

In Re Case No. 22-50073 (JAM)

HO WAN KWOK, Bridgeport, Connecticut

Debtor. July 5, 2022

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APPEARANCES:

Proceedings recorded by electronic sound recording, transcript  
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1 (Proceedings commenced at 3:54 p.m.)

2 THE CLERK: Number 22-50073, Ho Wan Kwok.

3 THE COURT: Okay. Good afternoon. Court is -- we  
4 just had another hearing that ran long, so I'm sorry to keep  
5 everyone waiting. If we could have appearances for the  
6 record starting with the debtor's counsel, please?

7 MR. BALDIGA: Good afternoon. William Baldiga,  
8 Brown Rudnick, for the debtor.

9 THE COURT: Good afternoon. Counsel for PAX?

10 MR. FRIEDMAN: Good afternoon, Your Honor. It's  
11 Peter Friedman from O'Melveny & Myers. I see Mr. Sarnoff as  
12 well and Mr. Birney.

13 THE COURT: Good afternoon to all of you.

14 MR. BIRNEY: Good afternoon, Your Honor.

15 THE COURT: Counsel for the creditor's committee.

16 MR. GOLDMAN: Good afternoon, Your Honor. Irve  
17 Goldman, Pullman & Comley, counsel for the creditor's  
18 committee.

19 THE COURT: Good afternoon. Counsel for Rui Ma  
20 and the other creditors?

21 MS. MAYHEW: Good afternoon, Your Honor. Kristen  
22 Mayhew, McElroy, Deutsch, Mulvaney, & Carpenter, on behalf  
23 of creditors Rui Ma, Zheng Wu, and Weican Meng.

24 THE COURT: Good afternoon. And counsel for the  
25 U.S. Trustee?

1 MS. CLAIBORN: Good afternoon, Your Honor. Holley  
2 Claiborn for the U.S. Trustee.

3 THE COURT: Good afternoon. Do we anticipate  
4 anyone else? Oh, I'm sorry, Attorney Wolman. Go ahead. I  
5 didn't see you.

6 MR. WOLMAN: Good afternoon, Your Honor. Jay  
7 Wolman, of Randazza Legal Group, for creditor, Logan Cheng.

8 THE COURT: Good afternoon. I think that I've  
9 taken everyone's appearances. Is that correct?

10 Okay. All right. So today's hearing was a  
11 hearing on an application to appoint trustee and application  
12 for order approving the Chapter 11 trustee appointment,  
13 which was ECF No. 499, and a motion to expedite the hearing,  
14 which was filed on Thursday, June 20 -- 30, excuse me --  
15 Thursday, June 30, 2022. The order granting the motion to  
16 expedite entered, setting a hearing for today at 3:30 p.m.

17 It's 3:58. As I said, I'm sorry. We did -- our  
18 3:00 hearing ran later than we thought it might, but in any  
19 event, the motion to expedite was granted because the Court  
20 wasn't sure why the U.S. Trustee's Office had filed an  
21 application to appoint a trustee and asking for an order  
22 approving the appointment of a trustee, and then today,  
23 there was a withdrawal filed by the U.S. Trustee's Office of  
24 the application.

25 So, Attorney Claiborn, I'm not sure what is

1       happening here, but as of June 30, Mr. White -- I don't know  
2       if it's Whitley or Whitely, accepted the appointment as  
3       being a Chapter 11 trustee in documents filed on the docket  
4       of this case.

5               He also filed an affidavit saying he was a  
6       disinterested person and, therefore, appeared to meet all  
7       the requirements of a trustee and as of June 30, became the  
8       representative of this estate.

9               And then today, a withdrawal was filed by your  
10      office, signed by you on behalf of Mr. Harrington as the  
11      U.S. Trustee for this -- for this region.

12              So I'm a little confused as to where things stand,  
13      and why the U.S. Trustee's office felt it even needed an  
14      order approving the appointment because under -- the  
15      documents say under 1104(d), but 1104(d) doesn't come into  
16      effect when I've already ruled for the appointment of a  
17      trustee. So your office's role, I think is what you did.  
18      You appointed a trustee.

19              So what's the -- what's the issue now? Why is  
20      this being withdrawn?

21              MS. CLAIBORN: Thank you, Your Honor. The process  
22      is implemented through Rule 2007.1.

23              THE COURT: Yep.

24              MS. CLAIBORN: Subsection C.

25              THE COURT: No, but that subsection doesn't come

1       into effect unless there's a problem. 2007.1 says that in  
2       order to appoint a trustee or examiner in a Chapter 11 case,  
3       a motion for an order to appoint a trustee or an examiner --  
4       and that was -- that motion was already granted and that  
5       order entered.

