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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 12-11076-shl

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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

December 17, 2013
3:20 PM

B E F O R E :
HON SEAN H. LANE
U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc. #1051 Motion for Omnibus Objection to
2 claim(s)- Debtors' Third Omnibus objection to Claims (Re:
3 claim Nos. 269-274)

4

5 Hearing re: Doc. #1050 Motion for omnibus Objection to
6 claim(s) -

Debtors' second Omnibus objection to claim (Re:
7 Claim No. 45)

8

9 Hearing re: Doc. #1689 Motion for Omnibus objection to
10 Claim(s) / Eighth Omnibus Objection to Claims

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24 Transcribed by: Melissa Looney

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P R O C E E D I N G S

THE COURT: All right. The Arcapita case and so before we chat further, let me get appearances from everybody who is here starting with the debtors' counsel.

MR. ROSENTHAL: Michael Rosenthal, Your Honor, from Gibson Dunn Crutcher on behalf of the Falcon debtor.

MS. MANDEL: Lena Mandel, Milbank, Tweed, Hadley & McCloy on behalf of the reorganized debtors.

THE COURT: All right.

MR. SIMON: Daniel Simon DLA Piper on behalf of National Bank of Bahrain.

MR. EGAN: Daniel Egan, DLA Piper on behalf of National Bank of Bahrain.

THE COURT: All right. So --

MR. ROSENTHAL: Your Honor, I'd like to just take a few minutes of your time and give you an update on the Falcon case because --

THE COURT: Sure.

MR. ROSENTHAL: -- we're trying to suggest a simple way to resolve that case and take it off of your docket.

As you may know, we reached a settlement in principle with the claimants in the district court action, the Tide claimants. That will resolve basically everything before the Court, the subordination dispute, which is sub

1 judice. There's an adversary involving the Hopper (ph)
2 defendants that will all be rolled into this settlement. We
3 are very, very close to the negotiation of a settlement
4 agreement. This settlement agreement resolves Tide's vote
5 with respect to the plan. It was a rejecting vote. It was
6 the only rejecting vote. It resolves that, it resolves
7 Tide's objection to the plan by withdrawing it. It was one
8 of two objections. The other objection has been -- was by
9 Ace Insurance and we have some negotiated language, the same
10 language as in the Arcapita plan.

11 So if you recall, when we went to confirmation on
12 Arcapita, it was a plan with a bunch of sub plans, including
13 the Falcon plan.

14 THE COURT: Right.

15 MR. ROSENTHAL: We commenced the confirmation
16 hearing and then we adjourned the falcon portion of that
17 hearing.

18 THE COURT: Right.

19 MR. ROSENTHAL: So what we'd like to do with the
20 resolution of the Tide, Hopper issues is put together and
21 file a 9019 motion. We hope to have that on file before the
22 end of the year. We'd like to set that for the next omnibus
23 hearing, which would be the 21st. And we'd like to also set
24 an adjourned hearing on confirmation of the Falcon plan for
25 that --

1 THE COURT: At the same time.

2 MR. ROSENTHAL: -- same day, for that same day.

3 THE COURT: That sounds imminently sensible.

4 MR. ROSENTHAL: And we'd proceed (indiscernible)
5 with the 9019 and go right into the plan confirmation.

6 THE COURT: All right. That's fine by me.

7 MR. ROSENTHAL: So may we -- we just intended to
8 send out a very simple notice of the adjourn date on the
9 confirmation of the Falcon plan.

10 THE COURT: All right. Yeah, that would be fine
11 and just make sure my courtroom deputy knows what to put on
12 the calendar that date, but that sounds like a sensible
13 approach because really this issue was what was holding up
14 the plan.

15 MR. ROSENTHAL: That's right. And we probably
16 just in support of confirmation will file a little simple
17 supplementary brief a week before or something of the sort.

18 THE COURT: All right. That would be fine.

19 MR. ROSENTHAL: Thank you very much, Your Honor.

20 THE COURT: And thank you also for -- I know I got
21 the heads up about the settlement in principle and I
22 appreciate that as that was actually very high on my to-do
23 list. And so I'm not sure that the holiday season without
24 subordination is quite as merry as it would be otherwise,
25 but I suspect I could --

1 MR. ROSENTHAL: And interesting as that subject
2 would have been, I don't --

3 THE COURT: Yes.

4 MR. ROSENTHAL: -- think you need to reach it.

5 THE COURT: And it was very interesting and I
6 think it's wise because I think without saying what I was
7 going to do; there certainly is enough room for continued
8 litigation for some time. It's -- interesting is not always
9 good and it's an interesting issue.

10 So I think parties could have decided to litigate
11 that for some time. So you not only could have been here
12 and in the district court I suspect the opportunities for
13 appellate litigation would have been quite robust. So I
14 think that's without knowing what your settlement is, I'll
15 see it in the fullness of time that I can see that as a very
16 wise course of action to give the parties some finality and
17 move forward.

