that we

secured the agreement, in this case, of Mercuria to fund that amount so that it would not dilute other creditors and negatively impact other creditors. Now, the United States --

THE COURT: That's a -- that's a slight difference from Lehman where one of the points that Judge Sullivan made was that one of the reasons, he thought that he should be careful about allowing the workaround, as he described in that case, was that it would have a small, almost infinitesimal, but small nevertheless detectable effect on other creditors' recoveries. It's true that he said that, but I don't think a fair reading of his decision is that that was the decisive point.

MR. QURESHI: Fair enough. Given --

THE COURT: It seemed pretty clear from his decision he would've ruled the same way whether that was the case or not.

MR. QURESHI: Given the numbers in that case, Your Honor, that's certainly fair. But I think the better approach, certainly on the facts here, is Judge Lane in AMR. Right? Which --

THE COURT: That predated the Lehman decision.

MR. QURESHI: It did predate the Lehman decision, but I don't --

THE COURT: In fact, he relied in part on the

decision that Judge Sullivan overturned.

MR. QURESHI: But Your Honor, I think here, again, the RSA that the -- the important point that was negotiated in the RSA is that the payment of these fees would come from Mercuria, and therefore not dilute recoveries to creditors. And yes, the implementation for that was through the plan. The amount at issue with respect to American Express, quite frankly, will -- would very -- would very quickly be dwarfed by having to go through the 503(b) process. But it's in total, I think, in the range of $130,000, 131 inclusive of what has been incurred over the course of the last couple of weeks.

And Your Honor, I just don't think that -- look, the bankruptcy code in certain instances I think needs to be approved practically. And here, where there is no adverse impact at all, there is full disclosure with respect to these fees and what these fees are and time records available to parties who want to -- who want to review those, I --

THE COURT: Aren't you asking me basically to say Judge Sullivan got it wrong?

MR. QURESHI: I --

THE COURT: And to refuse to follow the Lehman decision?

MR. QURESHI: I don't think so, Your Honor,

because I --

THE COURT: Sure feels that way to me.

MR. QURESHI: I think that -- I think that Lehman is distinguishable. But to the extent Your Honor doesn't agree with that, then yes. I think the better reading -- now, it -- I recognize, as Your Honor pointed out at confirmation, this Court always hears that every case is unique. And to some extent, of course it is. But here in context, $130,000 in fees given the overall numbers in this case, the combination of 1123(b)(6) and 1129(a)(4) --

THE COURT: What were the dollar amounts in Lehman?

MR. QURESHI: $26 million.

THE COURT: In the context of that case?

MR. QURESHI: In the context of that case probably equally small. But nonetheless, coming out of the estate, unlike the case here. I mean, the practical effect here will be to give Mercuria a windfall, albeit a small one, but allow Mercuria out of an obligation that they agreed to and that was negotiated in good faith as part of the RSA.

Now, here the United States Trustees say, well, why didn't you just negotiate differently? Why didn't you take that $40 million and gross it up?

Well, the answer to that, Your Honor, reflects the good faith of all of this. We weren't trying to maneuver in

some way to work around a provision of the bankruptcy code. The way the negotiations happen to fall out -- and Your Honor certainly has lots of experience from your days practicing in these kinds of negotiations -- an amount was agreed to for creditor recoveries. And then there was an additional discussion to say, and now you need to pay these fees. And the committee succeeded with the help of American Express and the other committee members in getting to that result, ultimately for the benefit of all creditors.

We didn't approach it as, well, we need a workaround in the event of this 503(b) argument, so let's just gross the number up. That's not how the negotiations played out. So I think it would be an impractical reading of the code.

And, look, Your Honor, on the record that we have, I think, frankly, it would not be difficult to satisfy the 503(b) element with respect to American Express and their contribution here. We could make that record in short order. They were acting in their capacity as an estate fiduciary. They were active in the negotiations. They were active in formulating that the committee took in those negotiations. And I can certainly represent to the Court that but for the role of American Express, it's unclear to me whether we would've achieved the deal that we did, a deal that has very tangible benefits to all creditors.

