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Combined hearing RE: approval of disclosure statement and
confirmation of Chapter 11 plan

Objections filed

Motion of Joanna Culley, Guardian of the Estate of Dennis Leroy
Williams, disabled for relief from the automatic stay

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ALSO PRESENT:

SEAN M. HARDING, FTI Consulting

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

2 THE COURT: Good morning, everybody. Are the parties
3 ready to proceed?

4 MR. DURRER II: We are, Your Honor.

5 THE COURT: Okay.

6 MR. DURRER II: This is Van Durrer, Your Honor,
7 Skadden, Arps, Slate, Meagher & Flom, on behalf of the debtors.
8 We're proceeding today with our omnibus agenda, which was filed
9 at docket 868.

10 There are two matters on the agenda. The first one,
11 which is Bank of Oklahoma's motion for allowance of an
12 administrative expense claim, is docket number 823. That is
13 resolved. We reached an agreement on the amount. We also
14 agreed to include Bank of Oklahoma in the consensual releases
15 that are set forth in the plan. I'll turn it over to Mr. Roach
16 to see if he wants to add anything, but I believe that the
17 certificate of no objection was already submitted to Your
18 Honor, docket 861.

19 THE COURT: Okay. That resolution is fine with me.

20 MR. GWYNNE: Good morning, Your Honor. Kurt Gwynne,
21 instead of Mr. Roach, from Reed Smith. Jared Roach, my
22 partner, is on the phone as well. Our firm represents BOKF
23 N.A. as successor indenture trustee.

24 We did file a certificate of no objection and revised
25 proposed order, which is at docket item 861. That order has

1 been agreed to, the form of order by both the debtor and
2 creditors' committee, and we would ask that Your Honor enter
3 that proposed order. We're happy to address any questions that
4 Your Honor may have.

5 THE COURT: All right. I've seen the confirmation
6 order. I'm not sure I've seen this particular settlement
7 order, but certainly in concept everything sounds fine. When
8 you submit the order we'll let you know if we have any issues
9 as to the wording.

10 MR. GWYNNE: For the record Kurt Gwynne again from
11 Reed Smith. The order, just so Your Honor knows, what it does
12 is it allows the claim in the amount of 150,000. The prior
13 order provided that our fees and expenses, as of the filing of
14 the motion, were at least 158,000, and we obviously incurred
15 fees and expenses thereafter in the filing and negotiation of
16 the motion. So that's what the proposed order at docket item
17 861 provides, and the order was emailed to Your Honor's
18 chambers in Word form yesterday. Would you like us to resend
19 that order after this hearing?

20 THE COURT: No. If my chambers has it then they'll
21 forward it to me.

22 MR. GWYNNE: Okay. Thank you, Your Honor.

23 THE COURT: Okay. All right, Mr. Durrer?

24 MR. DURRER II: Thank you, Your Honor.

25 Onto agenda item number two, this is confirmation of

1 the debtors' plan of distribution. The original motion was
2 filed at docket 785. As Your Honor knows, there were a handful
3 of objections filed. What I'm going to do is provide a brief
4 introduction and then I'll turn it over to Mr. Ortiz to go
5 through some of the more specific changes that were made to
6 resolve certain objections by the U.S. Trustee, which also got
7 captured in other rejections -- other objections I should
8 say -- and then, obviously, we'll address any questions you
9 have.

10 Just in terms of the record, I'll start there first.
11 We did file three declarations; they're listed on the agenda.
12 The first is the declaration of Sean Harding. It's a
13 comprehensive declaration that addresses all of the 1129(a)
14 factors; that's at docket number 828. We also filed the
15 declaration of Andres Estrada from KCC, who's our voting agent,
16 at docket 849, which certifies the hundred percent favorable
17 vote from Class III, which is our impaired accepting class.
18 And then finally, due to an update that we had just last week,
19 we submitted an additional declaration of Mr. Harding,
20 regarding the resolution of the director and officer claims,
21 which is at docket 865. Unless there's any objection, Your
22 Honor, we would move those to be part of the record today.

23 THE COURT: Are there any objections?

24 All right. They are admitted into evidence.

25 MR. DURRER II: Thank you, Your Honor. Let me start

1 with the update, then.

2 As Your Honor is familiar with the terms of the global
3 committee settlement -- that's how we've been calling it, the
4 committee settlement among the debtors, Chatam, and the UCC --
5 late last month, there's basically three forms of consideration
6 flowing through the plan to unsecured creditors. Specifically,
7 there's an initial payment of a million dollars in cash, a
8 portion of which is deferred pending a tax refund that the
9 debtors are seeking for the year 2020. Then, there were the
10 D&O claims themselves, and then finally there was a sharing of
11 seventy-seven-and-a-half percent of that same tax refund to
12 general unsecured creditors through the general unsecured
13 creditors' trust, with the balance of that tax refund being
14 retained by Chatam and/or NewCo, the buyer of McClatchy's
15 assets earlier this month.