6               So 2007.1 is already taken -- A is taken care of.  
7       The rest of the section talks about an election of a  
8       trustee, and there -- if there was an election of a trustee,  
9       your office would have to certify there was an election and  
10      say what the results were, and there's nothing on this  
11      docket that indicates this trustee was elected, number 1.

12             And number 2, if there's some problem with regard  
13      to this trustee, then it needs to be disclosed. Is the  
14      trustee resigning? Are you removing the trustee? Has the  
15      trustee passed away? I mean, those are the three grounds  
16      under which there would be a need for a court order. So --  
17      and this trustee is still the trustee until this trustee is  
18      not, so what is the status?

19             MS. CLAIBORN: Your Honor, getting back to the  
20      interplay between Rule 2007.1, Subsection C, and 1104(d),  
21      the process, as envisioned by the combination of that  
22      statute and that rule, is that the Court orders the U.S.  
23      Trustee to appoint a Chapter 11 trustee, and then the U.S.  
24      Trustee is to file an application that gets approved by the  
25      Court and, thereafter, if that approval is obtained from the

1 Court, then the Chapter 11 trustee who is appointed becomes  
2 effective.

3 So the U.S. Trustee has no current candidate  
4 before the Court, and there is no current Chapter 11 trustee  
5 before the Court.

6 THE COURT: Well, 1104(d) says, if the Court  
7 orders the appointment of a trustee or examiner, which I've  
8 already done in a memorandum of decision that was issued on  
9 June 15, if a trustee or examiner dies or resigns during the  
10 case or is removed under Section 324 of this title, or if a  
11 trustee fails to qualify under Section 322 of this title,  
12 then the United States Trustee, after consultation with  
13 parties in interest, shall appoint subject to the Court's  
14 approval, one disinterested person other than the United  
15 States Trustee to serve as a trustee or examiner as the case  
16 may be.

17 So it -- it already talks about the prior trustee  
18 dying or resigning or being removed. So 1104(d) deals with  
19 a successor trustee issue, not the original trustee. And so  
20 --

21 MS. CLAIBORN: Your Honor, I think it's important  
22 -- I apologize.

23 THE COURT: That's all right. And so, 2007.1 is  
24 premised on -- 2007.1(c), approval of appointment, is  
25 premised on 1104(d), which I just read, which is --

1 addresses the issue of when the trustee or examiner dies,  
2 resigns or is removed.

3 MS. CLAIBORN: Your Honor, 1104(d) has three  
4 topics, as it were, that start that section. One is if the  
5 Court orders the appointment of a Chapter 11 trustee or an  
6 examiner. Two, if a Chapter 11 trustee or examiner dies or  
7 resigns. Or three, if a trustee fails to qualify under  
8 Section 322.

9 So we are in the first section. If the Court  
10 orders the appointment, which the Court has, then you skip  
11 down to the part that says, the United States Trustee, after  
12 consultation with the parties in interest, shall appoint,  
13 subject to the Court's approval, one disinterested person to  
14 serve as the Chapter 11 trustee.

15 THE COURT: But we don't approve the appointment  
16 of trustees in Chapter 7 cases, in Chapter 13 cases, or in  
17 Chapter 11 cases. We've never entered orders approving the  
18 appointment of a trustee unless there was an election or a  
19 dispute with regard to the trustee.

20 So -- but that's still not answering the question.  
21 This is the trustee. How does the trustee just get to  
22 withdraw when they already said that they are -- accepted  
23 the appointment, and now five days later they don't?

24 Where is the trustee and why isn't the trustee  
25 here? How do you get to withdraw a trustee? We've already



1 -- we've now lost five days of which somebody was supposedly  
2 the representative of this estate and you don't have anybody  
3 else here, right? There's no successor trustee. So what is  
4 the plan?

5 MS. CLAIBORN: Your Honor, currently there is no  
6 Chapter 11 trustee appointed.

7 THE COURT: Well, that's not true.

8 MS. CLAIBORN: The U.S. Trustee withdrew -- Your  
9 Honor, I respectfully disagree with --

10 THE COURT: Okay. Sorry. Go ahead.

11 MS. CLAIBORN: -- the Court's interpretation of  
12 this section and the rule we've just been discussing.

13 It's the U.S. Trustee's viewpoint that the  
14 intersection of the rule and the section require a process  
15 that the U.S. Trustee has engaged in, and that process  
16 includes the notice of appointment. It includes the  
17 application to ask the Court to approve the appointment and  
18 that process also offers the opportunity for anyone to come  
19 in and have comments or criticisms or objections to the  
20 appointment and for that process to play out.

