1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 CASE NO. 12-11076-shl
4 - x
5 In the Matter of:
6
7 ARCAPITA BANK B.S.C.(C), et al, and
8 ARCAPITA BANK B.S.C.(c), et al,
9
10 Debtors.
11 - x
12
13 U.S. Bankruptcy Court
14 One Bowling Green
15 New York, New York
16
17 March 19, 2014
18 11:07 AM
19
20
21 B E F O R E :
22 HON. SEAN H. LANE
23 U.S. BANKRUPTCY JUDGE
24
25 ECRO - KAREN

1 HEARING Re Doc. #1766 Motion to Object to Claim No. 254

2

3 HEARING Re Doc. #1771 Motion to Approve/Motion for Order

4 Pursuant to Rule 9019 Approving Settlement Agreement With

5 Thronson Parties

6

7 HEARING Re Doc. #1707 Motion for Omnibus Objection to

8 Claim(s)/Ninth Omnibus Objection to Claims filed by Evan R.

9 Fleck on behalf of Reorganized Debtors and the New Holding

10 Companies (Claim 577)

11

12 HEARING Re Adversary Proceeding: 13-01434-shl Official

13 Committee of Unsecured Creditors of Arcap v Bahrain Islamic

14 Bank; pre-trial conference

15

16 HEARING Re Doc. #8 Motion to Dismiss Adversary Proceeding

17 Filed by Defendant: Bahrain Islamic Bank

18

19 HEARING Re Adversary Proceeding: 13-01435-shl Official

20 Committee of Unsecured Creditors of Arcap v. Tadhamon

21 Capital B.S.C., Pre-trial Conference

22

23

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1 HEARING Re Adversary Proceeding: 13-01435-shl Official
2 Committee of Unsecured Creditors of Arcap v Tadhamon Capital
3 B.S.C.; Doc #8 Motion to Dismiss Adversary Proceeding Filed
4 by Defendant Tadhamon Capital B.S.C.
5
6 HEARING Re Adversary Proceeding: 13-01677-shl Baeshen, et al
7 v Arcapita Bank B.S.C.(c) et al; Pre-trial Conference
8
9 HEARING Re Doc #4 Motion to Dismiss Adversary Proceeding
10 Filed by Defendant: Reorganized Debtors and the New Holding
11 Companies
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25 Transcribed by: Sheila Orms

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1 P R O C E E D I N G S
2 THE CLERK: All rise.
3 THE COURT: Good morning. Please be seated.
4 We're here this morning for a hearing in Arcapita
5 Bank and so before we begin, let me get appearances from
6 folks who expect to speak at the hearing this morning, in no
7 particular order.
8 MR. LEBLANC: Good morning, Your Honor, Andrew
9 Leblanc of Milbank Tweed Hadley & McCloy on behalf of the
10 reorganized Arcapita, joined by my colleagues, Nicholas
11 Bassett and Lena Mandel.
12 THE COURT: All right. Good morning. And who's
13 going to be arguing the other side of the motions that we
14 have in front of us today?
15 MS. ADLER: Your Honor, Lani Adler and John Bicks,
16 K&L Gates for the defendants in the adversary proceedings
17 against Bahrain Islamic Bank and Tadhamon Capital.
18 THE COURT: All right. Thank you.
19 MR. SKAPOF: Good morning, Your Honor, Marc
20 Skapof, Baker Hostetler with my colleague Regina Griffin and
21 Jim Day, arguing for the Baeshen claimants.
22 THE COURT: All right. So before we get to those
23 motions, there were a few other things on the calendar, so
24 take it away.
25 MS. MANDEL: Good morning, Your Honor.

1 THE COURT: Good morning.
2 MS. MANDEL: Lena Mandel, Milbank Tweed Hadley &
3 McCloy, on behalf of the reorganized debtors.
4 We do have a couple of claims related matters
5 today. The first matters on the agenda have been adjourned,
6 and at the time we filed the agenda, Your Honor, we didn't
7 have the date for the April omnibus hearing, so we adjourned
8 them without a date certain.
9 But with respect to matter number one, omnibus
10 objection number two, with respect to claim 255, we would
11 like to adjourn it to April 30 at 11 a.m.
12 THE COURT: All right.
13 MS. MANDEL: And with respect to the third omnibus
14 objection, this is one handled by Gibson Dunn, so I don't
15 have a date for that.
16 THE COURT: All right. That's fair enough.
17 MS. MANDEL: Thank you, Your Honor.
18 Then we have an uncontested objection to claim
19 number 254, filed by Joint Venture, Foreign Van Ness
20 Construction (ph) and Muhr and Roberts (ph).
21 There was a settlement agreement as we explained
22 in our objection that the debtors entered into post-petition
23 with the claimant. They never got Court approval, so it's
24 not a binding settlement agreement, but based on the review
25 of its terms by FTI, our financial consultants, we believe

1 that the terms of the settlement are reasonable, and we're
2 willing to abide by them.
3 So they filed a proof of claim based on the amount
4 set forth as the settlement amount in that agreement, which
5 was equivalent to slightly over $4 million. However, there
6 was one point in the agreement that dealt with a provisional
7 amount, which was slightly over a million dollars that
8 related to work that had not been performed at the time, and
9 on information belief that it had never been performed.
10 So we believe that the settlement amount should be
11 reduced by that number. And when we tried to contact the
12 claimant to resolve this consensually, but they -- we never
13 got any response. So we were forced to file a formal
14 objection.
15 As Your Honor can see, we served the objection on
16 them, we did not receive any response. And so we're asking
17 to have that claim reduced to $2,979,419 --
18 THE COURT: All right.
19 MS. MANDEL: -- and 10 cents.
20 THE COURT: So let me make sure I understand this.
21 You want me to essentially approve the settlement agreement,
22 but then back out of the settlement agreement certain funds
23 that are the subject of the objection?
24 MS. MANDEL: That is correct, Your Honor. Well,
25 we're not formally asking to approve the settlement

1 agreement. We're asking to reduce the proof of claim --
2 THE COURT: Claim.
3 MS. MANDEL: -- and allow it in the amount --
4 THE COURT: Consistent with a modified settlement
5 agreement.
6 MS. MANDEL: That is correct, Your Honor.
7 THE COURT: I understand, all right. And they
8 were noticed, properly noticed with --
9 MS. MANDEL: That's right. We filed affidavit of
10 service.
11 THE COURT: All right. Anybody wish to be heard
12 in connection with that claim objection?
13 (No response)
14 THE COURT: All right. I did take a look at it as
15 well as the settlement agreement to try to put the pieces
16 together, and I had understood the way you understood it
17 here this morning, but it's nice to confirm it, and I will
18 grant the claim objection. And I think you're right, that I
19 don't need to address the settlement, as the claim objection
20 really sets the proper figure.
21 MS. MANDEL: Thank you, Your Honor.
22 THE COURT: And so if you'd submit an order on
23 that.
24 MS. MANDEL: Thank you very much, we will.
25 THE COURT: Thank you.

1 MS. MANDEL: Okay. The next matter is motion
2 under Rule 9019 seeking approval of the settlement with the
3 Thronson Parties.
4 As Your Honor may recall, there were a lot of
5 different litigation surrounding the sale by Falcon Gas
6 Search Company, debtor of the Nortex (ph) assets, that was
7 one of them, filed in Texas state court by former employees
8 who were holding stock options.
9 And they alleged that, you know, they were not --
10 they were deprived of the opportunity of exercising those
11 stock options in connection with the sale. So they filed a
12 suit seeking damages close to $2 million.
13 We finally were able to consensually resolve those
14 claims, and we are seeking approval of the settlement, which
15 provides that Falcon will pay these parties $190,000 for
16 which there will be -- have the Texas lawsuit dismissed with
17 prejudice and grant debtor's wide release, very broad
18 release.
19 And we believe that this is a very good settlement
20 for Falcon's estate. You know, we're settling $2 million of
21 a claim for $190,000, where the settlement allowed the plan
22 to be confirmed, as with respect to Falcon and the Falcon
23 creditors will now -- their coverage will be enhanced. So
24 we're seeking approval of the settlement.
25 The only item in the settlement agreement that

1 we're asking to modify is the settlement -- there were --
2 Thronson Parties filed numerous proofs of claim, and they
3 were objected to on the fourth omnibus objection, which
4 obviously now resolved. And the stipulation -- the
5 settlement agreement provides that once the payment is made,
6 a joint stipulation will be filed withdrawing those claims.
7 We believe that's unnecessarily cumbersome and
8 unnecessary, so we're asking Your Honor, and we included it
9 in the proposed order that once the payment is made under
10 the settlement agreement three days after that, all the
11 claims will be deemed automatically withdrawn, and we will
12 withdraw the pending fourth omnibus objection.
13 THE COURT: Well, I agree with you it's probably
14 unnecessary, but I confess that I'm not anxious to start
15 approving settlement agreements, where you give you me a
16 settlement agreement and say we want you to approve it, but
17 we want you to change a part of it.
18 I can see -- again, this seems fairly
19 uncontroversial here, but I could see how that notion could
20 lead to some very unfortunate and confusing requests and
21 results, so I confess I'm not a big fan of that.
22 The other one I think is different, in that, you
23 noticed -- it's noticed in a way -- well, the two of them
24 together raise some concerns. I think I'm willing to let
25 you go on the first one, but the second one, I think it's a

1 very administerial act that can be accomplished fairly
2 easily without much expense at all.
3 MS. MANDEL: That's fine, Your Honor. We will --
4 THE COURT: If it's in the settlement agreement,
5 that's what the parties contemplated --
6 MS. MANDEL: Well, my only concern was that there
7 are 36 of them, but that's okay, we'll figure it out.
8 THE COURT: Well, you can tell them that in the
9 settlement agreement they agreed to do it so --
10 MS. MANDEL: Right.
11 THE COURT: -- the judge understands that they
12 will do it and if you have --
13 MS. MANDEL: That's fine, Your Honor, that's not a
14 problem. We'll modify the proposed order and we'll be then
15 seeking just approval of the settlement agreement as is.
16 THE COURT: All right. Anyone wish to be heard on
17 the request to approve this settlement?
18 (No response)
19 THE COURT: All right. Hearing no objection, I
20 will approve the settlement consistent with the settlement
21 agreement as we just discussed under Rule 9019 as satisfying
22 that requirement, and certainly within the -- more than the
23 lowest range of reasonableness and the factors identified by
24 the Court in Iridium.
25 MS. MANDEL: Thank you, Your Honor.

1 The last claims related matter on the agenda was
2 listed as a contested matter, and was relating to claim
3 number 577 from the ninth omnibus objection to claims.
4 Since we filed the agenda, the claimant has withdrawn its
5 proof of claim, so there's no need to go forward on a
6 contested matter.
7 And I understand that the claimant is on the phone
8 and wishes to say something.
9 THE COURT: All right. Who's on the phone?
10 (No response)
11 THE COURT: Maybe they're in listen only capacity.
12 MS. MANDEL: Okay. Maybe they're just listening.
13 THE COURT: It's all right.
14 MS. MANDEL: So that's --
15 THE COURT: All right. Well, I appreciate them
16 addressing it in a timely way so we can have the record
17 clear for the hearing. And in light of that, it doesn't
18 look like we need to do anything as to that claim.
19 MS. MANDEL: That's correct, thank you very much.
20 THE COURT: Thank you very much.
21 MS. MANDEL: Thank you, Your Honor.
22 THE COURT: All right. I believe that allows us
23 to move on to the motions part of the program. I thought
24 that it'd probably made sense to do the Baeshen motion first
25 unless --

1 MR. LEBLANC: Whichever the Court prefers, Your
2 Honor, it's -- I'm arguing all three of them so whatever the
3 Court's pleasure is.
4 THE COURT: All right. So you're stuck --
5 MR. LEBLANC: So I'll --
6 THE COURT: -- either way.
7 MR. LEBLANC: I will now stand and argue. Let me
8 just switch books if I could, Your Honor.
9 THE COURT: Absolutely and we'll give a second for
10 the folks to come up on the other side on that motion.
11 All right, proceed.
12 MR. LEBLANC: May it please the Court, Your Honor,
13 Andrew Leblanc of Milbank Tweed Hadley & McCloy on behalf of
14 the reorganized debtors.
15 I want to tell the Court at the outset that I'm
16 going to say this with respect to both motions that I'm
17 going to argue. The motions are extraordinary we believe,
18 in the context of the bankruptcy case for different reasons,
19 but I don't want Your Honor to think that I saw that about
20 every motion that I argue. It's just these two or the three
21 but two of them are really the same, are truly
22 extraordinary.
23 And I'm going to deal with this one obviously and
24 we'll deal with the other one when we get to that. But this
25 motion, Your Honor, in its simplest terms, seeks to gut the

1 confirmation order that the Court already entered.
2 Now, the confirmation order that the Court entered
3 dealt in relevant part with two critical elements. The two
4 elements that are necessary for the complainant's claims.
5 The first is the plan in as clear terms as one
6 could possibly do, dictated what the assets of the estate
7 were, which were property of the estate. The Court
8 determined that, and I have demonstratives here, Your Honor,
9 that show, and if the Court would like me to I'm happy to
10 walk through where those definitions are.
11 But the definition of property of the estate, as
12 reflected in the disclosure statement as confirmed by the
13 plan, includes all of the scheduled assets. There's a
14 commingled amount of cash, constituting $147 million of cash
15 that are designated on the schedules. The Court then found
16 that to be property of the estate.
17 The complainants seek a determination from the
18 Court that that was never property of the estate. And
19 astonishingly, and what again I think is truly extraordinary
20 is at no point in time until they filed their complaint
21 after the plan had gone effective, did they raise their hand
22 and say, we contest, we dispute, we even want to reserve our
23 rights as to whether or not that particular piece of
24 property is property of the estate.
25 And what makes that particular element of their

1 claim even more astonishing, is that in the context of this
2 plan, someone else did exactly that. Someone else raised
3 their hand, said I have a dispute as to whether or not my
4 particular piece of property is property of the estate. And
5 what happened? That particular creditor, Mr. Nazer (ph) got
6 a reservation of rights specific to him, allowing him to
7 preserve that argument. Had the Baeshens done the same, one
8 of two things would've happened.
9 Either it would've been concluded that we could
10 include them in a reservation of rights, or alternatively,
11 the dispute would've been resolved. But fundamentally,
12 because they didn't make themselves known at any point in
13 time prior to the filing of their complaint, nobody had any
14 reason to think that there was a contest to that.
15 And I think that Mr. Nazer came before the Court,
16 or came at least before the debtors filed an objection and
17 had the reservation, may explain it was in the contemplation
18 of somebody that that might be an argument that one could
19 make. And that reservation of rights, it's reflected in the
20 plan as repeated in our papers is clear that it relates to
21 Mr. Nazer.
22 Now, that's -- that element alone, that's fatal to
23 their claim because --
24 THE COURT: Well, let me ask whether -- there's a
25 res judicata aspect of this.

1 MR. LEBLANC: Correct.
2 THE COURT: But there's also what I hear in your
3 comments, also it's almost a laches kind of argument that by
4 waiting, and I guess that it's tied in with the res judicata
5 meaning that proceeding went forward and you didn't
6 challenge it. Are you making any sort of separate laches
7 argument?
8 MR. LEBLANC: No. No, I don't think, Your Honor,
9 that there's -- well, let me be clear, in a motion to
10 dismiss we're not. It's a declarable -- the constructive
11 trust is an equitable doctrine to the extent that they
12 wanted to assert a constructive trust.
13 We would argue a laches argument. That's probably
14 a summary judgment argument. The problem for them, Your
15 Honor, is they have to get past the motion to dismiss on the
16 basis of res judicata.
17 THE COURT: Right.
18 MR. LEBLANC: And the Court having determined this
19 in the confirmation order and in confirming the plan, they
20 don't get out of the starting gate, and we don't have to
21 raise affirmative defenses to inequitable relief like a
22 constructive trust that they seek, like affirmative defenses
23 like laches, because they simply don't get out of the
24 starting gate.
25 THE COURT: You mentioned the $147 million in

1 cash, how many other folks are in the same position as these
2 plaintiffs and the objecting party for purposes of the plan
3 are there? I mean, how much of that cash are we talking?
4 MR. LEBLANC: Your Honor, I think -- the number --
5 the dollar amount is $320 million, so even though there's
6 only 147 million because what's important for the Court to
7 remember is these are unrestricted investment accounts that
8 were deposited.
9 THE COURT: Right.
10 MR. LEBLANC: The company could do with them what
11 they chose. The 147 million is simply what was available --
12 THE COURT: At that time.
13 MR. LEBLANC: -- what was in bank accounts at that
14 time.
15 THE COURT: Was the balance but --
16 MR. LEBLANC: It was the balance, because the
17 money was obviously commingled, which in and of itself would
18 defeat if they get past the summary judgment stage, would
19 defeat a constructive trust argument. But again, we're not
20 at that point.
21 But it's 230 million, and I understand it's about
22 60 claimants who would be in exactly the same position. In
23 other words, who have URIA or RIA accounts, deposited money,
24 and could come before the Court if there's no restriction,
25 if the confirmation order meant nothing, could come before

1 the Court and contest or contend that they could assert a
2 constructive trust.
3 Now, I talked about the designation by the Court
4 of the assets. There's a second and independent fatal flaw
5 to their assertion, and that is that the Baeshens in the
6 plan, one of the things that occurs, is they are designated,
7 they're concluded to be creditors, based upon their URIA
8 accounts.
9 And separately with respect to their rights
10 offering account, there's a separately classified group of
11 claimants and the Baeshens fall into both of those
12 categories.
13 Now, the disclosure statement sets forth plainly
14 the classification of those claims. The Court by its
15 determination concludes that all claimants within those
16 categories are similarly situated, and all claimants get the
17 treatment that's provided for in the plan.
18 Now, the treatment that's provided for in the plan
19 is demonstrably different than what the Baeshens are
20 contending they're entitled to now, which is just take their
21 money and go home.
22 Now, why is that so critical, Your Honor, because
23 that is a second independent decision that the Court makes
24 in the context of the confirmation of the plan. That is,
25 that prohibits them from now asserting that their claims

1 against the estate are anything other than those that are
2 categorized as unsecured claims against Arcapita Bank
3 entitled to the distributions that are provided for in the
4 plan.
5 So, Your Honor, as to either of those issues, and
6 with respect to the claims themselves, they filed -- it's
7 not just that they were scheduled, they also filed proofs of
8 claim. They filed proofs of claim, so they came to the
9 Court, and they came to the debtors and said, we believe
10 ourselves to be claimants. It had a boilerplate reservation
11 of rights that didn't mention anything about constructive
12 trust. But it has -- they came to the Court and said, we
13 are claimants.
14 The debtors then proceeded, and the debtors with
15 the help of the plan sponsors and the committee proceeded
16 with proposing a plan, having a disclosure statement
17 approved, months later having that plan approved, months
18 after that, having that plan go effective and be
19 consummated, all the while with the understanding that the
20 Baeshens just like they said they were, were claimants
21 properly categorized in the two claims -- in the two
22 categories of claims.
23 Now -- so, Your Honor, that's an independent
24 reason why the Court must dismiss their claims on the
25 doctrine -- under the doctrine of res judicata.

