

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

United States Bankruptcy Court  
Southern District Of New York  
Case No. 12-11076

----- X

In The Matter Of:

ARCAPITA BANK B.S.C. (C), ET AL,

Debtors.

----- X

U.S. Bankruptcy Court  
One Bowling Green  
New York, New York

June 10, 2013  
11:35 A.M.

B E F O R E:  
Hon Sean H. Lane  
U.S. Bankruptcy Judge

1 Hearing Re: Subordination Of The Tide Claims

2

3 Doc. #1108 Memorandum Of Law/Debtors' Memorandum Of Law In

4 Support In Support Of Subordination Of The Tide Claims

5 Pursuant To The Confirmation Of The Second Amended Joint

6 Plan Of Reorganization Of Arcapita Bank B.S.C. (C), Et Al.

7

8 Doc. #1157 Motion To Approve Debtor In Possession Financing

9 Debtor' Motion For Order Pursuant To 11 U.S.C. §§ 105, 362,

10 363 (B)(1), 363(C)(1), 364 (C)(2), 364(C)(3), 364 (E) And

11 552 And Bankruptcy Rules 4001 And 6004 Authorizing The

12 Debtors To Obtain Replacement Postpetition Financing To

13 Repay Existing Postpetition Financing

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed By: Lee M. Sapp

1 A P P E A R A N C E S :

2 GIBSON DUNN

3 Attorneys For Debtors

4 200 Park Avenue

5 New York, New York 10166-0193

6

7 By: Craig Millet, Esq.

8 Matthew Williams, Esq.

9 Michael Rosenthal, Esq.

10

11 LATHAM & WATKINS LLP

12 Attorneys For Debtors

13 885 Third Avenue

14 New York, New York 10022-4834

15

16 By: Mitchell Seider, Esq.

17

18 MILBANK, TWEED, HADLEY & MCCLOY LLP

19 Attorneys For debtors

20 One Chase Manhattan Plaza

21 New York, New York 10005-1413

22

23 By: Evan Fleck, Esq.

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Attorneys For Captain Honey  
Address or firm information not provided

By: Tally Weiner, Esq.

Attorneys For Tide  
Address or firm information not provided

By: Troy Woods, Esq.

UNITED STATES OFFICE OF THE TRUSTEE

Attorneys for United States Trustee  
33 Whitehall St  
New York, New York 10004

BY: Richard Morrissey, Esq.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

The Court: Good morning, please be seated.

UNIDENTIFIED SPEAKER: Good morning, Your Honor.

THE COURT: We're here in Arcapita Bank B.S.C. et al for a hearing on a few different matters including the debtors motion for financing -- replacement post petition and financing as well as a hearing on an issue that's related to confirmation and subordination but is sufficiently discreet that I asked for folks to tee it up today in advance of two hours confirmation hearing. And I just want to let folks know what we were doing before we came out here. There is a request for a bench conference -- I'm sorry chamber's conference which sometimes can be useful in cases of parties want to have more candid conversations consistent with my practice of always in those instances having every party who is a party in interest to a particular matter be present for the chamber's conference. Everybody was so present in related to the financing motion and at that time I shared thoughts that I was going to share and will share now at the hearing. The financing motion is not -- is -- has been teed up for today. There's one objection to it and that objection as I understand is -- is at this point procedural although certainly Captain Honey's counsel can speak for herself. I perceive there's procedural saying essentially we didn't get the -- the

1 agreement itself until after the objection deadline and we  
2 haven't had sufficient time to look at it. And what I  
3 mentioned to parties back in the chambers conference is you  
4 know the rules about this rule 4001(c)1 which walk about a  
5 motion to obtain credit shall be accompanied by a copy of  
6 the credit agreement as well as a proposed form of order.  
7 They are what they are and that I always tried my best to  
8 see if I can cure any procedural issues because we all have  
9 plenty of other things to fight about on substance is  
10 normally the case. And I threw out the notion that in many  
11 large cases on the first day financing's addressed on an  
12 interim basis and -- and that's certainly something that  
13 would -- might resolve a procedural objection and then we  
14 can tee this up for a final hearing at some other date. And  
15 then I asked exactly when the financing expired. The  
16 existing financing expired and was told that that was later  
17 in the week. Although some time was needed to close. So  
18 Friday when the financing ends might not be an appropriate  
19 date, so.

20 All that's what was discussed earlier and so with  
21 that let me get appearances from counsel and I think it'd  
22 probably make sense to address the financing motion first.

23 MR. WILLIAMS: Good afternoon, Your Honor, Matthew  
24 Williams of Gibson Dunn and Crutcher for the debtors. With  
25 me are my partners Michael Rosenthal and Craig Millet.

1 MR. FLECK: Good Aft -- good morning, Your Honor,  
2 Evan Fleck of Milbank Tweed, Hadley and McCloy on behalf of  
3 the official committee of unsecured creditors and I'm joined  
4 by my partner Al Piza (Phonetic).

5 MR. SEIDER: Good day, Your Honor, Mitchell Seider  
6 of Latham and Watkins with Adam Goldberg of Latham and  
7 Watkins for Goldman Sachs International.

8 THE COURT: Good day is -- is wonderfully  
9 straddling the line. So anytime you can start to eat lunch  
10 I'm happy to go with morning, afternoon or good day.

11 MS. WEINER: And good day, Your Honor, I'm Tally  
12 Mindy Weiner here for Captain Honey also (Unintelligible).

13 THE COURT: All right.

14 MR. WOODS: I'm Richard Morrissey for US Trustee.

15 THE COURT: All right good day to you all. All  
16 right so we've turned over to debtors to talk about the  
17 financing motion.

18 MR. WILLIAMS: Good afternoon, Your Honor, Mathew  
19 Williams for the debtors. Originally what I had planned was  
20 to go through the you know why we need the financing which  
21 is set forth in the motion and to go through the terms and  
22 the financing which is also set forth in the motion and  
23 supplement that we filed yesterday, I'm sorry, last weekend  
24 there's a further supplement yesterday and then I was going  
25 to deal with the objection. I think that given Your Honor's

1 comments what might make more sense is to just deal with the  
2 objection first and then answer any questions Your Honor has  
3 but I'm happy to do which ever you think is appropriate.

4 THE COURT: Well maybe you could do a -- a highly  
5 abbreviated version of -- of the motion and what you're  
6 planning to do but you can certainly keep it short, I've  
7 read the papers.

8 MR. WILLIAMS: Okay. So here we are today the  
9 motion was filed on May 27th. The motion for replacement  
10 DIP financing with Goldman Sachs International. The  
11 objection deadline was June 3rd at 4:00 p.m. No objections  
12 were timely received. Although the creditors -- neither the  
13 creditor's committee not the ad hoc committee filed anything  
14 in response to the motion but I think I've got authority to  
15 say and certainly my understanding that both the committee  
16 and the ad hoc committee fully support the relief requested  
17 herein.

18 Four days after the objection deadline on Friday,  
19 June 7th, we got an objection filed by Captain Honey, Al  
20 Shoaibi (Phonetic). I'm just going to refer to the  
21 objecting party as Captain Honey given the -- I don't want  
22 to butcher the pronunciation.

23 So briefly where we are we need the DIP financing  
24 for two reasons. The first as Your Honor just mentioned is  
25 we're running out of time with our current DIP financing.



1 Our current DIP financing provided by Fortress terminates --  
2 matures on Friday of this week. We've got a hundred and  
3 fifty million dollar (\$150m) financing package with Fortress  
4 of that right now approximately a hundred and five million  
5 dollars (\$105m) is outstanding.

6 As set forth in the Macau Declaration filed with  
7 our objection we don't have the money to pay that come June  
8 14th. So absent the relief requested in this motion we  
9 would be in default under the Fortress facility absent some  
10 extension that facility which right now we don't have  
11 authority for.

12 There's another reason we need the money as well,  
13 Your Honor, the hundred and seventy five million (\$175m) and  
14 the reason for that is even though the Fortress facility was  
15 a hundred and fifty million dollar (\$150m) facility we've  
16 repaid approximately forty five million dollars (\$45m) of  
17 that as part of mandatory prepayments under that DIP  
18 facility. So right now we owe about a hundred and five  
19 (\$105) we only had access to that one O five (\$105).

20 The good news about the Goldman facility that will  
21 be provided pursuant to this motion is it's providing a  
22 hundred seventy five million dollars (\$175m) which will  
23 bridge us not only past June 14th but past consummation of  
24 the plan.

25 As Your Honor knows my colleagues will be here

1 tomorrow pursuing confirmation of a plan that has wide  
2 creditors support although we've got the confirmation  
3 hearing tomorrow that's likely to -- consummation, it's my  
4 understanding is going to take a while. And so because of  
5 that we're going to need additional liquidity. This  
6 facility will provide us with the ability not only to pay  
7 off Fortress but give us the liquidity going forward. So  
8 from a business perspective I don't think anybody could  
9 reasonably challenge the fact that we need the money. I  
10 think that's uncontroverted.

11 Just briefly on the terms of the replacement  
12 facility, Your Honor, again not only does it solve our two  
13 looming problems which is the maturity and the liquidity but  
14 it sounds substantially better terms than our current  
15 facility. You know what's the same about it? Quite a bit.  
16 We have the same debtor obligors. We have the same priority  
17 we -- which in essence their placement DIP will have super  
18 priority and expenses pursuant to 364(c)(1) and 503 (b) of the  
19 bankruptcy code. The claims will be subject to the same  
20 carve out which is the fifteen million dollar (\$15m) post  
21 default carve out that we had with the Fortress facility.

22 Like the original DIP facility the providers have  
23 also agreed to in essence the same treatment with SCB as  
24 Your Honor knows there's been a lot of back and forth with  
25 SCB and how we deal with the collateral. So there in

1 essence stepping into that same position. Being subordinate  
2 to SCB with respect to AEID 2 Rail Invest and Wind Tervine  
3 (Phonetic).

4 They also have the same security package under the  
5 original DIP facil -- I'm sorry under the current -- that  
6 provides DIP facility the liquidity of providers will  
7 receive a first lien priority on all encumbered assets.  
8 Secondly in priority on encumbered assets. No liens on  
9 avoidance actions again like the Fortress facility. And the  
10 liens like the administrative claims will be subject to the  
11 same carve out, the fifty million dollar (\$15m) carve out.

12 We also have a -- a -- if -- almost identical  
13 budge covenant which is basically -- it's not line item  
14 tested and we have a ten percent variance and that's the  
15 same. The good news is what's better are a lot of the  
16 commercial and legal terms, Your Honor. As you'll remember  
17 last month at the commitment letter hearing after a spirited  
18 auction we ultimately chose after going back and forth  
19 between two bidders we ultimately chose the -- this  
20 facility. And the reason we did that is because it provided  
21 materially better economic and legal terms for the debtor.

22 We realized at the time that it was going to be a  
23 lot of work to get the Goldman facility done and we took  
24 that into account and we determined well you know is it  
25 easier to go with Fortress you know because we knew that we

1 we're going to have timing issues and the like but the truth  
2 of the matter is this facility was a really, really -- it  
3 provided a substantial incremental benefit over the current  
4 facility that we had. For instance as I said earlier we  
5 have the hundred seventy million dollars (\$175m) as opposed  
6 to the hundred and fifty million dollars (\$150m).

7 In addition we have substantially better pricing,  
8 Your Honor. Right now we've got under the -- under the  
9 current DIP facility we had labor plus ten percent with a  
10 two percent labor floor. Under this facility the  
11 replacement facility we would have labor plus 8.25 percent  
12 with a lower labor floor of 1.5 percent. So it's better  
13 pricing.

14 The default profit is better as well. We've got  
15 two percent under this -- under the new facility as opposed  
16 to six percent in the old. As I stated earlier we'll have a  
17 longer duration right? I mean it's not going to be at  
18 maturity (Unintelligible) we've got a maturity date of July  
19 31st and the good news is to the extent that consummation  
20 gets delayed even further we can extend that out for an  
21 additional two months with no fee which is a big benefit for  
22 the estate.

23 Under the old DIP facility we would be subject for  
24 any extensions for among other things a 1.5 percent fee. The  
25 financial covenants, Your Honor, it really -- the

1 replacement facility really incorporates two financial and  
2 covenants, two principle financial and covenants. The  
3 first is a minimum liquidity covenant of fifteen million  
4 dollars (\$15m) and a second is the minimum loan to value  
5 coverage ratio. We -- in discussions with the debtor's  
6 financial advisors the debtors are more than comfortable  
7 that we'll be able to meet these covenants. We don't see  
8 them being an issue.

9 We have less restrictive prepayment provisions.  
10 I'm happy to go through them if you want, Your Honor, but I  
11 feel like I'm getting into details a little bit more --

12 THE COURT: No that's not necessary thank you.

13 MR. WILLIAMS: It -- it's a long -- the -- so we've  
14 got much better terms. We -- I think everyone would agree  
15 both the committee, the ad hoc committee, certainly the  
16 debtors and all the advisors. And we've got substantially  
17 better terms here.

18 And so what we're left with is a procedural  
19 objection filed late by a party who complains that we didn't  
20 technically comply with rule 4001(c). Now I heard Your  
21 Honor's comments and I'm happy to -- you know we have tried  
22 to resolve it both with the objecting party and with the DIP  
23 lenders we've pushed to give the objecting party more time  
24 to actually read the credit agreement. We also have been  
25 pushing the DIP lenders to maybe do an interim -- interim

1 order like Your Honor said. We haven't gotten either yet.  
2 I will tell Your Honor that a couple of things -- one and to  
3 the extent it's relevant the reason we didn't file the DIP  
4 credit agreement with the motion is that one it wasn't done  
5 yet. But two we did file a 27 page agreed upon term sheet  
6 with detailed terms, very detailed terms.

7 And that was an agreement between the parties. We  
8 also, Your Honor, one of the reasons we couldn't file it  
9 even as we got closer is given the fact that this agreement  
10 is subject to syndication. Once you file that agreement,  
11 once you make the agreement completely public lenders get  
12 wed to the terms and from the estate's perspective both from  
13 the committee's perspective and the debtors perspective  
14 filing that agreement, right the quote -- the form agreement  
15 inhibits our ability to get better terms as we continue to  
16 negotiate. So that was one of the principle reasons why we  
17 didn't file it even after we had a relatively good working  
18 draft.