21 We are here today after the U.S. Trustee has  
22 withdrawn the notice of appointment and has withdrawn the  
23 application to approve the appointment and that withdrawal  
24 happened due to a late arrival of information that happened  
25 this morning with respect to a conflict search.

1           The U.S. Trustee takes the role of finding a  
2           disinterested person who is qualified to perform the  
3           services of the Chapter 11 trustee seriously, and as a  
4           result of information that was provided this morning,  
5           determined that it was no longer appropriate to put forward  
6           that candidate and, therefore, withdrew the application.

7           The U.S. Trustee is now engaged in trying to fill  
8           the role with another candidate.

9           THE COURT: So you're saying as of this morning  
10          the trustee disclosed more information that resulted in the  
11          determination that the trustee has a conflict of interest  
12          and is not a disinterested person?

13          MS. CLAIBORN: Correct.

14          THE COURT: Even though the trustee --

15          MS. CLAIBORN: Correct.

16          THE COURT: -- signed an affidavit that said he  
17          was?

18          MS. CLAIBORN: Correct.

19          THE COURT: Well, isn't that a problem.

20          MS. CLAIBORN: Your Honor, it is unfortunate and  
21          the timing of this does cause a delay for which the U.S.  
22          Trustee is also unhappy about but, nevertheless, it's  
23          appropriate to select and install a person who is conflict  
24          free and who has the appearance that he can be impartial to  
25          all parties involved in this case.

1           And the determination was made by the U.S. Trustee  
2           that it was appropriate to withdraw that trustee who was  
3           noticed last week and, therefore, that's what I did today.

4           THE COURT: Well, but it's not a withdrawal,  
5           because you're saying he's not qualified now. He doesn't  
6           meet the qualification, so it's a removal because he's the  
7           trustee.

8           MS. CLAIBORN: Your Honor --

9           THE COURT: He accepted the appointment --

10          MS. CLAIBORN: Your Honor, that --

11          THE COURT: -- as of June 30, and he posted a bond  
12          --

13          MS. CLAIBORN: Your Honor, I respectfully disagree  
14          with the Court.

15          THE COURT: -- and he submitted an affidavit.

16          MS. CLAIBORN: The appointment --

17          THE COURT: I already ordered the appointment.

18          MS. CLAIBORN: -- (indiscernible) become  
19          effective in the case.

20          THE COURT: I ordered the appointment of a trustee  
21          on June 15th.

22          MS. CLAIBORN: Your Honor directed the U.S.  
23          Trustee to appoint a Chapter 11 trustee by order that  
24          entered on June 15th.

25          THE COURT: That is correct.

1 MS. CLAIBORN: Correct.

2 THE COURT: And you did that. Now you're saying  
3 this person is not qualified. Well, that -- there should be  
4 a process -- you can't withdraw it. How would anybody know  
5 that this person isn't -- isn't -- no longer qualified? How  
6 is that transparent? And what's the conflict?

7 I mean, he signed an affidavit saying that he had  
8 no conflicts and that he was a disinterested person. That's  
9 what he said.

10 The Court has to be able to -- and the creditors  
11 and the public have to be able to rely on that. So this  
12 should be a removal. This should be a motion to remove the  
13 trustee for being -- not being qualified under Section 324  
14 of the code.

15 I don't think you can withdraw the application.  
16 You've already appointed him, subject to approval. So maybe  
17 I don't approve it, but you can't not tell everybody what  
18 the problem is. The problem is there is some conflict of  
19 interest that came up today when the individual already  
20 signed a document that accepted the appointment and  
21 submitted an affidavit that said he had no conflict of  
22 interest and was a disinterested person.

23 So how does that -- I mean, I don't see how you  
24 can withdraw the appointment. I don't see it. There's  
25 nothing in the code that allows that to happen. The removal

1 of a trustee --

2 MS. CLAIBORN: Your Honor, by virtue of the --

3 THE COURT: -- or examiner is under Section 324.

4 MS. CLAIBORN: Your Honor, the appointment and the  
5 approval process is set forth, as we discussed today, in  
6 1104(d), and section -- sorry, Rule 2007.1.

7 THE COURT: I don't -- you know, I --

8 MS. CLAIBORN: And the process has not been  
9 finished, the appointment has not been approved, and the  
10 U.S. Trustee, based upon the information provided today,  
11 determined that it was appropriate to withdraw the notice of  
12 appointment which we have done.

13 THE COURT: Yeah, but you didn't say why. If I  
14 didn't have this hearing, nobody would know why.

15 MS. CLAIBORN: Your Honor, that's correct. The  
16 withdrawal does not cite a reason, and due to the  
17 governmental privilege and the deliberative process that the  
18 U.S. Trustee engages in, I am not in a position to share  
19 that reasoning or that discussion with the Court or with the  
20 parties.