1 And it's clear, Your Honor, the doctrine of res
2 judicata has very powerful effect. But it has even more
3 powerful effect in a bankruptcy case than it does in a
4 general commercial litigation. The reason for that is the
5 importance of finality, and we talk about this in our
6 papers.
7 And I think we've just mentioned, Your Honor, the
8 importance of finality in this particular case is
9 extraordinary, given the fact that the Baeshens are in no
10 different position than anyone else. Their claims are no
11 different than the other URIA, and for the reasons we talked
12 about, the -- just the sheer volume of money, it would
13 fundamentally alter the context of this case.
14 Were the Court now to say that they can contend
15 that they can just take their money out in full. Well, the
16 plan that the Court confirmed just falls apart in that
17 context. Not because of their 3 million, but because of all
18 of the money that can come out from the C people that are
19 identically situated.
20 So, Your Honor, we think that the basis to dismiss
21 this claim is just absolutely clear. It's a blatant,
22 blatant collateral attack on this Court's order. It doesn't
23 seek in any respect to comply with 1144, there's no
24 allegation that there was fraud, that they were misled, that
25 they didn't understand what was happening to them, no

1 allegation of that whatsoever. Instead, they just ask the
2 Court to ignore the orders that it enters.
3 The Court should reject that and should dismiss
4 these claims.
5 THE COURT: All right.
6 MR. LEBLANC: Unless the Court has any questions.
7 THE COURT: Yeah, my question is what do you make
8 of, and I'll put this in a broad brush of the case that they
9 cite dealing with property of the estate, and the idea that
10 that's separate and apart, is your answer one about sort of
11 the timing of raising those issues or the substance of it,
12 those cases being different than this circumstance?
13 MR. LEBLANC: I would say it's both, Your Honor.
14 Certainly the timing has an enormous impact. The second is
15 the substance of those.
16 The issue that was raised in those cases was an
17 argument that a particular piece of property couldn't become
18 property of the estate pursuant to the confirmation order,
19 when there was a dispute, a known dispute about that prior
20 to it.
21 In other words, the confirmation order isn't the
22 place to adjudicate disputes as to whether something is
23 property of the estate. However, the confirmation order is
24 the place to determine what is property of the estate.
25 The schedules here have been out for more than a

1 year. The disclosure statement have been out for several
2 months before the confirmation hearing, and that was
3 February -- it was filed in February, confirmation hearing
4 in June.
5 And there wasn't a dispute about this being
6 property of the estate. And just think about the floodgates
7 that open, Your Honor. If somebody can -- if there can be
8 no dispute and the Court can say, this is all listed in the
9 disclosure statement as property of the estate, I find it to
10 be property of the estate, and then someone can come in and
11 say afterwards, all of the debtor's property, I now dispute
12 whether it's property of the estate. And that's effectively
13 -- that is what they're doing.
14 And so, Your Honor, it's the absence of any
15 suggestion that there was a dispute. And it's the fact of
16 the Court's conclusion that these -- this was, in fact,
17 property of the estate. Something that as it relates to
18 this debtor, and Your Honor knows that this debtor
19 throughout much of its -- much of the course of this case,
20 it was not a debtor flush with cash.
21 And this plan, which is paying creditors pennies
22 on the dollar at the Arcapita Bank level, is not a plan
23 that's like a close to full play, where you could go -- get
24 away with giving away a few million bucks or even $300
25 million. That is not the case.

1 This is a debtor, upon reorganization, that has an
2 estimated reorganization value of 1.3 billion. And what
3 they're suggesting is that $320 million of cash could be
4 contended to be not property of the estate.
5 And I think that's the distinction with those
6 cases, Your Honor, is there was no dispute whatsoever in
7 this case as to whether or not this was property of the
8 state, when the Court ordered that to be the case. And for
9 that reason, it has res judicata effect.
10 THE COURT: So if it was raised, I would imagine
11 the options would be at the confirmation hearing to do one
12 of two things. One is to say, we can reserve that right, as
13 you did with the one party that raised it, because we can
14 afford to go ahead --
15 MR. LEBLANC: Uh-huh.
16 THE COURT: -- without that money. Or two, this
17 is a game changer and we need to litigate it now so the
18 confirmation hearing now becomes a hearing, an evidentiary
19 hearing or whatever it is on what's in and what's out.
20 MR. LEBLANC: Absolutely, and that's what I
21 mentioned at the outset. Had they raised this, Your Honor,
22 we had those two choices. We could've done effectively what
23 would be comparable to a quiet title action. To get anybody
24 who claims they had a -- anyone who claims they have a
25 property interest in the debtor's assets come forward and

1 say that you do.

2 Nobody was making a claim except for one person,

3 and as to that person, and for exactly the reason Your Honor

4 said, the plan can go forward with a reservation with

5 respect to Mr. Nazer. That's okay, we can do that. We

6 can't do it with respect to everybody else.

7 And just think about the impossible position.

8 Your Honor, I know, just confirmed American Airlines. If

9 somebody could come in today and say, well, six of those

10 planes, I have a property right in those, I'm asserting a

11 constructive trust over them, after the plan has been

12 confirmed upon which the ownership of those planes was just

13 part of it because nobody contested it, and presumably Your

14 Honor's orders, confirmation orders there say that the

15 planes that are listed on their schedules are property of

16 that estate.

17 If somebody could come in afterwards and just say,

18 well, now I'm going to assert that that is my property, it

19 just doesn't work. And exactly what Your Honor said, had

20 they raised this at any time, any time prior to the res

21 judicata order in this case, the confirmation order, we

22 would've resolved it in one of two ways.

23 Either, we would've carved them out if it was

24 acceptable to do that for all the plan sponsors with the

25 recognition that there was the risk that $3 million would be

1 declared later not to be property of the estate, or we
2 would've said, we've got to figure this out. And you could
3 figure it out in one of two ways. You can either change the
4 plan to react to that, or you can litigate the question and
5 resolve it at that point.
6 We were never given that option, and the Court was
7 never given that option. And instead what the Court did is
8 entered the order and that becomes -- that has res judicata
9 effect.
10 I think any conclusion to the contrary, Your
11 Honor, would be astonishing, and could wreak havoc in every
12 bankruptcy case. Because then what you -- you put the onus
13 on debtors and the creditors who put plans together with
14 debtors, to quiet title to all the assets that are on the
15 debtor's schedule. And there's been no suggestion
16 whatsoever that there's any dispute as to whether or not
17 they own it.
18 You also, you also put the onus on debtors to go
19 through what can be tens or hundreds or thousands of claims
20 to say, well, does anybody have some generic reservation of
21 rights, we have to go and litigate those claim objections to
22 resolve any generic reservations of right. Because somebody
23 who filed a proof of claim, who was classified as a
24 particular creditor, who was provided for a plan treatment,
25 would be free to come out -- come in after the plan was

1 confirmed and consummated and say, I just don't agree with
2 the order that the Court entered, and I'm free to contest
3 the treatment of my claims, the claims that I've asserted in
4 the plan.
5 Your Honor, that is -- that would be an
6 extraordinary outcome from this Court, and it would turn
7 bankruptcy, you know, up on its head.
8 So, Your Honor, we would ask that the Court to
9 dismiss the claims of the Baeshens without -- with
10 prejudice --
11 THE COURT: All right.
12 MR. LEBLANC: -- and without any further action
13 from the debtors. Thank you, Your Honor.
14 THE COURT: Thank you.
15 MR. SKAPOF: Good morning, Your Honor --
16 THE COURT: Good morning.
17 MR. SKAPOF: -- Marc Skapof from Baker Hostetler
18 on behalf of the Baeshens, and you'll excuse me because I'm
19 battling a cold, so if you have trouble hearing me --
20 THE COURT: That's all right, you and many other
21 people.
22 MR. SKAPOF: -- please let me know.
23 As a second indulgence, we're going to address the
24 arguments that Mr. Leblanc made, but I'd like to sort of
25 just take this one on to sort of frame what we think the

1 issue is.

2 THE COURT: Certainly, however you'd like to

3 proceed.

4 MR. SKAPOF: Right. And just as a matter of sort

5 of procedure, we're not here on a motion. We're here on a

6 complaint for declaratory relief, and we think that's

7 important because, you know, the debtors have raised one --

8 excuse me, reorganized debtors have raised one affirmative

9 defense to the claims that we've put at issue, the

10 allegations we put at issue, which we're all going to

11 assume, you know, are true for today.

12 And what we are talking about here is the Baeshens

13 invested a total of a little more than $12 million with the

14 debtors. The Baeshens accept under governing Bahraini law

15 that 75 percent of that $12 million, the debtors had an

16 interest in that. And we do not contest the treatment of

17 the debt Class 5 claims or the Class A claims as to the

18 money that we believe under Bahraini law title passed or the

19 debtors had an interest in.

20 So we're talking about $3 million and change

21 carved out of that 12 million. So to begin with, with the

22 147 that the debtors are using as a number, one, I think

23 it's improper that on a motion to dismiss, they're

24 essentially talking about a bunch of claimants that are not

25 in our complaint.

1 Our complaint specifically --
2 THE COURT: No, but it goes to the notion of what
3 this has to do with the plan, right? And so the argument
4 has been made that it's res judicata because of the plan,
5 and I was just trying to get a sense of where these kinds of
6 funds fit into the plan. And I certainly can get that
7 information by going back and looking at the plan. I'm just
8 trying to get a -- sort of a short thumbnail --
9 MR. SKAPOF: No, no.
10 THE COURT: -- sketch from folks who have already
11 done that work --
12 MR. SKAPOF: Sure.
13 THE COURT: -- as to what the plan provides for
14 and what the claims would be and, you know, is it central to
15 the plan.
16 MR. SKAPOF: Understood, Your Honor, and I think
17 the point I make to that, and then I'm going to sort of
18 circle back to the sort of bigger points that we want to
19 make is, the pot of assets available for distribution to
20 creditors is distinct from what the debtor holds that may or
21 may not be there.
22 So all that 147 --
23 THE COURT: How -- I'm not following you on that.
24 MR. SKAPOF: If I put down or disclose I've got
25 $147 million and we go back to Schedule B where that money's

1 listed, it just lists a bunch of bank accounts. There's no
2 way any particular person would know that their assets were
3 in those bank accounts or anything else.
4 So all the debtor is basically saying is, and
5 again, by the definitions in the plan, their definition is
6 assets, assets revested in the reorganized debtor. The
7 definition of assets is property that's property of the
8 estate under 541, which we contest, the language does fall
9 or on the schedules, but the case we cite in our papers, In
10 Re Toni (ph) says, just because you put something down on a
11 schedule, if it's not yours, it doesn't make it yours.
12 THE COURT: But let me just step back from the
13 sort of bankruptcy speak --
14 MR. SKAPOF: Uh-huh.
15 THE COURT: -- that we all engage in, and to a
16 more generalist perspective.
17 MR. SKAPOF: Uh-huh.
18 THE COURT: Your client, and I assume other folks
19 in similar circumstances, after all this was an investment
20 bank --
21 MR. SKAPOF: Uh-huh.
22 THE COURT: -- invested money with the debtors.
23 And the debtors had that money, that's why you filed a proof
24 of claim to say you owe us money, it's pretty clear that
25 whatever's left of that money, right, because they filed for

1 bankruptcy --
2 MR. SKAPOF: Uh-huh.
3 THE COURT: -- because they're in financial
4 distress, that the idea is to say, well, here's everything
5 we've got, all the assets we have, and we're going to
6 distribute them.
7 So I understand parsing needs to be done as to the
8 plan and the specifics, but how could your client not know
9 that the money that was invested by it and everybody else
10 would be part -- whatever is left is the assets that are
11 going to be divvied up?
12 MR. SKAPOF: Certainly, Your Honor, and I can
13 answer that, and it's also based on the allegations in our
14 complaint. Our client placed money under certain
15 agreements, there's two agreements at issue here, because
16 these are a family one -- one of the agreements that one of
17 the family members has and slightly different in terms of
18 the choice of law provision. And our theory under our
19 complaint is, is that initial investment under the governing
20 Bahraini law, which governs here. I don't think anyone
21 would disagree on a Buttner (ph) analysis, this is the law
22 that determines the property interest, that money until it
23 was deployed as we use in our complaint, that is used for
24 investment purposes, title remained with the claimant.
25 We filed a claim for the full amount --

1 THE COURT: Yeah, but we're getting into the
2 merits though of your argument.
3 MR. SKAPOF: No. But I agree, but I think I'm
4 addressing your point is, is that the 147 just because some
5 -- the number is there, it doesn't -- you can't tell if it's
6 including money that under the governing law isn't property
7 of the estate. And under the definitions in the plan of
8 assets non-property of the estate is already carved out of
9 that.
10 The definition in the plan, and it all talks about
11 assets is, property that's property under 541 or on the
12 schedule.
13 THE COURT: But do you have anything specific that
14 you can point to in the plan that says that these kind of --
15 these kinds of funds -- I mean, they're an investment bank,
16 so people give them money to invest.
17 I mean, isn't this the heart --
18 MR. SKAPOF: Yes, Your Honor.
19 THE COURT: -- of what they were doing?
20 MR. SKAPOF: Yeah, but what we're saying, Your
21 Honor --
22 THE COURT: And so it's the heart of the creditor
23 body and the heart of the assets?
24 MR. SKAPOF: Well, no, because we're -- what we're
25 saying, Your Honor, is we are a creditor for 75 percent of

1 the money we did, and we agree the plan binds that.

2 You keep on positing an example of, didn't you

3 deposit money with an investment bank, and I don't want to

4 go too much into the merits, but it does inform the answer

5 to your question, so you know, if you'll indulge me --

6 THE COURT: When you say you deposited money but

7 you retained the -- some of that money, nonetheless, even

8 though you gave it to the debtors was still yours --

9 MR. SKAPOF: Yes, right.

10 THE COURT: -- under Bahraini law?

11 MR. SKAPOF: What we're saying is, is we didn't

12 deposit money with an investment bank, like I would go and

13 give money to Goldman Sachs here. We gave money to a

14 Mudarabah bank that's regulated under Islamic banking

15 statute and is governed by Bahraini law as informed by

16 Sharia law.

17 So we would never take the position that that

18 initial deposit of the money or whatever you want to call

19 it, placement, made that -- let the debtor own that money.

20 The debtor did make further --

21 THE COURT: But is there anything in the plan --

22 MR. SKAPOF: Yes, Your Honor.

23 THE COURT: -- that carves -- I understand you've

24 cited the general --

25 MR. SKAPOF: Uh-huh.

1 THE COURT: -- notion that not -- this doesn't
2 address non-property, but is there anything in there that
3 addresses your -- these kinds of bank accounts? I'm just --
4 MR. SKAPOF: Yeah, I can --
5 THE COURT: Because what you're asking, I mean,
6 it's pretty clear, you are asking to undo the plan.
7 MR. SKAPOF: No, no, I would fundamentally
8 disagree with that, Your Honor, because, and let me explain,
9 and you know, people can respond to that.
10 We are making an argument based on our agreements,
11 which again, we have two different agreements, and the fact
12 that some portion of our money, about 25 percent was not
13 deployed, there is nothing in the plan, and there's no
14 evidence in the record here, because you know, they're just
15 saying what's in the plan but they're not introducing
16 evidence that the agreements were all these people are the
17 same, whether their money was deployed or not, or anything
18 else.
19 So it's completely speculative at this point, and
20 we're on a motion to dismiss. If that's the case, let's
21 have discovery on it, and they can come back and make the
22 argument.
23 THE COURT: Well, let me -- if the 147 million is
24 in a bank account for entities that are investment banks,
25 what else would the money be?