19 Now understand technically we did not comply with  
20 4001(c) there is case law out there Your Honor that provides  
21 that you know to the extent that a party doesn't technically  
22 comply with 4001(c) you know I would quote a case that we  
23 even found it was called in re Plaza Di Ritero (Phonetic)  
24 and it's 2009 WL 363356, where the court found that the  
25 failure to -- by the party to raise the 4001 (c) objection

1 timely precluded that part -- precluded the moving party  
2 from being aware that such non compliance would be an issue  
3 and thus from fixing the problem timely with the second  
4 amended motion.

5 So you know I -- I -- I understand that the  
6 technical objection, the procedural objection. And if we  
7 could solve it we would either with the party objecting or  
8 with the DIP lenders. It's unclear to me yet and maybe when  
9 the objecting party steps up to the podium here they'll  
10 explain their position in the case. What exactly their  
11 creditor position is because it wasn't clear to me at least  
12 in the motion -- in the objections and maybe they can  
13 explain that but you know given the extraordinary  
14 circumstances here you know the debtors would ask that you  
15 approve the motion on the final basis. And I know that  
16 Goldman wants to be heard on the interim final issue as well  
17 so maybe after the objecting party speaks we could hear from  
18 the DIP lender and the committee as well.

19 THE COURT: All right let me hear from the objector  
20 first.

21 MR. WILLIAMS: Thank you, Your Honor.

22 THE COURT: Thank you.

23 MR. WOODS: Your Honor, may I just add one point?

24 THE COURT: Sure.

25 MR. WOODS: I -- I know it's adding something to my

1 -- to my partner's comment. He said a couple times and I  
2 just want the court to be clear that confirmation may go on  
3 for a long time. I don't think that's the case. We intend  
4 to present our confirmation case pretty succinctly tomorrow.  
5 There have been limited objections filed. I think what he  
6 meant was that the effective date may not occur for a long  
7 time.

8 THE COURT: No that's how I understood it.

9 MR. WILLIAMS: Your Honor, I apologize. I thought I  
10 said consummation but I --

11 THE COURT: No I got it. All right let me hear  
12 from the objector.

13 MS. WEINER: Good day again, Your Honor. I ask at  
14 the outset for equal time. I'll try to be brief.

15 THE COURT: Well say what you need to say and we'll  
16 figure it out.

17 MS. WEINER: Okay. Well I understand that --  
18 Arcapita position is that my client has filed a procedural  
19 objection that was late and that I'm calling them out on  
20 technical non compliance. Now I don't agree with that  
21 characterization there's a substantive issue here and I  
22 think that if Your Honor looks at the case that was cited  
23 it's clearly distinguishable. I haven't seen the case but  
24 from the description it's distinguishable. What should have  
25 been filed by the debtors here --



1 THE COURT: No I know what the rule says. My  
2 question for you is where have you been? Certainly I've  
3 seen a pleading that your client filed earlier on the case  
4 so I know your client's been following the matters. We had  
5 a -- a rather lengthy financing beauty pageant for lack of a  
6 -- of a better term in which the -- the details and the  
7 terms were being fought about in open court with a wonderful  
8 situation for the estate and a more frustrating situation  
9 for most lenders where there were coming in with better and  
10 better terms in such that we actually had to set a last and  
11 final deadline where rather ceremoniously people provided me  
12 with the last and best offers. So that was pretty much out  
13 there it in -- in this courtroom as to what was going on as  
14 well as in -- in the docket. So if you're following the  
15 docket there were -- there were lots of pleading back and  
16 forth by -- by the debtors, by the committee, by parties who  
17 were seeking to be the financing parties. Your client was -  
18 - was nowhere to be seen in connection with that. And then  
19 there was a 27 page term sheet that was filed and certainly  
20 an objection could have been made timely that would have  
21 said that's insufficient and we object. No such objection  
22 was -- was lodged. And so when the inevitable happened  
23 which is the actual agreement was filed -- which was --  
24 which was clearly going to be what was going to happen there  
25 was a filing after that that didn't comply with the -- the

1 rules in terms of time. So you understand from my point of  
2 view that I -- I've tried to resolve procedural objections  
3 and I'm a big fan obviously of due process and of people  
4 getting things -- an opportunity to address things but you -  
5 - you will understand you're not in the best position to  
6 make that argument given the factual circumstances.

7 MS. WEINER: I -- I thank you, Your Honor. To  
8 address some of the points that you've made here. You've  
9 asked firstly where's the client. Ben Captain Honey has  
10 been in Jeddah, Saudia Arabia where -- where --

11 THE COURT: I -- I didn't mean that. If --

12 MS. WEINER: -- where he --

13 THE COURT: -- wait, wait. If -- I'm asking a  
14 question, I'm telling you what's on my mind so you get a  
15 chance to address it substantively. If we -- if we're going  
16 to get -- go down the road of being snarky then I -- I  
17 don't think this is going to be a very productive  
18 discussion. So I -- I'm -- I'm asking you how you want me to  
19 consider your objection procedurally. And in that same vein  
20 I'd also like to ask if there is -- you're clients view  
21 about how long and how much time would be necessary to  
22 review the agreement that is already been previewed in the  
23 27 page term sheet.

24 MS. WEINER: Okay and Your Honor, I -- I apologize.  
25 I don't mean to be getting snarky --

1 THE COURT: No I don't need an apology. I just  
2 want to have a -- a legitimate discussion on the merits.  
3 And I have my views, sometimes I'm right, sometimes I'm  
4 wrong, sometimes people point out things that I haven't  
5 thought of so I -- when I ask a question I actually do want  
6 a substantive answer because there may be something you're  
7 going to tell me that's going to change my mind so that's  
8 why I ask.

9 So -- so let me ask again, procedurally how you  
10 view your client's situation in terms of making this  
11 objection at this time. And secondly from a practical point  
12 of view how much time is your client requesting to look at  
13 this to the extent that I order it be interment final?

14 MS. WEINER: Okay, Your Honor, firstly the debtors  
15 -- even as of right now have not put on file everything that  
16 they're supposed to put on file. The cross references  
17 required by the rule went on file I think at 10:26 p.m. last  
18 night that woke me up as I was going to sleep. I heard the  
19 ping on my phone. As of when I handed my phone to security  
20 that had not been served. So I just want to be clear that  
21 even putting aside the lateness issues as of this morning  
22 there wasn't a complete file. I don't even know that you  
23 got a chambers copy but I shant belabor that because I think  
24 you understand the -- the -- there's been what's being  
25 called procedural non compliance.

1           And in terms of how much time is needed to review  
2 this agreement, late Thursday night the debtors filed a 186  
3 page PDF, I think about a 180 some odd pages of that were --

4           THE COURT: I -- I'd like to say it's unusual in  
5 this courthouse but I -- I'm sad to say I would be lying if  
6 I said so but how much time is it that your clients  
7 requesting?

8           MS. WEINER: I -- I am hopeful that we can do this  
9 in a week or two. I would need to find a Sharia -- someone  
10 who's sharia knowledgeable. This case is --

11           THE COURT: But -- but why would the finding of  
12 somebody who is Sharia knowledgeable be something that would  
13 have waited until this point in time given the finance --  
14 wouldn't that person -- it have been wise to retain that  
15 person when the financing motions were being filed and so  
16 you knew additional financing was going to be obtained?  
17 And on terms that were different than the existing  
18 financing? So I -- I'm -- I'm not -- that argument I will  
19 say does not persuade me. It persuades me that -- that you  
20 need some time to take a look at things and I'm thinking of  
21 sometime this week. That's what I'm willing to do is to try  
22 to work out something where there would be a hearing at the  
23 end of the week. I'm going to take everybody's views and  
24 I'm going to make a ruling. So I'm asking for your view but  
25 if it's one or two weeks I'm going to tell you two weeks is

1 -- is not happening.

2 MS. WEINER: Okay well perhaps this would help.  
3 Your Honor's is correct that Captain Al so Hiabib (Phonetic)  
4 has written to the court before. I was engaged by my client  
5 on Wednesday. So in terms of telling what have you been  
6 waiting for I haven't been waiting for anything. I've  
7 started acting --

8 THE COURT: Yeah but I can't -- I can't do that if  
9 you're client is -- waits till the last minute to get  
10 counsel. I -- I empathize with the position that you're in  
11 but your client's certainly has been in notice since I've  
12 seen filings from your client. And I believe they relate to  
13 the disclosure statement but don't quote me on that. But I  
14 know I've seen some several months ago. So your client has  
15 been following this matter and certainly has -- those --  
16 those pleadings if I remember correctly exhibited an  
17 understanding of exactly what we were doing here. I believe  
18 they were all pro se, that's correct but I -- I'm not going  
19 to consider except perhaps as a practical matter the fact  
20 that that you were retained Wednesday which is I think after  
21 the objection deadline, that -- that's your client's choice.  
22 And unfortunately your -- your stuck with your client's  
23 choices. I appreciate your candor on that but -- but I --  
24 I'm not going to -- that's of limited beauty (Phonetic)  
25 in this circumstance.

1 MS. WEINER: One -- one further thing with respect  
2 to the delay here which is Goldman Sachs from what I  
3 understand had been diligencing this DIP months ago, months  
4 ago. And indeed it sought and obtained a substantial  
5 contribution claim even though -- I'm sorry, substantial  
6 contribution award even though it didn't close. So if the  
7 question to me is well what is your client been waiting for.  
8 I don't understand why the debtors are teeing this up for  
9 you as an emergency. Why it's a sprint to the finish line  
10 because Goldman could've been negotiating --

11 THE COURT: Well let -- let -- let --

12 MS. WEINER: -- this months ago.

13 THE COURT: The financing issue has been the  
14 subject of multiple discussions going back to the hurricane  
15 in the fall so I will say it has been teed up at the last  
16 second so I think in -- in view of the pleadings would show  
17 -- and the docket would show that that's not the case. So  
18 to the extent that -- I'm not quite sure how that relates to  
19 what I have in front of me which is a very set motion  
20 response time and -- and a hearing date. This has been  
21 fairly well noticed. And so I -- I'm going to reject the --  
22 the that somehow this has been crammed down everybody's  
23 throat. It's been pretty much well noticed. And I'll ask  
24 the parties who are of -- of interest to sort of straighten  
25 me out to the extent that I have my dates wrong but I think

1 it's been on for a while. So anything else that you want to  
2 -- want to tell me?

3 MS. WEINER: Yes, to address three more things and  
4 then I'm happy to sit down. In terms of the noticing in  
5 this case, we ourselves served our papers over the -- the  
6 weekend. And we observed the master service list has been  
7 kept -- that's on the court's website is all messed up. So  
8 if you look at how the services have gone out in this case  
9 by Garden City Group on behalf of Arcapita --

10 THE COURT: Look do you have a specific argument as  
11 to your client? I didn't see this in the objection so I'm  
12 -- I'm a little in the dark as to what your argument is as  
13 to your client on this issue.

14 MS. WEINER: What I've been trying to -- to argue  
15 throughout here, Your Honor, is transparency, due process  
16 and fairness and if Your Honor's saying to me well these  
17 things have been noticed and people have known about this  
18 for months now --

19 THE COURT: No, no, I -- I want to hear --

20 MS. WEINER: -- I'm telling you that the service  
21 list is messed up.

22 THE COURT: Messed up as to your client? Or I'm  
23 not interested in you policing the universe here. And I'm  
24 trying to get this back to the objection to the motion that  
25 I have. I didn't see anything in the objection mentioning

1 services and issue, I'm always concerned about due process  
2 but I'm always weary of -- of a particular creditor deciding  
3 to serve as ombudsman to everybody's rights in a way that --  
4 that -- that might be perceived as -- as leverage. So what  
5 about service is it that you want to tell me as it pertains  
6 to your client if anything?

7 MS. WEINER: Okay. Your Honor, I'll tell you about  
8 service and notice as it pertains specifically to my client  
9 and not as -- as some kind of cop here that I'm not which is  
10 from what I understand the grand court in Cayman approved  
11 the Goldman financing on Friday --

12 THE COURT: What's this -- wait a minute, we've now  
13 segwayed into something else that's not -- you were talking  
14 about the master service list so let's finish the point and  
15 then we can move on to the Cayman Islands.

16 MS. WEINER: The point, Your Honor, is that there's  
17 been an assumption here that things are proceeding in a  
18 transparent manner and in a way that gives people time --  
19 you know what, I'm -- I'm happy to move on with that point  
20 because if no one in this courtroom cares that the master's  
21 service list is messed up I'm not going to make them care.  
22 We can move on to what's going on in the Cayman.

23 THE COURT: All right, you can do whatever you'd  
24 like to do counsel, it's up to you.

25 MS. WEINER: Your Honor, this is my first



1 appearance be -- before you and I -- I really -- really  
2 don't want to go down this way. I'm a three time federal  
3 law clerk I have the highest respect for the system and  
4 process and the Judges --

5 THE COURT: No, no, that -- that's fine just tell  
6 me what you want to tell me and I'll -- I'll hear it and  
7 then I'll make my decision.

8 MS. WEINER: Okay. I appreciate that. From what I  
9 -- I understand from friends in Cayman the grand court in  
10 Cayman approved the Goldman financing on Friday I believe  
11 that was not disclosed to parties in interest. It certainly  
12 was not disclosed to my client who has a direct interest in  
13 that because the liquidation of the company on the back end  
14 of the chapter 11 I believe will be going on in Cayman. I  
15 think it is disingenuous at best for them to ask Your Honor  
16 to approve this financing without disclosing to you and the  
17 other parties and interest that the Cayman court has already  
18 approved it. There's also not a chapter 15 in place so I  
19 don't think that you -- you have the authority technically  
20 to recognize that but you can enter your own approval order.  
21 I agree that that rather creates some -- some chaos, two  
22 different courts approving agreements on two different  
23 terms. It's important to Captain Al Shoaibi for me to let  
24 you know that he is in this case at all because he was  
25 unlawfully solicited in Saudi Arabia that is the subject of

1 an investigation in Saudi Arabia. The debtors do not  
2 dispute this by the way. So he's rather astounded that this  
3 court would -- would keep -- keep this case going and keep  
4 the protections of the automatic stay in place for a company  
5 that is breaking the law in his native country. He never  
6 wanted to come into this case. He got dragged into it by an  
7 unlawful solicitation.

8 And what we would like to see happen is a  
9 liquidation. We posit Your Honor that the company they keep  
10 telling you you should approve this because we need the  
11 money, we need the money, we need the money. Every time  
12 they get money they waste the money. If you look at  
13 operating reports they are losing money. So --

14 THE COURT: I believe we've segwayed into a  
15 confirmation objection. So which we're going to get to  
16 tomorrow. So just anything else on this particular motion?  
17 You're -- you're advocating liquidation rather than  
18 reorganization that's fine you can make that argument  
19 tomorrow. So anything else on this particular motion?