18 MR. ROSENTHAL: As with everything, I think the
19 existence of that dispute before the Court and the Court not
20 having ruled on it actually, and the uncertainty of what the
21 ruling would be --

22 THE COURT: Right.

23 MR. ROSENTHAL: -- pushed the parties to reach the
24 settlement.

25 THE COURT: All right. Well that's -- and that's

1 why I won't touch that with a --

2 MR. ROSENTHAL: Thank you very much, Your Honor.

3 THE COURT: -- any detail. All right. Thank you
4 very much.

5 MR. ROSENTHAL: May I be excused? I don't have a
6 stake in the objection fight.

7 THE COURT: Anything. And happy holidays.

8 MR. ROSENTHAL: Same to you. I hope to get up the
9 hill.

10 THE COURT: You and me both. Sometimes it's a bit
11 like sledding, but that's all right. As long as I'm doing
12 it and not one of the newer drivers in my family, I'll be
13 fine.

14 Good afternoon.

15 MS. MANDEL: Good afternoon, Your Honor. Again,
16 Lena Mandel, Milbank Tweed. And now we'll just got to the
17 main agenda. The first four items on the agenda are matters
18 that have been adjourned and these are two pretrial
19 conferences and adversary proceedings that have not been
20 adjourned to any particular date because the parties are
21 still negotiating that. And then some outstanding claims
22 from omnibus objections number 2 and 3 have also been
23 adjourned to January.

24 Then the uncontested matters, these are items 5
25 and 6 on the agenda, the claims -- item 5, these are five,

1 six rather proofs of claim by the same, by the related group
2 of claimants that has been resolved and we will be
3 submitting a stipulation resolving this claim shortly.

4 THE COURT: All right.

5 MS. MANDEL: And not to be presumptuous, Your
6 Honor, but I wanted to just make sure that the Court
7 remembers that we're trying to make the first distribution
8 before the --

9 THE COURT: End of the year.

10 MS. MANDEL: -- year end and so it's important
11 that all the stipulations are signed.

12 THE COURT: All right. If you get them to me,
13 I'll get them out.

14 MS. MANDEL: Thank you.

15 THE COURT: I can't confess I'll be sitting here
16 on the 24th waiting for them, so the sooner you get to me --
17 get them to me the better.

18 MS. MANDEL: No, no. We are hoping to submit them
19 within the next couple of days. This also relates to item 6
20 on the agenda. This is the eighth omnibus objection. At
21 the time we filed the agenda, the objection deadline has not
22 passed, so it says here that there were no responses. In
23 fact, we did get one response and we have resolved it. And
24 again, this will be resolved by a stipulation that we will
25 be submitting to Your Honor.

1 THE COURT: All right.

2 MS. MANDEL: And that brings us to item 7 on the
3 agenda, which is a contested matter. This is objection that
4 was part of the omnibus objection two to claim no. 45
5 asserted by National Bank of Bahrain. And let us know, Your
6 Honor, how you want this to be handled.

7 THE COURT: Well, I have the parties' pleadings
8 and I thought I would hear whatever argument people want to
9 make. I had a couple of questions and I think we'll see
10 where we go from there.

11 MS. MANDEL: Would you like the claimants to start
12 of the objectants?

13 THE COURT: Well it's your objection, so I think
14 it may make sense for you to start.

15 MS. MANDEL: Okay. Thank you.

16 THE COURT: And I basically have the arguments in
17 three or four different buckets.

18 MS. MANDEL: Right.

19 THE COURT: One is whether it's a claim or not and
20 some of that has to do with there's a discussion about set
21 off and subordination, which is somewhat ironic in light of
22 the previous discussion in the Tide case.

23 MS. MANDEL: Right.

24 THE COURT: And I guess my question -- this may be
25 just a matter of semantics, but on one hand, we're talking

1 about whether it's a claim or not, but I guess for
2 subordination, the idea is that if that's the case then it's
3 a claim, but it's a claim that has no recovery under the
4 circumstances --

5 MS. MANDEL: That's correct.

6 THE COURT: -- of the plan here.

7 MS. MANDEL: If it is a claim, then it would be a
8 subordinated claim, subordinated to the level of equity and
9 not entitled to any recovery.

10 THE COURT: All right. And the second one is
11 whether it's properly asserted against AIHL, which I saw
12 there was something in the claims objection. It doesn't
13 sound like there's any dispute that what we're talking about
14 is shares of a non-debtor entity, they are held by AIHL so
15 it seems to be that's the one issue that nobody really has
16 any ongoing dispute about.

17 MS. MANDEL: I believe so.

18 THE COURT: All right. So I can cross that off my
19 list of things to think about. And the third has to do with
20 whether -- if it's not a claim, whether it can be discharged
21 as an equitable remedy, whether it need to have an
22 adversary. And on that one -- and I'll certainly let you
23 make whatever comments you want to make, but for that one I
24 have a question, which is -- I hear you saying if it falls
25 within a certain categories of things, it would have to be

1 an adversary proceeding, but then what's the next step. In
2 other words, I'm wondering if for some reason, there was a -
3 - they filed an adversary proceeding, so you cure whatever
4 procedural defect, then what you're thinking about that
5 claim in an adversary proceeding.