16 The change that I wanted to update you on, Your Honor,
17 was that the parties never stopped with respect to their
18 efforts to mediate and settle the D&O claims. As a matter of
19 fact, we were all successful -- it was spearheaded, I should
20 say, by the directors and officers themselves, the Great
21 American Insurance company, and the UCC. They did reach a
22 settlement in the amount of 4.875 -- \$4.5875 million late last
23 week. We submitted a notice of that fact and then certain
24 changes to the plan to memorialize that.

25 One important change to the plan, which I just want to

1 highlight, is that Great American -- again, consensually --
2 will receive a release in exchange for that payment, and
3 basically among the three forms of consideration that I
4 outline, that middle form, the D&O claims, would obviously be
5 replaced with that amount of cash. And you'll find that change
6 sprinkled throughout the revised plan as well.

7 With that, Your Honor, I'll pause to see if you have
8 any questions, and then I want to give Mr. Fliman an
9 opportunity to address what should happen with the existing
10 standing motion, which you might recall had been continued to
11 today in anticipation of favorable consideration of
12 confirmation of the plan, but given the settlement, I think Mr.
13 Fliman had a suggestion as to how we would carry that forward.

14 THE COURT: All right. I've seen the proposed
15 settlement. No objections. Let me just ask before Mr. Fliman
16 talks if there are any objections to that settlement.

17 Okay. I hear none.

18 Why don't you proceed, Mr. Fliman?

19 MR. FLIMAN: Sure, Your Honor. For the record, Daniel
20 Fliman with Stroock, Stroock & Lavan on behalf of the
21 committee. Your Honor, just before I get to the mechanics with
22 respect to the standing motion, we did just want to provide a
23 little bit of context in connection with the settlement.

24 As Mr. Durrer walked through, following what we're
25 calling the global committee settlement, we engaged in

1 negotiations with the D&O carrier and the counsel to D&Os and
2 Milbank. After much back-and-forth, we reached the agreement
3 Mr. Durrer walked through, which is that \$4.5878 million in
4 exchange for releases of the remaining estate causes of action.

5 The UCC supports the settlement. While we believe in
6 the claims that we brought in the standing motion, we do
7 recognize the inherent challenges, the expenses, the delays
8 that correspond with realizing value in any claims, including
9 these, and so we support this number. We consent to this
10 number, which was a requirement under the prior settlement
11 reached in connection with the sale motion, and we request its
12 approval.

13 The housekeeping item that we need to deal with is our
14 standing motion still remains on the docket. We agreed to
15 adjourn it in connection with the prior settlement with Chatam.
16 What we would ask, Your Honor, is -- and we'll add this to the
17 language to the confirmation order if it's acceptable to the
18 Court -- is that given the settlement that we've reached on the
19 D&O claims, that our standing motion would be deemed
20 automatically withdrawn on the effective date of the plan. I
21 think in the interim we would continue to adjourn the motion,
22 just so we have it out there if, for whatever reason, we don't
23 get there, but I think what we would propose is that the motion
24 be automatically withdrawn on the effective date of the plan.

25 THE COURT: Okay. And I take it nobody else has any

1 issue with that?

2 Okay. That sounds fine.

3 MR. FLIMAN: Thank you.

4 MR. DURRER II: Okay, Your Honor. Thank you. This is
5 Van Durrer again. So just to walk through a couple resolutions
6 of the objections, and then, as I said, Mr. Ortiz will address
7 in more detail changes that we made with respect to issues
8 surrounding discharge release, exculpated claims, et cetera.

9 First, with respect to Oracle, whose original
10 objection was docket 850, we made it clear that the releases in
11 the plan are consensual releases by modifying the language
12 relating to who are releasing parties, and that satisfied them
13 and it -- it also addressed a number of other objections, and
14 they've filed a withdrawal of their objection at docket number
15 869.

16 With respect to the Mississippi and Texas taxing
17 authorities, they submitted to us informal comments, basically
18 setting out some procedures, routine reservations of rights,
19 and treatment of specific tax claims in those jurisdictions,
20 and those changes are reflected in paragraphs 109 and 110 of
21 the confirmation order, and I think Your Honor will find them
22 to be relatively routine. We likewise received informal
23 comments from Chubb, the insurance carrier.

24 Chubb had a fiduciary policy as well as certain
25 worker's comp policies many, many years ago; as many as

1 fourteen years ago. We couldn't locate any claims that were
2 still being administered, but rather than have a litigated
3 dispute, we accommodated, again, some reservation of rights
4 language, and that's reflected in paragraph 111. Basically, it
5 provides a certain notice function to Chubb in the event that
6 distributions are about to be made and Chubb wants to make one
7 last effort to identify any claims it may have. It has the
8 opportunity to do that, and there's also a, sort of, belt and
9 suspenders stay relief provision to make sure that Chubb can
10 continue to administer whatever claims it is handling at this
11 late date.