20 MS. WEINER: Your Honor, I would be willing to take  
21 adjournment if the other parties are to try to work this out  
22 yet again but if not I -- I have nothing further unless  
23 someone else wants to be heard here as well. In which case  
24 I'd like to be able to reply to that. Thank you very much.

25 THE COURT: Thank you.

1 MR. SEIDER: Your Honor, Mitchell Seider of Latham  
2 Watkins on behalf of Goldman Sachs International. I'd like  
3 to be heard for just a moment or two in support of the  
4 debtors motion for actually the final order today.

5 Your Honor, the motion requesting the relief was  
6 filed on May 27th and Your Honor is of course correct at the  
7 time the motion was filed the credit facility was not  
8 attached to the motion. And the objection deadline for the  
9 motion was set at June 3rd. between May 27th and June 3rd,  
10 the credit facility was not filed with the court and on the  
11 objection deadline it had not been filed.

12 The objector has filed its objection four days  
13 after the deadline. I've had the opportunity to read the  
14 objection and Your Honor is of course correct as to what  
15 rule 4001(c) provides with respect to timing. Rules  
16 however, Your Honor also become the subject of cases. And  
17 the case law on procedural deadlines in bankruptcy cases is  
18 fairly clear. When a deadline that's been set by a court is  
19 missed, it's incumbent upon the objecting party to  
20 demonstrate and substantiate excusable neglect for not  
21 meeting the deadline. There is nothing in the objection  
22 explaining or substantiating why there has been or even  
23 alleging why there has been or even alleging excusable  
24 neglect in this case.

25 One further point, Your Honor, it is typical at

1 least in my experience that when a party files a pleading  
2 before the court, the party sets forth the precise nature of  
3 its connection to the case. In the objection there is a  
4 statement that the objector is a party in interest. There  
5 is no statement in the objection that the objector is a  
6 creditor or how much the objector's claim as a creditor may  
7 be for.

8 It is entirely possible that the objector here is  
9 a creditor or an equity holder in a non debtor affiliate of  
10 the debtors. Those non debtors of course are not before  
11 Your Honor. So just to make this very brief and to sum it  
12 up Your Honor, there's been no showing of excusable neglect  
13 for missing the deadline. The entry of the final order  
14 today is important for reasons I know Your Honor understands  
15 and it's not even clear as to what the connection between  
16 the objector in the case is, thank you.

17 THE COURT: Anyone else wish to be heard?

18 MR. FLECK: Your Honor, once again Evan Fleck on  
19 behalf of the Official Committee of Unsecured Creditors.  
20 Mr. Williams was -- was correct the committee is supportive  
21 of the relief requested by the debtors in the motion. In  
22 particular, Your Honor I wanted to note that this is not the  
23 type of case where the committee was looking over the  
24 debtors shoulders as the debtor negotiated with the lender  
25 regarding the terms of the agreement. The committee has

1 been involved through its advisors indirectly in every step  
2 of the -- every step of the negotiation, every step of the  
3 documentation as a fiduciary for all the unsecured creditors  
4 we are comfortable with the terms that are before the court  
5 today for approval are appropriate. And are in the best  
6 interest of the estates. We take seriously as the committee  
7 -- as the fiduciary for unsecured creditors the issues that  
8 were raised by the objectors counsel today. Particular with  
9 respect to transparency and the appropriateness of the  
10 process. The committee was -- was comfortable with the  
11 timing of the motion as well as the filing of the -- the  
12 detail term sheet and then the definitive documentation. We  
13 think that that was appropriate for purposes of advancing  
14 the dialogue with respect to the negotiation. We think  
15 creditors were on notice. That issue was discussed with the  
16 -- with the committee directly and the committee was  
17 comfortable proceeding in the fashion that -- that we  
18 actually did receive in the case.

19 The -- the issues with respect to service in the  
20 case are also important. The committee members themselves  
21 have -- have -- have actually inquired of their advisors to  
22 be sure that service is appropriate particularly given the  
23 international nature of this case. And -- and not only have  
24 the -- is it our view that the debtors have handled that  
25 issue appropriately throughout the case but the committee

1 has also taken independent steps to be sure that -- that  
2 those issues are handled appropriately both with the respect  
3 to this proceeding as well as when action is taken in the  
4 Cayman court.

5 I know that's a little bit afield of what's before  
6 the court so I wanted to first speak in favor of the motion  
7 and make clear that notwithstanding the fact that the  
8 committee didn't file a separate pleading other than the one  
9 Your Honor referenced in support of the commitment letter,  
10 we are firmly in support of the relief that's being  
11 requested. But given the other comments that were made with  
12 respect to process in the case generally I thought it was  
13 important that -- that Your Honor hear from the committee  
14 our perspective with respect to the operation of the case  
15 throughout -- I know some of them are confirmation issues we  
16 can deal with them tomorrow but the committee has been kept  
17 apprised, we have used our website, we have used outreach  
18 and we've had a dialogue with -- with creditors throughout  
19 the case to be sure that they're informed with respect to  
20 the case generally and specifically with respect to  
21 financing because it has featured so prominently in -- in  
22 the proceedings of this case. Happy to answer any  
23 questions from the court.

24 THE COURT: Thank you. Anyone else who wishes to  
25 be heard?

1 MR. WOODS: Your Honor, I can't let the Cayman  
2 notice point go. So just a quick -- a quick response.  
3 There was a hearing in the Cayman as the court knows.  
4 Whenever we do something for AIHL that involves a potential  
5 transfer of AIHL property we need a Cayman validation order.  
6 It always comes in conjunction with an order from this court  
7 that we're seeking today with respect to all the debtors.  
8 But in the Cayman court it only relates to AIHL.

9 There may be many things that Captain Honey as we  
10 know he's not a creditor of AIHL. And the -- and the notice  
11 procedures that were followed in connection with the Cayman  
12 proceeding for the Cayman validation order complied with  
13 Cayman law, that is the basis of that Cayman joint  
14 liquidation proceeding.

15 THE COURT: All right, thank you.

16 MS. WEINER: Your Honor, AIHL is a debtor both in  
17 Cayman and here in this court. So I'm -- I'm not really  
18 appreciating with the significance is of saying that what's  
19 going on in Cayman affects only AIHL, I don't really get it  
20 because it's a here too.

21 In terms of responding to the comments of Goldman  
22 counsel the Captain Al Shoaibi is indeed a party in  
23 interest. He was sent a proof of claim from what I'm told,  
24 I haven't seen it yet. He was also sent a plan ballot or  
25 some kind of paper work in connection with the plan. In

1 terms of exact position I think that's in the papers he  
2 filed pro se but in any event parties are not being required  
3 to file claims publically the claim register is under seal

4 And in terms of who needs to show excusable --

5 THE COURT: Well I don't think it's under seal, I  
6 think it's just not on the docket which is not uncommon in  
7 large cases.

8 MS. WEINER: I think I can't access it like in the  
9 Leeman case, I do some work in Leeman, I can pull up the  
10 claims register online. In this case I can't.

11 THE COURT: Well it's not under seal. There's been  
12 no sealing order relating to any of the claims so that's --  
13 I can tell you that for a hundred percent certainty.

14 MS. WEINER: Is -- is that right?

15 THE COURT: I don't think we need to get -- Yeah  
16 I'm not going to have a -- an inquest on it --

17 MS. WEINER: Okay.

18 THE COURT: I'm just clarifying the facts.

19 MS. WEINER: Further with respect to excusable  
20 neglect, well -- we've explained that a motion was not fully  
21 on -- on -- on file so the financing motion -- so I don't  
22 believe that I need to show excusable neglect and indeed  
23 that I think that Arcapita and Goldman Sachs need to excuse  
24 their own neglect in not attaching the mandatory filings.  
25 That's all I have unless you have questions.



1 THE COURT: All right, no I don't.

2 MS. WEINER: Thank you very much.

3 THE COURT: All right anyone else wish to be heard  
4 on this motion? All right, I have in front of me a motion  
5 for financing that is to replace the existing financing with  
6 other financing. And the existing financing matures on  
7 Friday. There is no dispute about several facts relating to  
8 the financing. One is that it has significantly better  
9 terms for the estate than the existing financing. This  
10 includes better pricing, longer duration as well as  
11 flexibility also includes more money. There has been no  
12 dispute that the debtors need the money although there is  
13 clearly a -- a disagreement about the proper path of the  
14 case that Captain Honey wishes to pursue in a confirmation  
15 objection.

16 There's also no dispute that the financing has  
17 been the subject -- financing in this case has been the  
18 subject of many, many pleadings and many proceedings. I  
19 remember extensive proceedings up in White Plains where we  
20 had a hearing in this case as a result of the hurricane in  
21 the fall and there were many discussions at that time and  
22 there continue to be many discussions including the --  
23 essentially auction that was held on financing in this very  
24 courtroom not -- a few weeks ago.

25 So the matter has been on notice very publically

1 through docket as well as court proceedings to all  
2 interested parties.

3 So I am -- I do not adopt Captain Honey's  
4 objection about the -- the transparency issue. I -- I think  
5 it has been transparent the need for financing, the terms of  
6 the financing and I think Captain Honey has essentially been  
7 missing in that dialogue or even monitoring those  
8 proceedings. So unless he's been talking to the creditors  
9 committee in which case he would know the creditors  
10 committee is supporting -- essentially the path has been  
11 taken in this case on financing.

12 I find problematic many the objections that have  
13 been set forth in the pleadings as well as presented for the  
14 first time here today including things relating to the  
15 master service list and service in the case. I believe if  
16 my memory serves that in fact I have -- I tweaked the  
17 service at one point not permitting service simply by email  
18 but required packages to be sent overseas because of my  
19 concern about service.

20 I also reject any allegation thus far is unproven  
21 and unsubstantiated relating to the Cayman court. I -- I  
22 think I've been very well informed as to what's gone on in  
23 the Cayman court. It's been the subject of pretty much  
24 every hearing that we've had in this case. I've gotten an  
25 update and it is not -- it's not a simple dance back and

1       forth between a Chapter 11 in this jurisdiction in a  
2       proceeding in the Cayman Island's court but it is also not a  
3       rare one.

4               This is not a chapter 15, I think that comment  
5       misunderstands the nature of the relationship between a  
6       chapter 11 in this jurisdiction and a Cayman Island  
7       proceeding.

8               I have no view on the merits of any allegations  
9       regarding events and solicitations Saudi Arabia, not facts  
10      have been presented to me. Those -- those -- it is what it  
11      is. And that's being investigated as been -- Captain Honey  
12      has stated.

13              So I am -- the one thing I do have a hang up with  
14      which is what I said from the very get go this morning is  
15      the requirement of the rule. I do believe that debtors and  
16      the committee and Goldman given the facts and circumstance  
17      of this case thought it was beneficial to do something  
18      different than what the rule provided. There were no  
19      objections to that or timely objections I should say. A 27  
20      page term sheet is a fairly robust view of the financing.  
21      So they can't have it both ways and complain 27 pages  
22      doesn't give you enough but a 181 pages is too burdensome.  
23      I'm not quite sure what the magic page number in that range  
24      becomes.

25              But that said the rules are the rules which is

1 what I said from the get go. So what I am willing to do is  
2 to approve on an interim basis the financing here today and  
3 schedule a hearing later this week with sufficient time that  
4 for closing by Friday so that Captain Honey and his counsel  
5 can take a look at Shari compliance issues that they're  
6 interested in. I reject the notion that a week or two is  
7 the appropriate deadline for such a adjournment.

8 The merits on the final financing to the extent  
9 that Captain Honey has decided to retain counsel at the last  
10 minute despite knowing of the proceedings and monitoring  
11 them. That is a choice that he has made. This confirmation  
12 hearing has been set for some time and financing as I said  
13 has been the subject of -- of ongoing discussions for many,  
14 many months. So Wednesday is something that leaps out to  
15 me, Wednesday afternoon to the extent that that would work  
16 with parties schedules. If I understand the -- the  
17 deadlines right that would give some two days both for  
18 Captain Honey to take a look at the pleading that was filed  
19 on -- on the -- I believe the 6th or the 7th -- the 6th and  
20 it would also give hopefully sufficient time for the parties  
21 to close any financing as is appropriated if it is approved  
22 on a final basis.

23 So I'm happy to let parties chat among themselves  
24 if they want to do that before telling me what their view is  
25 on that but that's my current inclination.

1 MR. WILLIAMS: Good afternoon, Your Honor, Matthew  
2 Williams, Gibson Dunn for the record for the debtors. I --  
3 just one question I had with -- and again I have to speak  
4 with the DIP lenders and maybe a shorter term -- it would  
5 make sense but we -- to the extent we could get the DIP  
6 lenders to agree would Your Honor be willing to enter the  
7 interim order today so that the --

8 THE COURT: Yes.

9 MR. WILLIAMS: -- okay, all right. I just wanted  
10 to make sure.

11 THE COURT: Yeah, no, no. That -- an interim order  
12 today just -- justice is not -- not at all uncommon in fact  
13 the -- the routine way of doing it in first day, you should  
14 come in you need financing you get an interim order and then  
15 there's a final order which gives people sufficient time to  
16 take a look at things.

17 MR. WILLIAMS: Okay I'm sorry, I just misunderstood  
18 --

19 THE COURT: No, no, no I don't think I was very  
20 clear. So I would enter and interim order today and then  
21 have a final hearing with the thought of entering a final  
22 order if appropriate the same day right after the conclusion  
23 of that hearing. That's normally how -- how I handle  
24 financing in -- in Mega Chapter 11 cases. It's just sort of  
25 a standard course.

1 MR. WILLIAMS: Understood, Your Honor. I just  
2 needed that clarified.

3 THE COURT: That's fine.

4 MS. WEINER: That is one -- can you hear me from  
5 here?

6 THE COURT: You -- you may want to come around to  
7 just get a microphone, any microphone will do. You can use  
8 whatever works for you. Just -- I don't know if it counts  
9 for purposes -- I'll hear you but I don't think it counts  
10 for purposes of a transcript which is important.

11 MS. WEINER: I thank you. I'll certainly take the  
12 opportunity to speak with counsel if they would like to.  
13 Since from what I understand Your Honor is entering a -- an  
14 interim order today. I suppose I cannot appeal that  
15 immediately because I would need to bring a motion for leave  
16 to appeal. So I would ask if that could -- if you would  
17 grant leave to --

18 THE COURT: If you -- if you -- if you want to  
19 appeal it I'll need a motion asking for leave to appeal it  
20 because I -- I confess I -- I don't have -- I need somebody  
21 to look at the law, you need someone with the laws and  
22 people can respond. I question really the utility of doing  
23 so if I'm going to have a final hearing on Wednesday but  
24 obviously you're free to do whatever you think you'd like to  
25 do.