1 MR. SKAPOF: But, Your Honor, as alleged in our
2 complaint, the money is in a specific type of account, and
3 then some of that money was then, under the agreements, we
4 acknowledge that the agreements say Arcapita had the
5 discretion to invest the money.
6 Again, if you go back to the complaint, our theory
7 is, under Bahraini law, the initial placement with the bank
8 in the first account title does not pass. Once the debtor
9 invests that money --
10 THE COURT: No, I understand.
11 MR. SKAPOF: -- title did. Right. So -- but what
12 I'm saying is --
13 THE COURT: I understand the theory --
14 MR. SKAPOF: -- is that number, we can't tell what
15 it's referring to. And if you ask me, I want to turn to the
16 plan provisions because you asked me about that.
17 The first thing we would do is look at the actual
18 definitions in the plan because it's not boilerplate to
19 define assets, because that's fundamentally part of what the
20 plan does. And assets again include only property of the
21 estate, and there's a case that says, just because you put
22 it on the schedules it doesn't.
23 So while I acknowledge that the reorganized
24 debtors are saying we're claiming something extraordinary or
25 astonishing, because it has sort of fundamental impacts on

1 bankruptcy, I'd argue on the opposite side that we've cited
2 cases, and the debtors haven't cited any to the contrary
3 that say when a piece of property is not property of the
4 estate, it can't be turned into property of the estate under
5 a plan. The --
6 THE COURT: I understand that --
7 MR. SKAPOF: Right.
8 THE COURT: -- but why wasn't this raised at the
9 -- sometime before the plan --
10 MR. SKAPOF: Right.
11 THE COURT: -- was confirmed so that a bankruptcy
12 court can do --
13 MR. SKAPOF: Uh-huh.
14 THE COURT: -- what it has to do? There are all
15 sorts of cases that have issues, that say we can't confirm a
16 plan until --
17 MR. SKAPOF: Uh-huh.
18 THE COURT: -- we know X, and so, Judge, you're
19 not going to like this, but we need to take up two weeks in
20 June --
21 MR. SKAPOF: Uh-huh.
22 THE COURT: -- or whatever it is to have a hearing
23 on X because that is the fundamental issue that needs to be
24 resolved?
25 MR. SKAPOF: And I'm -- yeah. And I knew you were

1 going to ask this question, and I'm actually -- I thought it
2 would be the very first question you would ask me before I
3 even introduced myself, so now that we're dealing with it.
4 THE COURT: All right.
5 MR. SKAPOF: Now, clearly as a prudential matter,
6 our client would've been better served to raise this at the
7 time. However, our argument is, that just because it was
8 prudent at one time it's not foreclosed now.
9 And Mr. Leblanc mentioned the Nazer carve-out and
10 how it's exclusive to him, and they cite for that
11 proposition, Justice Scalia's dissent in a case that has
12 nothing to do with bankruptcy and a secondary source using
13 sort of a cannon of catchatory (ph) construction.
14 THE COURT: Well, but I'll tell you --
15 MR. SKAPOF: Yeah.
16 THE COURT: -- my take on that --
17 MR. SKAPOF: Uh-huh.
18 THE COURT: -- is how can I allow -- carve-outs
19 are a particular thing --
20 MR. SKAPOF: Uh-huh.
21 THE COURT: -- in bankruptcy. And they are
22 different than, you know, district court --
23 MR. SKAPOF: Uh-huh.
24 THE COURT: -- litigation, it's a very different
25 world. If I start saying one person's carve-out is a

1 universal carve-out, then nobody knows what the plan is
2 giving away or not.
3 MR. SKAPOF: Agreed, Your Honor.
4 THE COURT: I mean, how can I do that?
5 MR. SKAPOF: But in this case, the argument that
6 was raised by Mr. Nazer said, I don't think this is property
7 of the estate, I --
8 THE COURT: But that happens all the time.
9 MR. SKAPOF: No, no, no, I understand. And he
10 said it was held in trust and the debtors in their briefs
11 initially said, look, this isn't even a confirmation issue,
12 and if it's not covered by the plan or the order, it's not
13 covered by the plan or the order, and then they negotiated a
14 carve-out.
15 Our clients, we're making or we're making similar
16 kind of arguments now, believed they could've reasonably
17 relied on that because this is essentially talking about the
18 same kind of claim.
19 Second --
20 THE COURT: But let me -- before you move on --
21 MR. SKAPOF: Uh-huh.
22 THE COURT: -- to second, so what do you say to
23 Mr. Leblanc's hypothetical about aircraft ownership? In
24 fact, in American, there are very, very complex
25 relationships that govern aircraft ownership --

1 MR. SKAPOF: Uh-huh.
2 THE COURT: -- the aircraft are in effect not
3 owned by the airline.
4 MR. SKAPOF: Uh-huh.
5 THE COURT: They -- and people are getting ready
6 to send me many, many briefs on many, many complicated
7 issues --
8 MR. SKAPOF: Uh-huh.
9 THE COURT: -- relating to that. And if somebody
10 wanted to reserve, and in fact, various people did reserve
11 various rights as to particular aircraft, particular
12 airports, particular amounts owing, if those carve-outs at
13 confirmation were construed as to everybody in a similar
14 situation, I think that the debtor's counsel would've had no
15 choice in American to say, nobody gets any carve-outs, we
16 can't do this because we can't confirm a plan.
17 So I don't know how I can -- I'm just trying --
18 MR. SKAPOF: Yeah.
19 THE COURT: -- to address that. This is a very
20 narrow issue about --
21 MR. SKAPOF: It is. And --
22 THE COURT: -- reliance on its -- someone else's
23 carve-out.
24 MR. SKAPOF: And I would answer that, and I would
25 state the Maxwell case, which is in our briefs that says,

1 when you're dealing with a similar kind of issue in Maxwell,
2 it had to do with certain banks, and of whether the plan
3 administrator in the UK could bring preference actions, and
4 we acknowledge the actual holding of that case is based on
5 comity, but there is dicta in a section that discusses res
6 judicata, which specifically says Barkley's Bank came
7 forward and got a carve-out on this exact issue.
8 And that post-confirmation, the other two banks
9 who are subject to the potential avoidance action were
10 allowed to have reasonably relied on that carve-out because
11 they were talking about the same thing.
12 So to switch that back to your example of the
13 airplane, if Mr. Nazer had come in and said, Arcapita, I
14 think you own my airplane, that's different than saying, I
15 think you're holding my money in trust because title never
16 passed to it.
17 So it's reasonable reliance. And so the question
18 becomes, was it reasonable to rely on that carve-out because
19 it effectively -- it looked like it covered your situation.
20 THE COURT: Well, I think we've mixed our
21 metaphors there.
22 MR. SKAPOF: Uh-huh.
23 THE COURT: When Mr. Nazer is selling me an
24 airplane.
25 MR. SKAPOF: Right. Yes.

1 THE COURT: I think I used that as an example to
2 say --
3 MR. SKAPOF: Yes.
4 THE COURT: -- some reservation that is central to
5 what's going on --
6 MR. SKAPOF: Uh-huh.
7 THE COURT: -- in the plan, and it can be all
8 sorts of things. It can be an amount owed a -- the nature
9 of an asset, there are lots of things, and you can even have
10 -- it can even apply in things as far flung as the
11 government where somebody talks about the nature of a tax
12 owed and other taxing authorities could have the same
13 argument, and there you would -- you know, you could be
14 dealing with the IRS in 50 different states --
15 MR. SKAPOF: Sure.
16 THE COURT: -- and other taxing authorities
17 overseas.
18 So my point was that if you have something that is
19 an issue that's raised that's, for lack of a more technical
20 term, a big deal, and somebody raises -- asks for
21 reservation and gets it, I'm wondering what that -- if I
22 adopt your thinking, how that doesn't wreak havoc in plans
23 going forward.
24 MR. SKAPOF: Well, I mean, it didn't wreak havoc
25 in Maxwell, and we would say that --

1 THE COURT: But there wasn't a holding in Maxwell.
2 MR. SKAPOF: There wasn't a holding, but it said
3 that even -- if it didn't decide in comity, they did say you
4 -- res judicata doesn't apply here, the carve-out did apply
5 because you wouldn't --
6 THE COURT: Well --
7 MR. SKAPOF: -- even get to the comity part. But
8 my answer would be is, look, it has to be essentially on a
9 case-by-case basis. Because to flip it around, and this is
10 our fundamental position is, regardless of a tactical
11 mistake, which you know, or the fact that it would've been
12 better timing, does not as a legal matter allow a plan to
13 transform an asset that's not part of the estate into an
14 asset of the estate.
15 And if it does, it's based on some other argument
16 than res judicata. You asked the reorganized debtors if
17 they were making a laches argument, and they said no, but we
18 reserve it for later and that's fine.
19 But what it sounds like they're saying or you may
20 be eluding to is waiver. But there's case law that says
21 waiver is a conscious decision that's not based on
22 negligence, mistake, or anything else to forego a right.
23 And I can give an example that's in their papers
24 about where you could see that situation is, in the
25 Northwest case --

1 THE COURT: Well, but that's why I used waiver
2 rather than -- I'm sorry, laches rather than waiver.
3 MR. SKAPOF: Yeah, okay.
4 THE COURT: Because waiver is a particular thing,
5 but laches basically say you didn't act promptly.
6 MR. SKAPOF: Yes, too little too late, I think
7 Your Honor --
8 THE COURT: And I've got to say, I'm not
9 prejudging it --
10 MR. SKAPOF: Uh-huh.
11 THE COURT: -- but there is a similar event that
12 occurred between the time when this could've been raised and
13 now that is a big problem.
14 MR. SKAPOF: Uh-huh.
15 THE COURT: So -- but I don't think we need to get
16 it into it here today.
17 MR. SKAPOF: No, we don't need to get into it, and
18 I think, you know, the positions that we're arguing here, I
19 would just mention that, you know, to the extent, and I get
20 it from the debtor's point of view, and say this is
21 extraordinary, you're going to reopen the plan, you're going
22 to do all this. But there are no cases that hold again
23 through the alchemy of a plan. You can change an asset that
24 doesn't belong to you as a debtor to one that you do.
25 THE COURT: But you're presuming is that

1 (indiscernible) say a fact not in evidence. You're
2 presuming that it belongs to you.
3 MR. SKAPOF: Well --
4 THE COURT: And so there certainly have presumed
5 all along --
6 MR. SKAPOF: Right.
7 THE COURT: -- it belongs to them. The -- when
8 you talk about timing --
9 MR. SKAPOF: Yeah.
10 THE COURT: -- bad timing is raising on the day of
11 confirmation --
12 MR. SKAPOF: Uh-huh.
13 THE COURT: -- as opposed to a month before
14 confirmation.
15 MR. SKAPOF: Uh-huh.
16 THE COURT: That's bad timing. This is beyond bad
17 timing, so.
18 MR. SKAPOF: Well, there's a difference between
19 bad timing and being precluded timing, which is really what
20 we're on, and I would turn Your Honor to the Hollywell (ph)
21 case, the cite for that is 118 B.R. 876, Southern District
22 of Florida, 1990, and it's citing a Seventh Circuit case,
23 Pantel (ph), it's 777 F.2d 1281, 1985.
24 And the quote from the Hollywell case says, the
25 bankruptcy statutes do not give a bankruptcy court

1 jurisdiction, and then it talks about the specific property
2 interests that's at dispute here, without first finding that
3 the property also constitutes a part of the bankrupt's
4 property.
5 THE COURT: But didn't I make that finding by
6 having the debtors identify in the plan what the assets are?
7 I mean, I can't figure out how to distribute a pie unless I
8 know what the pie is, right?
9 MR. SKAPOF: I agree, Your Honor, but the federal
10 rules also say, bankruptcy rules say, if you want to make a
11 determination as to what property of the estate is, you have
12 to bring it by an adversary proceeding.
13 So buried in the schedule --
14 THE COURT: Well, yes and no.
15 MR. SKAPOF: -- of a plan --
16 THE COURT: I mean, are you saying that every plan
17 then has to have an adversary proceeding to ratify what's in
18 the plan?
19 MR. SKAPOF: No, but I think --
20 THE COURT: Because a plan --
21 MR. SKAPOF: Yeah.
22 THE COURT: -- has to -- I mean, you would have a
23 huge disclosure statement problem.
24 MR. SKAPOF: I agree, Your Honor, but --
25 THE COURT: Because that's what a liquidation

1 analysis is. Here's what we have --
2 MR. SKAPOF: Uh-huh.
3 THE COURT: -- and therefore, here's how many of -
4 -
5 MR. SKAPOF: Right.
6 THE COURT: -- you people in terms of creditors
7 there are --
8 MR. SKAPOF: Uh-huh.
9 THE COURT: -- and the classes and how it's going
10 to -- and here's what things look like.
11 MR. SKAPOF: Well, first of all, the liquidation
12 analysis and the projections when you look at it, have the
13 similar boilerplate as we're all throwing that around as we
14 don't really know, these are forward-looking, this is
15 subject to claim, it could come in after and whatever.
16 So that's what it says. But more importantly, you
17 know, debtors, and we would -- it didn't happen in this
18 case, essentially asked for relief that needs to be brought
19 by motion or otherwise within a plan.
20 This particular plan, for example, on the plan
21 settlement basically says this is a motion under 9019, this
22 is what we're doing, this is why it's reasonable. It
23 doesn't -- they knew people had come forward, Nazer and even
24 earlier in the case that was sort of like we think maybe
25 this is not your money, there's issue.

1 There's like a line in the disclosure statement
2 that says, we looked at it, we think it's ours. It's not
3 the same kind of robust discussion that you get. And so --
4 THE COURT: But if it says that in the disclosure
5 statement, we look -- people have raised this issue, we
6 looked at it, we think it's ours --
7 MR. SKAPOF: Uh-huh.
8 THE COURT: -- it's -- I mean, doesn't that cut
9 against you because the issue has been --
10 MR. SKAPOF: Well, I don't think so, because again
11 when it says ours, we're making a distinction about what
12 we're asking for. And again, we're not asking for all of
13 our 12 million.
14 So if we're not asking for all of our 12 million,
15 there has to be something different that differentiates the
16 three from the other nine. And that projections in the plan
17 don't say anything about that.
18 THE COURT: But at what point are you --
19 MR. SKAPOF: Well, I would answer that. I mean,
20 if you want to say at what point, I think if I can in here
21 two years from now, I wouldn't, because at some point,
22 laches and other equitable things would say, you know, this
23 has gone on too long.
24 THE COURT: Well, I'm not going to get into it
25 today, I've got to tell you though, I -- if you're saying

1 that those kind of concerns don't kick in for two years
2 after a plan --
3 MR. SKAPOF: Uh-huh. Uh-huh.
4 THE COURT: -- is confirmed, I categorically would
5 completely reject that.
6 MR. SKAPOF: Yeah.
7 THE COURT: I don't need a specific set of facts
8 to --
9 MR. SKAPOF: No.
10 THE COURT: -- go there.
11 So -- but my concern is this, you have to -- the
12 debtors identified the assets that were in the plan. The
13 language that you keep mentioning about things that aren't
14 property of the estate aren't covered. If I -- memory
15 serves, it's pretty boilerplate, I see it in every plan
16 everywhere.
17 MR. SKAPOF: But --
18 THE COURT: And you're so asking it to carry an
19 awful lot of water here.
20 MR. SKAPOF: But just because something is
21 boilerplate doesn't say it has meaning. And again, I would
22 just turn to the cases that we cited that said, the plan
23 can't deal with the property that's not property of the
24 estate. And this plan says that.
25 And so our fundamental point and the cases that we

1 cited --

2 THE COURT: I think that's right and that's why

3 there --

4 MR. SKAPOF: Yeah.

5 THE COURT: -- are objections to confirmation that

6 need to be made, to say, this isn't property of the estate

7 and cite those cases. And I say, hold up, we have a

8 dispute, and that's what we do. And --

9 MR. SKAPOF: Okay. So I guess my point is the --

10 if it wasn't raised, then does it take something which

11 conceivably for these purposes, or for the purposes of this

12 hypothetical, wasn't property and affect the transfer and

13 make it the debtors. And if it does, is that law, res

14 judicata, is it waiver. We all talk here it's not waiver.

15 THE COURT: But you're -- for me to make anybody

16 to jump through that hoop, requires me to agree with you --

17 MR. SKAPOF: Uh-huh.

18 THE COURT: -- that, in fact, the property is not

19 property of the estate. And I don't know that any more than

20 I know that it is property of the estate if we were thinking

21 about this prior to confirmation.

22 But let me -- I've certainly peppered you with

23 questions --

24 MR. SKAPOF: Yeah.

25 THE COURT: -- and I've done so, and I appreciate

1 you shifting gears to address them, because I want to make
2 sure that I covered certain things, but.
3 MR. SKAPOF: Yeah. No, I think the colloquy that
4 we had, you know, does address the concerns. And, you know,
5 again I'll just return to this fundamental point is, is that
6 we're in agreement on a lot of particulars here. And one of
7 the things that we agree on is, is that as we understand or
8 as we argue under Bahrain law, we did give up $9 million,
9 and we didn't object to the plan in terms of what that $9
10 million was classified as in terms of what its treatment is,
11 that -- whether the rights offering funds are subordinated.
12 We acknowledge. We can't do anything about that.
13 The ship has sailed on that. What we're arguing is, is that
14 25 percent of that never was in that bucket.
15 THE COURT: I understand it, but --
16 MR. SKAPOF: Yeah.
17 THE COURT: -- it was in the debtor's bank account
18 is my concern. But --
19 MR. SKAPOF: We'll --
20 THE COURT: -- I think we've plowed this ground
21 pretty well --
22 MR. SKAPOF: Yeah.
23 THE COURT: -- so I'm sure there may be some other
24 things that you want to mention --
25 MR. SKAPOF: No, no, I --

1 THE COURT: -- before you conclude.

2 MR. SKAPOF: -- mean, otherwise, Your Honor, I

3 mean, we think the -- you know, the (indiscernible) legal

4 discussion in our brief and why we think, you know, we

5 thread the needle on this is in there, and you know, it’s

6 there. I don’t -- unless you have any other questions --

7 THE COURT: No, I don’t.

8 MR. SKAPOF: -- I don’t.

9 THE COURT: Thank you very much.

10 MR. SKAPOF: Thank you very much, Your Honor.

11 MR. LEBLANC: Your Honor, I will -- I’ll be

12 relatively brief, but there are a few things that I think

13 have to be mentioned.

14 I think I will, with the Court’s indulgence --

15 THE COURT: Sure.

16 MR. LEBLANC: -- I will just pull up the first

17 demonstrative we created.

18 THE COURT: It’s always a shame to make a nice

19 demonstrative and not use it, so.