So I do think that the 503(b) criteria can quite easily be satisfied here, Your Honor. But nonetheless, from a precedential perspective, to require in circumstances like this that the 503(b) showing always be made where there is an arm's-length agreement that is reached as part of a negotiation where a non-Debtor is agreeing to make the payment, I don't think, Your Honor, that that can be read as being inconsistent with any provision code.

THE COURT: Let me hear more about the contractual argument.

MS. VANLARE: Good morning again, Your Honor. Jane Vanlare, Cleary, Gottlieb, Steen & Hamilton on behalf of American Express. As Mr. Qureshi represented, there is a provision in the contract that underlies American Express's claim against the Debtors that allows for the addition of legal fees to the claim. So while it's not entirely analogous to the indentured trustee claims, it's a similar situation where the prepetition contract does also provide for fees.

THE COURT: What is then -- what is -- what does the debt arise out of here, the underlying debt?

MS. VANLARE: It is -- it's a financing arrangement along the lines of a credit-card type lending, although it was not a credit card but similar type of unsecured lending.

THE COURT: And help me a little more. It advances to cover what kinds of things?

MS. VANLARE: It's my understanding that they were advances to cover things like bunkers and other things that the Debtors needed in the course of its -- of their operations. Basically, American Express would pay certain vendors of the Debtors, and then the Debtors were obligated to compensate American Express. You know, pay monthly invoices for those amounts that were advanced on their behalf.

THE COURT: And is it just the parent company that's the obligor or some of the subsidiary companies?

MS. VANLARE: Just the parent company.

THE COURT: Okay. So it's not a secured obligation, and it's not an entity that's not paying everybody in full.

MS. VANLARE: It is not a secured obligation. I'm sorry. I didn't hear the last part.

THE COURT: And it's not an entity that's not paying people in full.

MS. VANLARE: That's right. That's right.

THE COURT: Now, the difference seems to me to be the indentured trustees are still doing things that the Debtors need somebody to do. But American Express doesn't have an executory contract. It's not being assumed. And

when it's seeking its fees, it's not really doing anything that the Debtors need it to do. It's just trying to collect on its claim, isn't it?

MS. VANLARE: I think -- I think that's right, Your Honor. I think that is a difference. I think the similarity arises where it's similar to the U.S. Trustees. It's an obligation that arises out of the prepetition contract, and the Debtors -- although really Mercuria -- are essentially choosing to pay that -- pay those expenses. Again, that's one theory. As Mr. Qureshi I think identified, there are a number of other theories under which we believe we're entitled to, to the fees.

THE COURT: But on the one hand, I can at least conceptualize the Debtor's agreement as to the indentured trustees as a -- I'm going to pay you this, and you're going to give me these post-petition services. If they honor that obligation to you, that's just giving American Express something that maybe other unsecured creditors aren't getting. That would be a problem.

MS. VANLARE: I think that's where the fact that this was negotiated part of a deal and, you know, for all the reasons, again, that were previously enumerated, I think this is a different situation.

I don't think the basis for our reimbursement is simply the prepetition contract. I think that's just one

basis as one -- and one analogy that we want to identify. But I think -- again, I would -- I would ask Your Honor to look to the fact this was a deal that was agreed to. I think, as Mr. Qureshi had said, I don't think we would have an issue with a 503 -- with satisfying the 503(b) requirements. We'd rather avoid, frankly, just the expense and the time of filing a separate application. We don't think we need to do that, but I think because there was a deal here that was struck, I think that we made a -- we made a number of contributions. We were instrumental in those negotiations, and I think that the Lehman case is really distinguishable based on the fact that the estate is not truly bearing the economic cost.

THE COURT: If I were to require you to make a 503(b)(4) application and to show substantial contribution, would you waive the condition in the plan that requires your fees to be paid before the plan can go effective?

MS. VANLARE: I would need to confer with my client, Your Honor.

THE COURT: All right. Yes, Mr. Matsumoto.