1 MS. WEINER: Your Honor, the utility is that  
2 there's going to be a confirmation hearing tomorrow and so  
3 it's just sort of a sequencing thing. Which is if Your  
4 Honor confirms a plan tomorrow and I don't get -- get to put  
5 my objection on file till Wednesday the debtors no doubt  
6 will argue that I'm mooted out somehow. So I'm just trying  
7 to avoid getting mooted out.

8 THE COURT: I -- I -- just file your motion and  
9 I'll figure it out.

10 MS. WEINER: Thank you.

11 THE COURT: So thank you. All right I don't know  
12 if the lender wants to weigh in on this or if anybody want  
13 chat or how you want to do this. Again that -- that's up to  
14 you.

15 MR. WILLIAMS: Thank you, Your Honor. Thank you  
16 for your willingness to enter the interim order today under  
17 the circumstances I think that's the best course and we will  
18 of course be supportive of entry of the interim order today.  
19 If Your Honor will allow us a few minutes to have a  
20 discussion with Captain Honey's counsel around when we can  
21 set the final hearing using your suggestion of Wednesday as  
22 --

23 THE COURT: All right.

24 MR. WILLIAMS: As a good base from our perspective.

25 THE COURT: All right I -- I have matter Wednesday

1 morning but let me just check to see -- I have one thing at  
2 2:00 that's a status conference and I confess -- one moment.  
3 I confess that that's not a hearing on a contested matter,  
4 it's a status conference. So that if you all came in at  
5 2:30 I think that would be fine.

6 MR. WILLIAMS: I'm sorry, Your Honor. I apologize -

7 -

8 THE COURT: No, that's all right. I was saying I  
9 have --

10 MR. WILLIAMS: -- counsel --

11 THE COURT: -- matters on at 10:00 on -- on  
12 Wednesday and I have one matter on at 2:00. If memory  
13 serves that should be fairly brief. So I would expect to be  
14 free as in about 2:30 on Wednesday afternoon.

15 MR. WILLIAMS: Thank you, Your Honor. With that in  
16 mind may we have a few minutes to speak --

17 THE COURT: Sure.

18 MR. WILLIAMS: -- to the debtors, the committee,  
19 and the objector's counsel.

20 THE COURT: So what I will do is I will take a  
21 short recess and then when we come back you can let me know  
22 if there's anything else we need to discuss on that motion  
23 and if not we'll proceed with the subordination.

24 MR. WILLIAMS: Thank you, Your Honor.

25 (Whereupon the court recessed)



1 THE COURT: Please be seated.

2 MR. WILLIAMS: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MR. WILLIAMS: Matthew Williams, Gibson Dunn and  
5 Crutcher for the debtor. Captain Honey's counsel is not  
6 back in the courtroom yet. We've got somebody out looking  
7 for her.

8 THE COURT: That's fine. We'll wait a minute.

9 MR. WILLIAMS: Okay. I will -- while we're waiting  
10 for Captain Honey's counsel if -- well I guess we're not on  
11 the record. We -- it's probably better if we wait --

12 THE COURT: Yeah, it's the -- let's just give it a  
13 -- give it a second.

14 MR. WILLIAMS: We appreciate it. Thank you, Your  
15 Honor.

16 THE COURT: Shuffle some papers in the meantime.

17 MR. WILLIAMS: Your Honor, if I can be excused for  
18 a second I'll go join the search.

19 THE COURT: Sounds like Sea Quest.

20 MR. WILLIAMS: Your Honor, may I suggest -- I mean  
21 one alter -- one thing we can do as we're looking for her is  
22 move to the subordination matter unless you wanted to  
23 adjourn --

24 THE COURT: All right I have no problem with that  
25 if everybody's present who has an interest in that matter,

1 that would be fine.

2 All right so it is the debtors request under the  
3 plan to subordinate so I would imagine I'd hear from the  
4 debtors first and the committee and then from Tide. And I  
5 assume that all the folks from Tide are in the courtroom?

6 I -- I --

7 MR. WOODS: Good afternoon, Your Honor. Troy Wood  
8 on behalf of Tide.

9 THE COURT: Afternoon, all right.

10 MR. WILLIAMS: Good afternoon, Your Honor, Craig  
11 Millet from Gibson Dunn Crutcher on behalf of the debtors.

12 THE COURT: All right how can such a short  
13 obviously clearly drafted statute create such confusion? I  
14 had a number of questions that I thought might be worth to  
15 throw out and then folks can address then as they go  
16 through. One thing was it's clear in addressing the case  
17 law that many of the things that are talked about are not  
18 actually relevant to the actual decisions of those courts.  
19 So are of varying degrees of utility. And so what I'm  
20 trying to get is a -- a sense of how you read the entire  
21 statute in terms of giving effect to all of its parts. And  
22 there's been various arguments back and forth that  
23 somebody's reading something out of the statute. I know  
24 Tide makes that argument explicitly but also the questions  
25 had her to read it in a way that makes it most -- much

1 common sense out of out it as -- as we can.

2 So that's one point I'd like the parties to  
3 address. In terms of if there's language in there and it  
4 may not be implicated here but how does it relate to the  
5 overall results and -- and what -- what should it mean. I  
6 also would like folks to address the corporate sort of  
7 structure here in the sense that the arguments about who is  
8 structurally senior or not senior. And the parties have  
9 different views about that. I believe Tide says it's  
10 structurally senior because it's stock. And I believe the  
11 debtors say that it says something different so I'd like a  
12 little more detail on that because that was -- that was  
13 really addressed in passing in the papers.

14 And then the third thing that I think is sort of a  
15 common question that I had was does your position require  
16 the creation of a new class that's not contemplated in the  
17 existing plan and if so do you have any -- what's your  
18 support for -- for that or is it something that as long as  
19 you're subordinated to who you're supposed to be  
20 subordinated to that you fall into the next class. So those  
21 are the three things that I think cut across all parties  
22 positions. So when you get a chance to work that into your  
23 presentation whenever that is I'd appreciate it.

24 MR. MILLET: Very good, Your Honor. Hopefully I  
25 will be able to address all those -- those three. I think -

1 - I think my presentation will in fact do that.

2 Your Honor, I think first I would like to note  
3 that the briefs do reflect that the parties at least have  
4 some common ground here and I hope to show the court that by  
5 working through that this really is going to come down to at  
6 least as to this case, I'm not sure how to solve the  
7 problems or the statute as to every case but as to this case  
8 we'll come down to one fairly narrow issue.

9 We certainly know or at least it's been presented  
10 there was no issue or material factor that needs to be  
11 resolved and this is a legal issue. The subordinate issue  
12 can be decided procedurally as part of the confirmation of  
13 plan that's not longer in dispute. And that section 5 can  
14 be clearly applies at least to the claims and issue here. So  
15 that's not something that we have to fight about.

16 THE COURT: All right am I also right in saying I  
17 think for different reasons the parties both say the common  
18 stock exception does not apply. I think you say it for  
19 different reasons one because -- one's concern about being  
20 pulled down, the other's concerned about being pulled up but  
21 I think you both say it doesn't apply.

22 MR. MILLET: Well, Your Honor, I think what we  
23 would say is that if you follow the analysis that I think  
24 the parties actually have some common ground on it may not  
25 matter. Whether you apply it or don't apply it, you get to

1 the same place. And that's what I hope to show the court  
2 here by going through the analysis.

3 THE COURT: Well but I think the debtors opening  
4 brief said we don't think the common stock analysis applies.  
5 I think it was a preemptive position thinking that Tide  
6 might say it did and then Tide came back and said, no, no we  
7 don't think it'll --

8 MR. MILLET: I understood your question backward,  
9 Your Honor. Yes that's true.

10 THE COURT: Okay all right.

11 MR. MILLET: That's exactly why it does not apply  
12 to act as a saver here if you will to elevate the claim back  
13 to the level of common stock.

14 THE COURT: So then the only issue that I have is -  
15 - is how to read the statute when it does apply -- clearly  
16 does apply and the common stock exception doesn't apply to  
17 the level of subordination.

18 MR. MILLET: Well, Your Honor as the court  
19 commented at the beginning the cases here have been less  
20 than uniform in their approach. And 510(b) is clear if you  
21 will when it -- it deals with a security of the debtor  
22 itself. Of course when you get into the area of dealing a  
23 security of an affiliate of the debtor the area becomes much  
24 more murky.

25 And we get into having to determine what is the

1 claim or interest represented by set security? And that  
2 becomes the key issue in the case here today. Here as the  
3 Falcon of course it's what is the claim or interest  
4 represented by the Nortex (Phonetic) LLC membership interest  
5 as to Falcon. Once we determine that section 510 (b) says  
6 that of course we subordinated to all interest or claims  
7 that are equal to our (Unintelligible) so then it should  
8 step down somewhere between that and then figure out what  
9 happens with the common stock exception whether it applies  
10 or not to be elevated back up.

11 Like we said the cases have been anything other  
12 than uniform in this approach they oddly enough get to  
13 somewhat of the same result. Although they do it in very  
14 different ways but in continuing to look for some common  
15 ground and I think this happens to this will also help  
16 answer one of the courts questions is Tide claims that the  
17 National Farm case represents a correct reading of the  
18 statute. It applies every element of the statute. It reads  
19 every element in and applies under the analysis that it uses  
20 correctly applies the elements that 510 (b) would do in a  
21 case where you have -- have an affiliates stock being  
22 considered as to a parent. That's at page 11 paragraph 22 of  
23 their brief.

24 Of course National Farm arose in the context of a  
25 motion to appoint a Trustee as opposed directly as to a 510

1 (b) issue. And the opposition raised issues as to whether  
2 or not a joinder in the motion or that that joinder had  
3 standing because their claim should be subordinate. And so  
4 the court did address some of the 510 (b) issues and -- but  
5 never the less in the interest of having some common  
6 analytical ground that we can apply here, ground that Tide  
7 says applies every element of the statute gives meaning to  
8 the words of the statute. I think we can use 510 (b) at  
9 least for argument sake in an analytical approach and see  
10 where it takes us since that would be something that both  
11 parties agree upon.

12 The of course the approach in -- in National Farm  
13 was a follow the security approach. And -- and that is the  
14 approach that Tide says is the most appropriate case to  
15 follow. So looking at National Farm quickly and then  
16 applying it to our case here at National Farm was a breach  
17 of a stock purchase agreement with respect to its wholly  
18 owned subsidiary.

19 Similar to our case except in our case of course  
20 we have the consummation of the actual sale of the wholly  
21 owned subsidiary. The buyer there obtained a prepetition  
22 judgment for damages. The debtor filed of course the assets  
23 of the debtor at the time it filed its chapter 11 petition  
24 still included, the stock of the subsidiary. And it was in  
25 fact the valuable asset of the debtor.

1 The court analyzed the 510 (b) issues in the  
2 context (Unintelligible) appoint a Trustee but reasoned when  
3 it looked at those issues that set security means that the  
4 claim follows the security.

5 So in stating it as to that case the court said  
6 the claim represented by set security arising from the  
7 purchase of common stock of the debtors subsidiary has the  
8 same priority as the common stock of the subsidiary.

9 Okay. That sounds all right but exactly what does  
10 that mean? The court then went on to say of what value  
11 does that represent in that case? And the court there  
12 decided that the case turned upon whether or not the  
13 subsidiary which was still owned by the debtor in that case  
14 was solvent and therefore had value or what value does that  
15 stock represent to that entity.

16 The court said if that entity, if the affiliate --  
17 if the subsidiary that is still owned by the debtor has  
18 value, if there is equity in that entity then the claim is  
19 not subordinated to the extent of the debtors equity in the  
20 subsidiary. In other words to the extent of that value.

21 National Farm went on to say however if the  
22 subsidiary was not solvent and hence the parent's interest  
23 had no value then -- and this is quoting from the case, "The  
24 claim would be subordinated at the parent level." Further  
25 quoting, "And the claim would have the priority of the



1 subsidiaries common stock at the parent (Unintelligible)".  
2 And then the court finally said, "And shares of a subsidiary  
3 create no interest in the assets of the parent."

4 So then applying that analysis to our case here we  
5 have -- of course Tide purchased one hundred percent of the  
6 LLC membership interest in Nortex. The sale was consummated  
7 and the Nortex interest are no longer held by Falcon in this  
8 case.

9 Unlike National Farm there was no value left in  
10 Falcon with respect to Nortex. Like the National Farm case  
11 Tide is also said here but we don't have a judgment yet. We  
12 do have claims pending before the district court which we  
13 had decided including fraud and the inducement, breach of  
14 contract and importantly whether Tide was excused from  
15 performing the escrow as a result of fraud and therefore  
16 whether the money in escrow was property of the estate,  
17 property of the Falcon Estate or not. And Judge will --  
18 will tell us at some point whether it's property of the  
19 estate or not.

20 And therefore we'll know whether or not those  
21 proceeds at some point are assets of the parent. So the  
22 first step is as to Tide was the claimer and just  
23 represented by the hundred percent membership interest in  
24 Nortex will follow the security. We know that it's whatever  
25 it is that Falcon still holds in Nortex. Of course Falcon

1 holds nothing in Nortex.

2 Now Tide says -- and this is the key point of  
3 disagreement and this comes down to the key issue that  
4 needs to be decided by the court is Tide says, "The escrowed  
5 money represents the equity in Nortex." But that really  
6 can't be the case. First of all is -- if that statement is  
7 made by Tide in one clause, one half of a sentence in their  
8 brief no authority of any kind decided for the proposition  
9 that proceeds of the sale of an affiliate are themselves  
10 equity in the affiliate.

11 And it sort of begs the question because the  
12 district court's going to tell us whether or not those  
13 assets are property of the estate. If they're property of  
14 the estate they are just that. They are assets of the  
15 parent. The same assets of the parent that the National  
16 Farm case referred to when it said stock and the subsidiary  
17 creates no interest in the assets of a parent.

18 So Tide has to prove to show that there is still  
19 some interest here represented by the equity in Nortex that  
20 the proceeds are themselves equity in Nortex. And again  
21 we've had no case law whatsoever from Tide on that. There's  
22 no case showing the tracing is appropriate. There's no lien  
23 claimed in those proceeds. In fact Tide has represented to  
24 the district court and earlier proceedings that it does not  
25 claim a lien in those proceeds.