12 We also received informal comments from the SEC. We
13 narrowly tailored our exculpation proposal in the plan in the
14 confirmation order to post-petition conduct, and that addressed
15 the SEC's concerns, and that is something that Mr. Ortiz will
16 also touch on.

17 So unless there's any specific questions on those
18 handful of matters, Your Honor, I will turn things over to Mr.
19 Ortiz to walk through the larger U.S. Trustee comments and
20 issues that we addressed.

21 THE COURT: I'm sure, based on prior cases, Mr. Ortiz
22 knows what one of my questions is going to be.

23 MR. DURRER II: He's been a pretty good predictor of
24 those, Your Honor, so yes. I will yield the podium.

25 MR. ORTIZ: Thank you, Mr. Durrer.

1 Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. ORTIZ: Kyle Ortiz of Togut, Segal & Segal for the
4 debtors.

5 The good news is we've resolved all but one element of
6 one of the plan objections, with modifications made to the
7 first amended plan and the related proposed confirmation order.
8 As Your Honor is aware, three objections were filed. As Mr.
9 Durrer noted, Oracle's was withdrawn at docket 869. That
10 leaves us with an objection filed by Beth Desmond at docket 852
11 and the objection filed by the United States Trustee at docket
12 number 855.

13 Many of the issues raised in the U.S. Trustee and
14 Desmond objections overlap, so if it is okay with Your Honor,
15 we will run through the key modifications to the documents and
16 address how each resolves issues raised by the objections,
17 objecting parties, and also there's a couple places where edits
18 to the plan didn't quite carry through to the order yet, and
19 we'll identify those as well, so Your Honor is aware of changes
20 that will be made.

21 I'll be making reference to the redlines of the plan
22 and confirmation order that were filed as exhibits 1A and 2A,
23 to the notice of first amended plan filed on September 21st,
24 2020 at docket 857 and referring to the ECF page numbers, ECF
25 PDF page numbers, therein.

1 Do you have that document, Your Honor?

2 THE COURT: I've read it. I don't have it in front of
3 me at the moment, but go ahead.

4 MR. ORTIZ: Okay. Thank you, Your Honor.

5 Starting with the discharge issues raised by both
6 objectors. The section of the plan providing for discharge
7 pursuant to Section 1141 of the Bankruptcy Code, which was
8 formerly section 10.2 of the plan, has been removed, which Your
9 Honor can see in the redline at ETF PDF page number 155.

10 Additionally, consistent with Your Honor's comments at
11 other confirmation hearings related to liquidating debtors and
12 edits made to other confirmation orders, we removed all
13 language that had the effect of providing a discharge,
14 including language regarding final or full satisfaction,
15 release or settlement of claims, as we appreciate Your Honor's
16 views that such language has the same effect as a discharge,
17 just using different words.

18 THE COURT: I thought that that language was still
19 there when I reviewed the most recent plan filing.

20 MR. ORTIZ: So it may have -- there were two different
21 plan filings. There was one filed on Friday that had certain
22 of the language still in, and we went through and then pulled
23 out all of the additional language around those sorts of
24 language. And then I will also note that the mirror edits that
25 are supposed to be in the confirmation order relating to

1 discharge were inadvertently not made in the version filed on
2 Monday, but that we will be deleting the paragraph eighty-six
3 of the confirmation order, which provides for a discharge prior
4 to submission of the final order, and we do plan to go through
5 both documents and make sure to do our best to scrub all such
6 references to these sorts of language, which we do appreciate
7 are just basically a discharge, wearing different clothing.

8 THE COURT: Very good.

9 In at least one of our other cases, rather than
10 looking for it everywhere it appears, I think we just put in
11 the confirmation order something that dealt with it, so you
12 could do it that way, if you prefer.

13 MR. ORTIZ: Yeah. I think there was specifics on
14 them. We had language that essentially said anywhere that that
15 appears it doesn't have effect, and made specific that it only
16 applies to those consenting third-party releasers. So we'll
17 take a crack at it as we send it down to Your Honor, because we
18 are aware that you have another megacase that was just filed,
19 and we'll make sure to do our best to do it all on our end.

20 THE COURT: Okay.

21 MR. ORTIZ: Moving on to third-party releases, Your
22 Honor. The definition of releasing parties no longer includes
23 the language all other holders of claims, to the fullest extent
24 permitted by law, which is reflected in the redline at PDF
25 pages 111 through 112. With that edit, third-party releases

1 are only being granted by parties who have affirmatively
2 consented to granting such releases.

3 The U.S. Trustee also raised an issue with prospective
4 releases for entities that do not yet exist, and this was
5 resolved through the deletion of reference to the winddown
6 debtors, the plan administration trust, and the (indiscernible)
7 recovery trust from the plan's release provision, which Your
8 Honor will be able to see at redline PDF pages 156 through 58,
9 which deleted those terms from the current debtor and
10 third-party release provision in section 10.3 and 10.4 of the
11 plan, respectively.