6 And then I guess what I'm wondering about is where
7 does the recovery come and does that really say anything
8 about whether in fact it's a claim, if in fact, the recovery
9 would have to come in the form of some sort of financial
10 remuneration given by AIHL.

11 So I don't know if you have any views about the
12 next step, because procedurally that's a curable defect,
13 right, if it has to be an adversary. So let me hear your
14 views on that.

15 MS. MANDEL: On that. Well, I believe that to the
16 extent it's cured procedurally, which obviously it's not
17 very hard to do, it appears to me that what the claimant is
18 saying is that it -- it's equitable remedy is really
19 specific performance because it will only be non-
20 dischargeable if it doesn't constitute a claim, i.e. it's
21 not entitled to any payment.

22 That leaves specific performance. If that's what
23 Your Honor rules, that they are entitled to the specific
24 performance, then they will be entitled to purchase the
25 shares at -- off this entity, this (indiscernible) entity at

1 its fair market value, because that's what their pre-
2 petition contract entitles it to the extent that the
3 contract still exists and is not deemed to have been
4 rejected under the plan.

5 THE COURT: All right. And is that last part of
6 what you said, to the extent the contract still exists and
7 hasn't been rejected under the plan, what is the state of
8 play on that? What can --

9 MS. MANDEL: Well the plan's default mode is
10 rejecting all the contracts that have not been specifically
11 assumed. This contract certainly has not been specifically
12 assumed. So to the extent it's rejectable, it has been
13 rejected. And we believe that it has been rejected. I'm
14 just leaving the possibility that the claimant may assert
15 that it was non -- a rejectable contract and then we'll have
16 to deal with it.

17 THE COURT: All right. And if it is rejected,
18 what does that -- again, I understand, there is no adversary
19 we're not -- I'm speculating down a road, but I'm just
20 trying to tease it out to sort of see where that road could
21 potentially lead.

22 MS. MANDEL: Well, frankly, Your Honor, I haven't
23 given it much thought, but I would doubt whether a rejected
24 contract can be entitled to be enforced through specific
25 performance. That would be a very odd result. Like is aid,

1 I haven't researched this issue, but my reaction is that it
2 probably wouldn't be.

3 THE COURT: No, I won't hold you to it, but it is
4 helpful to just get your general thinking about the issue.
5 I suspected that from your point of view, there were some
6 perils along the way, so I at least just wanted to get your
7 big picture thinking on it. All right.

8 And those were my questions. So but obviously
9 you're free to make whatever argument you'd like to make on
10 any of the issues raised in the objection.

11 MS. MANDEL: Thank you, Your Honor. So as you --
12 as you mentioned, the claimants assertion is that what they
13 have constitutes a claim under the broad definition of a
14 claim under the Bankruptcy Code. We think, however, that as
15 broad as that definition is, it's not broad enough to
16 encompass what the claimant has here, which is a claim under
17 a contract to sell shares.

18 It is not a claim because it doesn't entitle the
19 claimant to any payment. It -- the way that the National
20 Bank of Bahrain was trying to overcome our argument that no
21 right to payment exists and no equitable right that would
22 entitle it to payment, was by asserting that the set of
23 feature that is admittedly contained in the agreement,
24 somehow constitutes right to payment.

25 We disagree, Your Honor. A setoff right does not

1 constitute a right of payment. At most, what it constitutes
2 is a right to pay less on the claimant's own liability.
3 Furthermore, as we have stated in our papers, it's not even
4 particularly relevant whether generally a set off right
5 would or would not constitute a right to payment because
6 under these particular circumstances, even the set off right
7 is not enforceable.

8 As we've explained and as the contract very
9 clearly states, what it provides for is a triangular set off
10 right. It says that to the extent MBB chose to exercise its
11 option and purchase the shares in this non-debtor entity, it
12 would have the right to either pay the purchase price to
13 AIHL or set off the amount it was willing to pay against any
14 claim owed to the bank.

15 That is a classic triangular set off configuration
16 and as the cases we have cited very clearly state,
17 triangular set offs have not and never have been enforced
18 under Section 553(a), whether or not it is enforced pursuant
19 to a valid contract outside of bankruptcy is not relevant
20 because we are in fact in bankruptcy and operating under the
21 Bankruptcy Code.

22 There is -- there's not exception to the mutuality
23 requirement in Section 553 based on a written contract.
24 Both the Sam Prude (Ph) case, both of the bankruptcy case
25 and the district court case as well as the Lehman Brothers

1 case, as cited by Judge Peck discussed this particular --
2 this specific issue. And both decide that there is no
3 contractual exception. There is no contractual way of
4 contracting around the mutuality requirement in the
5 bankruptcy code.