1           And in fact the law does provide that you can't  
2 trump 510 (b) by claiming a constructive trust interest in  
3 the proceeds of the sale based upon fraud and the  
4 inducement. Which is exactly the situation we have here.  
5 In that case at least the court considered whether or not  
6 the parties had even made a case for constructive trust and  
7 then went and said you haven't -- but even if you did --  
8 even if you did you can't trump 5 -- section 510 (b) by  
9 claiming that there -- that there is some sort of interest  
10 here that trumps 510 (b) by saying that's my specific  
11 property. Here we have no claim for constructive trust. We  
12 don't even get to square one.

13           Second, even if we did for -- for Tide to say the  
14 cash proceeds of the sale represent the interest in Nortex  
15 of what was sold but be creating a constructive trust. But  
16 be creating a lien. When we think of an interest in  
17 specific money that is property of the parent assets of the  
18 parent which is exactly what National Farm said the stock  
19 does not represent.

20           And this really has an important aspect for both  
21 the bank as well as the claims against Falcon. And I think  
22 this is an important distinction here for confirmation  
23 purposes, Your Honor. Is -- whatever happens to Falcon,  
24 whatever the court does with respect to subordination the  
25 falcon plan can be confirmed because it's a direct waterfall

1 plan, how would they fit in.

2 In the bank case here we need to have -- because  
3 otherwise if we create a new class we're going to have  
4 issues with whether that's a consenting class and various  
5 things. But there clearly isn't a new class at least as to  
6 the bank. We'll talk about the new class issue in a minute  
7 that the court talked about. But at least as to the bank I  
8 know the analysis of National Farm which has been adopted by  
9 Tide there really can't be because whether or not that  
10 seventy million dollars (\$70m) represents equity in Nortex  
11 that Falcon holds it doesn't represent anything that our  
12 Arcapita Bank holds. Arcapita Bank itself doesn't have that  
13 money. Its not alleged to have that money, it can't  
14 possibly have that money. So whatever that money represents  
15 in terms of being equity and Nortex at the Falcon level over  
16 at the bank level it repre -- there's nothing there. So  
17 there is no asset of the parent derivative of Nortex to  
18 which Tide can look to to say that's my claim and so  
19 therefore I should be anything senior other than common  
20 stock.

21 Now the important part and this is what I meant a  
22 moment ago by you don't necessarily need the common stock  
23 exception to apply or not apply to get the point that  
24 they've made in National Farms. National Farms says if  
25 there is no equity, if that Nortex stock in this case does

1 not represent any value to the debtor. Then, subsidiary --  
2 then that stock in the subsidiary the Nortex stock here has  
3 the -- the priority of the Nortex stock. And then as we've  
4 said many times, because that does not create any interest  
5 in the assets of the debtor that means it goes below common  
6 stock. It actually drops down. And that's what follow the  
7 security means. That's even what Lernout (Phonetic) said,  
8 "Follow the security" means.

9 So as to Tide -- pardon me as to Falcon we clearly  
10 have the issue where if there's no equity in Nortex as we're  
11 still being held by Falcon then the priority of the claim  
12 represented by the Nortex Security goes below common stock.  
13 The same is true at the bank that we don't even have an  
14 allegation, there's something at the bank level that would  
15 represent an equity interest in Nortex. So it goes down.

16 Now if perchance as argued to be very passive with  
17 common stock that's when the common stock exception here  
18 we'd have to argue whether it implies or not and because  
19 such interest here, set security is LLC interest and not  
20 common stock the U.S. commercial cases reading the plain  
21 text of the statute and giving meaning to it it doesn't save  
22 it and bring it back up. 510 (b) says it must go below the  
23 claim represented by set security unless it's common stock.

24 Now the reading of which way you use the common  
25 stock exception of push if you will claim I think the only

1 case that's ever used up to push something down was the VF  
2 case. And that's sort of an outlier in terms of this entire  
3 analysis. But that case really does not give --

4 THE COURT: And what's your understanding of VF is  
5 that in looking at it I got the sense that the Judge being  
6 on the verge of having a discussion about the level of  
7 subordination said it's covered by the common stock  
8 exception and -- and stocked her analysis and therefore in  
9 terms of an actual holding while it has many holdings in it,  
10 it doesn't really have a holding about the level of  
11 subordination as I understand it. Is that something you  
12 agree with or disagree with?

13 MR. MILLET: Generally, Your Honor, it's difficult  
14 to see -- it's looked there like the Judge had a result in  
15 mind and then sort of backed into an analysis if you will.  
16 Because the Judge even assumed there that you start with the  
17 presumption that the claim represented by set security is at  
18 the general unsecured level because she reasoned there the  
19 court ruled that reason there that -- because if you didn't  
20 have 510 (b) at all that's where it would be. However we do  
21 have 540 (b) and it says, you started at different places  
22 the claim represented by set security. Doesn't say the  
23 claim that would have existed but for section 510 (b).  
24 Could have said that but congress didn't say that. It said  
25 the claim represented by set security. So you can't simply

1 plug the starting point in at general unsecured drop it down  
2 and then say okay I also have common stock so it goes here.

3 Now whether the court really did this kind of one,  
4 two, three step analysis it just says well it's got to be  
5 subordinate at something and the common stock exception says  
6 it goes at common stock -- I've got common stock that's one  
7 that'll put it.

8 And so I think the court got there by parking at a  
9 common stock and ending the analysis. Lernout got to a --  
10 the similar result in a wholly different way. And National  
11 Farm gets there but it depends upon what equity is still  
12 left in the parent, you know the affiliate, not even how you  
13 get there.

14 THE COURT: All right now I know that -- that  
15 Tide's analysis of 510(b) is not your analysis so I -- I  
16 assume what you just basically did is say to the extent you  
17 follow their analysis we -- we still prevail so I assume  
18 you're going to get to your analysis of how the statute  
19 should work.

20 MR. MILLET: Your Honor, we tried to lay that out  
21 in our papers. And we think under whatever analysis -- I  
22 mean whether you VF, whether you pick Lernout, whether you  
23 pick even National Farm you more or less get to the same  
24 place. But the interest represented by the security is  
25 because figuring out what that means at the parent level it

1 should be then over because here of course we have one  
2 hundred percent of the assets of Falcon in effect being  
3 sold. It's almost the same as selling Falcon.

4 It should come in at the Common Stock level if you  
5 will and be at the Common Stock level. And then look to see  
6 whether the common stock exception, once you have to put it  
7 below because 510 (b) says we have to subordinate the claim  
8 to everything equal to or seniors (Unintelligible) does the  
9 common stock exception and push it back up. And here  
10 because we have in essence a hundred percent of the equity  
11 being sold comes in at common stock drops down, common stock  
12 exception doesn't apply because set security is LLC  
13 membership interest so it doesn't go back up, it comes  
14 insubordinate. So under that analysis or National Farm end  
15 up in the same place is our view.

16 THE COURT: All right.

17 MR. MILLET: Now I -- I looking at the court's  
18 questions. We talked -- I think I talked about corporate  
19 structure a little bit. If I haven't answered that question  
20 I'd be happy to do so. We talked about giving effect to all  
21 the parts of the statute because we said okay assuming we  
22 take National Farm which Tide says give effective part to  
23 the statute.

24 THE COURT: Well let me back up for the corporate  
25 structure. Is there any dispute among the parties as to how



1 to understand the corporate structure here in terms of  
2 seniority. I know they don't agree with the outcome but I'm  
3 just trying to get a sense on whether there's a dispute as  
4 to how you consider that question.

5 MR. MILLET: Not that I'm aware of, Your Honor. I  
6 think it's quite clear that these were in fact LLC  
7 membership interest. And the -- the structure of Falcon is  
8 relatively simple as well. There are no debentures or other  
9 securities that might come above it in that sense. We have  
10 general and scribd claims and then we would have these  
11 claims.

12 THE COURT: So it's really just a matter of -- well  
13 I'll -- I'll hear from Tide in a minute about -- about that  
14 question. So in terms of your reading of the statute Tide  
15 does make the argument that the debtors read that file the  
16 language about equal -- equal to the claim or interest  
17 represented by security that language out. So what's your  
18 response to that?

19 MR. MILLET: Not at all, Your Honor, in fact we --  
20 we very heavily rely on that because we are trying to look  
21 at the claim represented by the security. What does it mean  
22 over at the Tide level and partly at the Falcon level. We  
23 have to try to figure out what that is and under National  
24 Farm of course talked about what equity and just what value  
25 does it represent at the Falcon level, represents none so it

1 ends up down believe.

2 Under a different analysis followed by the other  
3 cases because this involved a hundred percent of the  
4 securities or a hundred percent of the assets it's the same  
5 as common stock it's like buying Falcon. So it would come  
6 in at the common stock level. Its subordinated down and not  
7 pushed back up by the common stock.

8 So we are actually looking very carefully and  
9 saying what is represented by that security much like they  
10 did in National Farm. So I'm not at all reading it out, in  
11 fact heavily relying on it. We think VF read it out of the  
12 statute. And in fact then said well we're going to treat it  
13 as if there was no statute and say okay now apply the  
14 statute. Start at general and scribd claim it out from  
15 there. And we're saying no the statute does say claim  
16 represented by set security. It doesn't say the claim would  
17 have been filed but for 510 (b). And therefore we're in  
18 fact saying very much so they're relying on that language.

19 THE COURT: So in your view your reading of it  
20 means that in most cases the result unless its common stock  
21 is going to be -- that it's going to be just allowed?

22 MR. MILLET: In most cases and -- and depending  
23 upon if you have a more senior level of security perhaps and  
24 the -- and the structure of the debtor in a simple case like  
25 this it may very well be disallowed and unfortunately that's

1 what the case law has paid lip service to and said as they  
2 did in Geneva Steel that this is a very important issue for  
3 investors because often in cases there's no distribution to  
4 certain class levels. And so you have to worry about the  
5 same thing that USA commercial said.

6 And -- and also the final question of the court, I  
7 didn't want to ignore that about should there be some new  
8 class? No case has created sort of if you will a new  
9 class. No -- there's been no support for that. Every case  
10 no matter what analysis they've employed have -- is in  
11 essence plugged in. The claim represented by such security  
12 at some existing level of claim within the structure of the  
13 debtor and work within that.

14 If you didn't do that and you didn't create a new  
15 class you -- you could create all kinds of havoc in terms of  
16 confirmation issues and acceptance by that class and what  
17 the plan would mean and a whole variety of issues.

18 THE COURT: But when you plug it in and then say  
19 its subordinate to the claim equal or interest equal to,  
20 that means you just go down to the next level whatever the  
21 next class is, whatever that may be.

22 MR. MILLET: Yes and that's what the courts have  
23 done with it and it -- and it is difficult to reconcile if  
24 you will simply looking at the statute with -- but National  
25 Farm does it by saying if you follow the security and

1 therefore the value that it represents and sort of figure  
2 out where it goes. National Farm to the extent there was  
3 value in you know in that issue the (Unintelligible) trust  
4 company or here in the security -- in Nortex itself -- not  
5 just because there's proceeds in the -- in the company but  
6 because of the ask itself would just simply say it's not  
7 subordinated period to the extent of that value. So it  
8 doesn't create a new class if you will. It just says it's  
9 not subordinated to the extent of that value.

10 So yes otherwise if there is no value there it  
11 would go down and let's say by common stock based upon the -  
12 - the reading of the statute. That's what the statute says.  
13 Now one can say well perhaps that's not the intent of the  
14 statute but whenever you have the -- the -- really look at  
15 the intent of the statute is but you look at the statute  
16 itself and it says, "Subordinated to all claims senior to or  
17 equal to." And that equal to language is hard to see right  
18 there in the statute and then reconcile it with all the  
19 pundits who've commented upon the purpose of the statute  
20 because the -- to really make the statute work with what  
21 others say or its purpose it's very difficult to do so with  
22 those expressed words that congress put in there so --

23 THE COURT: Well and there's a lot of cases that  
24 talk about the purpose and it seems clear that the purpose  
25 is to -- to -- since you as an investor have the upside you

1 shouldn't get the protection that a creditor would get. And  
2 I think beyond that it's -- it's -- I wouldn't say its  
3 silent but there's just -- there's not a whole lot of  
4 clarity so I feel like in terms of legislative intent which  
5 as -- as Justice Scalia would -- would -- would cringe at  
6 this very conversation.

7 But I don't know that there's a whole lot to go on  
8 beyond that fundamental principle in any event which I guess  
9 is a -- if you -- if you took the legislative intents and  
10 used it as your touch stone then you probably are -- are VF  
11 -- you follow VF I would think.

12 MR. MILLET: And you -- you -- I'm glad you did but  
13 you sort of stole the point I was going to make cause the  
14 legislative history speaks to when you first -- how you  
15 first knock it out of a class but it doesn't talk about  
16 where it ends up. And the courts then struggle with that.  
17 And that's the -- the assistance we're trying to provide the  
18 court in terms of an (Unintelligible) today.

19 THE COURT: Remind me what the plan says. I know  
20 there's a super subordinated class which I assume is the  
21 debtors view of where Tide's claim should end up but there's  
22 also a subordinated class which is above that. And what  
23 does that consist of?

24 MR. MILLET: As to Falcon that -- that's a class of  
25 employee interests in Falcon itself. In other words, they

1 had common stock interests in Falcon. So applying  
2 subordination there we place them in -- in a class but it's  
3 not -- it's a different class but it's not above common  
4 stock. It shares pari passu with common stock. So it  
5 effectively applies the statute. Because of their  
6 employment claims or their unemployment rights they have in  
7 affect common stock in Falcon that would them be at the  
8 Falcon's common stock level. It would get subordinated to  
9 that level except that there because it is common stock in  
10 Falcon, their employees are Falcon, you could save back the  
11 common stock.

12 That class that they're in shares pari passu with  
13 common stock even though it's numbered 8 and this one's  
14 numbered 9 it's the same.

15 THE COURT: All right.

16 MR. MILLET: So that's the classes --

17 THE COURT: So it's subordinated but not to common  
18 stock?

19 MR. MILLET: Correct.

20 THE COURT: All right.

21 MR. MILLET: Down to an equal level of pari passu  
22 with common stock as well.

23 THE COURT: All right.

24 MR. MILLET: As to Falcon. That's an important  
25 distinction. One final comment, Your Honor, is I may have

1 spent too much time about Arcapita Bank because in reading  
2 Tide's opposition I'm not sure I necessarily understand them  
3 to be objecting to the Arcapita Bank plan. There's nothing  
4 in the opposition that says it expressly objects to the  
5 Arcapita Bank plan. So I did explain that if they are --  
6 well it shouldn't matter because there is certainly is no  
7 equity in Arcapatia Bank as to Nortex but perhaps its not  
8 even -- an objection's been made because I -- I don't even  
9 really see an objection to class 10(a) the "A" class is  
10 (Unintelligible) Arcapital Bank classes.