12 THE COURT: Right.

13 MS. CLARK: The U.S. Trustee's objection to the
14 breadth of exculpation provision has also been resolved because
15 the debtors removed reference to out of court restructuring
16 efforts from the definition of exculpated claims, which Your
17 Honor will be able to see at page 102 of the plan redline.

18 I'll also note, Your Honor that in preparing for the
19 hearing, we saw that there's still some language in the
20 exculpation definition using phrases like related to and
21 arising from that Your Honor typically strikes, in favor of
22 phrases like derived from and based upon. So we will make
23 appropriate changes to the final version of the plan to comport
24 with Your Honor's preferred language, which we understand
25 better comports with the actual concept of exculpation.

1 THE COURT: Thank you.

2 MR. ORTIZ: We also added to the exculpation provision
3 at page 160 in section 10.5 of the plan. It calls out to the
4 provision for governmental units, enforcing police, and
5 regulatory powers with respect to pre-petition claims, based on
6 informal comments received from the SEC and the Texas
7 comptroller. We added language requested by the U.S. Trustee
8 concerning post-confirmation operating reports and payment of
9 statutory fees to both the plan and the confirmation order.

10 With regard to the Desmond objection specifically, we
11 added new paragraph 112 to the confirmation order that makes
12 clear that nothing in the confirmation order, or the plan,
13 impairs the right of Ms. Desmond to the Desmond appeal bond or
14 her right to prosecute the Desmond lawsuit, and also makes
15 explicit that the Desmond appeal bond is not property of the
16 estate.

17 Turning to the U.S. Trustee's concerns with payment of
18 non-estate professionals as administrative expenses under the
19 plan, the U.S. Trustee's concerns with regard to the Chatham
20 and Brigade professionals was resolved through clarifying
21 language that such fees are being paid consistent with orders
22 already entered by the Court, specifically the DIP order and
23 the sale order and not as administrative expenses under the
24 plan. And this can be seen through the addition of new section
25 2.7 and the removal of the reference to administrative expenses

1 in section 2.2 of the plan.

2 The debtors do believe that this same argument applies
3 with regards to the indenture trustee fees, which were
4 addressed in the sale order and are an essential component of
5 the sale and mediated plan settlement, which has already been
6 approved pursuant to Bankruptcy Rule 9019 at docket number 744.

7 I know that the committee council has more to say on
8 this one last open issue, which is the indenture trustee fees.
9 But we'll pause here before yielding the virtual podium to see
10 if Your Honor has any comments to the edits made to address the
11 Desmond objection and the balance of the U.S. Trustee's
12 objection.

13 But really quickly, before I do that, I will also note
14 that one change that I know you'll ask for that we will make is
15 for return distributions, that we will make reasonable efforts
16 to find the claimants and not just sit on the return
17 distributions.

18 THE COURT: Very good. First, on the Desmond
19 objection, have you resolved that, or is there still any
20 objection left?

21 MR. ORTIZ: My understanding is it's resolved,
22 although Mr. Kohn is on the line, and if there's any open
23 issues, he can address it.

24 MR. KOHN: Yes. Good morning, Your Honor. Samuel
25 Kohn of Dorsey & Whitney on behalf of Beth Desmond. My

1 partner, Monica Clark, is also on the phone, as is North
2 Carolina litigation Counsel, James Johnson, of DeMent Askew &
3 Johnson.

4 As Mr. Ortiz said, paragraph 112 as filed on docket
5 867 addresses and resolves our objection completely. And I
6 just wanted to thank Mr. Ortiz for his efforts to resolve our
7 objection and it preserves the status quo, and that's all we
8 wanted. And thank you, Your Honor.

9 THE COURT: Okay. Very good. I read that language
10 yesterday, and it looked fine to me.

11 MR. ORTIZ: Thank you, Your Honor. And of course, we
12 appreciate Mr. Kohn's efforts as well to also reach a
13 resolution. And with that, unless Your Honor has any
14 questions, I'll yield the podium to, I believe Ms. Martin -- it
15 will either be Ms. Martin or Mr. Hansen who have some further
16 comments with regard to the open indenture trustee fee
17 question.

18 THE COURT: Before we do that and before we forget,
19 there's a paragraph in the proposed confirmation order. It was
20 paragraph 84, which I read, that said that my order constitutes
21 all required government consents. Whose consent am I granting
22 here? I don't think I have power to do that, do I?

23 MR. ORTIZ: Let me find the order. I'm not aware of
24 any -- obviously, Mr. Durrer can speak up if he's aware of any.
25 I remember we had this issue in Westinghouse, and there it was

1 there were additional government consents that we all knew were
2 still out there and being waited for. But I'm not aware of
3 anything specific and don't necessarily see an issue with
4 taking it out.

5 THE COURT: Even if there in, I'm not sure I have the
6 power to give it to you, to take -- for some governmental
7 agency's possible regulatory review of something, right?

8 MR. DURRER: Yeah. This is Van Durrer, Your Honor.
9 We're happy to strike that language. We're not aware of any
10 rules that would apply.