20 MR. LEBLANC: Should I take a picture of it, no,

21 no.

22 (Pause)

23 MR. LEBLANC: Your Honor, the -- words matter, and

24 I think everybody will agree with that. This is the

25 definition that Your Honor confirmed in the plan. Assets in

1 relevant part, and we have the blow-up there, assets mean
2 all property wherever located in which any of the debtors
3 holds a legal or equity interest. Fair enough. That's what
4 they argued. The debtors don't hold an equitable interest
5 in this. But it actually goes on from that.
6 Including, and then there's one clause, and -- so
7 including all property disclosed in the debtor's respective
8 schedules in the disclosure statement. That ends this
9 analysis, Your Honor. There was a disclosure of this, there
10 was no mention by them of any objection to that, none
11 whatsoever.
12 If I understand their --
13 THE COURT: When you say disclosure of this, can
14 you be more precise?
15 MR. LEBLANC: Sure. Can I go to the demonstrative
16 because it's the next one?
17 (Pause)
18 MR. LEBLANC: This is the full version.
19 MR. SKAPOF: So this is just the schedule?
20 MR. LEBLANC: That's the actual --
21 MR. SKAPOF: Oh, it's Schedule B.
22 MR. LEBLANC: So, Your Honor, the debtor's
23 schedule, Schedule B, disclosed all of the monies that were
24 in bank accounts all over the world, totaling $147 million.
25 That's what it disclosed. It identifies -- there's a

1 number, and it's Schedule B-1 lists the bank accounts to
2 Schedule B, Schedule B then Schedule B-1 lists the bank
3 accounts. It has every dollar that Arcapita has listed on
4 it, disclosed to the Court, disclosed to all the parties,
5 and no mention was made by anybody other than Mr. Nazer of a
6 contest to the -- when you go back to the plan definition of
7 concluding -- of this Court concluding that that was the
8 property of the estate.
9 Now, it's important to contrast this. They -- he
10 mentioned the Tooney (ph) case or the Toni case. In the
11 Toni case, the secured creditor there had completed a
12 foreclosure action with respect to the debtor's residence,
13 prior to the bankruptcy filing, the debtor filed for
14 bankruptcy and listed on his schedules the house that had
15 been the subject of the foreclosure action.
16 Subsequent to that, the Court noted that it didn't
17 appear as though the secured creditor had gotten notice of
18 the fact that the debtor was claiming a property interest in
19 property that had been foreclosed upon.
20 That's the circumstance where I think it would be
21 fair to say that the debtor should reasonably expect to
22 commence an adversary proceeding to quiet title if they're
23 going to put on their schedule a piece of property that had
24 already been foreclosed upon at the time they filed their
25 petition. That is not this case.

1 Because make no mistake about it, what they're
2 suggesting would, in fact, require, in every single case, an
3 actual adversary proceeding, to quiet title, because you
4 cannot do a plan if your schedules can't be ordered to be
5 said -- to be property of the estate.
6 If American can't say, we're going to dispose of
7 our assets, and our assets include all of these aircraft
8 with the comfort that that -- where there's no contest to
9 it, that that is, in fact, property of the estate, you
10 simply can't do it.
11 Yes, liquidation analyses include boilerplate
12 language because claims may go down and may go up, and
13 because assets, particularly if you think about this estate,
14 where their assets consist of portfolio investments in
15 companies that are of uncertain value, of course, the
16 disclosure statement values are going to go up and they're
17 going to go down.
18 But that doesn't mean that the debtor doesn't know
19 and the Court doesn't know, and the parties who vote on the
20 plan don't know what is and what is not property of the
21 estate. It's about as fundamental as you can imagine in a
22 bankruptcy case.
23 Now, let me turn to a second topic, the carve-out,
24 the reservation. I want to read for the Court the entirety
25 of the reservation, it's not long. Paragraph 65 of the

1 Court's confirmation order -- of the Court's findings of
2 fact with respect to confirmation. And it's actually --
3 it's not just called reservation of rights, it's actually --
4 the title, it's in bold, "Claims of Nazer" period in bold.
5 "Nothing in the confirmation order, the plan, or
6 the plan documents shall prejudice or impair the right of,
7 Monzur Nazer (ph) or Beatrice Flecha Delima Nazer (ph)
8 collectively the Nazers to argue that any property held by
9 the debtors or the reorganized debtors is not property of
10 the debtor's estates, or has been or is being improperly or
11 wrongfully withheld from the Nazers," and that's defined as
12 the title disputes.
13 And two, "That the Nazers have timely preserved
14 their right to assert title disputes. And for the Nazers to
15 be granted a remedy with respect thereto, nor shall anything
16 in the confirmation order," then it preserves the debtor's
17 right to contest the Nazers -- to contest that what's
18 defined as the title disputes.
19 The title disputes are defined as the Nazer
20 parties' title disputes. That odd maxim of statutory
21 interpretation we cite from Justice Scalia's dissent is the
22 expression unius est exclusion alterius. To state one thing
23 means the exclusion of others.
24 It's not -- I don't think we needed to cite to a
25 majority opinion from the Supreme Court to understand that

1 that is a statutory -- that is a maxim of construction that
2 courts routinely apply. We could've simply used the Latin.
3 Your Honor, two other things that I think -- I
4 don't -- I'm sure they're not suggesting, because they
5 weren't here, nor was I, but my colleagues certainly were
6 here at the confirmation order. Your Honor was not a
7 rubberstamp with respect to confirmation. I think Your
8 Honor did what a judge is supposed to do when faced with
9 findings, even in the absence of a contest to them.
10 The Court painstakingly went through the findings
11 to make sure that the Court could enter each of the findings
12 that were requested of it. You gave credence to the fact
13 that there weren't people here objecting to the plan, that
14 it was a settlement. But Your Honor went through in
15 painstaking detail, and I'm advised by my colleague that you
16 even apologized for the level of detail through which you
17 went, the findings of fact. This was not a court acting as
18 a rubberstamp. Even if that had anything to do with the
19 application of res judicata because Your Honor's signature
20 on a document is an order, however it came about. And I
21 think that's the critical thing here, Your Honor.
22 Now, lastly, I just want to touch upon, because
23 there's mention after mention after mention of they're
24 giving up $9 million, giving up $9 million. It's a little
25 bit to be judicious, it's a little misleading, Your Honor.

1 Your Honor is very familiar with this issue, as it
2 relates to many other claimants, including Mr. Osohabi (ph).
3 The Baeshens invested in certain things, they got shares in
4 portfolio investments. Some of their money was not
5 invested, 25 percent of it apparently they allege.
6 But it's not as though they gave it up, they
7 traded that money for equity interest in other things. They
8 didn't walk away from $9 million, they exchanged that in
9 return for investments, just might -- like Captain Osohabi
10 did, and Your Honor has already dealt with his claim with
11 respect to the really almost identical assertions that he's
12 entitled to get a return of his investments, even in those
13 equity interests. That's what's going on here.
14 At the end of the day, Your Honor, this is truly
15 extraordinary. They're asking you to fundamentally alter
16 the Chapter 11 process, to require a debtor to quiet title
17 to all of the property that they assert, they put on their
18 schedules, to say that is their property, and Your Honor
19 should reject the idea that that's an appropriate thing to
20 do and you should dismiss this case without any further
21 action by the debtors.
22 THE COURT: All right.
23 MR. LEBLANC: Thank you, Your Honor.
24 MR. SKAPOF: One brief point, Your Honor, and
25 we're mostly going to rest on our papers here. I just

1 really want to address the last point and Mr. Leblanc's
2 actually correct, and we said walk away, I mean, I'm using
3 that colloquially.
4 What I mean is, is we acknowledge that 75 percent
5 of our money was invested, it went to portfolio companies or
6 whatever it did, and whatever the treatment of that is under
7 the plan, is the treatment under the plan. So that --
8 THE COURT: Yeah, that's how I understood your
9 argument.
10 MR. SKAPOF: We're not seeking that money, and so
11 it's a little different than people who are saying
12 everything I gave, I want back.
13 THE COURT: You get your recovery under the plan.
14 MR. SKAPOF: Exactly.
15 THE COURT: Because there's a plan and a
16 confirmation order. And on the carve-out, again, I would
17 just point, and Your Honor, you know, can look at it. The
18 Maxwell one where one bank raised an issue as to a
19 particular action that the plan administrators wanted to
20 take, got its rights reserved, post-confirmation albeit in
21 dicta because it held in comity, the Court said, the one
22 covers the all.
23 THE COURT: All right.
24 MR. SKAPOF: And on that, we'll rest on our
25 papers, Your Honor, thank you very much.

1 THE COURT: All right. Thank you very much. I
2 appreciate the argument. I will take the matter under
3 advisement. Thank you.
4 The other two motions which really are essentially
5 one motion in terms of legal issues raised.
6 MS. ADLER: Give us just a moment to get --
7 THE COURT: Absolutely, that's fine.
8 (Pause)
9 THE COURT: All right. Let me know when you're
10 ready.
11 MS. ADLER: I am ready, Your Honor.
12 THE COURT: All right. So before we start, I know
13 there's a slightly, but only ever so slightly, from what I
14 can tell, difference between the two motions, the facts.
15 But it would seem that the legal arguments and everything
16 that everybody has to say are otherwise identical. Am I
17 right in that?
18 MS. ADLER: That is correct, Your Honor. Most of
19 the facts -- there is an --
20 THE COURT: I think it's one -- it's two versus
21 one.
22 MS. ADLER: -- substantial overlap of facts, and
23 where they don't overlap and where I think it impacts the
24 argument, I'm going to address that with Your Honor --
25 THE COURT: Okay.

1 MS. ADLER: -- but counsel and I agreed that it
2 would be more efficient for the Court --
3 THE COURT: I agree.
4 MS. ADLER: -- hopefully if we made the arguments
5 one time, as opposed to the identical arguments twice.
6 THE COURT: Thank you for that.
7 All right, proceed.
8 MS. ADLER: Lani Adler for -- from K&L Gates for
9 Defendant Bahrain Islamic Bank which we call BISB and
10 Tadhamon, Defendant Tadhamon Capital B.S.C., which we call
11 Tadhamon.
12 Your Honor is aware that neither of these
13 defendants filed proofs of claim, and have not appeared
14 other than to object to the jurisdiction of this court. And
15 the real issues here, Your Honor, I believe, are whether
16 this Court could constitutionally exercise personal
17 jurisdiction over these clients in the first instance.
18 Because if you determine that you cannot, we don’t even get
19 to the subsequent arguments and the extraterritorial
20 application of the Bankruptcy Code on these particular
21 facts.
22 Now, the plaintiff has admitted in both instances,
23 let me just frame the facts for a moment. In BISB, there
24 was a single transfer by Arcapita to BISB of $10 million
25 made on March 14th. That investment was made by Arcapita

1 pursuant to an agreement negotiated, performed, executed in
2 Bahrain for the purchase in that instance of commodities
3 outside of Bahrain, and subject to Bahraini law.
4 The agreements specified that everything that BISB
5 did, including with respect to the collection and the
6 movement of funds, it was undertaking as Arcapita's agent.
7 In the Tadhamon case similarly, there were two
8 transfers, each of $10 million on one day, the following day
9 March 15th. In that agreement again, between two Bahrain
10 entities because let's not forget that the debtor is
11 Bahraini, and each of the banks is Bahraini and there is no
12 dispute on these facts. I believe that all of the facts
13 we're going to be discussing this morning are undisputed as
14 between the parties.
15 In the Tadhamon case, there were two transfers on
16 March 15th of $10 million each made by the Bahraini debtor
17 Arcapita to the Bahraini Bank Tadhamon. Each of those
18 called for -- was made pursuant again to an agreement
19 negotiated, performed, and executed in Bahrain, had nothing
20 to do with the United States, in that case, for the purpose
21 of treasury securities in Bahrain, outside of the United
22 States.
23 And that agreement not only specified that
24 Bahraini law would govern, but also that any disputes
25 arising out of that agreement would be adjudicated in

1 Bahrain.

2 THE COURT: Can I ask, and maybe it's not proper

3 for me to consider it, and you can feel free to tell me so,

4 I didn't see anything in the record about why New York banks

5 were involved at all in this particular transaction.

6 MS. ADLER: The two who --

7 THE COURT: And maybe nobody knows, I --

8 MS. ADLER: Well, apparently Arcapita, the way

9 that these templates were set up, and you see the templates

10 in the papers because they were made part of the agreements

11 was Arcapita wanted to make the transfer in dollars, and it

12 wanted to make it from its -- Arcapita's JPMorgan Chase

13 corresponding bank accounts in New York.

14 So the recipients of the transfers, BISB on the

15 14th, and Tadhamon on the 15th, had to have an account that

16 could in the first instance accept the dollars. In BISB's

17 case, it used a correspondent bank account also at Chase,

18 and the dollars were transferred the very same day to BISB's

19 bank account in Manama, Bahrain. And in Tadhamon's case,

20 because it didn't even have a corresponding bank account in

21 the United States, it used an HSBC account for the, again,

22 one day transfer, transferred the same day to its Bahrain,

23 but the Tadhamon -- the account used by Tadhamon was not

24 even Tadhamon's, it was the account of Tadhamon's Bahraini

25 Bank, which is called Khaleeji Commercial Bank.

1 And you see that in the swift transfer documents
2 where they describe both of those intermediary banks, I'm
3 calling them intermediary in New York, as the intermediary
4 banks. But your question raises an important point because
5 the dollars, or the funds, remained in New York for less
6 than 12 hours, according to the SWIFT documents, and there
7 really isn't a dispute. They're pleaded that way, they go
8 both ways, I don't think that's in dispute.
9 And the SWIFT documents indicate that they were
10 ordered in the BISB case by First Islamic Bank, which is
11 Arcapita's either relative or its former name from Bahrain,
12 and in the second instance, Tadhamon's the same.
13 So these are Bahraini transactions that have this
14 intermediary slice where they're on one day in BISB's case
15 in one transaction, and in Tadhamon's two, briefly routed
16 for literally a matter of hours through New York.
17 And if you look at the Maxwell case, which I know
18 you were talking about at a different instance this morning,
19 but we discuss at length, and it speaks more to
20 extraterritoriality than jurisdiction, and I'll hook it into
21 jurisdiction in a moment.
22 But the transfers in Maxwell that are discussed at
23 great length in both the bankruptcy court case and the
24 district court case were made by Maxwell, the British debtor
25 in one instance to Barclay's another British debtor there,

1 and in another instance by Maxwell to NatWest, another
2 British bank. And those transfers which originated in the
3 same fashion, they were ordered by the British debtor to be
4 made to these other British banks likewise passed through
5 momentarily New York, and they describe that in the facts.
6 In no way, and I've jumped to extraterritoriality
7 and in a moment, I'll jump back to jurisdiction, did any of
8 the courts that looked very hard and scrutinized those
9 transfers from top to bottom consider that tiny New York
10 intermediary piece to in any way constitute -- make those
11 domestic or U.S. transfers. They did not overcome the
12 British-ness of the transactions, that's really important.
13 And they did not, for purposes of determining the
14 extraterritoriality analysis, whether there's -- those were
15 domestic transfers that therefore one did not have to go
16 through the calculation of whether the Bankruptcy Code could
17 be extraterritorially applied, or would it have to be.
18 Both courts concluded that those were foreign
19 transfers because they were made by one British entity to
20 other British entities. They started in England, they ended
21 up in England, the funds ended up in England on behalf of
22 what was purported to be antecedent debt incurred abroad and
23 that little piece of it, that little New York moment did not
24 undo that in any sense.
25 And if we look at that, if I bring that back to

1 the jurisdictional piece, I think we should start with that
2 because that's the most fundamental here, the plaintiffs
3 have conceded that they haven't been able to make out a
4 general jurisdiction case, meaning that there's a systematic
5 presence of either bank here.
6 They conceded, and they haven't put in anything
7 that refutes the moving affidavits by the CEOs of both BISB
8 and of Tadhamon that says, we don't do business here, we
9 don't have an office, we don't have a staff, we don't have a
10 phone number, we don't have property, we don't solicit
11 business here, we don't advertise business here, we don't
12 have any of the indicia of being present here because we are
13 not.
14 So let's just put general jurisdiction to the
15 side, and I believe that the defendants can concede it. And
16 just on that one point, Your Honor, defendants threw in in
17 their opposition papers what I believed was kind of a
18 desperate fall-back argument, which was, well, yeah, we
19 can't make out general jurisdiction, but maybe, Judge, you
20 should give us an opportunity to take discovery on it,
21 because maybe we could somehow come up with it.
22 And the cases are really clear that you do not get
23 discovery for jurisdictional purposes if you can't come up
24 with any facts whatsoever, if you haven't made out a prima
25 facie case, or you can't say something specific. So in that

1 case, they haven't done anything to refute the general
2 jurisdiction.
3 Now, specific jurisdiction, which I'm sure Your
4 Honor knows, requires that the -- there be some purposeful
5 availment by the defendant in this case with the United
6 States that is tied in some meaningful substantive way to
7 the claims at issue.
8 Here the only allegation that speaks to specific
9 jurisdiction at all is that -- it started as Arcapita
10 determined to make this transfer in -- from its New York
11 correspondent bank to another one. But then I think
12 defendants realized, gee, that was Arcapita's action, not
13 the defendants. So they changed it to defendant's
14 designated a bank account.
15 Well, to get this deal, defendants had to come up
16 with a bank account, an intermediary bank account. And the
17 question really becomes is that good enough under the Leachy
18 (ph) cases, when is a -- the use -- the one day single time
19 only use of a correspondent bank account good enough to
20 predicate specific jurisdiction. And there is not a single
21 case that the plaintiff can point to where it does.
22 In the Leachy case, which is the leading case on
23 this, in which Your Honor may know that the Second Circuit
24 certified the question to the Court of Appeals, and then it
25 went back to the Second Circuit, the Court of Appeals and