11 THE COURT: All right. Thank you. All right let me  
12 hear from Tide unless the committee wants to add something  
13 at this point. Maybe I should hear from everybody on one  
14 side.

15 MR. FLECK: I can just -- I can do it from here,  
16 Your Honor. Evan Fleck on behalf of the committee. Your  
17 Honor, we filed a brief joinder to set the position of the  
18 committee first of all to join in the arguments that the  
19 debtors made also to set out what we believe is the fact  
20 that the -- the statute is clear we -- we don't think we  
21 need to look for legislative intent but then further if you  
22 do we think if you look at the progression of the statute we  
23 think it is helpful and aids in the debtor's argument with  
24 respect to the application of the exception. But other than  
25 that, Your Honor, we'll -- we'll join the debtor's argument

1 and support the position that was laid out by Mr. Mellit.

2 THE COURT: All right let me just answer your  
3 question about that. I did read your chart. Can you sort  
4 of summarize how in your view the progression of the -- of  
5 the statute supports the argument.

6 MR. FLECK: Well, Your Honor, it's just that --  
7 that the -- the -- congress spent -- spent a great deal of  
8 time with respect dealing with this section, 510 (b) but the  
9 common stock and we think that if there was a desire to --  
10 to modify the common stock exception that would have been  
11 done. We see the language elsewhere within 510 (b) being  
12 modified with this common stock exception that remains as --  
13 as it was intended. And -- and -- well remains static.

14 THE COURT: All right thank you. Now let me hear  
15 from Tide.

16 MR. WOODS: Good afternoon, Your Honor. Troy Wood  
17 on behalf of Tide.

18 THE COURT: Afternoon. Let me start out with  
19 asking the question that I think Mr. Millet ended with is  
20 your take on the Arcapita Bank plan and whether this is a --  
21 I didn't understand this to be a -- a Falcon only objection  
22 but let me ask you.

23 MR. WOODS: The argument applies to both. We  
24 objected to that -- to the -- in our plan objections we did  
25 object and our objection is that really you asked what --



1 there's not a new class that needs to be created it's just  
2 that class 8 just doesn't need to share pari passu with the  
3 shareholders.

4 They mentioned the -- the individual claimants.  
5 The debtor hadn't sought to subordinate those claimants.  
6 They -- they sought to disallow them. They filed plan  
7 objections -- I mean claim objections. So the only party in  
8 class A is (Unintelligible).

9 They objected to the individual shareholders  
10 claims and said that they -- they equal equity and -- and  
11 they don't have valid claims. They do not seek to  
12 subordinate those claims. They have not filed any  
13 subordination to those claims. So the only class -- the only  
14 part in class in Falcon is my client. And all you had to do  
15 to the plan is to say we don't share pari passu with the  
16 shareholders. That's the only change. You don't have to  
17 create a new -- a new class. All you have to do is just say  
18 that we don't share pari passu with shareholders which is  
19 the law. That's how the courts have interpreted. That's  
20 what National Farm did and that's what VF Brands did.

21 THE COURT: All right.

22 MR. WOODS: Your Honor, going to your question is -  
23 - the other thing you brought is what provision they ignore  
24 and as put in our papers. They do -- they did strike out  
25 that are senior or equal to the claim or interest

1 represented by such security. And you asked the debtors  
2 counsel a very important question is if not here when would  
3 an affiliate security ever have priority or ever have  
4 entitlement to a claim in the debtor. And -- and they said  
5 well most of the time. And then his answer was you have to  
6 look at the corporate structure. Well that's exactly what  
7 we're doing here. And that's our argument is -- is to  
8 determine when an affiliate's claims based on a cell of an  
9 affiliates security is senior or equal to other claims of  
10 the debtor and other interest of the debtor. You have to  
11 look at the corporate structure. And here --

12 THE COURT: Why don't you walk me through it as to  
13 each of the debtors from your point of view?

14 MR. WOODS: Okay. Your Honor, I have a  
15 demonstrative evidence.

16 THE COURT: Sure.

17 MR. WOODS: May I approach? May I approach?

18 THE COURT: Sure. Actually do you have one more  
19 copy?

20 MR. WOODS: I do.

21 THE COURT: Since I have made someone else suffer  
22 with me in discussing the wonders of subordination. Thank  
23 you.

24 MR. WOODS: Your Honor, the -- the importance and  
25 what distinguishes this case from all of the other cases

1 that the debtor relies on is that we bought an asset of --  
2 of the debtor Falcon. And so our interest the equity in  
3 Nortex is structurally superior as it relates to the  
4 purchase price that was paid for that equity is structurally  
5 superior to all interest above that. And that's what VF  
6 Brands recognizes. And that's -- that's what National Farms  
7 recognizes is what 510 is pro -- is intended to prohibit is  
8 if Nortex was a debtor in this bankruptcy it would prohibit  
9 us from jumping ahead of that equity and having a claim  
10 against Nortex and its assets and debtors. It doesn't -- it  
11 doesn't prohibit us from following the security. Meaning  
12 following back behind. In fact the one case they rely on is  
13 U.S. Commercial Mortgage.

14 And what that case said is you're subordinated to the  
15 level immediately below your -- your interest. So in this  
16 instance in the corporate chart we bought equity in Nortex  
17 and so if we have to fall back behind Nortex that gives you  
18 a claim against Falcon. That's the -- that's the seniority  
19 based on corporate structure of the debtors in this case.  
20 What VF Brands says is okay then you have a claim that's  
21 equal to the unsecured creditors Falcon and so you're  
22 subordinated to those unsecured creditors.

23 Now she was -- Judge Walrath (Phonetic) was very  
24 clear on the two step process. I think to answer the court's  
25 question is absolutely she addressed the common stock. And

1 used it as a sword in that case but for the common stock  
2 exception used as a sword by Judge Walrath the -- the claims  
3 of those creditors in that case would have stopped  
4 immediately behind the generally unsecured creditors and  
5 that's what we're asking in this case is that we're  
6 subordinated to the general unsecured creditors but not to  
7 the level of equity by --

8 THE COURT: But doesn't that create a new class?

9 MR. WOODS: No. It's class 8 its just it doesn't  
10 share pari passu that's all it is.

11 THE COURT: I don't know how that works if class 8  
12 does -- is supposed to share pari passu. If you have a  
13 class and you say it's in this class but it's treated  
14 differently then I don't -- how is it the same as -- as  
15 things in that class?

16 MR. WOODS: It -- in class 8 either it should not  
17 share pari passu or if -- if the debtor wants to keep class  
18 8 then there will have to be another class that's in between  
19 the general unsecured creditors in equity. The debtors  
20 could have just as easily said class 8 doesn't share pari  
21 passu. It -- there's nothing in the bankruptcy code that  
22 says class 8 has to share pari passu. We're the only  
23 creditor in that class. They've objected to every other  
24 claim in the case.

25 THE COURT: Well but if I -- if I haven't ruled on

1 the objections they -- they are still in a class. So if  
2 there's a claimant who -- who's in a class there's an intent  
3 to object to it but it hasn't been objected, right now  
4 they're accounted for in that plan in that class so you're  
5 not the only person in that class. You may someday be the  
6 only person in that class but you're not currently is my  
7 understanding of that.

8 MR. WOODS: The -- the -- I think the court's  
9 remedy is either to say class 8 doesn't share pari passu and  
10 these other creditors would be class 9. They would  
11 essentially be -- they would be treated because that's what  
12 they are they're equity. That's what the hopper parties are  
13 and that's what these claimants are. They -- they have --  
14 they have equity interest in -- in the debtor Falcon and  
15 they want to share in the pro rata distribution. And -- and  
16 so they would go into class 9.

17 And so I think the court -- the remedies for this  
18 court would either change class 8 so it wouldn't be pari su  
19 or create another class that says -- but I think that --  
20 that -- that would resolve our objection if there was a  
21 class in between the general unsecured creditors and the  
22 subordinated credit claims that share pari passu.

23 THE COURT: And your support for creating a  
24 separate class is -- is -- what do you rely on for that?

25 MR. WOODS: It's just that following the bankruptcy

1 code. The banks play the points --

2 THE COURT: Well but subordination can mean a  
3 couple different things right? It could mean for the sake  
4 of simplifying the hypothetical that there are three classes  
5 and class two is -- is -- is where it lines up in terms of  
6 such security and if you're subordinated below class 2 you  
7 could either just fall into class 3 or you could be  
8 essentially class 2 (b), so --

9 MR. WOODS: But there's no -- I'm sorry. I didn't  
10 mean to interrupt you.

11 THE COURT: -- so that's -- I guess my question is  
12 in -- in your view what -- what should happen here?

13 MR. WOODS: Either a new class be sub -- to be  
14 created which would resolve our objection and allow the  
15 confirmation to be --

16 THE COURT: All right that's the 2(b) methodology,  
17 okay.

18 MR. WOODS: Okay or change class 8 to not share  
19 pari passu.

20 THE COURT: But how do I -- how do I -- I mean I  
21 have a plan that has other claimants in class 8 right? So  
22 you're saying I would -- I would affect those rights or I  
23 would change the plan of the debtors to say that we propose  
24 class 8, class 8 has voted on the plan or done whatever it's  
25 going to do not object based on the understanding that it is

1 going to share pari passu but then I'm going to sua sponte  
2 take them and -- and change their rights after -- after the  
3 plan has sort of -- I mean do it at confirmation?

4 MR. WOODS: There are class -- Your Honor, if you -  
5 - if you deny the objections of those claims they fall in  
6 class 5 not 8.

7 THE COURT: But I don't have any objections in  
8 front of me.

9 MR. WOODS: Correct, Your Honor.

10 THE COURT: I -- I know you've said that but you --  
11 you're -- you're --

12 MR. WOODS: But there's no --

13 THE COURT: -- linking two things that aren't  
14 linked for purposes of the plan. People object to claims  
15 before sometimes during, usually after and until I have an  
16 objection that's been ruled on, a claim is prima facia valid  
17 and its accounted for in a plan right? I mean that's the  
18 way I understand that it works unless somebody has some  
19 really interesting authority to tell me to the contrary.

20 So -- so I can't -- I'm just struggling with your  
21 alternative. I understand the creating a 2 (b) class a  
22 separate class but I'm wondering if under your world view  
23 that there really is no choice but to create a -- a new  
24 class. Because I would have to -- I would have to -- I  
25 would have to address it. And because otherwise you'd be

1 asking me to come in and change the rights of folks under  
2 the plan after all this time at a confirmation hearing.

3 MR. WOODS: Correct, Your Honor. To the best way  
4 to address the courts concerns would be to create class 8  
5 (a) and class 8 (b).

6 THE COURT: All right.

7 MR. WOODS: That essentially -- or 1 and 8 (1) and  
8 8 (2).

9 THE COURT: And what -- what case authority do you  
10 have from my ability to create a new class in that plan  
11 confirmation context?

12 MR. WOODS: Well the court would either deny  
13 confirmation of Falcon it's a liquidating plan or the debtor  
14 to -- to overcome that objection it would resolve our  
15 objection and allow the liquidating plan to -- to -- to be  
16 confirmed. And so the court would either say I'm going to  
17 deny confirmation because it does not adequately provide --  
18 apply 510 (b) or I'll let you amend it and -- and at that  
19 point we would consent to the amendment and -- and the court  
20 would confirm the plan.

21 THE COURT: All right and for Arcapita Bank?

22 MR. WOODS: I think a similar resolution could be  
23 had but the courts correct. I don't know if there's any  
24 distribution above to get to our claims up at Arcapita Bank.  
25 Our main concern is the seventy million dollars (\$70m), Your



1 Honor.

2 THE COURT: Right well that may be not as important  
3 to you but its -- its important to me in terms of trying to  
4 figure out what I have to resolve and what I don't have to  
5 resolve so if you -- if you pursue a claim in the Arcapita  
6 Bank situation in that case then I deal with it whether  
7 you're like well I'm not that -- all that interested in it  
8 or very interested in it, it's all the same to me so --

9 MR. WOODS: It would be the same result, Your  
10 Honor.

11 THE COURT: No, no, no I -- I understand that but  
12 what I'm -- what you're saying is it's -- it's not really  
13 what you're after but it really -- that doesn't matter to me  
14 either you're pursuing that argument as to Arcapita Bank or  
15 you're not and I understand you are so that my question then  
16 is how does it -- how does your world view apply to Arcapita  
17 and you're saying it's the same thing either say deny  
18 confirmation because it doesn't apply to 510 (b) or -- or I  
19 guess that's probably -- probably it.

20 MR. WOODS: Or create class 8 (1) and 8(2).

21 THE COURT: All right well I think that's a new  
22 plan though. If I -- I think about got 8 (1) and 8 (2).  
23 That -- that's fine I mean it -- but I'm just -- I'm just  
24 trying to understand the implications that's all.

25 MR. WOODS: Your Honor, you know all the cases have

1 gone to great lengths not to interrupt the statute to  
2 provide for disallowance. And in the -- if the -- if -- if  
3 congress wanted to just say look all affiliate claims,  
4 claims arising from sales of affiliates are just simply  
5 disallowed except for the common stock exception. Well one  
6 they didn't do that and so the court shouldn't interpret the  
7 statute to provide that. And again if you adopt their  
8 interpretation it's not that most of the time affiliates  
9 claims would be disallowed it is all of the time affiliates  
10 claims.

11 If -- if you don't say that equity in a wholly  
12 owned subsidiary and the claims that arise there can be  
13 senior to or equal to claims of a debtor then in no  
14 circumstances could a claim from in any affiliate ever be  
15 allowed except for the common stock exception. And that  
16 just wasn't what congress intended. Why would congress  
17 draft the statute that is dead as opposed to just saying  
18 what we want to do is disallow claims from sale of all  
19 affiliate debtors except for the common stock. What is so  
20 special about common stock first all? And they even admit  
21 in their -- in their -- in their pleadings that its probably  
22 just an oversight cause at the time that the congress in  
23 acted this that -- that -- you know LLC interests were just  
24 not as popular as they are now. And -- and there's a lot of  
25 talk about well if congress wanted to amend the statute it

1 could. The fact of the matter is -- is you know as this  
2 court's aware it just -- this issue doesn't arise very often  
3 in bankruptcy cause normally there's not distribution up to  
4 equity and so what happens in all of these cases that are  
5 being cited to the court is they're saying all right you're  
6 claims are subordinated to the general unsecured creditors.  
7 Well the general unsecured creditors are getting cents on  
8 the dollar so you're out of the money.