21 But it was in the best interest of the estate and  
22 the creditors and the process to not pursue the selected  
23 candidate.

24 THE COURT: Does anyone else wish to be heard on  
25 this issue, because we've now lost five days of which

1       somebody was supposedly in charge of this estate. And then  
2       what happens? What if something happened in the last five  
3       days? You're saying, oh, and by the way -- so you're saying  
4       that even though there was a trustee appointed and you note  
5       -- you had -- you noticed it, it really didn't take effect  
6       until there is a court order. That's crazy.

7               MS. CLAIBORN: That's correct, Your Honor.

8               THE COURT: I already ordered the appointment of  
9       the trustee. If someone wants to object to the --

10              MS. CLAIBORN: Your Honor entered an order  
11       directing the U.S. Trustee to appoint a trustee --

12              THE COURT: I didn't direct anybody. I granted a  
13       motion --

14              MS. CLAIBORN: -- and that's the process.

15              THE COURT: -- that said a trustee shall be  
16       appointed. That's what it said.

17              MS. CLAIBORN: Correct. And there's a process  
18       that follows and so that's what we had done.

19              THE COURT: Well, I -- the process is broken then,  
20       if that's the process. Does anyone else wish to be heard?  
21       Attorney Friedman, I think I saw you raise your hand.

22              MR. FRIEDMAN: Yes, Your Honor. You know, for  
23       what it's worth, I do think 1104 may be read to have the  
24       *if/or*, and that the Court may have ultimate authority to  
25       approve any application, the same as any other professional.

1           But I think more fundamentally, we are concerned.  
2       You know, there are issues. The Lady May will be returned.  
3       We had hoped that when the order was entered on June 15th,  
4       that, you know, that there would be a trustee in place to  
5       deal with that so PAX didn't have to. Our concern has  
6       always been, there's no funding for the estate. Perhaps the  
7       trustee, had it been appointed quickly, could have addressed  
8       that.

9           We now have a boat being returned, an inspection  
10      has to be conducted, there's still no money in the estate to  
11      deal with that. If PAX has to deal with that, obviously, it  
12      will have to file substantial contribution motion.

13          You know, the Court's order, which we respect and  
14      we reviewed was without prejudice, but in the absence of a  
15      trustee being able to take command, one who we would be --  
16      you know, we -- let me take a step back.

17          We reached out to the trustee immediately to have  
18      discussions, the proposed trustee. You know, we were  
19      prepared to try to work cooperatively because we read what  
20      the Court's opinion said, noting that it was without  
21      prejudice.

22          But what -- the absence of a trustee causes  
23      prejudice. The estate is already being prejudiced. We  
24      think, as the Court knows, that PAX is by far the  
25      overwhelming creditor of this estate, and so it's being

1 prejudiced by this delay.

2 You know, we respect the Court's decision and  
3 that's why we didn't appeal because it was without  
4 prejudice, but if -- if sort of, this is the way the case is  
5 going, we're going to have to reinstitute our motion, you  
6 know, sooner rather than later, because we think that there  
7 is prejudice to PAX already by the delay in time. And you  
8 know, we'll be sort of guided accordingly.

9 If there is a fast appointment, again, we will try  
10 in good faith to work cooperatively. But without a trustee  
11 in place, you know, there's a vacuum here.

12 If PAX has to step up, there will be substantial  
13 contribution motions. PAX is already going to have to file  
14 one, I think, you know, to deal with the return of the boat.

15 And we just want that to be clear that if there's  
16 no one else to pay for things -- you know, and PAX may have  
17 to address that and seek compensation from the estate on,  
18 you know, a very quick basis. Your Honor, this is an  
19 unfortunate circumstance with delay.

20 THE COURT: Anyone else wish to be heard?

21 MR. BALDIGA: Yes, Your Honor. William Baldiga.

22 MR. GOLDMAN: I think --

23 MR. BALDIGA: Go ahead, Irve. I'm sorry.

24 MR. GOLDMAN: I think this temporary setback ought  
25 to be used as some sort of platform to revisit the --



1 THE COURT: Mr. Baldiga, I can't hear you. You  
2 need to speak into your microphone a little bit more,  
3 please. I can't hear you.

4 MR. GOLDMAN: It's Mr. Goldman, Your Honor.  
5 I'll --

6 THE COURT: Oh, okay, Mr. Goldman. I thought Mr.  
7 Baldiga was talking. Go ahead.

8 MR. GOLDMAN: Yeah. I'll try to adjust my volume  
9 here. Your Honor.

10 THE COURT: Go ahead. Let's see if we can hear  
11 you.

12 MR. GOLDMAN: Is this any better?

13 THE COURT: Let's -- go ahead and speak.

14 MR. GOLDMAN: Yep. No, what I was going to say  
15 was, the -- or what I did try to say was that I don't think  
16 this temporary setback should be used as some sort of  
17 platform to revisit the dismissal motion.