6 To this, I would like to add that it is the
7 claimant's burden to prove mutuality to claim a valid set
8 off right and as far as I can tell, the claimant hasn't even
9 attempted to do so, hasn't cited any cases, has not really
10 tried to make its case.

11 It just basically made a bare statement that that
12 creates a right to payment. Furthermore, even if the
13 claimant had a claim as we've alluded to earlier, it would
14 have been a subordinated claim. It would have been
15 subordinated to the level of equity in AIHL which is out of
16 the money. So having a subordinated claim here, wouldn't
17 really bring any recovery to MBB.

18 The reason that this claim would have been
19 subordinated is clearly Section 510(b) of the Bankruptcy
20 Code, which provides for subordination of claims based on an
21 agreement to purchase a security of a debtors' affiliate.
22 And the cases we have cited in our brief clearly demonstrate
23 that even though these are equity securities of a non-debtor
24 affiliate and not the debtor itself, the claim should be
25 subordinated to the level of the equity in the debtor, AIHL

1 in this case.

2 THE COURT: Right. Well the resolution that was
3 being spoken about before by Mr. Rosenthal in the Tide
4 bankruptcy all had to do with subordination so we spent
5 quite a bit of time talking about these cases and the issues
6 of subordination.

7 MS. MANDEL: The debtors were actually getting
8 super subordination.

9 THE COURT: Right. Well, you can't get to super
10 subordination without talking about subordination, so --

11 MS. MANDEL: Right, before subordination,
12 that's --

13 THE COURT: -- just to the extent that you don't
14 have to feel the need to spend too much time on
15 subordination.

16 MS. MANDEL: Right. Yeah. Well that's really
17 pretty much all I had to say as an opening matter, just
18 basically restating what we already said in our brief.

19 THE COURT: All right.

20 MS. MANDEL: And that's all, thank you.

21 THE COURT: All right. Thank you very much.

22 MR. SIMON: Thank you, Ms. Mandel. Good
23 afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. SIMON: For the record, Daniel Simon, DLA

1 Piper on behalf of National Bank of Bahrain. If it's all
2 right, I think I know that you have read the papers but
3 perhaps it would be worthwhile to give maybe a one or two
4 minute introduction on the basic facts that are at play
5 here.

6 THE COURT: Sure. I mean, I -- just to sort of
7 cut to the chase, I understand that this agreement here is a
8 promise to sell shares and it was really sort of part and
9 parcel though coming after the more traditional looking
10 guarantee. And it was essentially additional security for
11 the National Bank of Bahrain, in the event that Arcapita
12 failed to perform under the guarantee. So I think I have
13 those facts pretty squared away. Obviously if there's
14 something of particular note that you think we should talk
15 about, that's fine.

16 MR. SIMON: Sure. And exactly what you said. The
17 promise to sell shares was -- it acted simply almost as a
18 guarantee on the guarantee in the event that Arcapita Bank
19 failed to pay the amount. And obviously Ms. Mandel makes
20 clear -- points out Section 4.22 of the promise to sell
21 shares stating that NBB may at its sole discretion elect to
22 deduct or set off from the purchase price any amounts due by
23 Arcapita under the guarantee agreement. Just to frame the
24 issues for Your Honor, I think --

25 THE COURT: We're talking about 4.22, why isn't

1 she right that this is a triangular set off?

2 MR. SIMON: We do not contest that it would be a
3 triangular set off, nor are we seeking to invoke a
4 triangular set off. What we're doing is we're simply
5 identifying it as a -- that is our right to repayment. And
6 simply because something is not or something is prohibited
7 by the bankruptcy code, such as a triangular set off, does
8 not mean that a creditor does not have a claim or a creditor
9 cannot make a claim. An analogy -- I'm sorry.

10 THE COURT: All right, go ahead.

11 MR. SIMON: An analogy would be the acceleration
12 of a loan. If a lender has the ability to accelerate a loan
13 and the automatic stay comes into play and the lender had
14 not accelerated the loan, that doesn't foreclose the ability
15 to file a claim for the full amount of the debt.

16 And, you know, the debtors cannot shield
17 themselves from liability --

18 THE COURT: Well, I don't know. I thought the
19 mutuality requirements for set off were in fact did exactly
20 that for a debtor. I thought that was the whole point in
21 bankruptcy, because if you're talking about mutuality and
22 set off, you're talking about claims and what you can set
23 off and what you can't set off. And that all has to do with
24 claims.

25 Loan acceleration is a tricky example in that

1 timing becomes hugely important. The agreements become
2 important, the state law becomes important. There's a lot
3 of things that can become important under those
4 circumstances as I have learned in connection with some
5 things in the American Airlines case.

6 So, but my understanding of the set off argument
7 here is a -- if that's what we're talking about for purposes
8 of a claim, then it has to be -- in order to be appropriate,
9 has to be -- has to satisfy the requirements of mutuality
10 and other things that a triangular set off would not do
11 that. So my understanding is the case law exists exactly to
12 do what you say it doesn't in this case. So do you have any
13 support for that notion?