11 THE COURT: Okay. All right. So the only issue is
12 the indenture trustee fees, and I read the responses, and I
13 understand that they were provided for in the settlement that I
14 already approved. So what's the issue, then?

15 MR. HIGGINS: Your Honor, this is Ben Higgins for the
16 U.S. Trustee. I can address that, if I may be heard?

17 THE COURT: Yes.

18 MR. HIGGINS: Thank you, Your Honor. The issue is
19 that the sale order provides for the -- you're correct, the
20 sale order does provide for the approval of the settlement,
21 which provides for the payment of the professional fees for the
22 indentured trustee.

23 But the sale order also provides that to the extent
24 any provisions of the settlement agreement are to be
25 implemented through the plan, those would be subject to

1 confirmation of the plan and approval through confirmation, so.

2 And if you look at the specific provision providing
3 for the fees of the indenture trustees professionals in the
4 settlement, it provides that the fees shall be paid on the
5 effective date. And the U.S. Trustee would submit that these
6 are fees that are to be paid -- or excuse me, this is a
7 provision to be implemented through the plan. And accordingly,
8 our ability to object to it is preserved, at least at this
9 stage.

10 And our argument on the merits are set forth in the
11 papers, Your Honor, but it's essentially, that to the extent
12 that they're being paid as an administrative expense or
13 effectively as an administrative expense, they need to satisfy
14 503(b). So that's the argument, Your Honor. I can address any
15 additional questions you may have.

16 THE COURT: You know, indentured trustees that are
17 hired pre-petition or engaged pre-petition, they represent
18 note-holders, but they do so for the convenience of the company
19 and usually at the expense of the company. And that role
20 continues post-bankruptcy, so what's the big deal about paying
21 their fees?

22 MR. HIGGINS: Well, Your Honor, to the extent that
23 they're being paid as administrative expenses, our position is
24 that they need to demonstrate some entitlement under 503(b),
25 whether it's 503(b)1 or 503(b)3. And the record is -- it

1 doesn't demonstrate that entitlement at this point. So that's
2 what the objection is based off.

3 THE COURT: How much are we talking about?

4 MR. HIGGINS: I should let either committee Counsel or
5 the trustee Counsel speak to that, Your Honor.

6 THE COURT: Okay. Mr. Hansen or Mr. Fliman, who
7 wishes to address this?

8 MR. HANSON: Your Honor, it's Kris Hanson with Stroock
9 on behalf of the official committee. My colleague, Samantha
10 Martin, is going to handle this issue for us, so she's on.

11 THE COURT: Okay.

12 Ms. Martin?

13 I see Ms. Martin listed, but I don't see her.

14 MS. MARTIN: Good morning, Your Honor. This is
15 Samantha Martin at Stroock & Stroock & Lavan on behalf of the
16 official committee. I believe the amount is in the low
17 300,000-dollar range.

18 MR. ASHMEAD: Your Honor, it's John Ashmead. Can you
19 hear me?

20 THE COURT: Yes.

21 MR. ASHMEAD: Yeah. Hi, Your Honor. Good morning.
22 It's John Ashmead, Seward & Kissel, Counsel to Wilmington
23 Savings Fund Society. Ms. Martin is correct. That is a
24 combination of my firm's fees, which were around 200,000, and
25 the client's fees in this matter. I'll turn it back to Ms.

1 Martin, and then I can answer any other questions or add on.

2 Thank you.

3 MS. MARTIN: Thank you.

4 Your Honor, we agree with you that this is included in
5 the settlement, which was approved as part of the sale order.
6 While Ben notes that there was a proviso that any provisions
7 that need to be implemented in the plan will be incorporated
8 and subject to plan confirmation, we don't believe that this is
9 one of the provisions that was necessary to implement in the
10 plan. This was simply something that included as a matter of
11 timing because we wanted to make the payment on the effective
12 date.

13 But I think once the settlement was approved as part
14 of a sale order, we certainly could have paid these amounts as
15 part of the sale closing. And in fact, they actually are
16 effectively payments being made by a third party to a third
17 party, which is really coming from Chatham for the benefit of
18 WSFS and Seward & Kissell

19 The purchaser, as you know, bought substantially all
20 of the debtor's assets, including all the debtor's cash except
21 for a specific amount that's to be used as prescribed in the
22 APA and the settlements schedules. And one of the specific
23 uses of cash was the payment of these indenture trustee fees
24 and expenses. And if these amounts were not going to be used
25 for this very specific purchase -- or for this very specific

1 purpose, the purchaser would have swept the cash from the
2 estates at closing.

3 If you do feel, as a technical matter, that these
4 payments are being made by the debtors because they're coming
5 from the debtors' accounts now, there is ample authority in
6 this district and elsewhere providing that the payment of
7 indentured trustee fees and expenses and are permitted under
8 Bankruptcy Code section 363(b) and Bankruptcy Rule 9019. And
9 we would submit that that reasoning is applicable here and that
10 503 is not required.