18 I expect that the U.S. Trustee is going to move  
19 with expedition. We will all work together, as we did with  
20 respect to this appointment and we will get a trustee in  
21 place.

22 And I've already indicated to Mr. Friedman that  
23 the committee conceptually has no problem with a substantial  
24 contribution claim. We recognize that if they step up and,  
25 for example, have to pay for the inspection, that it should

1 be a considered a substantial contribution.

2 So I don't see that there are any issues right now  
3 that the Court needs to address, other than to try to get a  
4 handle on when the U.S. Trustee might expect to appoint --

5 THE COURT: Well, okay --

6 MR. GOLDMAN: -- the next trustee.

7 THE COURT: -- I understand what you're saying,  
8 Attorney Goldman, but there's nothing in this record other  
9 than this hearing right now that has any information to  
10 anyone about why this trustee, who accepted the appointment  
11 and filed a docket -- document on this docket, accepting the  
12 appointment and saying that he has no -- had no -- he was  
13 disinterested and had no conflicts, and then come today --  
14 he certainly -- he suddenly does. That's a problem.

15 So the last -- who knows what's happened in the  
16 last five days of this case when there supposedly was a  
17 trustee in place.

18 And I understand what you just said, but I think -  
19 - the Court is very concerned about it. I think it's -- I  
20 think it's -- you know, the -- it was issued on -- everybody  
21 kept saying, the Court has to act quickly and everybody knew  
22 that the -- a trustee was a possibility, but yet it took two  
23 weeks to get a trustee and then five days later the trustee  
24 whatever -- which by the way, I don't agree that the trustee  
25 isn't a trustee right now, but that's the position that's

1       being taken.

2               Now we're five days after that and there's no  
3 trustee. And now how long is it going to take to get  
4 another trustee? And what happens if something happens  
5 during this time frame?

6               I'm very disappointed in this whole process. It's  
7 not as if this hasn't been on the table since, oh, I think  
8 the middle of March and it's July 5th.

9               So I don't know -- you know, I'm not worried about  
10 substantial contribution and dismissal right now. I've  
11 heard all those issues. I know those issues. What I'm  
12 worried about is where is the trustee? I ordered it on June  
13 15th, after everyone said I had to act quickly, which I did  
14 to the best of my ability and I didn't do it in 15 days, I  
15 did it in 17 days. Okay. Where is the trustee?

16              So what's the next step, Attorney Claiborn? When  
17 is the U.S. Trustee's office going to have another trustee,  
18 which it is another trustee in my mind, whether or not you  
19 agree with that.

20              And I'm not suggesting that this trustee has been  
21 -- this gentleman, who said he was disinterested and  
22 accepted the appointment, is not subject to some kind of  
23 claim someone could bring against him for these five days,  
24 or however many days he's the trustee until there's a  
25 successor trustee.

1           The only thing that the code talks about in any  
2       kind of vacancy of a trustee is if a trustee dies or  
3       resigns. Neither one of those things apparently has  
4       happened. So what's the plan?

5           MS. CLAIBORN: Your Honor, the U.S. Trustee, as  
6       soon as the order entered directing U.S. Trustee to appoint  
7       a Chapter 11 trustee, engaged in a appropriate request of  
8       the parties for input and solicitation as to appropriate and  
9       suitable candidates.

10          Thereafter, the U.S. Trustee conducted a number of  
11       interviews over a number of days with many candidates. And  
12       as part of that interview process and that vetting process  
13       candidates were asked to submit and perform some conflict  
14       checks. As it turns out, the particular candidate selected  
15       ultimately uncovered something that was important enough for  
16       the U.S. Trustee to withdraw the selection.

17          So the U.S. Trustee will now go to alternate  
18       candidates and will select an appropriate candidate as soon  
19       as possible. The U.S. Trustee is very aware that this is an  
20       urgent situation and the U.S. Trustee is taking it very  
21       seriously and all I can say is that we are acting as quickly  
22       as we can. I cannot promise a date, but we know that it is  
23       important.

24          THE COURT: Well, I don't agree that you have the  
25       ability to withdraw, so that's -- I don't -- I've never seen

1 a case. You show me a case where the U.S. Trustee's office  
2 has a --

3 MS. CLAIBORN: Your Honor --

4 THE COURT: -- ability to withdraw the appointment  
5 of a trustee. I don't --

6 MS. CLAIBORN: Your Honor, you may have -- Your  
7 Honor has done it before, actually, in the case of *Perilla*.

8 THE COURT: When we had a successor trustee in  
9 place. There was a difference.

10 MS. CLAIBORN: No, the original --

11 THE COURT: We had a successor --

12 MS. CLAIBORN: The original appointment of Steve  
13 Cohen.

14 THE COURT: -- and the original trustee actually  
15 served as a trustee. There's a difference. A big  
16 difference.