9 So the fact that congress hasn't amended it is  
10 quite frankly if this issue hadn't made its way up to the  
11 circuit courts --

12 THE COURT: Well it -- for my purposes doesn't  
13 really matter why they haven't amended it they just haven't  
14 amended it so -- so I'm stuck with a statute that other  
15 courts have struggled to interpret. So --

16 MR. WOODS: That's fine --

17 THE COURT: Mr. Mellit had gone through his -- his  
18 take on value using the follow the security approach. And -  
19 - and I think I can probably guess a number of things you  
20 would say but I wanted to get your take on where you part  
21 company with him on that analysis. That is he goes through  
22 and talks about the value saying well if you're going to do  
23 it that way you -- you look for the value and you look to  
24 solvency and then you apply to each debtor and he thinks  
25 it's very easy on the Arcapita front to reach the result and

1 that -- but even as to -- to Falcon you reach the same  
2 result so where you part company with them on that analysis?

3 MR. WOODS: Down at the Falcon level, Your Honor,  
4 clearly the seventy million dollars (\$70m) represents the  
5 alleged equity in the debtors interest in -- in Nortex  
6 equity, in their stock. I mean that's what we did. We  
7 bought -- we didn't buy assets of Nortex, we bought Falcon's  
8 equity in Nortex. So by very definition the proceeds of  
9 that equals the equity.

10 Our position is that we overpay a hundred and  
11 twenty million dollars (\$120m) because of their fraud,  
12 they've admitted that. For the purposes of today they're  
13 saying you're correct. You overpaid by a hundred twenty  
14 million dollars (\$120m). Fifty million dollars (\$50m) of  
15 that has already been dispersed to Arcapita. So they have  
16 already guiding Arcapaita and its creditors they've already  
17 received four hundred and forty five million dollars (\$445m)  
18 which we believe and what they've admitted is hundred and  
19 twenty million dollars (\$120) over the true value of that  
20 equity. Fifty million's (\$50m) already left the barn it is  
21 up and -- and Arcapita and its creditors have already  
22 enjoyed the fruits of that fraud. The question is is the  
23 seventy (\$70m) that's remaining are we entitled to -- to  
24 distributions as a creditor of Falcon before Falcon's equity  
25 and the creditors of Falcon's equity receive distributions

1 on that seventy (\$70m). Now the ironic thing is they're  
2 using 510 for the very purpose it's intended to prevent.  
3 They're using 510 so that they're equity interest can jump  
4 ahead of our claims. We contacted for the sale of an asset.

5 THE COURT: Well --

6 MR. WOODS: That's the result. That is the net  
7 result is -- is that if the court adopts their  
8 interpretation then essentially they are jumping ahead --

9 THE COURT: But the -- but the purpose of it is  
10 that -- is that security just don't end up robbing unsecured  
11 creditors of value and that you -- you have certain upside  
12 risks and certain downside risks and they're distinct from -  
13 - from what creditors and the position that they're in. But  
14 -- but let me get back to the val -- let me get back to the  
15 value thing for a second. So in your view when -- when Mr.  
16 Millet says that the seventy million (\$70m) is not an  
17 appropriate proxy for the value here you disagree and think  
18 it is because it's the purchase of the stock itself?

19 MR. WOODS: Absolutely.

20 THE COURT: All right.

21 MR. WOODS: It's -- it's -- absolutely.

22 THE COURT: Then, then let me ask you about that as  
23 to Arcapita he says as to Arcapita its pretty clear that --  
24 that -- that is -- is -- is not value for the parent and  
25 therefore that even under the case you rely on you still end

1 up subordinated down. And so I know the parties have treated  
2 these things together but there are some factual  
3 distinctions. So what's your -- what's your response on his  
4 value point as to Arcapita Bank?

5 MR. WOODS: Well assuming the seventy million  
6 (\$70m) never leaves Falcon then I agree with them because it  
7 will be eaten up by creditors, claims including ours it  
8 would never get to Arcapita so I would agree that at that  
9 point. They -- Arcapita besides the fifty million (\$50m)  
10 they've already received there would now be additional  
11 distributions up there. And so our claim wouldn't rely on  
12 the equity of -- of -- of excuse me, the -- the equity value  
13 going up. Our claim would be under VF Brands which said  
14 that our claim because we bought stock that is structurally  
15 subordinated in the corporate tree which -- that's our  
16 position is you look at the corporate tree that's what  
17 debtors counsel -- when the court asks the question under  
18 what circumstances could affiliates claim ever be senior to  
19 a claim or an interest in the debtor. The court -- the  
20 response you got was sometimes it could you have to look at  
21 the corporate tree. So we're just asking you look at the  
22 corporate tree when you buy a wholly owned subsidiary of the  
23 debtor then you are structurally superior to those -- all  
24 the claims. You can follow that security, meaning you can  
25 go behind it. You can't jump ahead of it, go behind it.

1 When you go behind it you have a claim against Falcon. You  
2 have a claim against Arcapita. You're subor -- under VF  
3 Brands you're subordinated to general unsecured but you're  
4 not subordinated to equity.

5 THE COURT: Right but -- but I would have to adopt  
6 VF Brands starting point of looking at the unsecured which  
7 you will admit is a bit of an out wire compared to other  
8 cases that -- that talk about comparing it to -- to not to  
9 the unsecured, you use a different starting point, you look  
10 at the securities.

11 MR. WOODS: No, Your Honor, I don't believe it's an  
12 outlier --

13 THE COURT: I mean for Arcapita Bank I'm referring  
14 to because what I think you said is that the value analysis  
15 that you don't see the seventy million dollars (\$70m) going  
16 up. And therefore there is no -- there's no value that  
17 would make it appropriate to -- to have -- to come before  
18 equity in Arcapita Bank, if I'm understanding Mr. --

19 MR. WOODS: That's correct, Your Honor. But I don't  
20 think it's an outlier because again if you look at all the  
21 cases that they cite its always someone above the debtor  
22 that's buying equity above the debtor trying to jump down  
23 into that class. There's nothing that says you can follow -  
24 - that you can't follow you're equity and swim upstream.  
25 It's just -- and the -- you say that VF Brands is an outlier

1 the problem with VF Brands it's the only case that really  
2 address this issue. This is the only public -- I mean  
3 published opinion that actually address this specific issue  
4 is how do you treat claims that arise from a wholly owned  
5 subsidiary downstream that are structurally -- structurally  
6 senior to the claims and interest above that. And so that's  
7 what Judge Walrath was struggling with and we believe she  
8 came to the right decision.

9 THE COURT: Well again there are numerous of these  
10 cases that you don't know what the right decision would be  
11 on a level without the common stock exception cause the --  
12 the courts apply that and it solves a significant portion of  
13 the issues for all these judges. And then there are a  
14 couple of circuit decisions that -- and other decisions that  
15 address these things only in dicta but tend to be more  
16 expansive. So there's -- there's not a whole lot out there  
17 that actually grapples with the issue on -- on the terms of  
18 making an actual holding.

19 So for -- for purposes of the Arcapita Bank you  
20 don't dispute the debtors sort of value analysis but rather  
21 you rely on -- on VF for purposes of the part.

22 MR. WOODS: That's correct. Your Honor, the last  
23 thing I would -- I would suggest to the court, it's in our  
24 pleadings but you know I think it is important that this  
25 court not interpret the statute to cause observed results.



1 No one -- it -- Arcapita and its creditors and the Hopper  
2 parties they have equity in Falcon. They bore the risk of  
3 whether that equity would ever bear any fruit. We --  
4 because we contractually bargained for the purchase of an  
5 asset of Falcon, our claims are structurally senior to those  
6 claims. And so they want to shift that -- that -- that  
7 burden of risk. That's why I'm saying that they're  
8 interpretation misuses 510 (b) cause if you look at the --  
9 at the cases they cite they talk about who bore the risk of  
10 the equity in Falcon and what's the absolute priority rules.  
11 Follow the absolute priority rules. Here our case we  
12 contractually bargained for and obtained an agreement to buy  
13 an asset of Falcon. The equity in Falcon, which is Arcapita  
14 in the Hopper parties they're the ones that bore the risk  
15 that it turns out that hey they -- Falcon defrauded us or  
16 breached their contract that those claims would stop  
17 distributions up to their level.

18 In this instance what they're -- what they're  
19 arguing is interpret that to allow us to you know don't let  
20 Tide -- they're saying Tide needs to bear all that risk  
21 because they're an equity buyer. Well they're an equity  
22 holder. And they're the ones that hold the risk of Falcon.

23 THE COURT: All right well let me play devil's  
24 advocate for a second. Isn't that consistent with the  
25 statute that you -- you find sort of what you're similar to

1 and then you're subordinated to that right? I mean that --  
th  
2 that's what one -- I think it's the 9 circuit Bap decision  
3 with Judge Russell writing it said, "The statute says what  
4 it says. You can question its wisdom but it doesn't  
5 contemplate the same treatment." And maybe -- maybe the  
6 common stock exception is outdated. That it should be more  
7 expansive and as a matter of policy I'm sure people in this  
8 room could probably write a better statute at this point  
9 given the -- the various financial instruments that are out  
10 there but at least Judge Russell had a problem with a notion  
11 of -- of saying that something that's on the same level with  
12 the way 510 (b) operates that -- that it would -- it would -  
13 - it would work that way cause the language in the statute  
14 doesn't say that way and has that common stock carve out in  
15 that one instance where congress thought it was appropriate.

16 MR. WOODS: Your Honor, and -- but remember Judge  
17 Rosa what the -- what he was struggling with was they were  
18 -- the claimant in there were seeking double recovery. They  
19 had filed a proof of interest in one amount and a proof of  
20 claim in another amount. And they wanted to double recovery  
21 at the level of equity. And that's what they subordinated.

22 THE COURT: I -- I don't know about that because  
23 he had language in that where -- wherein he reversed the  
24 decision saying you know you're entitled to file both.  
25 They've said that they one -- one will be credited against

1 the other so we're going to treat them separately. So I  
2 don't know that that was the animating principle of that  
3 decision. I think he -- he went on probably as only a trial  
4 court Judge would who's sitting in an appellate panel to try  
5 to provide some detailed guidance. To -- to address the  
6 issue since he was -- had -- should've gotten himself up to  
7 speed. So -- so that -- I mean that's my concern is that --  
8 is the statute when sort of treating -- this idea of  
9 treating like alike doesn't -- isn't written that way. It -  
10 - other than the common stock exception it's really designed  
11 to say well if you're alike you go after.

12 And I -- no academics have debated that hotly as  
13 to why that is and what it means and whether it makes any  
14 sense at all but that's the way it's written and that's -- I  
15 spent -- before I got to the cases I spent a few days just  
16 trying to read the statute and figure out what the statute  
17 on its own meant and it's quite a bit of a challenge.

18 MR. WOODS: The -- but we're not alike because  
19 again we did not buy equity in -- in Falcon. That's what  
20 Hopper did and that's what Arcapita -- we -- we contracted  
21 with Falcon that gave us an unsecured creditor. So we are  
22 not like them. We could have bought -- we could have just  
23 bought Falcon's interest in -- excuse me, Arcapita's equity  
24 interest in -- in Falcon. And we could have bought that.  
25 We could have bought it from Hopper but we didn't. The

1 parties contractually negotiated and bargained for a  
2 position that was senior to the -- to the interest of  
3 Arcapita and the Hopper parties.

4 And, Your Honor, the -- the -- what -- what really  
5 is happening here is they're -- they're trying to profit  
6 from the fruits of their own fraud. I mean there's seventy  
7 million dollars (\$70m) left. The fifty million dollars  
8 (\$50m) has gone out the door. And there's not much we can  
9 do to get that money back but there is seventy million  
10 (\$70m) there.

11 THE COURT: Well I -- I have some questions about  
12 that. I mean the -- the statute is written in a way that it  
13 contemplates the kind of allegations that are made here  
14 being subordinated and then it's just a question of the  
15 level. So congress made a decision that these fights about  
16 stock and shareholders and various things are subordinated  
17 and then the questions what the hell does the rest of it  
18 mean. So I don't know if you're going to go down that road  
19 then congress would have -- would have carved out certain  
20 kinds of exceptions based on conduct, not on class or kind.  
21 So I don't know that that's going to get you very far. I  
22 think the idea of comparing what -- comparing the different  
23 interest is -- is -- is what you've spent a lot of time on  
24 and as Mr. Millet is the right way to go because I don't --  
25 I don't know that I have that kind of authority the way

1 congress is -- you know they were certainly aware of fraud  
2 allegations and rescission, all sorts of stuff that -- that  
3 you know if you're making those allegations you think you've  
4 been wronged.

5 MR. WOODS: The only reason I bring that up, Your  
6 Honor is because you have to decide between two  
7 interpretations. If you decide our interpretation then you  
8 avoid those observed results and that -- and that's why I  
9 brought it up. And -- and -- and our interpretation is the  
10 only one that gives full effect to the entire statute and  
11 all the language and recognizes as congress did, is there  
12 could be a scenario when affiliates claim -- or claims  
13 arising from a sale of an affiliate there's going to be an  
14 allowed claim. And it's going to be senior to claims and  
15 other interests. When is that scenario? That scenario can  
16 only be when you buy a wholly owned subsidiary of the  
17 debtor. And if you don't agree with that then what you're  
18 interpreting the statute to mean and what congress meant was  
19 I want to disallow all claims from all cells involving  
20 affiliates except for a common stock exception. Which just  
21 does not -- it leads to observed results and it just doesn't  
22 make sense why congress would prefer common stock over other  
23 interest. Thank you, Your Honor.

24 THE COURT: Thank you.

25 MR. WOODS: Your Honor, can I have 30 seconds to

1 ask my partner one question?

2 THE COURT: Sure, absolutely.

3 MR. WOODS: Your Honor, in answer your question and  
4 maybe simplify this hearing, we withdraw our objection to  
5 the Arcapita plan treatment.