MR. MATSUMOTO: Your Honor, I just wanted, I guess, the clarification back to -- sort of to go back to the indentured trustee. I know Your Honor indicated that you believe that there is a separate obligation of the Debtor with respect to the indentured trustee. But if Your

Honor's ruling was to implicate that you're approving under 1129(a)(4) or 1123(b)(6) or some other -- again, I understand the rationale you give, but I'm wondering whether or not they're (indiscernible) particular statutory provision under the plan.

THE COURT: Well, what I'm pegging it to is, as I say, it's a little unclear whether it's a modification of a contact and an assumption of that contract on the theory that there are executory obligations, or whether it's new contract with the indentured trustee under which they agree to do certain things, and this is what they get in return, whether it's a reinstatement --

Conceptually, it's not entirely clear, but what is clear to me is it's not just an end-run around the provisions in the Bankruptcy Code because the indentured trustee isn't just trying to collect for enforcement of its claim or for being a committee members. It's got actual responsibilities that it's performing during the course of the case.

And so an agreement to pay the indentured trustee's fees in that context seems to me a lot more like the situation where the debtor pays the fees of other parties to commercial contracts that it enters into including DIP lenders. And I don't think that that's a workaround. I don't think that's an evasion. I think it's

just that's what administrative expenses are. They are commercial obligations that you incur in connection with getting services from people during the course of the case.

And since the plan provided for it, well, I'm not going to say what the theory was because I can think of three possible theories, nobody objected to it. So the important point to me is it's not just an evasion of 503(b)(4). Whether it would apply in all cases, whether there are other objections to it, I'll leave for other cases.

With AmEx, though, I have a problem. It seems quite clearly covered by Judge Sullivan's decision in the Lehman case. I think as a technical matter, there are cases that say that I am a unit of the district court and that I can ignore a district court's decision the same way any other district judge could do. Whatever the merits of that or not, it seems unwise for me to ignore a decision that Judge Sullivan issued and that he regarded as not really subject to even sufficient dispute to allow an immediate appeal.

I don't think, maybe I'm wrong, but I don't think that other judges of this district have since expressed their disagreement with Judge Sullivan. Does anybody know to the contrary?

MR. MATSUMOTO: I'm not aware of --

THE COURT: Yeah. So I don't think this is a situation where I can conceptualize this as a commercial arrangement with American Express that is similar to the commercial arrangement with the indentured trustees. American Express was acting as a creditor. If it made a substantial contribution, that's fine, but I think the U.S. Trustee is right. It has to show that in order to get its fees. Whether it's because it was a committee member or just otherwise, it's got to show a substantial contribution. So --

MS. VANLARE: Your Honor?

THE COURT: Yes, go ahead.

MS. VANLARE: If I may, just one other distinction here and one other avenue I think through which we are entitled to payment, and that's the RSA itself and the contractual obligations of the parties under the RSA including Mercuria. There's a provision, at least one provision that I can think of in which they agreed to take any actions to effectuate the terms of the restructuring.

So I think one way to do this would be to say that this is enforcing -- Your Honor enforcing a contract that had been approved by the Court.

THE COURT: They gave you exactly what you asked for, a plan that provides for the reimbursement of the reasonable and documented fees and expenses of the committee

members. I don't see anything in it that guarantees that I'll approve that provision or that the U.S. Trustee won't object. You know, I understand your argument. If it comes out of Mercuria's pocket, $123,000 does not seem like the end of the world for this case. But Judge Sullivan's decision is on point and the U.S. Trustee's objection is on point. So I think you do have to proceed by way of substantial contribution application. Okay.

MS. VANLARE: Okay. Thank you, Your Honor.

MR. MATSUMOTO: Your Honor, I do apologize and if you'll bear with me, but as Your Honor knows, the decision that anything with respect to the professional fees of committee members is an important one. And since I have to go back and address it with my supervisors --

THE COURT: Oh, try one more time.

MR. MATSUMOTO: Pardon.

THE COURT: Well, try one more time.

MR. MATSUMOTO: No, no. I'm sorry, Your Honor. I just wanted to understand the landscape. For example, if the indentured trustee were not part of the committee and there was an agreement, would it make any difference for Your Honor if the plan provision provided for the indentured trustee member's fees if they weren't committee members. I'm just trying to determine whether or not --

THE COURT: Yes, I think that's what I said that I

think of the indentured trustee language here as something that would apply regardless of whether they had been members of the committee or not. And there's nothing that requires a debtor to make such an agreement with an indentured trustee. Indentured trustees can work things out in different cases.