17 MS. CLAIBORN: Correct, but the original  
18 appointment of Trustee Cohen was done pursuant to the same  
19 process.

20 THE COURT: The creditors all agreed in that case.  
21 That was -- that's a different situation and I think this  
22 process doesn't make any sense.

23 Either you have -- you appoint someone, or you  
24 have a vote and you -- that's what the -- that's what the  
25 code sections require. That's what it says.

1           And you didn't have a vote. You appointed  
2           somebody, and the person said that they accepted the  
3           appointment and that they had no -- and they were  
4           disinterested.

5           You can't then just say, withdraw. Why? Why  
6           shouldn't the person have to come in here and explain the  
7           problem? He accepted it. He's made statements under  
8           penalty of perjury that's in this docket.

9           Why shouldn't he have to come in and explain why  
10          he's no longer qualified, or why shouldn't you have to file  
11          a motion to remove him, to explain everything to everyone,  
12          because if we didn't have this hearing, there would be no  
13          explanation that anyone would understand as to why this  
14          trustee is not serving in this case according to the United  
15          States Trustee's office.

16          So why shouldn't you have to file the --

17          MS. CLAIBORN: Your Honor, can I --

18          THE COURT: -- why -- you know, you cite to Rule  
19          2007. Well, look at section of the Bankruptcy Code 324 that  
20          says removal of trustee or examiner. This gentleman already  
21          accepted the appointment under an order in which he was --  
22          that this Court directed the appointment of that Chapter 11  
23          trustee.

24          So according to you then every time there's a  
25          Chapter 11 trustee appointed, we're going to have to wait

1 another -- if you didn't do an expedited hearing, when were  
2 we going to have the hearing? So it could be 30 days. How  
3 does that possibly make sense?

4 When a court rules that a Chapter 11 trustee is  
5 appointed, and then the U.S. Trustee's office appoints one,  
6 and then the U.S. Trustee's office can say, no, that's all  
7 right, I'm going to take that back. I don't think that's  
8 how it works and that's not the way it should work.

9 If there's a problem, you file a motion. You say  
10 that -- I'm -- we're removing him because he's no longer  
11 qualified, because he discovered something that he didn't  
12 discover at the time and we're moving with all due speed to  
13 get a successor trustee appointed.

14 But you don't get to -- he doesn't get to just  
15 walk away as if he was -- never accepted the appointment,  
16 and that's essentially what you're allowing him to do.  
17 You're allowing him to absolve himself of any liability that  
18 he -- that he incurred when he agreed to be appointed as the  
19 trustee.

20 MS. CLAIBORN: Your Honor, it's the U.S. Trustee's  
21 position that until the appointment is approved by the  
22 Court, the U.S. -- the Chapter 11 trustee is not installed  
23 as the Chapter 11 trustee, because that --

24 THE COURT: So is that going to be true in all  
25 Chapter 7 cases --

1 MS. CLAIBORN: -- is part of a process --

2 THE COURT: -- and Chapter 13 cases as well,  
3 because all the same sections of the code apply with regard  
4 to the qualifications of a trustee. And in Chapter 7  
5 they're supposed to vote on the trustee at 341 meetings, but  
6 that doesn't happen, because that's what the code says.

7 MS. CLAIBORN: Only if there is an election  
8 process --

9 THE COURT: -- that a trustee is an interim  
10 trustee until after the 341 meeting where the creditors are  
11 supposed to elect the trustee. That doesn't happen.

12 MS. CLAIBORN: Creditors have the right to --

13 THE COURT: Same as Chapter 13 trustees.

14 MS. CLAIBORN: -- ask the Court to have an  
15 election process. That has not been done in this case.

16 THE COURT: No, I'm not asking about this case.

17 MS. CLAIBORN: That process --

18 THE COURT: I'm saying, you don't follow the  
19 process in the Chapter 7 and 13 cases where the trustee is  
20 supposed to only be an interim trustee and then be elected  
21 by the creditors at a -- at 341 meeting in Chapter 7 and 13.

22 MS. CLAIBORN: Correct.

23 THE COURT: So why are we doing that? It makes  
24 absolutely no sense to say the trustee isn't the trustee  
25 until after there's an order appointing him, approving the



1 appointment, when I already ordered that he be appointed.