1 the Second Circuit determined that the defendant there,
2 which was called Lebanese Canadian Bank had the -- its use
3 of a correspondent bank account in connection with tort
4 claims involving the tourist financing of Middle Eastern
5 terrorist organizations which the American/Canadian, and
6 there may have been one other nationality of plaintiffs, had
7 claimed they'd been injured by, they've lost family or
8 family members as a result.
9 In that case, the Leachy case said, for a
10 correspondent bank account to predicate specific
11 jurisdiction, it needs to be recurring, it needs to be
12 deliberate, and it needs to be the tort itself. It needs to
13 be actionable in itself.
14 So in that case, the terrorist financing was
15 literally occasioned by the dozens and dozens, and that
16 dozens I'm quoting, of the wire transfers made through that
17 account. And it was Lebanese.
18 In this case, by contrast, we do not have anything
19 remotely recurring. And, in fact, the Second Circuit when
20 they're discussing the recurringness, says you've got to
21 have enough recurring deliberate, so that it is quote, in
22 effect a course of dealing between the parties, to use this
23 correspondent bank account.
24 Here, not only do we not have a course of dealing,
25 but the complaints in both the BISB and Tadhamon actions

1 allege that there is no course of dealing. These were kind
2 of one off singular transactions, thing one.
3 Thing two, it's not deliberate, it's ministerial,
4 it's not like they're using it again. And most importantly,
5 thing three, or as importantly of thing three, it is not the
6 use of the correspondent bank account that is actionable or
7 the tort here.
8 No one is claiming that the transfer by itself
9 violated any statute, it is only by virtue of Arcapita
10 filing bankruptcy and/or here, so that isn't an activity
11 undertaken by the defendants and/or BISB and Tadhamon who
12 each set off amounts, and I think you're familiar with that,
13 but I'll loop that back in, which occurred in Bahrain or
14 failing as plaintiff's claim, to pay certain proceeds to the
15 -- to Arcapita, which also occurred in Bahrain that that
16 happened.
17 Again, for specific jurisdiction, the critical
18 concept regardless of the correspondent bank account we've
19 just covered that, but its purposeful availment.
20 THE COURT: Does it make any difference in your
21 analysis, or had -- would you like me to construe the fact
22 that at one point some funds were reinvested? Does it
23 matter at all?
24 MS. ADLER: The funds were reinvested in Tadhamon,
25 and it could -- it made the argument in Tadhamon because we

1 believe that if there were jurisdiction, it would show that
2 there were, you know, that Arcapita had access to these
3 funds in order to instruct us to reinvest them, and that's
4 handwritten in timing. So that would defeat -- that would
5 be sort of a 12(b)(6) that would effectively preclude those
6 claims.
7 But from a jurisdictional point of view, which is
8 what I'm focusing on that --
9 THE COURT: Right.
10 MS. ADLER: -- I can put that to the side.
11 THE COURT: All right.
12 MS. ADLER: But I do want to make the point, Your
13 Honor, the purposeful availment in all of the Supreme Court
14 and everybody else's articulation of it, requires that a
15 defendant purposefully direct activities toward residence of
16 the forum, residence of the United States.
17 So if you look at the one activity that plaintiff
18 claim, which is the use of this correspondent bank account,
19 that activity wasn't directed at residence of the forum, it
20 was directed at Arcapita, designating the bank account was
21 directed at Arcapita in Bahrain because you needed to do it
22 to effectuate this agreement.
23 And the one piece of paper that plaintiffs have
24 submitted in their opposition papers, it's Exhibit DRA (ph)
25 to Mr. Bassett's (ph) affidavit is basically a hearsay

1 exchange of e-mails between one person at Arcapita and
2 another person at Arcapita, and it's intended to show that
3 BISB instructed Arcapita to send the dollars to this
4 particular account in New York.
5 And aside from the fact that it's hearsay, and
6 aside from the fact that it's between two Arcapita people,
7 so query its credibility in the first instance, but it makes
8 the point that it's directed at Bahrain. It's not directed
9 at any residence of the United States. It has nothing to do
10 with that.
11 So the other point that flows from that is that
12 purposeful availment has to be an independent action
13 undertaken by the defendant to avail itself of the forum,
14 the benefits of the forum, the United States in this
15 instance. But the use of the correspondent bank account was
16 undertaken by both BISB and Tadhamon expressly as the agent
17 of Arcapita. That doesn't get you to that independent
18 purposeful availment stuff.
19 And the fact that it was undertaken is actually
20 explicit in the contractual language in both. And I can
21 point you out -- point that out to you, it's in our brief.
22 So I don't think you really need it.
23 So again, the only question that we're really
24 dealing with here, is whether this truly ministerial,
25 momentary, internal, intermediary exchange of the dollars in

1 a Bahraini transaction between Bahraini entities where the
2 money started in Bahrain and ended up in Bahrain under an
3 agreement, that we all agree was Bahrain, governed by
4 Bahraini law, and in one case, to be adjudicated in Bahrain
5 is good enough on a one time basis.
6 And don't think it's close question, Your Honor, I
7 don't think it is, especially when they -- those activities
8 were undertaken as the agent of the plaintiff, and the agent
9 of the Bahraini plaintiff.
10 THE COURT: I saw that your reply addressed the
11 cases that the plaintiffs rely upon --
12 MS. ADLER: Right.
13 THE COURT: -- and I didn't know -- and those
14 include I guess Bank Brussels Lambert and Correspondent
15 Services in the Dell case, and I certainly have looked at
16 that. I don't know if you have anything else that you want
17 to say in the context of your argument --
18 MS. ADLER: On those -- sure.
19 THE COURT: -- on those cases, and how to
20 understand them.
21 MS. ADLER: I think those cases are easily
22 distinguishable. All of them were cases brought under
23 302(a). In Bank Brussels Lambert you may recall that the
24 question was whether a Puerto Rico law firm had enough
25 systematic presence so that its other actions in New York

1 considered tort actions, could get it within the rubric of
2 302(a). 302(a) which I happen to have in front of me, the
3 New York Long Arm, will enable someone who commits a tort
4 without the state, causing injury to person or property
5 within the state. So that's the first piece. We didn't
6 cause any injury or any property to anybody within the
7 state.
8 But you have to, if you want to be in 302(a),
9 either regularly do or solicit business, or engage in a
10 persistent course of conduct, that's 302(a)(1) which was the
11 provision at issue in Bank Brussels Lambert. And there, in
12 Bank Brussels Lambert, that Puerto Rico law firm had an
13 apartment in New York that it used on -- or that the Court
14 found that it used on a regular basis, and that got it to
15 the piece about regularly engaging in a persistent court of
16 conduct.
17 And the Court also found that the Puerto Rico law
18 firm engaged in advertising and PR because it was trying to
19 get more work in the New York market from New York clients.
20 Obviously that's a distinguishable case.
21 The other cases were similarly much closer and
22 though the plaintiff periodically says, yes, but one
23 instance is good enough because that's its way to get around
24 the Leachy correspondent bank requirement of recurring and
25 deliberateness; a) it has to be deliberate which it wasn't;

1 and b) in those cases, again, the use of the bank account
2 was itself the tort.
3 In one of the cases it -- the defendant is accused
4 of making unauthorized securities trades, generally by the
5 way for New York plaintiffs, and in that instance, they used
6 the -- it was the bank account through which they made the
7 trades. So much closer to the account being the instrument
8 of action, being actionable on its own without anything
9 else, and similarly so were the other cases.
10 I think again it's important to know the
11 plaintiffs beef as it were, it's not the use of the
12 correspondent bank account, that was just a, in my opinion,
13 contrived construct to try to generate jurisdiction.
14 The beef, and it's pleaded this way, is that the
15 defendants either did not repurchase the investments post-
16 petition as initially planned, and/or that they set off the
17 amounts which they were permitted to do under Bahraini law,
18 and which plaintiff has not challenged by the way -- I mean,
19 challenged the propriety of the Bahraini law. They
20 challenge that they don't like the set off, but they haven't
21 challenged that Bahraini law permits it.
22 With respect -- oh, now there's one more piece of
23 the jurisdictional analysis that I should get to.
24 If there -- and again, we're in constitutionally
25 -- we're in Fifth Amendment due process because the

1 bankruptcy and United States.

2 If you get to -- if you find the minimum contacts,

3 then there is a second question that the Court is obligated

4 to engage in, which is whether it is constitutionally

5 reasonable to exert -- to -- for the Court to exercise

6 jurisdiction. And that reasonableness is articulated as is,

7 does it -- would it comport with substantial justice and

8 fair play for the Court to exercise jurisdiction.

9 I don’t think there is -- you don’t get to that

10 question in the first instance, if you don’t get through

11 minimal contacts. And so our argument is that, you don’t

12 have minimal contacts here, so you don’t need to get to that

13 question.

14 But even if you did get to that question, Your

15 Honor, the metric is could the defendant -- is it fair that

16 the defendant could reasonably foresee being hailed, and

17 they spell it h-a-l-e-d, into court, and the answer is, I

18 don’t see how that’s possible. Again, because were Bahraini

19 transactions for performance that took place in Bahrain or

20 outside the United States under Bahraini law with no

21 connection to the United States to be adjudicated and to be

22 governed by Bahraini law. There’s just no way a defendant

23 could imagine being hailed into court here. I don’t see

24 that.

25 The analogy is to the Supreme Court Assai (ph)

1 case, and Your Honor may know that the Court found that it's
2 inappropriate often where you have claims that have
3 basically little, if anything, to do with the United States.
4 In Osohahi (ph), there was a third party claim because there
5 had been a tort action between I think a bicycle tire
6 manufacturer in Taiwan and the tire manufacturer which had
7 blown out in Japan. The Court found it was wholly
8 inappropriate to -- and that the California state court in
9 that instance did not have jurisdiction.
10 And in connection with that, I want to point out
11 that this plaintiff is not without a remedy. If this
12 plaintiff thinks that set off was inappropriate, this
13 plaintiff which has among its members, the committee
14 members, a number of Bahraini entities itself, can go to
15 Bahrain and challenge the legitimacy of the set-off, if it
16 so chooses.
17 Now -- nor -- so again, just to reiterate on the
18 discovery piece, I've told Your Honor why I don't think
19 discovery is warranted on general jurisdiction, but the
20 cases are very clear that this is different than other
21 bankruptcy examinations that one is not entitled to a
22 fishing expedition to put a defendant to the trouble and
23 expense of discovery, if there's just nothing there, even on
24 a specific jurisdiction basis.
25 In this case, the defendants -- the plaintiff's

1 opposition papers said well, we should get discovery to get
2 more information about the transfers because again, specific
3 jurisdiction, you have to link up the specifics to the
4 claim. And the answer is, they have access to Arcapita.
5 They know as much about the transfers as anybody, and it
6 wasn't able to generate for them any basis for jurisdiction
7 other than this one time correspondent bank use. That is
8 not good enough, and the cases are quite clear on that.
9 And there's kind of a due process to it one could
10 understand, which is if you really don't have a case, and
11 you've dragged someone in to the expense and a burden of
12 having to show up in court to make that point, you surely
13 shouldn't be able to keep it going, if you don't have any
14 good reason to do it, and the cases are very clear, that
15 hope and conjuncture, and they use those words, hope and
16 speculation I think, are not a sufficient basis to warrant
17 discovery for jurisdictional purposes.
18 Now, on extraterritoriality, the plaintiff makes
19 two arguments that have been squarely rejected in courts in
20 this district. The first is that as Your Honor probably
21 knows for a statute to be applied extraterritorial under
22 Morrison and the recent Supreme Court and Second Circuit
23 cases like Norags (ph) the statute has to extremely clearly
24 provide for extraterritorial application. Statutes that
25 speak to foreign commerce like the RICO statute are not good

1 enough. Almost no statute has been found good enough that
2 I'm aware of.
3 The plaintiff's argument is that the wherever
4 located in the definition of property of the estate in
5 Section 541 of the Code is good enough, that argument was
6 expressly rejected in both the Maxwell bankruptcy case and
7 district court case. And interestingly, I'd like to point
8 out that in the second amended disclosure statement filed by
9 the debtor, not by the committee, but of course, the
10 committee stands in the shoes of the debtor, the debtors
11 conceded that those cases are currently good law, and they
12 remain good law, their words.
13 So that's not good enough, and that gets you
14 there. The second argument, and I point out that in, you
15 know, generic words are not good enough, the Keyable (ph)
16 Supreme Court says any and every are not sufficient, that's
17 at 133 S.Court at 1665, and in Morrison, the -- Judge Scalia
18 went even farther and said, "possible interpretations of
19 statutory language."
20 So language that one could not arguably
21 unreasonably engraft something on to Allah wherever located,
22 again are not good enough, 130 S.Court at 2883.
23 So that's the first piece, we don't have the
24 language. The second piece is you then -- you also
25 scrutinize the transfer itself, and you scrutinize according

1 to Maxwell, the totality of the transfer, not just the teeny
2 momentary hours long piece of it that occurs in New York.
3 To determine if the transfer is domestic, in which
4 case, you don't need to worry about extraterritorial
5 application, or if the transfer is itself foreign, and
6 therefore, you have to consider whether the statute can be
7 extraterritorially applied.
8 I don't think that there is any substantive real
9 question that on these facts, which are very close to the
10 maximal facts, that these transfers began and ended in
11 Bahrain. Again, I don't want to keep repeating myself,
12 between Bahraini entities.
13 THE COURT: Well, the debtors cited the use of the
14 correspondent bank, you responded by saying that that was
15 essentially Arcapita's direction, and in other words,
16 Arcapita required this.
17 MS. ADLER: I said that --
18 THE COURT: And --
19 MS. ADLER: -- I said anything we did was
20 undertaken, and I said that even if you put that -- as
21 Arcapita's agent, and even if you put that aside, it's
22 ministerial, it's not critical to the transaction.
23 THE COURT: No, I understand, but what do you say
24 to the notion that if that's what the agreement said and
25 Arcapita said, well, in order to sign this agreement and do

1 this, we want it done this way, that that's a decision to
2 avail yourself from the forum, it may be done at the
3 direction of somebody else, but it's still a decision to
4 avail yourself of the forum.
5 MS. ADLER: I don't think it's availing yourself
6 of the forum. I think it's really ministerial. So I think
7 you make a good point, Judge, you have to focus on two
8 things. You have to focus on a) is there independent action
9 by the defendant, which I think there is not, but b) you
10 look at that action itself, and if it's too, I'll use the
11 legal phrase, namby-pamby, if it's too ministerial or
12 adventitious is a word I had known before I started reading
13 these cases, that's not good enough.
14 And again, in Maxwell, you know, the monies that
15 get transferred, get transferred in the first instance from
16 Maxwell through a New York account to the debtor's New York
17 accounts and immediately transferred to the debtors in
18 Britain.
19 And in Maxwell, the case, certainly the
20 extraterritoriality, that the connection to the U.S. was
21 even stronger, because the funds that were transferred, were
22 those that indisputably were the proceeds of the sale of
23 U.S. assets. We don't even have that connection here.
24 But I don't think that if you -- the agreements do
25 not say New York -- that there is no agreement and there is

1 no piece of paper that says either BISB or Tadhamon has to
2 use a New York account to do it. The agreements leave open,
3 in the BISB case, and we can look -- I can take you through
4 those documents. In the BISB case, you know, the way these
5 work is there's an overlapping agreement, and then there are
6 a series of templates because you want to make it -- it
7 needs to -- it is structured to be Sharia compliant, so that
8 there won't be interests by both parties.
9 THE COURT: Right.
10 MS. ADLER: So the way that it works in BISB, is
11 that either party can propose a transaction by which the
12 agent, in this case, BISB and Tadhamon would purchase, in
13 the BISB case, commodities, in the Tadhamon case, treasury
14 securities for Arcapita. Arcapita wants to do those deals
15 out of the dollars that none of them say -- the template in
16 the BISB says, it leaves blank which bank account BISB will
17 use, and it says it will be an account in favor, in f-a-v-o-
18 u-r, of BISB and Tadhamon does something similar. And then
19 when they do the specifics, they do it -- they put in the
20 accounts.
21 So I don't think -- I don't know of any case where
22 receipt of funds, and there are cases and we've cited them
23 in our brief, Your Honor, receipt of funds on a one time
24 transitory basis in New York, whether whoever designated the
25 account, is sufficient to predicate personal jurisdiction.

1 THE COURT: All right. Okay.
2 MS. ADLER: There just is simply zero authority
3 for that.
4 I think we were talking about extraterritoriality,
5 and I think I made the point that there is no basis,
6 especially when you look at Maxwell, that these transfers
7 when scrutinized in their totality, could be considered
8 domestic rather than Bahraini in nature, and therefore, they
9 would require extraterritorial application.
10 Finally, we argued that international comity would
11 more of this Court's deference to Bahraini law and set off,
12 you've got two Bahraini parties, Bahraini transaction who
13 agree that Bahraini law is going to cover, and Tadhamon, who
14 also agree that stuff is going to be adjudicated, you know,
15 disputes are going to be adjudicated in Bahrain.
16 The plaintiff seems to think that there is a
17 requirement that there be a pending parallel insolvency
18 proceeding. There is no case that says that. And the
19 Hilton v Guyo (ph) language, which is what's always cited
20 says the Court is to pay deference to judicial legislative
21 proceedings. I don't think that's required.
22 Again, you know, the parties understood that they
23 were going to be doing a transaction under Bahraini law.
24 Bahraini law, and it's important to note this, provides for
25 set off, and it's different than the U.S. set off law. The

1 Bahraini law it's quoted to you, we've given you as good --
2 does not require for mutuality, and Bahraini law specifies
3 in its set off provision, that a creditor can set off
4 obligations even from a different agreement that is
5 different or than the U.S. law is required of mutuality and
6 would call for, I think, different results here.
7 And again if the plaintiff thinks that's
8 problematic, the plaintiff easily can go to Bahrain and
9 address it.
10 I don't think we get to any of the equities of
11 bankruptcy law or creditors being treated differently if the
12 Court does not have jurisdiction or the Bankruptcy Code
13 cannot be applied on these facts, Your Honor. Thank you.
14 THE COURT: All right. Thank you. It is a
15 quarter to 1. I'll give you the option of whether you want
16 to proceed straight through, or take a break for lunch.
17 MR. LEBLANC: Your Honor, I'm certainly at the
18 pleasure of the Court, so I'm prepared to proceed. I
19 actually am currently in a trial downstairs, one floor down,
20 so I'd love to get back to that, but if Your Honor wants to
21 take a break --
22 THE COURT: No, that's fine.
23 MR. LEBLANC: -- I don't have any witnesses today,
24 so I'm --
25 MS. ADLER: So to be so long-winded, Your Honor.