11 And the debtors under 363(b) can use funds for non-
12 ordinary-course transactions with bankruptcy court approval and
13 with a sound business reason, and the business judgment rule
14 would apply here. The debtors determined in their business
15 judgment that this was an appropriate use of cash into the
16 settlement and that the global settlement is fair, appropriate,
17 and in the best interests of the estates and all parties in
18 interest.

19 And under rule 9019, the standard is whether the
20 settlement is fair and equitable and whether it falls below the
21 lowest point in the range of reasonableness. And here, I think
22 the settlement is fair, equitable, and is eminently reasonable.
23 It's the product of a long-term, hard-fought, extensive
24 negotiations, as you've heard a lot about through court-ordered
25 mediation. It's full supported by the debtor's key

1 constituencies.

2 The settlement eliminated the risk of contentious and
3 costly litigation that would have really impacted the debtors'
4 ability to close this sale, and it also would have put their
5 ability to pursue a plan gravely at risk. It significantly
6 improved their recoveries for unsecured creditors. And it
7 created a clear path with almost no obstacles for the potential
8 emergence from bankruptcy.

9 And Your Honor, we believe the settlement terms cannot
10 be picked apart piecemeal. This payment is one of many
11 addressed in the global settlement, and there is significant
12 approval -- or significant support for approval of the entire
13 transaction.

14 And as I mentioned, courts in this district have
15 approved payments to indenture trustees under section 363(b)
16 and rule 9019 before, including very recently in Windstream and
17 Stars (sic) Holdings. And for these reasons, Your Honor, we
18 would respectfully request that you overrule the U.S. Trustee's
19 objection, authorize the payments, or find that they were
20 authorized in the sale order, and confirm the plan. Thank you.

21 MR. GWYNNE: Your Honor, this is Kurt Gwynne from Reed
22 Smith, Counsel for BOKF. May I also be heard on this?

23 THE COURT: Yes.

24 MR. GWYNNE: Thank you, Your Honor. I'm not sure if
25 the U.S. Trustee's objection applies to BOKF as well as

1 Wilmington Savings Fund Society, but to the extent that it
2 does, I'd like to address it. Some arguments will apply to
3 BOKF and WSFS, some just to BOKF.

4 But first of all, in the case called Aegean Marine,
5 Your Honor requested that going forward, debtors and indenture
6 trustees focus on the means by which they're seeking approval
7 of indentured trustees fees and expenses in the case. And as
8 Your Honor noted at the record of that hearing, that there are
9 a number of ways that a debtor and indenture trustee can agree
10 to the payment of the fees and expenses.

11 Here, because there wasn't previously an agreement,
12 BOKF filed a motion for allowance and payment of administrative
13 expense claim. That was not objected to by the U.S. Trustee.
14 We did submit a declaration of James Lewis of BOKF at docket
15 item 824 and a declaration of Jaren Roach, a partner at Reed
16 Smith, at docket number 825.

17 So it wouldn't make sense for BOKF to have an
18 administrative expense claim having filed a motion, submitted
19 evidence in support thereof, and there being no objection, and
20 not to have that administrative claim paid under the plan. The
21 plan provides for the payment of all administrative expense
22 claims, and there shouldn't -- there's no exception in the code
23 for an administrative expense claim of an indenture trustee.

24 But in this case, I also want to point out that BOKF's
25 fees and expenses -- not only were they incurred post-petition,

1 but here, BOKF was not the indenture trustee on the petition
2 date. In fact, twelve days after the petition date, the
3 debtor, as the issuer of the notes, Bank of New York Mellon --
4 as the prior and resigning indentured trustee and BOKF as the
5 successor -- entered into a resignation and appointment
6 agreement.

7 That was on February 25th, approximately twelve days
8 after the February 13th, 2020, petition date. So here we have
9 a post-petition agreement. Prior to that, BOKF had no
10 involvement as trustee, had no obligation to provide any
11 services under the indenture.

12 As provided in that resignation and appointment
13 agreement, the debtor accepted Bank of New York Mellon's
14 resignation, and the debtor appointed BOKF because it needed to
15 have an indentured trustee. And as the inducement for serving
16 as successor trustee, the registration and appointment
17 agreement provides that BOKF is entitled to all the rights of
18 the indenture trustee under the indenture. One of those, of
19 course, in the right for compensation under section 707 of the
20 indenture.

21 Interestingly, the indenture, although it doesn't bind
22 Your Honor, in section 10.01 specifically provides that the
23 parties contemplated that the indenture trustee fees and
24 expenses would be cost of administration under section 503(b).

25 As Your Honor pointed in the Aegean case, indenture

1 trustees serve a commercial function. And in fact, when the
2 Trust Indenture Act was enacted shortly after the Great
3 Depression, Congress specifically required the appointment of
4 an indentured trustee at all times to provide that commercial
5 function because it served the national public interest of
6 providing information and facilitating communications to the
7 noteholders.