All I'm saying to you, Mr. Matsumoto, is while I wouldn't want to commit myself to one of the many possible theories as they could support this, whether it's executory contract, modified executory contract, partial reinstatement, new contract, whatever it is, there are many other ways in which this can be justified than through -- than by saying that they made a substantial contribution. It's a commercial arrangement. The Debtor gets some benefit of having an indentured trustee in place, maybe even satisfies a statutory obligation of the Debtor's.

And so in that context, agreeing to pay their fees seems to be that's exactly what they would do if they had to replace the indentured trustee because nobody would do it otherwise or unlikely anybody would do it otherwise. And that to me just a term of a commercial arrangement. And as long as it's a reasonable and customary term of a commercial arrangement, much like DIP lenders getting their own fees, then it's administrative expense just because that's what it is. It's a term of the commercial arrangement.

And so I just don't think of this as having to go through 503(b)(4) because it's not an expense that a creditor has incurred in the course of enforcing its own claim but claiming to have in the process conferred a benefit on the estate as a whole. This is -- the indentured trustee are doing something that the debtors need somebody to do. It's very different in that sense for me.

MR. MATSUMOTO: All right. Thank you, Your Honor.

THE COURT: Okay.

MR. QUERESHI: Your Honor, if I may with respect to American Express propose the following. I believe that it's quite clear that all of the parties that can conceivably be interested in this issue are here pursuant to obviously the filings that were made on Friday. Although we did not seek 503(b)(4) as the basis for American Express to be paid its fees, we'd be prepared to make that record right now.

And, Your Honor, I think it's really quite straightforward because I would rely in part on the confirmation record because I think the confirmation record is robust in establishing the terms of the agreement that was reached with Mercuria, how those terms evolved from where things were at the beginning of the case, in other words, how those terms improved over the beginning of the case.

So as I look at the 503(b)(4) requirements in this circuit, Your Honor, I think that the -- and I'm referring now to the way those are framed by the district court in AMR, the first prong being whether the services benefitted a creditor of the estate itself or all interested parties. And satisfaction of that prong, we would again rely upon the terms of the plan itself as benefitting unsecured creditors when viewed in light of how those terms improved from the beginning of the case.

The other two criteria, Your Honor, whether the services resulted in actual and significant and demonstrative benefit and whether those services were duplicated by the efforts of others, I would propose to satisfy in one of two ways. My colleague, Mr. Zuzulo's in the courtroom. He is counsel at Akin Gump. He was involved at every step of the way in the negotiations leading to the perem. I can proffer his testimony. He's obviously here.

Or I can put him on the stand for a very brief direct to really establish two things, Your Honor, which I believe satisfied those elements of the AMR case. The first is that American Express in their capacity as a state fiduciary was, number one, acting in that capacity at all times; number two, was actively involved in the negotiations with Mercuria and in the committee's deliberations in the formulation of positions that the committee took in the

course of those negotiations; and lastly, that it is unclear whether the deal that was achieved with Mercuria would have been possible but for the involvement of American Express.

Stated differently, had the committee professionals been left to their own devices and not had the input of American Express and their counsel and not had the involvement of Cleary Gottlieb in lending their experience and their guidance in those negotiations.

THE COURT: Careful. You got your own fee application.

MR. QUERESHI: Unclear whether we would get to the same result. So I'd like to avoid if possible the expense and really I'm in part saving Mercuria some money here too by having to come back and do this again and see if we can make that evidentiary record today given that I think any party that conceivably has an interest in it is here.

THE COURT: Mr. Matsumoto?

MR. MATSUMOTO: Your Honor, I don't know that Your Honor's had a chance to review the time records again (indiscernible).

THE COURT: Let's just say I read them with the same level of sustained attention that I'm ever able to read time records.

MR. MATSUMOTO: Mind-numbing.

THE COURT: Exactly.