14 MR. SIMON: Well, it -- I guess I would simply say
15 that we are not invoking the right to set off under 422. We
16 have a right to acquire the shares and that under 101 is a
17 claim.

18 THE COURT: But where does the right to get the
19 shares come from? So, but that then would take you out of a
20 claim and into a -- into a right to -- some sort of
21 equitable remedy that takes you outside of a claim?

22 MS. MANDEL: If Your Honor gives me a moment, I
23 just want to --

24 THE COURT: Yeah, I guess my question is if you're
25 saying there's no right to -- you're not invoking your right

1 to payment under 4.22, what is it that you're invoking then
2 as the basis for --

3 MR. SIMON: Under 101(5)(b), a right to an equity
4 remedy.

5 THE COURT: No, no, no, yeah, I'm talking about
6 the agreement, what in the agreement are --

7 MR. SIMON: Sure.

8 THE COURT: -- you invoking? Because I think I
9 understand -- and folks should feel free to chime in, to the
10 extent I'm mischaracterizing somebody's argument or their
11 documents, which you all know much better than I do.

12 But I thought I understand the exchange back and
13 forth to be about 4.22 and the reorganized debtors to be
14 saying, well that's what you're invoking as the basis for
15 your claim, your promise to sell shares or am I
16 misunderstanding is there some independent obligation?

17 MR. SIMON: Well the -- I think the promise to
18 sell shares is the right itself and not the set off
19 provision for the \$10 million.

20 THE COURT: All right.

21 MR. SIMON: We have a right under the promise to
22 sell shares to obtain those shares and that we believe is
23 the --

24 THE COURT: All right. Well, what is it in the
25 document that your -- I just want to see contractually what

1 is it that you're relying on then so I can understand the
2 nature of the obligation. Folks have identified 4.22 for
3 me, so I guess I'm just asking what else I should be looking
4 at if it's not 4.22.

5 MR. SIMON: I would point to Sections 2, Sections
6 3.1 which says upon the occurrence of a valid trigger event,
7 NBB may exercise its purchase right by serving the company
8 with a promise to sell shares notice and then --

9 THE COURT: Wait, Section 2 and Section 3.1?

10 MR. SIMON: Correct.

11 THE COURT: All right. So Section 2 says the
12 company -- essentially it's a right to acquire shares and
13 3.1 is the exercise of that right and some details about how
14 it's supposed to be done. All right. All right.

15 Let me while we're talking about it then obviously
16 lawyers argue in the alternative and that's fine, although
17 sometimes it can be a bit befuddling. From your point of
18 view, is -- and I'm not asking you to give up any of your
19 alternative arguments, but your best foot forward, is this a
20 claim in your view or is it not a claim? I'm trying to
21 figure out what your primary argument is and what your
22 secondary argument is.

23 MR. SIMON: Sure. The -- I will note in our
24 papers, we did -- as we have discussed -- mention the
25 potential for filing an adversary. Our view there was

1 simply to reserve our rights. We're obviously not hear in
2 front of you on that equitable relief. We're here to assert
3 our claim. We believe this is a claim. We believe it's a
4 right to payment. We believe we've cited in re Mark Fore
5 (ph), which his in front of -- which has been in front of
6 this Court as support for an equitable right of payment.

7 And I don't -- I believe I heard Ms. Mandel
8 correctly in that she does not or perhaps she does have
9 dispute the fact that this is property of the estate, the
10 shares and the non-debtor subsidiary.

11 THE COURT: No, I think that issue is not
12 something that's disputed at this point. All right. So
13 you're saying I don't need to reach the issue of 4.22
14 because you're not invoking that for purposes of responding
15 to claim objection. So I guess then that leaves two other
16 arguments of the reorganized debtors, I understand.

17 One is that there is in fact, it's a right to pay
18 less, not more because of the way things worked out so
19 there's no gain here and the other is the subordination. So
20 let me take the subordination first.

21 Why, in your view, is this not subject to 510(b)
22 or is it?

23 MR. SIMON: Well I think before we actually get
24 into the merits of 510(b) and subordination, I would note
25 that the debtors did not mention subordination in their

1 claims objection. The debtors have not filed an adversary.
2 It only came up for the very first time in their omnibus
3 reply. Under the Federal Rules 3007 requires that it be
4 raised in an adversary proceeding. It cites back to Rule
5 7001. Case law is very clear on this topic. The
6 appropriate procedural vehicle for subordination is
7 initiation of an adversary proceeding. Rule 7001 does
8 provide one exception, which is where the plan provides for
9 a subordinating class. This plan does not provide for an
10 AIHL subordinating class, therefore, I don't think we need
11 to reach the merits of it. I'm happy to go into it if you'd
12 like, but I don't think it is properly in front of Your
13 Honor.

14 THE COURT: All right. I understand your
15 procedural argument on that score, but I confess I'm still
16 interested in what your substantive argument is.