1 THE COURT: No, no, not at all.
2 MR. LEBLANC: I'm going to be going down there and
3 sitting.
4 THE COURT: You --
5 MR. LEBLANC: So -- but I --
6 MS. ADLER: It was the guys before us.
7 THE COURT: All right. No, I think --
8 MR. LEBLANC: Your Honor, whatever Your Honor
9 wants to do.
10 THE COURT: -- that's fine. I'm fine. I just
11 figured I'd always ask because I do my -- when I did the
12 Chapter 13 cases, I went from 10 in the morning till when
13 they were done, and often at 4 o'clock, and when I told my
14 wife that, she accused me of being inhumane. So I decided I
15 should ask rather than barreling ahead in circumstances.
16 MR. LEBLANC: At least in those cases, you're only
17 being inhumane to yourself, Your Honor, not because you've
18 got, I assume, people flowing through.
19 THE COURT: No, there are a couple of lawyers that
20 are in there for the long haul usually, but anyway, yeah,
21 let's -- I'm fine, let's go ahead.
22 MR. LEBLANC: Your Honor, let me begin by -- I've
23 never actually had somebody correct our spelling in a brief
24 standing at the podium, so I apologize sincerely, Your
25 Honor, for the typographical error when we misspelled hailed

1 apparently in our brief. I thought that was just odd.

2 MS. ADLER: It's counter intuitive.

3 MR. LEBLANC: Your Honor, so let me -- I think it

4 is --

5 THE COURT: It's a nice quaint spelling.

6 MR. LEBLANC: Sure. Your Honor, I think it's a

7 little bit -- it's important to step back, and obviously I

8 don't think there's any fair dispute. This is what's

9 alleged in the complaint.

10 The actions that were taken here deprive the

11 estate of $30 million worth of assets. They were

12 transferred a few days before the bankruptcy, they were

13 transferred in amounts that were almost the same as amounts

14 that were owed by Arcapita, and then subsequent to that they

15 were -- you know, they exercised what they claimed to be a

16 right of set off. And as a result of that, the Arcapita

17 estate was deprived of $30 million, which would have

18 otherwise been available to distribute to creditors when

19 these banks would've like everyone else had a claim against

20 these estates and recovered on a pro rata basis.

21 THE COURT: No, I understand that, but -- and

22 certainly I know that's a good fact to get out there, but I

23 don't know that it's relevant for what I have to decide in

24 the motions.

25 MR. LEBLANC: Well, I think it is relevant, Your

1 Honor, for a couple of reasons. Because you actually have
2 to look at the claims that are asserted in the motion,
3 because there are five of them. And their motion just
4 mushes everything together.
5 And, Your Honor, I said at the outset, when I was
6 talking about the other motion that you're hearing some
7 extraordinary things argued today, and let me tell you why
8 that is. No court in the history of the Bankruptcy Code, so
9 far as I can tell, has ever said that the automatic stay is
10 not extraterritorial. None.
11 Maxwell doesn't do it, and Your Honor, I'm sorry,
12 I'm getting responses to my argument as I'm standing here.
13 MS. ADLER: Sorry, I apologize.
14 THE COURT: All right. Well, let's -- I mean, I
15 want to address personal jurisdiction first anyway.
16 MR. LEBLANC: Sure.
17 THE COURT: And as I understand it, I think people
18 are unanimous in how to look at the case and what the issues
19 are, and that personal jurisdiction is one issue that's been
20 raised, and extraterritoriality is another.
21 MR. LEBLANC: Sure.
22 THE COURT: So let's sort of take it, personal
23 jurisdiction first. I think the -- if the case arises or
24 falls on the extraterritoriality, thank you, of the
25 automatic stay, I'd be very surprised.

1 MR. LEBLANC: Fair enough, Your Honor. Let's --
2 so let me deal with personal jurisdiction.
3 Your Honor, there is -- we've not found a single
4 case that has said, and this is where we dispute that the
5 facts are the facts, but there's one critical distinction.
6 The parties here actually performed the contract in the
7 United States. The only exchange of consideration that
8 occurred, occurred between two New York banks. They
9 purposely availed themselves of the New York banking system
10 to exchange the only piece of consideration that was to be
11 exchanged to commence the contract. That is undisputable.
12 And, Your Honor, there is no case, none, that says
13 that the use of a bank account in the U.S. to consummate a
14 transaction, and a suit about that transaction, that that
15 does not constitute personal jurisdiction. That is not what
16 the Listy (ph) case says.
17 And it's important to recognize, the Listy court
18 had the facts before that it had. It had a year of
19 discovery in which it was determined that there were dozens
20 of transactions. Those were the facts. But the New York
21 Court of Appeals on the certification of that question, Your
22 Honor, the facts were that there were dozens of
23 transactions. But that's not what the New York Court of
24 Appeals held was necessary.
25 And quite to the contrary, Your Honor, the

1 Correspondent Services case that we cite, the Correspondent
2 Services, and I will quote from that decision says, "the
3 single purposeful act of transferring JVW's funds to New
4 York constituted the transacting of business from which the
5 cause of action directly arose." That's Correspondent
6 Services.
7 THE COURT: Well, that raises a good point. So --
8 where the parties disagree. I understand that what the
9 debtors are seeking is -- well, exactly what are the debtors
10 seeking? That's why I asked about the reinvesting of some
11 of the money after the bankruptcy so because -- to sort of
12 dumb this down, think about it as a practical matter,
13 doesn't it make -- doesn't that make it less about those
14 transfers and more about then what happened later, which is,
15 you decide to set off the amount of money and not give it
16 back to us, and you refused to honor your agreement to, on
17 the maturity date, pay us.
18 So it's not the -- at least they say, it's not the
19 investment of the money, it's rather what happened at the
20 end.
21 MR. LEBLANC: Well, Your Honor, then that's why I
22 started to go through the claims, and I think it's important
23 to think about what claims we assert. We assert a breach of
24 contract because they had an obligation to return the funds
25 upon the conclusion of the contract. That's true, whether

1 there's reinvestment or not. And to be clear, there's only
2 reinvestment with respect to one of the two institutions,
3 there's not with respect to the other.
4 THE COURT: Right.
5 MR. LEBLANC: So there's a breach of contract
6 claim. The consummation of the contract; i.e., the exchange
7 of consideration occurs in New York. And, in fact, in the
8 case of Tadhamon, documents that they submitted make clear
9 that when Tadhamon is supposed to return the money to
10 Arcapita with the profit, it's identified on those documents
11 and there's four of them that they submitted, Exhibits -- I
12 think it's B, C, D and E to their motions, all four of those
13 identified Arcapita's New York bank account as the place to
14 which they were to remit the funds. That was the direction.
15 So there's a breach of contract claim, unrelated
16 to whether or not there was reinvestment. The second claim
17 is a claim for turnover under Section 541 -- 542 of the
18 Bankruptcy Code.
19 The turnover claim, Your Honor, there is no
20 dispute as to whether or not this is property of the estate.
21 They don't contest that, that it's property of the estate,
22 because this is a matured debt.
23 So the second claim, turnover, doesn't, in our
24 view, Your Honor, turn on whether or not there is
25 reinvestment of the proceeds. It's Arcapita's money. The

1 debt matured, they're obligated to turn the money over.
2 It's Arcapita's property.
3 The third claim is an automatic -- a claim for
4 violation of the automatic stay under Section 362. That
5 relates to the contention that they've made that without
6 coming to Court, that they simply unilaterally set it off.
7 The fourth claim, and this is the only claim as to
8 which you could even potentially claim it was a later acting
9 event. That claim is a preference claim.
10 Now, just let me be clear about that. That's pled
11 in the alternative, Your Honor, because to the extent that
12 they contend that instead of being a contract that called
13 for them to return the money, it was designed to repay an
14 antecedent obligation, then we would assert that was a
15 preference. Or alternatively, to the extent that they
16 contend that there was a set-off, we would say that set-off
17 was a preference, because it was made five days before the
18 bankruptcy filing at a point in time that the other elements
19 of Section 547 are met.
20 And then the fifth claim, one as to which there
21 really isn't any defense, as far as we can tell if -- it's
22 only a claim if we lose, that isn't a claim objection
23 because the debt that we don't believe has been set off,
24 which we believe we owe to them if they return the money,
25 the debt is scheduled, and therefore, needs to be objected

1 to.

2 And so as to that claim, there can't be a personal

3 jurisdiction argument. They would -- I assume, if there's a

4 dismissal, they would simply default on that question and we

5 could expunge that record from the schedules and no claim

6 would be made.

7 But it's important for those reasons, Your Honor,

8 to talk about each and every one of those claims, because

9 the two primary arguments are just fundamentally different

10 as they relate to them. Because when you think about the --

11 the first three claims all relate to the transaction and the

12 consummation of that transaction incurred entirely in New

13 York. You would be, I submit, Your Honor, the first judge

14 to look at a case in which the transaction that is being

15 sued upon was consummated in New York, and you would

16 conclude -- between two banks in New York, and you would

17 conclude that you did not have jurisdiction over that.

18 Now, I want to be clear, because there was I think

19 some effort to muddle this. Your Honor has, under the

20 Constitution, the full reach of the jurisdiction that the

21 Court has. Now, you have as expansive of a reach as the

22 Constitution provides.

23 To the extent that something is covered by the New

24 York Long Arm Statute, you have that reach as well. Because

25 it's been said many times that the New York Long Arm Statute

1 is less extensive than the reach of Article 5 of the Fifth
2 Amendment to the Constitution.
3 So to the extent that it's covered, now the Lessy
4 (ph) case I think is quite instructive on this issue. The
5 facts were that there were dozens of transactions, but what
6 was the relevant part? What did the Court use the fact that
7 there were dozens of transactions? And I think it's
8 important because from time to time we stand here and we say
9 cases what mean, I think it's important to read the words
10 that they actually use.
11 The Court begins by -- there's two elements to the
12 302, because that was a 302(a) case. The Court begins by
13 saying, "In its response to our certified questions," and
14 this is at page 168 of the Second Circuit decision, "the
15 Court of Appeals confirmed that Amego Foods v Marine Midland
16 Bank (ph)," and I won't give the cite there, "stands for the
17 proposition that the use of a New York correspondent bank
18 account standing alone may be considered a transaction of
19 business under the Long Arm Statute, if the defendant's use
20 of the correspondent bank account was purposeful."
21 And then they go through a discussion, and make
22 note of the fact that there were dozens and dozens of
23 transfers. And what do they say about that?
24 "The Court focused on the allegations that LCB
25 used its New York correspondent account, 'dozens' of times

1 'to affect its support of Shadid (ph) and Shared Terraskulls
2 (ph), not 'once or twice by mistake'."
3 Next line, "The Court confirmed that this conduct
4 indicates the desirability and a lack of coincidence."
5 That's the relevance of the number of transactions.
6 Now, the Court -- the Second Circuit then again,
7 quoting for the Court of Appeals goes on to say, "Because
8 the defendant's allegedly culpable conduct stems from this
9 use of the New York correspondent account, the Court of
10 Appeals concluded the plaintiff's claims are sufficiently
11 related to LCB's New York business activity to satisfy the
12 second prong of 302(a)(1)."
13 Now, Your Honor, the issue that they were faced
14 with there, the injury that was complained of in the Listy
15 case occurred in Lebanon and Israel, when there is injuries
16 to individuals living in Israel from attacks by Hezbollah,
17 that did not have -- didn't happen in New York.
18 Here, by contrast, we have without question, the
19 purposeful availment of New York, and let me just step back
20 and just as a digression.
21 I -- it's a little silly to say that Arcapita
22 could've dictated where those funds went. They had to
23 identify a bank account, Your Honor, they had to, meaning
24 the defendants had to. Our complaint in paragraph 6 alleges
25 that at BISB's direction, the funds were transferred to

1 accounts in New York. It's not something made up in our
2 reply.
3 THE COURT: Before we get into that, though, I
4 just want to ask you about your reading of the Lissy (ph)
5 case. In Lissy, I read that, and again, I know it's under
6 302, but let's put that aside for a second. I read that to
7 say that a one -- this one time use, with this use that's at
8 issue can satisfy if there's some other depth to the
9 relationship. And so there, they looked at these other
10 transactions and said, okay, it's not an accident, it's not
11 essentially just coincidental.
12 And so the cases that seem to talk about a one-
13 time availment seem to focus on one of two things. That
14 they are really part and parcel of the actual injury, so a
15 fraud case, here's where the money goes, that's -- it's
16 going into this bank account, so it's really, it's part and
17 parcel of the injury.
18 Or that there's some other depth to it, that is,
19 that this party has availed itself of the forum in -- on
20 other instances, in terms of this one account, and it begins
21 to blur frankly from my point of view, specific and general
22 jurisdiction.
23 MR. LEBLANC: I agree with you, and I had the same
24 question reading Lissy.
25 THE COURT: So I'm trying to figure out since the

1 Second Circuit is binding precedent, but sometimes the
2 binding precedent is not always very clear, how the parties
3 construe that, because it does seem to have an element,
4 Lissy does seem to have an element and the Second Circuit's
5 decision in that has an element of the specific in general.
6 So what do you take from that reference to the
7 many bank accounts -- I'm sorry, the many transfers, and how
8 that essentially proves up the specific jurisdiction?
9 MR. LEBLANC: Well, I take two things, Your Honor.
10 I take first of all that those were the facts at the time,
11 that's one. It's just what it is.
12 THE COURT: Right.
13 MR. LEBLANC: What it -- what you cannot conclude
14 from that is that if you only had one, that the Second
15 Circuit or the New York Court of Appeals more appropriately
16 on certification would've come out differently. It didn't
17 rest its holding on the fact that there were many -- there
18 were dozens and dozens. Those were the facts.
19 But the important question I think is what we just
20 walked through which is, what was the relevance of the
21 dozens and dozens of transactions? It was because the
22 relevance was that it was purposeful. It was not
23 coincidental. It was knowing on their part.
24 Because under Lissy when you actually look at the
25 facts of Lissy, it was a client or a customer of the banks

1 who was transacting business in the U.S. through Lissy's
2 accounts. So it wasn't Lissy itself conducting the
3 business, it was one of its customers.
4 And so I think the numerosity of the transactions
5 there gave comfort to the Court, and those were the facts
6 they had, but gave comfort to the Court of the
7 purposefulness of the bank's use of a New York account.
8 And importantly, I think their -- and the cases
9 recognize this, Your Honor, that there's a continuum, that
10 the more directly connected the transaction is, the injury
11 is to the transaction, the less frequency of contact you
12 have to have. That's why if I drive through New York one
13 time in my life, and I get into a car accident, I am subject
14 to the jurisdiction of New York, because the injury alleged
15 is -- it doesn't matter that I've come through here time and
16 time again or never before, that's the best analogy I think
17 you can give to that.
18 But here, the very depletion of the estate's
19 assets, of which we complain, the very contract of which we
20 seek remedy for breach was consummated pursuant to the
21 transfer of consideration in New York.
22 THE COURT: I understand that, but that's sort of
23 a but for view which is a little different than it being the
24 actual injury.
25 So if, for example, the set off was accomplished

1 by a transfer of funds that went through New York, and you
2 say, well, the set off is the -- and this gets muddled by
3 the fact that there are many different claims --
4 MR. LEBLANC: Correct.
5 THE COURT: -- and we begin to sort of put on
6 different hats, but if you say well that set off is the
7 problem, that's the injury, that's the improper conduct, for
8 lack of a more precise term, then would you have a better
9 argument if that -- if there was some transfer that went
10 through New York for that, as opposed to this transfer seems
11 to be setting the stage for the ultimate problems to come,
12 but doesn't seem to the actual injury, in the way that I
13 understand the cases.
14 So it's one thing to say, hey, I gave money to
15 you, you were supposed to do X, Y, and Z with it, and you
16 said you would transfer it to Switzerland, went through a
17 New York account, well, that's part of the injury, that's
18 part of the actual tort in that case or breach of contract
19 or whatever it is. And here, it seems to be a little
20 further afield, wouldn't you agree?
21 MR. LEBLANC: I would not, Your Honor. The set
22 off is their defense to our claims. We don't plead --
23 THE COURT: But there was nothing --
24 MR. LEBLANC: -- the set off.
25 THE COURT: But there was nothing -- no one would

1 complain that there was something improper about the -- what
2 happened with the funds initially.
3 MR. LEBLANC: Well --
4 THE COURT: It was later when the funds were
5 either supposed to be -- the investment was supposed to
6 mature and be paid, and it wasn't paid.
7 MR. LEBLANC: It's --
8 THE COURT: So it's not the initial transfer
9 that's the problem, it's the failure to make another
10 transfer back to the debtors.
11 MR. LEBLANC: Well, Your Honor, it's -- the
12 problem and our first two claims are breach of contract and
13 turnover. They defend -- we expect when they answer the
14 complaint, that they will defend on the basis of set off,
15 but that's their defense.
16 The fact that they did a transaction which we
17 believe to be in violation of the automatic stay and Bahrain
18 can't change whether or not they're subject to jurisdiction
19 here, the conduct of which we complain is the depletion of
20 -- is the contract and the fact that they didn't turn over
21 into the United States where they were required to under the
22 terms of the contract, the funds owed to Arcapita.
23 That's -- and the transaction that we're seeking,
24 we're not seeking to unwind the transaction, we're seeking
25 to have it completed. The first step in the consideration

1 of that transaction, Your Honor, and there's two steps as it
2 relates as between the parties, there are two steps;
3 Arcapita gives money to them, they give money back to
4 Arcapita. Only one of those steps occurred because they
5 breached the contract and therefore cut it off.
6 THE COURT: Right, but --
7 MR. LEBLANC: The first of that happened in New
8 York entirely.
9 THE COURT: I agree, but I don't think that's the
10 harm, but I think in isolation -- you still have an
11 argument. You still have an argument to say it's part of --
12 you can't have the second part of the transaction without
13 the first part of the transaction, but I think it does
14 remove it a little bit from those cases where it's the
15 transfer is the harm. And the transfer is, you took my
16 money and should've made that transfer, and somebody said
17 that transfer was improper.
18 The transfer, this transfer is improper, it's --
19 it is the consideration for the transaction that you say
20 wasn't handled appropriately on the back end, which was a
21 fairly short period of time.
22 MR. LEBLANC: But it's not handled appropriately
23 on the back end, it wasn't -- the contract -- it has --
24 again, exchange of consideration, we can think of it as a
25 loan, we give them money, they give it back to us with a

1 profit.