8 So here, we believe the services provided by BOKF were
9 provided to the debtors and are an incident to the operation of
10 a business that issues public debt. In Redding v. Brown, the
11 Supreme Court case held in 1978 -- but interpreting the
12 language "actual and necessary cost" under the former
13 Bankruptcy Act -- that costs ordinarily incident to the
14 operation of a business include or constitute administrative
15 expense claims and that actual and necessary costs are not
16 limited to those costs without which rehabilitation would be
17 impossible.

18 So as Your Honor also recognized in Aegean, if you
19 didn't pay trustees fees, eligible trustees would refuse to
20 serve as replacement trustees and existing trustees would
21 resign. And in those instances, a debtor would either be in
22 violation of the indenture or potentially in violation of the
23 trust indenture act because the debtor does not have an
24 indenture trustee at all times.

25 So for those reasons, many of which apply to both BOKF

1 and WSFS, BOKF asks Your Honor to confirm the plan and approve
2 the payment of indentured trustees' fees and expenses including
3 those of their Counsel. And that's all I have unless Your
4 Honor has any questions.

5 THE COURT: No. I don't.

6 Mr. Higgins, why wasn't this already decided when I
7 approved the settlement?

8 MR. HIGGINS: Your Honor, when you approved -- can I
9 just have clarification? Why wasn't it decided when you
10 approved the settlement -- the global settlement with the sale
11 order? Is that the question that you're asking?

12 THE COURT: Yes.

13 MR. HIGGINS: Well, Your Honor, our position on that
14 would be that the language of the sale order reserves for
15 portions of the settlement that need to be implemented through
16 the plan and the payment of an administrative expense would be
17 something that has to be implemented through the plan. If Your
18 Honor will permit me, may I response briefly to the points
19 raised by Ms. Martin and Counsel for BOKF?

20 THE COURT: Yes. Before you proceed though, you know,
21 didn't I say in the settlement that the indenture trustee fees
22 would be paid? Wasn't that part of the deal?

23 MR. HIGGINS: It did, Your Honor. It said a language
24 is that it will be paid -- it shall be paid on the effective
25 date.

1 THE COURT: Well, that doesn't suggest that the
2 possibility was left open for the plan. The plan may have had
3 to be confirmed, but it sounds like it was resolved already.
4 What was the point of saying that if the issue still remained
5 open?

6 MR. HIGGINS: Understood, Your Honor. I understand
7 what Your Honor is saying, and certainly, to the extent Your
8 Honor is prepared to rule on that basis, I won't get back into
9 the reply and the other points. But if it's an open issue, I'm
10 happy to go back into those points.

11 THE COURT: Okay. Well, why don't you go ahead and
12 make the record as to anything else you wanted to put on.

13 MR. HIGGINS: Thank you, Your Honor.

14 MR. ASHMEAD: Your Honor, if I may. This is John
15 Ashmead for WSFS. I just don't want to be out of order and
16 then be precluded from saying anything. I thought the podium
17 was turning to me after Ms. Martin. It's fine that Mr. Gwynne
18 spoke, and I'll be very brief. If I could just -- to try to
19 keep the, sort of, cars on the train in order here. Would that
20 be all right? I'll just take thirty seconds.

21 THE COURT: Well, let Mr. Higgins finish, and then you
22 can go ahead.

23 MR. ASHMEAD: Okay. Fine. Thank you.

24 MR. HIGGINS: So Your Honor, just with respect to
25 BOKF, I think what BOKF did here is what we're asking for.

1 It's for -- to the extent the parties believe that they're
2 entitled to 503(b) treatment, to demonstrate that some way.
3 And they put in an application with competent evidence and
4 explanations that are not in the confirmation papers
5 demonstrating why they think they're entitled to 503(b)
6 treatment. So that is effectively what we're looking for with
7 respect to, I guess, Wilmington, the trustee that is also
8 getting paid.

9 And very briefly, just with respect to the two points
10 Ms. Martin made, one about how this payment is effectively
11 coming through Chatham or the purchaser, you know, we're
12 working off the language of the plan, and it's -- the payments
13 are being paid through the plan. So even if it's money that
14 originally came from Chatham, to the extent it's being allowed
15 under the plan as a plan payment, that is something that we
16 believe 503(b) controls.

17 And to the last point, just that other courts have
18 approved this type of payment under 363 or 9019, we've
19 essentially briefed that issue in the argument, Your Honor. We
20 understand we've been overruled in other cases on this issue.
21 We respectfully disagree that 363 is appropriate, and the
22 rationale is that 503(b) specifically controls administrative
23 expenses and 363 is a general provision of the bankruptcy Code
24 and -- as is 9019 of the rules.

25 And to the extent the specific controls the general,

1 we believe 503(b) controls what administrative expenses are.
2 And to the extent someone is being treated as an administrative
3 expense, they need to satisfy 503(b). That's it for me, Your
4 Honor, unless you have further questions.