MR. MATSUMOTO: I understand, Your Honor, and part of my concern is that the description of the (indiscernible) are essentially one that would be a professional representing for on an individual member and obviously, seem to support the argument that their efforts were critical to the settlement with Mercuria.

THE COURT: Well, he's got some changes he wants to talk to American Express about, right?

MR. QUERESHI: Yes.

THE COURT: And maybe the Trustees as well.

MR. QUERESHI: Yeah. I mean two things on that note, Your Honor. To satisfy 503(b)(4), it's of course not the time records that are controlling. It's what they do as opposed to does the time record that they have submitted disclose in sufficient detail what they did. So I --

THE COURT: Right. But it does have to be time spent in doing the things that amounted to a substantial contribution?

MS. QUERESHI: Fair enough, Your Honor. I do agree at least that much is satisfied by their time records. And secondly, with respect to the issues that Mercuria may have with the invoice itself, I will note that all of the invoices reflect a 15 percent discount that Cleary Gottlieb gave off its standard hourly rates. That's already baked into the amounts that they are seeking in the motion here

today, Your Honor.

MR. FRIEDMAN: Your Honor, if I may, we certainly appreciate the process because it's all about the process here and having some clarity, I think enables us to have a pathway forward.

With respect to the indentured trustees and having heard Your Honor's, you know, it's a commercial arrangement aspect, certainly Mercuria's prepared to pay the undisputed portion of the committee members' fees, but we recognize there are multiple paths, as Your Honor did and certainly the noteholders' counsel, that they have a number of provisions in the plan that enable them to be compensated.

So we're certainly prepared to pay the undisputed portion of those fees. We'd like to be able to have those conversations so that we can have clarity on that. What we don't want to have, Your Honor, is any concern relative to the 503 issue and the process, as I mentioned, relative to the indentured trustees and certainly even with respect to the Cleary Gottlieb fee.

So we've heard Your Honor's indications and rulings. We're certainly anxious to try to bring some closure to this issue. And like I said, we have the ability to make payments directly under the plan. We're prepared to do so. We're prepared to pay the undisputed portion of those invoices. We'd like to be able to hopefully have an

agreement from all parties of those dollar amounts so that we can move forward in that process.

MR. SOMERSTEIN: Your Honor, Mark Somerstein, Ropes & Gray, for Deutsche Bank Trust Bank of the Americas, for the record. I keep hearing counsel say that they're going to pay undisputed amounts. That's not what the plan says. The plan says they'll pay the reasonable and documented fees. And actually, Your Honor, can I approach? May I approach and hand up the supplemental (indiscernible) to the Court, the ones that we circulated this morning? I've handed them to counsel.

THE COURT: No, it's not necessary because I'm not going to rule on this before you've even talked to him about what he has in mind. When he says undisputed, I assume what he's saying is that he may thing that some of your fees aren't reasonable. So if it provides for reasonable and documented fees, then okay. Then maybe he's got an issue, maybe he doesn't.

But before I decide whether I can resolve that today or proceed with substantial contribution today seems to me you should all talk about what he has in mind and decide to what extent you've got issues with it and to what extent if you want to fight, you've got your witnesses here. Maybe depending on what he wants to do and what people agree to do in response to that, maybe the U.S. Trustee will be

comfortable with the rest as a substantial contribution in the case of AmEx. I don't know.

But you need to have that discussion. So why don't you do that while we have our -- we'll have an extended lunch break. We'll get back together at 2:30.

MR. SOMERSTEIN: Thank you, Your Honor.

THE COURT: And you can let me know whether peace has broken out or whether there are issues to proceed and how you'd like to proceed with them.

MR. FRIEDMAN: And one other point if I may, Your Honor, the payment of the committee members' fees under that provision of the plan is the condition precedent. And certainly, because some of those fees may not be paid pursuant to that provision of the plan because as Your Honor recognized, there were multiple paths to deal with the indentured trustee issues, we'd like to make sure that we get this over the goal line as promptly as possible. Thank you.

THE COURT: Okay.

ALL ATTORNEYS: Thank you, Your Honor.

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

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

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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