2 We gave it to them in New York, they were supposed

3 to give it back to us in New York and they didn't. They

4 just didn't do it. So I -- to suggest that this is somehow

5 in Bahrain, it's just not.

6 And I would submit, Your Honor, you couldn't find,

7 and when we're suing for a breach of contract, a contract

8 that they purposely availed themselves, they chose to

9 consummate and that's our allegation, and I don't know how

10 they could even contest that they chose which bank account

11 we would send money to them in, we couldn't dictate that for

12 them, they had to open it or talk to somebody to do so, that

13 they chose to send it there. I think you would be the --

14 and I actually know, you would be the first court ever to

15 say that in that circumstance there isn't personal

16 jurisdiction.

17 And if you look at the Second Circuit I think one

18 thing that -- I actually wondered this question because Your

19 Honor asked why did this happen in New York, and I had

20 thought the same thing. But if you read the Lissy case, I

21 think it tells you that the decision to do it in New York is

22 of quite some moment because this is what the Court says.

23 And they're noting the fact that the banks here, or that the

24 customer in that instance in the Lissy case didn't have to

25 use New York, even though it was a U.S. dollar denominated

1 transaction.

2 In light of the widespread, and this is a quote,

3 in light of the widespread acceptance and availability of

4 U.S. currency LCB could have, as it acknowledges, processed

5 U.S. dollar denominated wire transfers for the Shaheed (ph)

6 account through corresponding accounts anywhere in the

7 world. And then they cite a case which cites a number of

8 places they could've done this, including Saudi Arabia.

9 So they could've done it anywhere they wanted to

10 including in a neighboring country in the Middle East. And

11 still done it as a U.S. dollar denominated transaction.

12 But when the money was to be sent from Arcapita to

13 them, and Arcapita had to ask and our complaint alleges they

14 did, they were directed by BISB and by Tadhamon to say where

15 should we put the money, they said, put it in these accounts

16 in New York.

17 Under those facts, Your Honor, I don't think any

18 court in New York has ever said that's not sufficient.

19 Now, the other point --

20 THE COURT: Well, let me ask whether or what

21 significance, if any, is it to you that Arcapita essentially

22 -- it seems to be undisputed that they designated a

23 particular account from which the funds were to go, that is

24 that account in New York, and so you had to find another

25 bank, that is the recipient had to find a bank. You're

1 saying it didn't have to be a New York bank.

2 MR. LEBLANC: It didn't have to be in New York.

3 THE COURT: But -- so what am I supposed to take

4 from the fact that Arcapita designated this New York account

5 to be the last bank that Arcapita had control of funds and

6 would transfer the funds somewhere to? Does it matter at

7 all?

8 MR. LEBLANC: Well, I think it makes a huge

9 difference to this case, because in the absence of that

10 designation, presumably that money would have been here five

11 days later when the company filed for bankruptcy. It would

12 have been part of -- not just part of the estate, but would

13 have been physically present in New York.

14 But the simple fact, Your Honor, is that the fact

15 that Arcapita was using a bank here, this is a completely

16 different case. If they said, okay, you're using JPMorgan

17 Chase here, wire it to us to our account in Saudi Arabia,

18 our U.S. dollar denominated account in Saudi Arabia. They

19 could have done that. That's what the Lissy court says.

20 THE COURT: Well, I guess what I'm asking is, does

21 the use of one New York corresponding bank account have

22 anything to do with the other and you're saying no.

23 MR. LEBLANC: No.

24 THE COURT: Because, for example, say Arcapita

25 didn't designate its New York -- this New York bank to be

1 involved. And say they, through whatever -- it went through
2 various financial institutions, but it never went through a
3 bank in New York. And so when the funds finally left the
4 Arcapita side, it left from a bank in Saudi Arabia and it
5 was the defendants who said, send it to us in New York. So
6 you're saying that essentially is factual indistinguishable
7 from your case? It doesn't matter that Arcapita --
8 MR. LEBLANC: I am, Your Honor. Because there's
9 no indication -- and the Lissy court says exactly the
10 opposite of that, that you can do U.S. dollar denominated
11 transactions outside of the U.S.
12 So I don't know of any reason why the defendants
13 couldn't have identified in response to Arcapita saying,
14 it's coming from our JPMorgan Chase account and we want it
15 to go back to our JPMorgan Chase account, they couldn't have
16 said sent it to our account in London.
17 There's no suggestion -- and we're here on a
18 motion to dismiss, so you have to accept the facts pled in
19 the complaint. There's no suggestion that that couldn't
20 have happened. And that's a very different case than the
21 one that's facing us here.
22 Because in that instance, if the money is just
23 coming out of the U.S. then there's a real question as to
24 purposeful availment, I think that's a very fair question.
25 But the banks -- the only BISB and Tadhamon could have said

1 where they would receive the money. And they said, when
2 asked that question, here it is in New York. That, I think,
3 is dispositive of it. And Your Honor would be cutting the
4 legs out of personal jurisdiction if you said something
5 other than that.
6 And let me respond to the Maxwell suggestion
7 because Maxwell doesn't deal in the least bit with personal
8 jurisdiction. It was Sochan (ph) and Barclays that were
9 defendants in that who are the subject of jurisdiction in
10 the United States. But the facts actually matter there as
11 well. Because in that instance, the reason that the Second
12 Circuit found that comity should have the case proceed in
13 the parallel proceeding that was pending in the UK is
14 because the debtor rather, transferred funds out of a UK
15 account into a U.S. account.
16 So when you're talking about the extraterritorial
17 reach of U.S. law, the fact that the debtor's estate in the
18 UK was depleted is the relevant inquiry when you're talking
19 about the extraterritoriality -- extraterritorial reach of
20 -- and just to be clear, it's only the preferenced statute
21 there.
22 But here, that's -- the destination -- if it was a
23 personal jurisdiction question, the destination of the money
24 would be the relevant question. And so Maxwell doesn't have
25 -- nobody suggests that it does deal with personal

1 jurisdiction but -- and I don't know why it was raised in
2 that context, but just to be clear, the facts are that if
3 the plaintiff or the defendant here designated a New York
4 bank account, that's the relevant question.
5 Now, one other point to make about Lissy, Your
6 Honor is, the allegations in Lissy were about a number of
7 transactions that constituted violations of the anti-terror
8 -- anti-money laundering and anti-terror act. There was --
9 so the allegations turned on the number of transactions
10 here. We have a single transaction, a onetime use of a bank
11 account that is the subject of the lawsuit.
12 So, inevitably, our facts are going to be
13 different than those that were present in Lissy. Our facts,
14 frankly, are going to be more like what was present in the
15 Correspondent Services case that I read to Your Honor from
16 before where one account -- one transaction was found to be
17 sufficient.
18 Now, let me turn -- let me talk about
19 extraterritoriality, Your Honor, unless the Court doesn't
20 want me to.
21 THE COURT: One question about -- before we leave
22 personal jurisdiction --
23 MR. LEBLANC: Yes.
24 THE COURT: -- is what do you want me to make of
25 your mention of discovery and --

1 MR. LEBLANC: Sure.
2 THE COURT: -- and how this would work?
3 MR. LEBLANC: Your Honor, I don't think -- we
4 don't think you need to give -- grant us discovery, because
5 we think Your Honor must comply -- must conclude that
6 there's jurisdiction on the basis of the transaction.
7 However, there is -- it is the -- if you can have
8 an elephant in the room in a declaration, in each of the
9 declarations there's an elephant in the room. What they
10 ignore. They give you all sorts of facts that they contend
11 are helpful for them, but what they completely ignore is
12 what throughout their brief they contend to be the relevant
13 question. They don't tell the Court or us how frequently
14 these institutions use the U.S. banking system. Yet they
15 contend that the relevant inquiry is how frequently do they
16 use the U.S. banking system.
17 They tell you, they don't have employees here,
18 they don't have branches here. They don't solicit business.
19 All of that's fine and well, but when they turn to the
20 question of what it actually matters for the Court, they
21 ignore that.
22 Your Honor, in the Lissy case, there was -- I
23 think it was a year of discovery on the jurisdictional
24 question. What we would suggest, if the Court disagrees
25 with us on the application of New York law to this question

1 and we think the Court shouldn't, but if it did, we should
2 be permitted to take discovery to understand the use of
3 correspondent bank accounts in the United States, because to
4 the extent that it's dozens and dozens of times, the Court
5 has no evidence before it whatsoever.
6 And that's not a fishing expedition here, Your
7 Honor. Because we know, as a matter of fact, that they used
8 it one time. That they directed it be used in this
9 instance. Now, it happens to be in our view sufficient,
10 that alone is sufficient. But to the extent that they think
11 or the Court thinks that the relevant question is, do they
12 use it frequently, has it been used dozens and dozens of
13 times? Well, let us take that discovery. And that's what
14 we suggest with respect to discovery, although, again, Your
15 Honor, I think Your Honor should dispose of it without the
16 need to resort to discovery.
17 THE COURT: But I guess what you are -- and your
18 requests I should understand as being consistent with the
19 Lissy case, in other words, that's what Lissy talked about,
20 which is these other -- the other uses of this account?
21 MR. LEBLANC: If that's -- if the Court were to
22 conclude that on this -- on the record before it, on the
23 complaint, and the specific transaction that we're
24 challenging and its connection to New York, that that was
25 insufficient and that what would have to be shown is what

1 was shown in Lissy that as a matter of fact, there were
2 dozens and dozens of transactions, then yes we should be
3 permitted to take discovery.
4 To understand -- and that's not -- we're not
5 talking about burdensome onerous discovery. I suspect it
6 was a conscious decision when you're submitting an affidavit
7 on personal jurisdiction where the issue is how many --
8 their argument is the frequency with which they use it and
9 they don't say anything about it, I can leap to what that
10 might mean. But if the Court thinks that's necessary then
11 we should be entitled to understand that.
12 THE COURT: All right. And just to circle back on
13 the one other issue that we discussed, the notion about what
14 Lissy talks about in this sort of melding of specific and
15 personal jurisdiction, I don't know if you have any views
16 about how to understand that.
17 My own view, which I don't know if it's correct,
18 was the best I could come up with, is that it's a function
19 of the fact that they're applying a particular New York Long
20 Arm Statute, which is what it is and therefore you don't get
21 into, sort of, the constitutional question as Pacific versus
22 General (ph) you apply the Long Arm Statute, which in fact
23 might have elements of both. I don't know, but I'd be
24 interested in the parties' view on that.
25 MR. LEBLANC: I'll tell you my view, Your Honor,

1 and it's what I suggested before is that it is a continuum
2 between the two. You have the very clear -- the car
3 accident in New York, that's the most direct specific, the
4 furthest, you know, at the other end of the spectrum is
5 somebody who travels to New York twice a week, but doesn't
6 live here and commits a tort in Connecticut, but is subject
7 to personal jurisdiction here because they're always in New
8 York. That's the classic general jurisdictional argument.
9 I think it's a spectrum as between the two.
10 That's how I would read Lissy because I actually asked the
11 same question. I said, is this -- because Lissy is -- it is
12 under the New York specific jurisdiction prong. But they
13 note the relationship between the transactions and the tort
14 that's alleged. And the tort, of course is, occurred
15 entirely elsewhere. The physical -- we're talking about
16 physical injuries here.
17 Here, this is a transaction that we're seeking
18 recovery with respect to that occurred entirely in New York.
19 The fact that it's a onetime transaction doesn't change
20 anything. It just means that the only relevant data point
21 is when the parties did the one thing that they had to do
22 under the contract, which is transfer the money, what did --
23 where did they do it? They did it in New York. That's the
24 relevant inquiry. The fact that it was negotiated
25 elsewhere, other laws applied, none of that, in our view,

1 matters, Your Honor. Because the consummation of the
2 transaction, it's not like they met in the airport lounge
3 and talked about the contract. When they decided where to
4 send the money, they -- Arcapita sent it from New York and
5 they received it, at their request, in New York.
6 So I don't know how much Your Honor wants me to
7 talk about the extraterritoriality because it is beyond
8 belief to me that anyone would suggest that turnover actions
9 or the automatic stay do not apply extraterritorially. That
10 is not front page news.
11 Just in the American Bankruptcy -- the ABI
12 Journal, that's front page news is the Wall Street Journal.
13 If the Court were to say the automatic stay doesn't apply
14 extraterritorially, that would be extraordinary.
15 In other words, what that means, let's just be
16 clear about what that means. If a debtor before the Court
17 -- if American Airlines has gates in London and somebody
18 goes to London to try to seize them, this Court would be
19 without power to prevent that from happening, that's what
20 they argue.
21 Now, it is critical, I think, Your Honor, to look
22 very carefully at Maxwell, all of the various decisions,
23 except for the Second Circuit's, because that doesn't deal
24 at all with the question of extraterritoriality. The only
25 decision, which is not binding on this Court that deals with

1 that question of extraterritoriality is the district court's
2 decision not binding on this Court.
3 When you look at those decisions, the only
4 question presented is whether 547 of the Bankruptcy Code,
5 the preference statute applies extraterritorially. That is
6 the only question presented. And I think, Your Honor, I
7 think just to read, page 11 of their reply brief I think
8 reflects just an astonishing misstatement of the law. And
9 it's worth going through almost every paragraph. I don't
10 know if the Court has it there. I have copies.
11 THE COURT: I do. No, I have it. Thank you.
12 Give me two seconds to find it.
13 MR. LEBLANC: Of course.
14 THE COURT: Page 11?
15 MR. LEBLANC: Yes. And it's the paragraph that
16 begins, plaintiff asserts.
17 THE COURT: I'm there.
18 MR. LEBLANC: Okay. So the first sentence just
19 states what we assert. I think it's a fair recitation. The
20 second sentence says plaintiff is wrong, I disagree. Third
21 sentence, it is quote, well established that generic terms
22 like any and every do not rebut the presumption against
23 extraterritoriality.
24 Your Honor, that sentence -- that quote literally
25 refers to a statute that says any civil action. That's what

1 the statute says.

2 By contrast, Section 541 of the Bankruptcy Code

3 says property wherever located, wherever located. There is

4 simply no comparison between generic terms like any or

5 every, like any civil action and property wherever located.

6 The next sentence -- and this one we have to break

7 into two clauses because they're completely different

8 arguments. Plaintiff's argument was squarely rejected in

9 Maxwell, which held the wherever located language did not

10 meet the stringent Morrison standard for clear intent. And

11 I'll stop there.

12 That is, first of all, the Morrison decision was

13 issued 17 years after Judge Brozman's decision in Maxwell

14 and 16 years after Judge Scheindlin's decision in the

15 district court. So they obviously weren't opining on the

16 Morrison decision.

17 Moreover, no one of those decisions says in any

18 respect that the wherever located language was not -- did

19 not express a clear intent. That is simply untrue.

20 Instead, what is correct is the second clause of that

21 sentence.