17 MR. SIMON: Sure. Without of course waiving that
18 right, NBB is very cognizant of the relatively broad nature
19 of Section 510(b) and its mandatory subordination. Yet,
20 under Second Circuit's authority in in re Med Diversified,
21 there is also the equal concern for a debtors' attempt at
22 clothing a general creditor, such as National Bank of
23 Bahrain, in the garb of a shareholder.

24 The circumstances in this case are very different
25 from those in your typical and traditional 510(b)

1 subordination cases. Those cases although not exclusively,
2 typically deal with shareholders claiming fraud, attempting
3 to recover for a decline in stock value, et cetera. And
4 these policy implications are not here.

5 Here, National Bank of Bahrain is a creditor,
6 entered it to the promise to sell shares merely to have an
7 additional layer of protection for its indebtedness. And
8 when taken into consideration, the entire transaction did
9 not bargain for the risks associated with equity status.

10 There are many cases that discuss the policy of
11 510 --

12 THE COURT: Well, let me back up. How did you
13 bargain for the risk associated with equity status if this
14 is your -- essentially your guarantee to the guarantee and
15 it's -- I mean, it's pretty clear that you're saying we have
16 a right to sell -- we have a right to purchase shares. I
17 mean, it's not some complicated mechanism that results in
18 you getting some right to shares. It's right here in the
19 print and it says shares when you start talking about
20 shares.

21 While I understand your policy argument, I think
22 the general applicability of the statute is you look to see
23 whether the plan language applies. So if you're talking
24 about shares, I don't know that this is exactly cloaked in
25 mystery in this particular circumstance.

1 MR. SIMON: Absolutely, Your Honor. There are
2 cases where they involve shares, but the way that courts
3 have looked at them is whether they actually take the risk
4 as an equity holder or whether they're merely --

5 THE COURT: But why wouldn't you be? I mean, the
6 -- what I'm -- the question I have is it seems that one can
7 make an argument that the agreement here said here's what
8 we're going to do and we're going to have a guarantee. To
9 the extent you want some additional guarantee, a guarantee
10 to the guarantee as you correctly characterized it, we're
11 going to give you some rights as essentially an equity
12 holder. Maybe it goes up, maybe it goes down, whatever it
13 is, but you get this right and it's under the transaction
14 that we've worked out. We think it's the appropriate level
15 of risk reward for everybody involved. And therefore, I
16 guess one could argue that that's -- since it's tied to the
17 equity that 510, you know, why isn't the rationale for 510
18 equally valid here?

19 MR. SIMON: Because here at least under non-
20 bankruptcy law, when the agreement was entered into we did
21 have the set off right absent bankruptcy law. And so if we
22 were to exercise a promise to sell shares, we would assume
23 that Arcapita Bank had not made its payment. And so we
24 would set off the \$10 million, which means we would not pay
25 any money for the equity which essentially gives us all

1 reward and no risk. If the shares went up, there are
2 reward, but at the same time, if the shares were devalued to
3 zero, we have not lost anything. And there is a case
4 directly on point from Delaware in which under similar
5 circumstances, they do say that a put option -- that it was
6 tied to a number where they had the reward, but not the risk
7 -- would not fall under 510(b) because we're not taking the
8 same risks. Now, I do --

9 THE COURT: What's the name of that case?

10 MR. SIMON: In re DirecTV Latin America. And I'm
11 happy to provide you a copy if you'd like. But there, the
12 Court declined to subordinate the claim arising from a
13 membership interest put agreement where the value of the put
14 was tied to an arbitrary number and not the enterprise value
15 of the debtor.

16 That's similar here with the \$10 million number
17 and the Court noted that simply being a holder of equity
18 interest -- sorry, quote, unquote, simply being a holder of
19 equity interest would be too broad of a basis to justify
20 subordination or claims.

21 The Court further noted that if a transaction were
22 structured such that the purchaser would not bear the risk
23 of illiquidity or insolvency, it possessed few of the
24 characteristics consistent with equity status. That
25 certainly is our argument if this -- if the merits of

1 subordination are in front of Your Honor.

2 THE COURT: All right. That's helpful to know.

3 Thank you.

4 All right. So looping back to the other argument
5 I understand that the reorganized debtors' counsel referred
6 to it as essentially the right to pay less. So what's your
7 view about that?

8 MR. SIMON: I don't see how it's relevant given
9 the definition of claim. I -- under 101 there is a claim
10 and so I guess I don't fully understand that argument given
11 that it wasn't in the papers.

12 MS. MANDEL: I'll be happy to clarify.

13 THE COURT: We'll get through and then we'll loop
14 back. All right. That's fair enough. All right. So I
15 think you've covered my questions. So whatever other
16 argument you'd like to make.