5 THE COURT: Okay. Thank you.

6 And who else wants to be heard now?

7 MR. ASHMEAD: Yes, Your Honor. John Ashmead of Seward
8 on behalf of Wilmington Savings Fund Society, just very
9 briefly, Your Honor. Wilmington Savings Fund Society is the
10 trustee on two indentures, was co-chair of the committee. You
11 know, we join in the comments made by the debtors and the
12 committee and added on by BOKF Counsel here, you know, so I'm
13 not going to re-cover in any detail.

14 But just to reiterate, you know, the high points, the
15 WSFS fees and expenses were agreed to as part of the settlement
16 that you approved. I could be corrected, but I don't believe
17 BOKF was part of that settlement. So you know, the fact that
18 they've filed a claim for payment of administrative expense is
19 just -- it's distinguishable on that ground. So it's already
20 approved.

21 And as you've heard, it's more than fairly usual and
22 customary for a Chapter 11 plan to provide for the payment of
23 the reasonable fees and expense of indenture trustees for a
24 host of reasons including the underlying contract, post-
25 petition, effective date and post-effective date, obligations

1 that they have to fulfil as well as their charging lien rights.

2 And like BOKF here, WSFS came on a week after the
3 filing. It was pursuant to an agreement executed by the
4 debtors after the filing date. So in short, Your Honor, as
5 part of a settlement, but even if there were not a settlement,
6 there are a host of reasons that these should and typically
7 would be paid under a Chapter 11 plan.

8 And of course, there are countless, countless examples
9 of that in Chapter 11 plans. And just fairly recently, three
10 judges have spoken to these issues in one or way or another,
11 including Your Honor in Aegean, Judge Drain in Windstream just
12 a month or so ago, and Judge Hoffman in Murray Energy just two
13 or three weeks ago where they approved such fees in this
14 context. And with that, Your Honor, I'll stop speaking and
15 thank you for your patience.

16 THE COURT: Okay.

17 Anything else?

18 All right. Well, I think as I said in Aegean, that
19 the indenture trustees would be well-served to think in advance
20 about specifically how the fees are going to be justified, but
21 I believe I already approved these payments here. And if the
22 indenture trustee at issue was hired post-petition, that sounds
23 sufficiently ordinary course to me to not require a specific
24 application of the kind that's being requested.

25 Maybe I'll revisit that issue sometime in the future,

1 maybe not, but given what I've already done here and the
2 settlement I've already approved, I'm fine with it as it is.

3 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

4 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

5 THE COURT: Okay. Is there anything else?

6 MR. DURRER: Your Honor, Van Durrer for the debtors.

7 At the risk of taking another moment of everybody's time, I
8 wanted to underscore something and express our gratitude, not
9 only on behalf the debtors but also on behalf of myself and my
10 firm.

11 We live in a very different world than on Valentine's
12 Day, when we started this Chapter 11 case, give or take twenty-
13 four hours. And everyone has been extraordinary in terms of
14 their professionalism, their responsiveness, their
15 collaborativeness (sic), and I really wanted to thank
16 everybody, their advisors in particular, for the way that
17 they've comported themselves throughout this process.

18 At the risk of offending some people, I did want to
19 specifically call out a handful of names that really went above
20 and beyond with respect to chambers. Of course, Lorraine
21 Evevarria and Ron Howard have been terrific. Judge Carey,
22 that's our mediator, was very helpful throughout the process
23 and never gave up on us; I appreciate that. Ben Higgins for
24 the U.S. Trustee's office has been terrific and a great
25 professional, and we appreciate his conduct.

1 And then, selfishly, I did want to mention a couple of
2 people -- notwithstanding that we all live in four different
3 cities -- my team has really impressed me with their ability to
4 work as a team under really trying circumstances. That
5 includes Jennifer Madden, Ben Strucklick (phonetic), Destiny
6 Almogue, Moshe Jacob, and Jackie Dakin as well as our great
7 paralegals, Andrea Bates (phonetic), Chris Heaney (phonetic),
8 and Wanda Romano (phonetic).

9 So again, with apologies for indulging in a few
10 moments, I did want to thank everybody for that. It's a really
11 strange world, but you all made it as normal as it could
12 conceivably be. Thank you.

13 THE COURT: All right. Thank you. Okay. Is there
14 anything else that anybody wishes to add?

15 All right. If you'll, Mr. Ortiz, finish making those
16 modifications on the confirmation order and submit it in Word
17 format, we'll take a look at it and let you know if we have any
18 additional comments. But otherwise, I'm sure we will confirm
19 the plan.

20 MR. ORTIZ: Certainly, Your Honor. Thank you.

21 THE COURT: Okay. Very good. Thank you all very
22 much. We are adjourned.

23 (Whereupon these proceedings were concluded)
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C E R T I F I C A T I O N

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



Colin Richilano

eScribers

352 Seventh Ave., Suite #604

New York, NY 10001

Date: September 28, 2020

September 23, 2020

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