UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

**NOT FOR PUBLICATION**

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| In re: | : | Chapter 11 |
| **FLAG TELECOM HOLDINGS LIMITED,** | : | Case Nos. 02-11732 through |
| **FLAG LIMITED,** | : | 02-11736,and 02-11975 |
| **FLAG PACIFIC USA LIMITED,** | : | through 02-11979 (ALG) |
| **FLAG TELECOM GROUP SERVICES LIMITED,** | : | (Jointly Administered) |
| **FLAG TELECOM USA LTD.,** | : | |
| **FLAG ASIA LIMITED,** | : | |
| **FLAG ATLANTIC HOLDINGS LIMITED,** | : | |
| **FLAG ATLANTIC LIMITED,** | : | |
| **FLAG ATLANTIC USA LIMITED** | : | |
| Debtors. | : | |
| **FLAG TELECOM GROUP LIMITED, FLAG ASIA LIMITED, FLAG TELECOM ASIA LIMITED, FLAG TELECOM TAIWAN LIMITED and FLAG TELECOM JAPAN LIMITED** | : | |
| Plaintiffs, | : | |
| -against- | : | Adv. Proc. No. 03-06712 |
| **KENSINGTON INTERNATIONAL, LTD., SPRINGFIELD ASSOCIATES, LLC, ELLIOTT ASSOCIATES, L.P., ELLIOTT INTERNATIONAL, L.P., WILMINGTON TRUST COMPANY, and THE BANK OF NEW YORK** | : | |
| Defendants. | : | |

**SUPPLEMENTAL OPINION**

**ALLAN L. GROPPER**
**UNITED STATES BANKRUPTCY JUDGE**

The above-captioned plaintiffs (collectively the "Companies") have settled a proposed form of judgment in connection with the Court's Decision granting the Companies' motion for summary judgment, 320 B.R. 763 (Bankr. S.D.N.Y. 2005). Defendants Kensington International, Ltd., Springfield Associates, LLC, Elliott Associates, L.P., and Elliott International, L.P. (collectively, the "Elliott Group") and the Indenture Trustee for the Series A, B, and C Notes, Bank of New York ("BNY"), object to certain provisions of the proposed judgment. The purpose of this memorandum is to set forth the reasons for the judgment entered concurrently herewith.[1]

The parties are in disagreement on two issues contained in the proposed form of judgment. First, the Companies have requested that the Elliott Group be charged with attorney's fees, which include costs of the Debtors, including the fees of BNY and the Collateral Trustee under the Alcatel Note, Wilmington Trust Co. ("WTC").[2] Second, the Companies seek an order directing WTC and BNY to release the collateral securing the Notes and the Alcatel Note (the "Collateral") once judgment is entered.

## I. The Companies are Not Entitled to Attorney's Fees

The Companies argue that the Court has discretion, pursuant to the Indenture for the Series A, B and C Notes, to require the Elliott Group to reimburse them for their

[1] Capitalized terms used but not defined herein have the meaning given to them in the Court's Decision.
[2] The Companies initially refused to pay WTC's and BNY's attorney's fees, as required by the Alcatel Note and the Notes issued under the Indenture. This dispute has been resolved by separate stipulations, and the Companies have agreed to pay attorney's fees for WTC and BNY. The only issue remaining as to these fees is whether the Elliott Group should reimburse the Companies for these expenses.

attorney's fees and costs in connection with this adversary proceeding. For their contractual right to fees, they rely on § 9.07 of the Indenture, which provides

> the court may in its discretion assess reasonable costs, including reasonably [sic] attorney's fees, against any party litigant . . . provided however, that the provisions of this Section 9.07 shall not apply to any action, suit or proceeding instituted by any one or more holders of Securities holding in the aggregate more than 5% in principal amount of the Securities of any series outstanding . . . .

(Indenture at 48.) The Elliott Group argues among other things that the Indenture does not require them to pay attorney's fees because they hold more than 5% of the outstanding Notes under the Indenture.

This dispute can be resolved by a fair application of the terms of the Indenture. No party disputes that the Elliott Group holds more than 5% of the outstanding Notes under the Indenture, and thus would not be liable for attorney's fees if it had "instituted" this adversary proceeding. The Companies contend that the exception does not apply because the Elliott Group did not institute the suit. However, this action was filed by the Companies seeking declaratory and injunctive relief to prevent the Elliott Group from following through with its stated intention (i) to call a default on the Alcatel Note, and (ii) to call a cross-default and institute suit on the Series A, B, and C Notes. It is black letter law that the existence of a declaratory remedy should not alter substantive rights simply because a prospective defendant is able to commence a suit as a plaintiff. *Nashville, C. & S. L. Ry. v. Wallace*, 288 U.S. 249 (1933). The provisions of § 9.07 of the Indenture should not vary simply because the issuer sues a large holder to prevent the holder from taking action. In other words, the Companies cannot fairly charge the Elliott Group with its legal fees merely by beating Elliott to the courthouse steps. The Companies' request for legal fees is denied.

**II. The Release of the Collateral**

Next, the Companies seek to have BNY and WTC release the Collateral. The Companies' position is that they were successful on their motion for summary judgment and that the Collateral for the Notes should be released as part of final relief awarded in the case. The Elliott Group argues that the release of the Collateral is premature as it intends to appeal; BNY agrees with Elliott and has filed a more formal motion for "Relief Preserving Collateral." In that motion, BNY argues that the Court's Decision is not final as it is subject to appeal and the Noteholders would be irreparably harmed by a release of the Collateral if the Decision were reversed.

The arguments of the Elliott Group and BNY are classic arguments as to why the Court should grant a stay pending an appeal. Even though BNY has called its motion one for "Relief Preserving Collateral", the relief it seeks is properly dealt with in a motion for a stay pending appeal. If the parties timely file a notice of appeal, the Court will treat BNY's motion as a motion for a stay pending appeal and will consider all other papers submitted on the issue as well. If further briefing is required, the parties are directed to contact chambers and propose a prompt schedule. In the meantime, the status quo should be preserved and the judgment will provide that the current stay relating to the Collateral (originally imposed by Judge Drain in the order on FLAG's motion for a preliminary injunction) remains in place pending the hearing and determination of a motion for a stay pending appeal.

Dated: New York, New York
May 12, 2005

*/s/ Allan L. Gropper*
UNITED STATES BANKRUPTCY JUDGE