17 MR. SIMON: No, I guess just in closing, you know,
18 I would point, Your Honor, to paragraph 3, I'm sorry,
19 footnote 3 of our paper, which it goes to this whole issue
20 of whether we're invoking the set off or whether we're not.
21 We don't think it's necessary to get into and the reason we
22 didn't go into it, is it's not necessary to get into the
23 mutuality of debt for set off purposes and it's our view
24 that simply because set off of this type may be prohibited
25 from the bankruptcy code does not take it out of the ambit

1 of the extraordinarily broad definition of 101.

2 I will, I guess just echo what I said before that
3 we do not think that procedurally we are there on
4 subordination and so of course, I guess one point I would
5 add to that is the debtors' own plan as well as the order
6 that the debtors entered regarding claim objection
7 procedures, that's docket 785 discusses the potential
8 grounds for objection, subordination is not one of them.
9 And given that it wasn't even raised in their claim
10 objection, I don't think we're there on the merits and we're
11 happy to brief the issue if that comes before Your Honor.

12 THE COURT: All right. Thank you.

13 MR. SIMON: Thank you.

14 THE COURT: All right. Any response?

15 MS. MANDEL: Thank you, Your Honor. If I may from
16 here --

17 THE COURT: Sure.

18 MS. MANDEL: -- too much stuff.

19 THE COURT: Just make sure you get -- there's some
20 air behind me, but it's not heat, so I have no idea why it
21 exists at all, but just so I can make sure to hear you.

22 MS. MANDEL: Certainly, Your Honor. Okay, the
23 definition of claim is broad, we concede that, but it's not
24 limitless. It includes either right to payment or right to
25 an equity remedy that gives rise to a right to payment.

1 So we are in fact back to the issue whether or not
2 the National Bank of Bahrain had a right to payment. And
3 that is why -- and I was a little surprised to hear Mr.
4 Simon saying that he is not basing his argument on Section
5 4.22 because that is in fact what the argument in their
6 response was based on.

7 Paragraph 16 of their response clearly says that
8 yes there is a right to payment and it arises under Section
9 4.22 based on the set off right. That is why the set off
10 right is relevant. We understand that the claimant is not
11 attempting to enforce it's set off right, but it is invoking
12 it's set off right as the basis for claiming that they have
13 a claim -- a right to payment.

14 If I may quote in re Simcore (ph), which is in
15 fact quoted, cited, in our brief, it says very clear, a
16 right to effect a set off can never impose a right to
17 payment. It can only yield a right to pay less than one
18 would otherwise have to pay. That's why it was relevant,
19 that's why it was raised and it's clear that it does not in
20 fact create a right to payment.

21 Moving on we equally were not looking to
22 subordinate NBB's claim, because our position is that it
23 doesn't have a claim. We mentioned Section 510(b) and the
24 subordination, not because we're seeking to subordinate it,
25 but to demonstrate to the Court that to the extent the Court

1 decides that a claim exists, all that would follow from that
2 is that then we would procedurally properly file an
3 adversary proceeding seeking to have this claim subordinated
4 and this all will be just a large waste of time and
5 resources.

6 Furthermore, the reason that or rather, the
7 argument --

8 THE COURT: Well, if I can before you go on.

9 MS. MANDEL: I'm sorry.

10 THE COURT: No, not at all. As to the first point
11 you made you basically cite and I see it in paragraph 16
12 where paragraph 4.2.2 is cited, and it says 4.2.2 provides
13 that NBB will pay the purchase price to AIHL upon completion
14 of the exercise, et cetera, et cetera, et cetera, and the
15 ability to deduct set off is tantamount substance to a right
16 to payment.

17 So I see your response saying well that can't be
18 relied upon because it's got a set off problem.

19 MS. MANDEL: Correct.

20 THE COURT: But what I hear today is the notion
21 that they also are relying or perhaps relying exclusively
22 now on section 2 and section 3.1, which is this right to
23 purchase shares and so I suspect your answer is that's not a
24 claim, it's an equitable right and I'm not --

25 MS. MANDEL: At best

1 THE COURT: -- I'm not sure. Is that --

2 MS. MANDEL: Well, aside from the fact that I
3 don't think they have the right to raise new argument at
4 this point, particularly because we gave them opportunity to
5 file further in additional pleadings and they didn't do so,
6 I'm not sure that they have the right to do that. But to
7 the extent they do, I do not see how a right to purchase
8 shares creates a right to payment. At best it's a right to
9 spend money, not the right to collect, which actually brings
10 me to the last point I wanted to make before I forget
11 because I'm liable to forget.

12 Mr. Simon also mentioned the fact that no
13 subordinated classes against -- there's no subordinated
14 claims class in the plan against AIHL. I do not believe
15 that that would be a problem. And again, there is a case I
16 could cite if Your Honor would like that dealt with exact
17 issue and decided it was not a problem.

18 THE COURT: Well I think if we end up in
19 subordination, I think the parties will have at it. So I'll
20 make a mental note of that. But I've already probably asked
21 more questions on the substance of that than perhaps is
22 appropriate at this time.