6 THE COURT: All right. All right --

7 MR. WOODS: So we're just focused on the Falcon --

8 THE COURT: Thank you, that does clarify -- clarify  
9 things a little bit cause it's a different analysis.

10 MR. WOODS: Thank you, Your Honor.

11 THE COURT: Thank you. I appreciate pragmat --  
12 pragmatism where I can find it.

13 MR. MILLET: Seeing if Ms. Weiner was back yet.  
14 Your Honor, Craig Millet again for the -- for the debtor.  
15 That will make my comments more brief in light of the  
16 withdrawal of the issues as to Arcapita Bank.

17 There is one thing that is very important that I  
18 clear up. At the outset of Mr. Wood's arguments he made  
19 comments that Tide is the only party in class 8. Which  
20 disturbs me a little bit in that Thronson (Phonetic) is not  
21 in class 8. We filed objections to the Thronson claims  
22 because they had basically duplicated claims and claimed  
23 priority in a variety of things. We don't dispute that they  
24 have claims we dispute the amount that they claim and that  
25 will get worked out. We also objected to Tide's claim.

1 Tide's claim in the plan is in class 10 (a), not in 8 (a).  
2 We entered into a voting stipulation that this court  
3 approved pursuant to an order. The voting stipulation  
4 expressly provides for purposes of voting only. Tide will  
5 be in class 8 (a). And then it went on to recite a litany  
6 of words about how this is not admitting that it's in class  
7 8 (a), everybody reserves their rights and all that jazz.

8 But we did not put them in class 8(a) as Mr. Woods  
9 claims. They are not the only party in class 8(a). They  
10 currently are in class 10 (a) and will only move from that  
11 if this court makes a decision on the subordination matter  
12 to put them someplace other than 10 (a).

13 THE COURT: So you gave them the benefit of the  
14 doubt in terms of this argument for purposes of voting on  
15 the plan?

16 MR. MILLET: Exactly, so it is not at all correct  
17 to say that they are in class 8 or that they are the only  
18 party in class 8 or that they're in class 8 (a) at all  
19 because they will not go to class 8 (a) unless this court  
20 puts them there.

21 Now if this court were to put them there the court  
22 has the -- this court would be effecting the rights of the  
23 Thronson parties who's claims are based upon common stock of  
24 Falcon not LLC membership interest in Nortex it will be  
25 changing. So you can't simply do that. It would require

1 the creation of some new class that we don't currently have  
2 that would give rise to confirmation issues potentially  
3 because of course for voting purposes Tide has voted no. So  
4 if you put them in some class we could have a problem with a  
5 rejecting class that would cram down in a variety of other  
6 issues. So simply creating classes is -- sounds nice  
7 perhaps on its face but it has a lot more ramifications and  
8 therefore is unsupported by the authorities. There's no  
9 cases that have really done that. And I don't believe that  
10 you know that Mr. Woods been able to cite to any of his  
11 brief while we're here before the court. So we stand on our  
12 position that creating a new class at Falcon or anywhere  
13 else is -- is not appropriate.

14 Passing over my bank comments now. Mr. Woods  
15 focused a great deal on congressional intent on doing what  
16 congress intended and giving them the benefit of their  
17 bargain and what they bargain for and they said they bargain  
18 for a structurally senior position of sale of course but  
19 nobody even addressed that they bargained to buy some LLC  
20 interest and that was it.

21 But Mr. Woods never tied -- tied, T I E D, his --  
22 his arguments to a specific case with the authority. He  
23 strictly said this is the result that the court should  
24 impose because it is -- it gives rise to the purpose of the  
25 statute. But in their papers Tide said that National Farm



1 was the correct analysis to follow and that it gave meaning  
2 to every aspect of the statute. And yet he's rejected  
3 National Farm now and said we should do something different  
4 instead of looking at what value the Nortex Security still  
5 represents to Falcon.

6 And also there is discussion whether in every case  
7 there would always be subordinated interest here when you  
8 deal with an affiliate, perhaps not so. Falcon could have  
9 sold 20 percent of the interest of Nortex to someone who  
10 could have then had a claim, Falcon would have of course  
11 then still retained 80 percent and the Nortex stock or  
12 Nortex LLC membership interest that the Falcon  
13 (Unintelligible) would have represented value following the  
14 National Farm. And (Unintelligible) therefore would have  
15 still been something left in that case so it's not every  
16 case but even if it is our position is that's unfortunately  
17 what the statute says because it says suborning it to  
18 anything equal to the case law have recognized that, Geneva  
19 Steel recognized that, USA Commercial recognized that and by  
20 the way we don't admit that it was necessarily an oversight  
21 of congress. I don't know why congress limited the common  
22 stock. Judge Russell said and we quoted that in our papers,  
23 that Judge Russell noted it was a commercial. That don't  
24 know why this was done. But we have not admitted that it  
25 was an oversight in any way, shape or form. It was strictly

1 a quote from the (Unintelligible) said USA Commercial.

2 To argue that there is some specific right to the  
3 seventy million dollars (\$70m) there was arguing for the  
4 imposition of the constructive trust or a lien or some  
5 special interest in that fund that has not been provided by  
6 any case law and certainly not by 510 (b).

7 THE COURT: Well let me ask a practicing question  
8 about the seventy million (\$70m). On the merits of the case  
9 in -- in front of Judge Wood I'm having some -- and maybe  
10 there's an easy answer to this that I haven't seen. If she  
11 decides that its property of the debtors estate then you go  
12 through this analysis in terms of where the money is  
13 distributed, right? And but in which case she is likely to  
14 if I understand correctly have rejected the merits of the  
15 underlying litigation.

16 MR. MILLET: Perhaps, not necessarily.

17 THE COURT: Not necessarily. Well I guess not  
18 necessarily. But I mean conversely if -- if -- if she -- if  
19 she sides with Tide then she will have said the seventy  
20 million dollars (\$70m) is -- is likely not part of the  
21 debtors estate. And this will all be moot. So I'm -- I'm --  
22 I'm sort of wondering whether in fact that we're going to  
23 have a serious mootness problem if we ever had a meris  
24 (Phonetic) decision on it but I guess it doesn't matter  
25 anyway.

1 MR. MILLET: True, Your Honor, there's -- there's a  
2 claim of fraud in the inducement and if its somehow proven  
3 that Tide was excused both -- excused from releasing the  
4 money from escrow and that the money had not already passed  
5 to the estate, to it was titled that -- and Falcon had not  
6 occurred, in that case the money could go directly solely to  
7 Tide in that instance. But if the court gets past that it  
8 could still address whether it was simple fraud or whether  
9 it was a breach of contract. In which case that simply  
10 represents a claim at this -- at this courts level that this  
11 court will then resolve and as the court quickly observed  
12 fraud or no fraud congress has recognized these just as  
13 claims without some sort of moral difference between them  
14 and how they're treated in bankruptcy.

15 So in that instance it could come to this court  
16 without necessarily resolving all of the issues in that --  
17 in that sense.

18 The last point I'll make, Your Honor, is the  
19 comments about the VF case and whether the comments like  
20 exception can be used to move up or move down the level of  
21 interest. And -- and I respectfully submit that the court  
22 there are just simply got it wrong. If -- if the court even  
23 really analyzed how to use the common stock exception.

24 The Geneva Steel case which the 10th Circuit case  
25 cited in our reply brief, spoke as to what that -- the

1 effect of the common stock exception laws and I've said in  
2 1984 congress amended the statute to make clear that fraud  
3 claims springing from the purchase or sale of common stock  
4 are created on the same level as common stock. Springing  
5 from the same level as common stock. All other claims are  
6 subordinative to their underlying security. So it's -- it's  
7 a saver clause if you will, it keeps it up. It's not  
8 something used to push down.

9 THE COURT: All right.

10 MR. MILLET: With that, unless the court has any  
11 further questions --

12 THE COURT: I -- I do not, thank you.

13 MR. WOODS: The 80 20 split that wouldn't change  
14 the effect you just have two claimants. We -- both the 80  
15 and the 20 would be subordinated to the equity of Falcon and  
16 -- and receive no distribution so if you interpret the  
17 statute the way they wanted the court is going to be  
18 interpreting the statute to say all claims arising from  
19 sales of affiliates at -- securities are disallowed except  
20 common stock exception. Common stocks are the only ones  
21 that are going to be preserved. Everything else is not  
22 subordinated but disallowed. Even on the 80 20 split it  
23 wouldn't -- if I -- if I have 20 and there's another  
24 creditor with 80 that creditor would also be super  
25 subordinated according to them. And they would also be

1 behind equity. And there's nothing behind equity, always.  
2 If you put us behind equity once we -- we will always be  
3 disallowed. And so that -- so our interpretation is the  
4 only interpretation that gives full effect to all the  
5 language in (Unintelligible). Thank you, Your Honor.

6 THE COURT: Thank you. All right anyone else wish  
7 to be heard? All right well thank you for agreeing to take  
8 this subordination piece a day early. I think it'll make  
9 the confirmation hearing which I'm sure will have its own --  
10 own issues to address a little more efficient so I'm going  
11 to take the matter under advisement and I appreciate the  
12 helpful papers and arguments folks. And I do reserve the  
13 right to ask a follow up question tomorrow if I -- if I have  
14 -- have an epiphany that something that I had not asked  
15 today. All right anything else that we need to do today?  
16 I assume we need to circle back on the financing issue. I -  
17 - I was happy to hear if parties had worked something out  
18 but if they haven't I really made what I thought was a  
19 ruling and I'll -- I'll stick by it which is that I'll --  
20 I'll grant the interim financing today and then the only  
21 question is the scheduling for the --

22 UNIDENTIFIED SPEAKER: May it please the court I'd  
23 like to mention just one thing and I apologize for this. My  
24 sons graduating high school tomorrow so I won't be here. I  
25 just wanted to explain to the court that I -- I'm not absent

1 from lack of interest but I --

2 THE COURT: You should be there.

3 UNIDENTIFIED SPEAKER: My colleagues will -- will  
4 carry on and I thank the court for its time today.

5 THE COURT: As -- as somebody who had a son  
6 graduate this year as well you -- you definitely should be  
7 there that's a moment in life you don't want to miss. And I  
8 will suspect that you will remember missing that and -- and  
9 you might not remember being here on your death bed you --  
10 you never want to have to say your regret is that you should  
11 have spent more time at work that's --

12 UNIDENTIFIED SPEAKER: My wife has promised that  
13 she would remind daily if --

14 THE COURT: All right.

15 UNIDENTIFIED SPEAKER: I will remember it when you  
16 ask me, I'll remember it.

17 THE COURT: That's true. I guess it's all a matter  
18 of one's perspective. But no congratulations to your son.  
19 Where's he going to college?

20 UNIDENTIFIED SPEAKER: He's going to go to Cal Poly  
21 San Luis Obispo and he informed me just about a year ago he  
22 wants to be a lawyer which was quite a shock.

23 THE COURT: All right awesome. My -- my oldest is  
24 -- is decided he's not going to follow in the legal  
25 tradition so -- so. Congratulations

1 MR. WILLIAMS: Good afternoon, Your Honor,  
2 apologize we were not able to locate Captain Honey's  
3 counsel.

4 THE COURT: All right well then what I'm go to do -  
5 -

6 MR. WILLIAMS: I if I could --

7 THE COURT: Sure.

8 MR. WILLIAMS: -- indulge -- I do think -- well we  
9 talked with Captain Honey's counsel outside and Captain  
10 Honey's counsel was of the view that Wednesday was too tight  
11 for them and it was going to -- and it was -- they were  
12 going to continue their objections. So what I -- I think  
13 after talking with the DIP lenders and with the committee I  
14 think we had some productive discussions and what we'd like  
15 to do to avoid this issue you know on appeal to the extent  
16 that Captain Honey does determine to appeal and the like but  
17 I -- I think where we are is we get the interim order  
18 entered today given the fact that we filed the credit  
19 agreement on the 6th if we could schedule a hearing on or  
20 around the 20th that would obviate the 14 day issue  
21 altogether and then we can set objection deadlines 7 days  
22 prior to the hearing date.

23 THE COURT: All right well there -- there a couple  
24 wrinkles in that. One is I'm assuming if you're doing that  
25 that you don't have a problem with the 14 as a date because

1 you had a maturity issue right?

2 MR. WILLIAMS: Well what we would do, Your Honor,  
3 we still on the interim basis give in everything we've got  
4 going on. We would still draw down the entire amount so  
5 we'd be able to deal with the maturity issue.

6 THE COURT: All right. The other is -- is  
7 something that's not something you can fix. I'm actually  
8 camping on an Island in Lake George on the 20th. And it's a  
9 tradition that I started when I was in the US Attorney's  
10 office because the only way to actually be away was to go to  
11 an island. And have no modern conveniences so I've  
12 continued the tradition. I -- I certainly can fit you in  
13 shortly after that and I'm looking at the calendar now and  
14 think that the 24th, which is the Monday which should be the  
15 first day to be available would -- would -- I can squeeze  
16 you in then if that works.

17 MR. WILLIAMS: It works for the debtors, Your Honor  
18 if could just discuss with --

19 THE COURT: Certainly.

20 MR. WILLIAMS: We think that works, Your Honor.

21 THE COURT: All right so what I'd like to do is  
22 schedule that in the afternoon at 2:00 and if you would send  
23 out a notice -- well I guess the -- the order can -- can do  
24 the trick but just in an abundance of caution I think  
25 probably a separate notice to say that there's going to be a



1 hearing on the -- on the final approval of the financing for  
2 the 24th at 2:00 and just give me one moment.

3 MR. WILLIAMS: Sure.

4 THE COURT: I just wanted to make sure that there  
5 was not matter that I was overlooking and setting that date.  
6 All right and if you get me the interim order today I will -  
7 - I will sign it and get it in today.

8 MR. WILLIAMS: Yes, Your Honor I believe we have  
9 black lines and on a disk as well so we'll hand that into  
10 chambers.

11 THE COURT: All right.

12 MR. WILLIAMS: Thank you, Your Honor.

13 THE COURT: Anything else we should discuss this  
14 afternoon? All right then I'll see you all tomorrow. Thank  
15 you.

16 MULTIPLE SPEAKERS: Thank you, Your Honor.

17 (Whereupon Proceedings Concluded At 1:56 P.M.)

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Lee M. Sapp, Certify That The Foregoing Transcript Is A  
True And Accurate Record Of The Proceedings.

Lee M  
Sapp

Digitally signed by Lee M Sapp  
DN: cn=Lee M Sapp, o, ou,  
email=digital1@veritext.com,  
c=US  
Date: 2013.06.17 11:10:48  
-04'00'

Aaert Certified Electronic Transcriber Cet\*\*D-596

Veritext

200 Old Country Road

Suite 580

Mineola, Ny 11501

Date: March 14, 2013