2 The Court doesn't -- why am I approving anything  
3 you do? It doesn't matter. I already said it's your office  
4 that's responsible for the appointment, not the Court.

5 And those sections that you're reading those deal  
6 with different issues than when there is a court order  
7 deciding that a trustee should be appointed. So I mean,  
8 that's fine. I understand your position, I don't agree with  
9 it.

10 So what's the plan? So are we going to have  
11 another hearing tomorrow or the next day, because I'm going  
12 to have one. I want to know when this trustee is going to  
13 be appointed. And it's going to be a successor trustee.  
14 That -- I mean, because by the way, the code and the rules  
15 talk about successor trustees.

16 This gentleman can't escape liability just because  
17 he's now found that he's got a conflict. I mean, we deal  
18 with this all the time in debtor's counselor and other  
19 professionals, and you -- and the argument is, well, they  
20 said they didn't have a conflict, but now they do.

21 Well, then there should be a ramification for  
22 that. There should be some responsibility for that, and  
23 there shouldn't be a Chapter 11 debtor who, you know, since  
24 June 15, wasn't -- isn't supposed to be in control of the  
25 estate, but he still is apparently. And he's still going to

1 be until a new trustee is appointed.

2 So I don't agree with you that Mr. Whitely doesn't  
3 have any liability in this case, because he does from the  
4 Court's perspective.

5 He accepted the appointment and he said he had no  
6 conflict of interest, and no -- and he was a disinterested  
7 party.

8 And if he later discovers there's a problem, then  
9 you move to remove him under the code, under Section 342 of  
10 -- 24 of the code. That's what you do. That's how it  
11 should be handled, not a withdrawal of an application. He's  
12 already accepted the position.

13 So what time are we having a hearing tomorrow so I  
14 can find out when the successor trustee is going to be  
15 available?

16 MS. CLAIBORN: Your Honor, with all due respect, I  
17 may not have an answer for the Court tomorrow as to whether  
18 or not there is a time frame during which I can tell the  
19 Court that a Chapter 11 trustee will be installed.

20 All I can tell the Court is that the U.S. Trustee  
21 is actively working on this situation, we are actively  
22 communicating with people and the process will be done as  
23 soon as it is possible to do so.

24 THE COURT: Attorney Friedman. Attorney Goldman.

25 MR. FRIEDMAN: Your Honor.

1 THE COURT: Attorney Mayhew.

2 MR. FRIEDMAN: Okay. I'm sorry.

3 THE COURT: Have you -- have your clients  
4 identified anyone that they would want to act as the Chapter  
5 11 trustee in this case?

6 MR. FRIEDMAN: Your Honor, we -- it's Peter  
7 Friedman.

8 We have consulted with the U.S. Trustee and made a  
9 recommendation. We have also consulted with other creditors  
10 and, you know -- and indicated other names of candidates who  
11 would be acceptable to our clients.

12 MR. GOLDMAN: Your Honor, on behalf of the  
13 Committee, we did submit two names for consideration for the  
14 trusteeship (indiscernible) with PAX and the U.S. Trustee  
15 concerning the preference. So we've gone through that  
16 process.

17 MS. MAYHEW: And on behalf of the creditors, Your  
18 Honor, we also consulted with the United States Trustee's  
19 office and joined in the recommendation of the creditor's  
20 committee.

21 THE COURT: Okay. Well, I'm going to order --

22 UNIDENTIFIED SPEAKER: Your Honor --

23 THE COURT: -- you all to --

24 UNIDENTIFIED SPEAKER: -- Your Honor, but --

25 THE COURT: -- meet tomorrow, and I want to know

1 where we are on the trustee by first thing Thursday morning.  
2 This is unacceptable. This is unacceptable.

3 This is now a situation where this debtor in  
4 possession has been in control of this estate for a period  
5 of now more than 20 days -- 21 days since the order  
6 appointing the trustee, which didn't come from thin air, was  
7 entered. And I'm not going to allow this to happen again.

8 If I have to order you to have a vote, you'll have  
9 to have a vote. This is just unacceptable, and I'm just --  
10 I will decide at the end of the day how -- where this all  
11 comes out.

12 But if I find out that something happened during  
13 these five days, I'm not going to be happy about it. Or  
14 these six days, or these seven days, or however many days it  
15 takes to get a trustee in place.

16 So all the creditors, you need to set up a call  
17 with Attorney Claiborn and Attorney Harrington, if you need  
18 to have Attorney Harrington involved, the U.S. Trustee  
19 involved. But this -- there has to be a trustee appointed  
20 in this case.

21 And this form over substance process -- so every  
22 single time there's a Chapter 11 trustee appointed, we have  
23 to have an emergency hearing to enter another order to  
24 approve -- that doesn't make any sense.