23 MS. MANDEL: Our main argument is that there is no
24 claim. That there is no right to payment, I do not see any
25 provision in the operative agreement that provides a right

1 to payment, hence, there is no claim.

2 THE COURT: All right. Any response to any of
3 that?

4 MR. SIMON: I guess very briefly, Your Honor, I
5 would just -- we do not rely exclusively on the provisions I
6 cited.

7 THE COURT: Well but this is not an open audition.
8 I mean, I rely on the papers. You cited 4.2.2. I don't
9 think you cited section 2 and section 3.1, you cited them
10 now. You can give me your answer on that, but it's not --
11 there's a lot of documents, there's a lot of paper, but
12 people need to make arguments. So I'm not going to guess as
13 to what you're citing and that's what needs to be in the
14 response to the objection. So I understand your argument
15 about procedure as to subordination and how that works, but
16 it's equally true in a claims objection that people have to
17 come forward and make their argument.

18 So what is it that you want to tell me given that
19 context?

20 MR. SIMON: Well, absolutely. I mean, and our
21 papers do lay out our argument on 4.22. I think unless Your
22 Honor has further questions, we rely upon the papers on
23 that.

24 THE COURT: But what I guess my question then and
25 perhaps I'm giving you incentive to go off script, but I

1 think 4.22 I guess your argument is that it's a set off
2 right and it somehow exists outside of the bankruptcy code
3 prohibition or concern about triangular set offs. But so the
4 right to payment you rely on 4.22, but would you agree with
5 me that section 2 and section 3.1 really talk about the
6 right to do something, but not a right to payment?

7 MR. SIMON: Correct. I would agree with that.

8 THE COURT: All right. And am I right in saying
9 that for purposes of your papers, the only paragraph that is
10 cited about the right to payment is 4.22?

11 MR. SIMON: I agree with that.

12 THE COURT: All right. Thank you. That's
13 helpful.

14 All right. Anything else that you'd like to point
15 out?

16 MR. SIMON: No. I guess the only other point
17 would be I'm not sure which case Ms. Mandela is referring to
18 on the subordination procedural issue. But I think, you
19 know, the federal rules are very clear on that.

20 THE COURT: All right. Well, why don't you let me
21 know what that case is that way everybody knows what it is
22 and if we end up going down that rabbit hole, you've given
23 her a case, she's given you a case and everybody is equal.

24 MS. MANDEL: I'm sorry I don't understand which
25 case would you like?

1 THE COURT: You had just mentioned that from your
2 point of view the fact that there was no subordination
3 provided for in the plan is not an issue and there's a case
4 for that.

5 MS. MANDEL: Yes. This is in re Delbiagio (ph).

6 THE COURT: And do you have a cite for that?

7 MS. MANDEL: It is cited in our papers, but yes,
8 2012 Westlaw 5467754 Bankruptcy Court Northern District
9 California.

10 THE COURT: All right. Great. I don't think
11 there's any dispute today about a couple things and so I can
12 at least end on this. One is that to the extent there is a
13 claim it's properly asserted against AHL because they hold
14 the stock here. So that issue came up in passing, so I
15 consider that to be sort of resolved. And the second is
16 everybody agrees that to the extent subordination, we need
17 to address subordination that that would be the subject of a
18 separate adversary proceeding as would any adversary
19 proceeding would be necessary to the extent somebody was
20 pursuing some right that was not a claim under the
21 bankruptcy code. So I think everybody is on the same page
22 on that.

23 I appreciate you answering my questions about
24 those issues in any event. I just think for purposes of
25 parties assessing where they are, sometimes it's helpful to

1 lay cards out on the table so people can see where things
2 are headed if we end up going down those avenues. So I
3 appreciate that and that's one of the things I can get to
4 do, which sometimes parties are not in a posture of sharing
5 that kind of information. Strategic thinking is freely, so
6 it's helpful for me and maybe it's helpful for you as well.

7 So what's left is the question of whether this is
8 a claim for purposes of section 1015 of the bankruptcy code.
9 I understand the parties' arguments. I'm going to do a
10 little more research on it and what I anticipate doing is
11 issuing a bench ruling in the not too distant future where
12 I'll call up the parties and you can either come in or just
13 listen in on the phone and I'll give you my ruling on that
14 issue. All right.

15 So with all that said, is there anything else we
16 need to address here this afternoon?

17 MS. MANDEL: No, Your Honor. Thank you. This is
18 it.

19 MR. SIMON: Thank you, Your Honor.

20 THE COURT: Thank you very much and I appreciate
21 the argument of counsel. It was very helpful on both sides
22 in terms of me understanding your arguments and the case in
23 chief also. Thank you very much.

24 MS. MANDEL: Thank you, Your Honor.

25 MR. SIMON: Thank you, Your Honor.

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THE COURT: Happy holidays.
MS. MANDEL: Happy holidays.
(Proceedings concluded at 4:08 p.m.)

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

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

**Melissa
Looney**

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Date: December 19, 2013