25 If someone doesn't like the trustee, they can move

1 to remove him. It's just form over substance. Just  
2 complete form over substance. The job of the U.S. Trustee's  
3 office is to appoint the trustee. You did that. He has a  
4 conflict, then he should have to be removed and disclose the  
5 conduct -- the conflict to this Court.

6 The fact that none of this was disclosed and none  
7 of this would happen if this hearing didn't go forward, is  
8 unacceptable to this Court and it should be to all of you as  
9 well.

10 So what time are you going --

11 UNIDENTIFIED SPEAKER: Your Honor --

12 THE COURT: -- to meet and who's going to report  
13 back to the Court --

14 UNIDENTIFIED SPEAKER: Your Honor, that --

15 THE COURT: -- tomorrow on when a Chapter 11  
16 trustee is going to be appointed?

17 I'll just make it easier for you. We're going to  
18 have a hearing tomorrow at 3:00 p.m. and it will be virtual.  
19 And you will all tell me where things stand on the  
20 appointment of a Chapter 11 trustee.

21 And I expect the U.S. Trustee's office to make  
22 themselves available to all the creditors in this case and  
23 to make sure that this appointment happens very, very, very  
24 soon, because where we stand now is just very unfortunate.

25 Does anyone have any questions?

1 MR. BALDIGA: Your Honor, it's William Baldiga.

2 Yes. Yes.

3 THE COURT: Go ahead, Attorney Baldiga.

4 MR. BALDIGA: It's Mr. Baldiga. Can you hear me?

5 Yes, thank you.

6 I was inferring initially from your comments that  
7 the debtor would be able to participate in those  
8 conversations, as generally the case.

9 The U.S. Trustee, as appropriate, did reach out to  
10 us immediately at the entry of the Court's order. We  
11 responded in kind as to thoughts as to a trustee, which I  
12 understand is customary. We would expect to continue in  
13 that process and I just didn't want your comments to be  
14 taken to exclude us from that.

15 THE COURT: Okay. I understand.

16 MR. BALDIGA: Second -- okay. Second, I do  
17 inquire as to what information has occurred or has been  
18 brought forth. I understand from Ms. Claiborn that there  
19 may be an assertion of a privilege with which I'm just not  
20 familiar, but I do make that inquiry as to what happened.

21 THE COURT: Are you asking her to tell you this on  
22 the record right now, Attorney Baldiga?

23 MR. BALDIGA: I would respect that -- if she  
24 preferred to that privately, I would respect that. But I am  
25 making that request. I -- I'm not --

1 THE COURT: Well, I'm not sure the Court would  
2 respect that. If there -- I want to know why this person is  
3 -- is not -- no longer qualified. And if you have to file  
4 it under seal, file it under seal, but I think it's  
5 unacceptable to have proceeded this way and to withdraw the  
6 appointment and not disclose to anyone what the reason is.

7 And as I have said, and I will say again, Mr.  
8 Whitely accepted that appointment and filed documents under  
9 penalty of perjury in this case that he was a disinterested  
10 person.

11 So I -- you know, I don't agree that this form  
12 over substance order needs to have entered for him to have  
13 -- he's already posted a bond.

14 So are you saying that the bonding company is  
15 going to say that the bond doesn't go into effect until  
16 there's an order entered? Well, that's interesting, because  
17 that doesn't happen in Chapter 7 and Chapter 13 cases.

18 MS. CLAIBORN: Your Honor, to my knowledge Mr.  
19 Whitely has not posted a bond.

20 THE COURT: Okay. All right. What time did I say  
21 we're going to have this hearing tomorrow?

22 THE CLERK: 3:00.

23 THE COURT: 3:00 p.m. All right. So you can all  
24 reach out to the courtroom deputy and obtain the information  
25 for the hearing and I want to hear what the progress is and

1 I want to know how long it's going to take, because it's  
2 been 20 days since that order that everyone insisted needed  
3 to enter right away, and it did, and we still don't have a  
4 trustee.

5 Anyone else have any questions?

6 (No audible response)

7 THE COURT: Okay. That concludes today's hearing.  
8 Thank you.

9 MS. MAYHEW: Thank you.

10 THE CLERK: Court is adjourned.

11 (Proceedings concluded at 4:34 p.m.)

12 I, CHRISTINE FIORE, court-approved transcriber and  
13 certified electronic reporter and transcriber, certify that  
14 the foregoing is a correct transcript from the official  
15 electronic sound recording of the proceedings in the above-  
16 entitled matter.

17  
18 

19 \_\_\_\_\_ July 13, 2022

20 Christine Fiore, CERT

21 Transcriber  
22  
23  
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