22 The Maxwell decision, both one and two, the

23 district court and the bankruptcy court does in fact say

24 that because of the Second Circuit's Colonial Realty

25 decision, which deals with the question of whether avoidance

1 actions become property of the estate upon the filing of the
2 case, whether those are property of the estate could not
3 apply to claims for preferential transfer, since property
4 which has been preferentially transferred does not become
5 property of the estate until recovered.
6 That's just -- that's correct, Your Honor. That's
7 what Maxwell says and I'll turn to that in a second. But
8 the first half of that sentence is demonstrably wrong.
9 The next sentence -- in the next sentence is just
10 a quotation from Maxwell so that is what it is. The last
11 sentence, "As the Maxwell Court recognized, the same
12 reasoning precludes using the wherever located language in
13 the Code's definition of property of the estate as a basis
14 for extraterritorial application of claims made pursuant to
15 Section 362 for violation of the automatic stay and they
16 quote to Maxwell, 170 B.R. at 812. And Your Honor, that's
17 just wrong. Let me read to you from the decision.
18 And again just to step back from this, we can use
19 these words, but this is their contention that the automatic
20 stay does not extend outside the continental United States
21 and the two external states we have.
22 Judge Brozman says -- and this is presumably on
23 page 812 what they're suggesting. It says, "And for that
24 same reason the extraterritorial application of Section 362,
25 which serves to protect the property of the estate wherever

1 located does not help the joint administrators either." And
2 she cites to the In Re McLean Industries (ph) decision.
3 So, Your Honor, what she's saying is that the
4 extraterritorial -- that Section 362 applies
5 extraterritorially, but it doesn't help the joint
6 administrators who are asserting a preference claim only in
7 that instance. And there's no real dispute. One of the
8 more recent Madoff decisions cited in our papers, Your
9 Honor, goes through a long discussion of whether Section 362
10 applies extraterritorially.
11 And then the last part of this sentence, "And
12 likewise would prevent extraterritorial application with
13 respect to plaintiff's turnover in other code claims,"
14 demonstrably wrong, Your Honor. The very same part of the
15 sentence, footnote 16 of Judge Brozman's decision.
16 Since the transferred property was property of the
17 estate and since our bankruptcy laws permit recovery of
18 estate property wherever located, there was a rationale for
19 the extraterritorial application of the statute. In other
20 words, turnover is not subject to the same analysis with
21 respect to extraterritoriality as is a preference claim.
22 And if this wasn't clear, Your Honor, the analysis
23 that I just walked through is exactly the analysis that is
24 done in the Madoff decision and most importantly, the
25 decision that inexplicably they completely ignore in their

1 reply brief, which is Judge Lifland's most recent decision
2 in the Picard v. Madoff cases.
3 Judge Lifland spends the last four pages of that
4 decision, pages 25 to 29 on the Lexis printed version,
5 discussing why Maxwell doesn't apply to preference actions
6 in circumstances that are indistinguishable from the
7 circumstances we have here.
8 Now, here's the only area that there's area for
9 fair debate even, Your Honor. Not with respect to whether a
10 541 applies extraterritoriality. In other words, whether
11 the Court could order a debtor to bring property from
12 outside the U.S. into the U.S., or whether 362 applies
13 extraterritoriality so the Court could order somebody
14 hurting a debtor's property outside the United States.
15 There's room for fair debate whether 547 applies.
16 And the reason there's room for fair debate there,
17 and again, that's our pleading in the alternative, is
18 because of the -- because there's questions as to whether a
19 preference action is property of the estate for the purposes
20 of extraterritoriality.
21 Now, Judge Lifland in the most recent decision,
22 that's again cited in our papers, goes through an extensive
23 analysis as to why -- how he distinguishes Judge Brozman and
24 Judge Scheindlin's decision in Maxwell.
25 And here's the key element and I mentioned this

1 before, Your Honor. The key distinction, because he notes
2 that the transfer that was at issue in the Madoff case was
3 between, as it turns out the very same two New York banks
4 that are at issue here, JPMorgan transferred to HSBC just by
5 coincidence.
6 But he walks through it and he notes the
7 fundamental difference between the Madoff case and the
8 Maxwell case is that the depletion of the assets occurred
9 from the United States. That's the distinction.
10 So -- and Judge Lifland says he's not disagreeing
11 with Judge Brozman's decision in the Madoff decision, but
12 reaches a different conclusion based on that fundamentally
13 different fact, Your Honor.
14 And here's -- the bottom line is, I don't know how
15 you could read our opposition and not even mention this
16 recent decision in response to it. And I don't know how one
17 could even contend that the automatic stay and that the
18 turnover actions are even questionably within the reach of
19 this Court, that this Court's orders don't apply
20 extraterritorially in those two respects.
21 And even without even mentioning the fact that the
22 breach of contract claim doesn't have anything to do with
23 extraterritorial application. This Court couldn't say, I
24 can't do a breach of contract case because it involves a
25 contract from Bahrain. That's not even part of the

1 analysis.

2 It's -- the question is whether there's a

3 statutory reach to extend statutory provisions

4 extraterritoriality. So it doesn't apply at all to the

5 contract case and they're simply wrong and about as wrong as

6 one could stand before a bankruptcy court and be in

7 suggesting that your automatic stay doesn't work outside

8 these waters.

9 Now, I can talk, if Your Honor wants me to about

10 comity, but it's just -- it's a flawed premise, the notion

11 of comity. There's no reason -- Judge Lifland in the Madoff

12 decision, in the Picard v. Madoff decision notes that there

13 was a request for comity there. There actually were

14 proceedings elsewhere, but there were no proceedings with

15 respect to that debtor. So a similar situation to what we

16 have here there were proceedings in the Cayman Islands. But

17 Judge Lifland simply dismisses it because he says that's an

18 affirmative defense, we'll deal with that later.

19 So it's not an issue for this Court today, but

20 fundamentally Your Honor would be -- I don't know of an

21 instance where a court would defer on the basis of comity to

22 something that doesn't exist.

23 I can understand the argument under a for non-

24 convenes to be sure, but on the basis of comity. And even

25 if that applied at all, even if the principle applied, under

1 no circumstance does it -- have has it ever been applied to
2 a breach of contract case.
3 That's an argument if they want to make it under
4 for non-convenes, they could make it with respect to the
5 breach of contract, but the principle doesn't even apply to
6 a breach of contract.
7 Now, unless the Court has any other questions, I
8 think the Court --
9 THE COURT: I don't.
10 MR. LEBLANC: -- should reject the motion to
11 dismiss. They're clearly within Your Honor's personal
12 jurisdiction, and Your Honor's reach, the reach of the
13 Bankruptcy Code certainly touches these actions. Thank you,
14 Your Honor.
15 THE COURT: Thank you.
16 MS. ADLER: Your Honor, I would like to respond
17 briefly.
18 THE COURT: Sure.
19 MS. ADLER: Thank you. Unless you need a lunch
20 break.
21 THE COURT: No, let's go ahead.
22 MS. ADLER: The first point is to call this a New
23 York transaction on the jurisdictional point is simply
24 assuming a conclusion. It is clearly not looking at the
25 totality of the transaction. It is not looking at the

1 document which reflect that the monies were ordered through
2 Bahraini things and ended up in Bahrain the same day.
3 So the point is that those monies probably spent
4 more time -- less time in New York than we have just devoted
5 thus far this morning and early afternoon to talking about
6 it. That's thing one.
7 The beef again, and I think counsel appeared to
8 fudge it, was it wasn't the set-off of antecedent debt, it
9 was the fact that we didn't pay them back, and then set off
10 the amounts down the road.
11 Had we paid them back, they wouldn't contend -- we
12 would've done so from Bahrain, and they wouldn't contended
13 that anything happened in New York.
14 Again, when you look at the cases, the mere
15 receipt of funds in New York without anything more on a one
16 time basis is simply not good enough, and you've misstated
17 Leechy. For one thing Leechy, the district court which
18 granted the motion to dismiss denied discovery.
19 The Court -- the case then -- there was no
20 discovery in Leechy. The case then was appealed to the
21 Second Circuit. The Second Circuit certified it to the New
22 York Court of Appeals, and then thereafter, it went back to
23 the Second Circuit. There was no basis for discovery there,
24 for the same reasons that we've already discussed.
25 And in the discussion of discovery, counsel was

1 conflating personal -- specific jurisdiction and general
2 jurisdiction. How many times the defendants may or may not
3 have used a New York correspondent bank account would speak
4 only to systematic general jurisdiction.
5 THE COURT: Right. Well, that gets back to my
6 question about how you read Leechy, and why does Leechy talk
7 about that in what seems to be a specific jurisdiction
8 context.
9 MS. ADLER: Leechy is a specific jurisdictional
10 case. And the cases that -- the 2000 case Correspondent
11 Bank way pre-Leechy, was a 302(a) case.
12 THE COURT: Right.
13 MS. ADLER: It was about were they doing business
14 here. And again, as Your Honor correctly perceived, the
15 issue was not only the multitude of times they used the
16 securities account, the defendant, you know, but also the
17 fact that they were doing unauthorized securities trades in
18 it. There is always something more.
19 And in Leechy --
20 THE COURT: Well, but let me -- when the case law
21 contemplates jurisdictional discovery, it doesn't cabin it
22 off to say you can only have this, you can only have that.
23 It, like all discovery is tied to what's going on in the
24 case. And while it's more limited, so you have to
25 essentially have some sort of an offering or a proffer as to

1 why discovery is appropriate, what I understand here, the
2 request is to the extent I disagree with plaintiff's view
3 about personal jurisdiction to allow them some discovery on
4 the use of correspondent bank accounts in New York.
5 Now, that may lead to a claim that there's
6 specific jurisdiction, it might lead to a claim there's
7 general jurisdiction, might lead to some claim that there's
8 Leechy jurisdiction, which seems to be straddling --
9 MS. ADLER: I think --
10 THE COURT: -- the line. So what's your response
11 to that?
12 MS. ADLER: I think that that is one desperate,
13 and two, in this specific instance it would be misplaced.
14 Because counsel keeps misrepresenting that the basis for
15 this jurisdiction is that the payments that the defendants
16 did not make were to be made to New York accounts. But, in
17 fact, those were New York accounts again designated by
18 Arcapita.
19 And if you look at --
20 THE COURT: Well, but I understand the argument
21 there --
22 MS. ADLER: But literally Arcapita says, pay us
23 back to this account.
24 THE COURT: I know, I understand that.
25 MS. ADLER: Okay.

1 THE COURT: But there's a New York encounter on
2 Arcapita's side, but the argument is, and I'm not saying I
3 agree with it or disagree with it, but I understand the
4 argument to be that put that aside, what's really relevant
5 is what's on the defendant's side for the receipt of the
6 funds.
7 MS. ADLER: I understand, but look at the Tadhamon
8 case, for example, Tadhamon doesn't have a New York
9 correspondent bank account, didn't have any correspondent
10 bank account. It had to use the HSBC bank account of its
11 bank in Bahrain.
12 And you look at the use of it in Leechy, the
13 defendant bank was alleged to have used the New York
14 correspondent bank many, many times to disseminate funds to
15 terrorists, to do something bad.
16 Here, the use of the account wasn't again anything
17 bad. So Tadhamon doesn't even have a correspondent bank
18 account. Leechy -- I mean, in BISB which used it the one
19 time, but obviously that wouldn't get you to specific
20 jurisdiction, and in general jurisdiction, that's just
21 irrelevant. You don't have anything that overcomes -- we
22 don't solicit business in the United States. We don't do
23 business with people in the United States, we don't avail
24 ourselves of -- BISB does not avail itself of the United
25 States. You don't have the something more.

1 So to just kind of pull something out of thin air
2 to keep a case alive, basically out of hope or conjuncture,
3 literally the cases say that is not good enough, that's
4 really, really important. And you can't just presume your
5 conclusion by citing to depletion of the estate in New York,
6 when the defendants reasonably, I don't think anybody
7 disagrees with that, have no basis to assume that they will
8 be hailed into court, and have every basis to believe that
9 under Bahraini law they can after the petition was filed,
10 set off amounts due to them.
11 I mean, those are -- that's just wrong. So I want
12 to point out again the misstatements about Leechy. Because
13 Leechy really does turn on the recurriness and
14 deliberateness, and it says that minimum contacts again, you
15 know, have to exist where the defendant purposely avails
16 itself. And you have to look at the jurisdictional inquiry
17 focused on the affiliation between the forum and the
18 underlying controversy. We don't have that affiliation
19 here.
20 These were not consummated transactions in New
21 York. They were -- there was a tiny New York piece that was
22 a predicate to the rest of the transaction. And if the real
23 bit of the transaction was the purchase of investments by
24 BISB and Tadhamon as agents, again as agents for Arcapita,
25 those purchases, the value exchanged happened outside of the

1 United States. They happened in Bahrain, they happened
2 where the things were made.
3 And if you look at the BISB -- just to make it
4 really plain, if you look at the agreement, that is the
5 agreement under which plaintiffs sued BISB, and it's
6 attached as Exhibit A to BISB's moving papers, it's the
7 agreement.
8 And you look at paragraph 4.4, it says, "Once
9 payment --"
10 THE COURT: Hold on one minute, let me get there.
11 MS. ADLER: I -- Exhibit 82, BISB's notice of
12 motion.
13 THE COURT: All right. Okay.
14 MS. ADLER: The fact, and I'm showing you this,
15 Your Honor, to make the point that these were not
16 transactions that were completed in any remote sense in New
17 York.
18 If you look at 4.4 the parties agreed that once
19 such payment reaches the agent's account, and here, that was
20 the agent's account in Bahrain, the agent being BISB, the
21 agent shall complete the purchase of commodities, that
22 happened outside the United States and notified the bank
23 that was Arcapita of such purpose, whereupon title to the
24 commodities shall pass to the bank, who shall thereupon
25 become the owner of the commodities.

1 The point is that this was just the facilitation,
2 and it could've happened anywhere. You don't give the
3 purposeful availment, and the monies, and this is not in
4 dispute, get immediately transferred to Bahrain, which again
5 distinguishes it from Leechy.
6 In Leechy, the monies go through New York, and
7 then they go to the purported terrorist organizations
8 supposedly to shield them from view, that's not the case
9 here.
10 Arcapita wants to do them in dollars, they ask for
11 the -- they asked for us to do it. And if you would look at
12 likewise the Arcapita notice of motion, Your Honor, Exhibit
13 B, which is the schedule that speaks to these transfers with
14 respect to the transfer from Arcapita to Tadhamon. You tell
15 me when you're ready.
16 THE COURT: So you're asking me to look at --
17 MS. ADLER: It's Tadhamon --
18 THE COURT: Tadhamon's motion, okay.
19 MS. ADLER: -- motion, Exhibit B, please.
20 THE COURT: Okay. All right.
21 MS. ADLER: It says the first schedule at the top.
22 THE COURT: Got you.
23 MS. ADLER: Page -- and it says page 7 at the
24 bottom.
25 You'll see that Tadhamon is writing at the top in

1 this offer to Arcapita, and it says we refer to the master
2 agreement, we know that was, and your instructions of today,
3 you, Arcapita's instructions of today, in which you
4 indicated your wish to deposit an amount with us for
5 investment by us and Islamic transactions on your behalf.
6 And then it says, please authorize -- paragraph 6,
7 please authorize in respect of the investment amount, the 10
8 million to be transferred by Arcapita, please authorize us
9 to debit your account with us or credit the amount to our
10 following account, receiving bank, the bank that was getting
11 the money, Khaleeji Commercial Bank, Bahrain. And then it
12 gives its SWIFT number.
13 The beneficiary is Tadhamon. The intermediary,
14 the one-time intermediary is HSBC, not even Tadhamon's
15 correspondent bank.
16 And then in Arcapita's acceptance, which is the
17 form at the bottom, Arcapita writes -- asks that on maturity
18 date, when the monies were to be repurchased by Tadhamon, we
19 want to receive the dollars at our account at JPMorgan
20 Chase, and again, in New York, and again it gives the SWIFT
21 code information.
22 These are instructions coming from Arcapita, you
23 cannot bootstrap the actions of the Bahraini debtor Arcapita
24 to become, to morph into the purposeful availment
25 independent availment by its agent in these transactions

1 which were BISB and Tadhamon.

2 Now, also you have to understand the policy

3 reasons. If anybody, any time, anyone ever used a

4 correspondent bank account on a single -- a foreign entity

5 in a foreign transaction between foreign entities, a

6 correspondent bank account in New York for a single

7 transaction, there would never not be jurisdiction. There

8 are no floodgates here, and it's really important to

9 understand that. It seems to me that some of plaintiff's

10 arguments are overbroad like that.

11 So, for example, if depletion of the estate in

12 itself could overcome objections to jurisdiction or

13 territoriality, that would mean that any time a foreign

14 entity determined to file bankruptcy there would never --

15 you would automatically have jurisdiction, and there would

16 never be any extra-territoriality inquiry. That is really

17 not the law. Maxwell makes that really clear.

18 I think that's the case. Maxwell says clear,

19 Judge Scheindlin, that augmentation of the estate is not by

20 itself a reason to do it. These cases are easily

21 distinguished from the Madoff cases that plaintiff cited

22 toward the end.

23 In that case, you had a U.S. debtor, you had

24 overseas sometimes transferees who had done business in the

25 Chase case through her father-in-law, a U.S. agent who had

1 used New York bank accounts to receive monies, and make
2 investments. They were wholly distinguishable in terms and
3 often had signed and Judge Lifland made a big deal about
4 this, often had signed agreements with Madoff Securities
5 which provided for a New York choice of law, and sometimes a
6 New York forum. So those are obviously entirely
7 distinguishable cases.
8 The exchange of consideration as I've just shown
9 was really the monies after they were received in Bahrain
10 and the title passing to the investments in commodities in
11 BISB's case, and in treasury securities into Tadhamon's that
12 also -- Tadhamon received in -- that also, forgive me,
13 Arcapita received in Bahrain.
14 We do contest that the wherever located in
15 property of the estate has been presumed to be okay, and you
16 know, to be presumed, should always be acceptable. And I
17 also want to --
18 THE COURT: Well, let me ask you about that. I
19 understand your 547 argument, and I think the parties while
20 they vehemently disagree with each other, sort of agree what
21 they're arguing, which is you rely on Maxwell and some
22 statements from the Second Circuit, and the other side
23 relies on distinguishing those cases as Judge Rakoff has
24 recently done. So I think I just need to look at that.
25 But I think everyone agrees what it says. But for

1 property of the estate, and the automatic stay, again, I
2 think maybe you could argue that it's not property of the
3 estate and that's a separate argument. But accepting
4 something as true, if you accept it as property of the
5 estate, you accept that proffer, well, I -- and the
6 Bankruptcy Code says property wherever located, you're not
7 trying to augment the estate, you're just trying to deal
8 with the property.
9 And again, you may have beef with that whole
10 concept --
11 MS. ADLER: I do, Your Honor --
12 THE COURT: -- I understand that.
13 MS. ADLER: -- yeah, I do.
14 THE COURT: But I don't know that that beef -- why
15 is that beef something that isn't addressed here, if I have
16 to take those allegations as true, and the Code talks about
17 property wherever located. I understand your beef to be
18 it's not property. Are you --
19 MS. ADLER: I'm saying something further than
20 that.
21 THE COURT: All right.
22 MS. ADLER: I'm saying that wherever located does
23 not pass Morrison muster at least as applied on these facts.
24 THE COURT: But if I do that, haven't I thrown the
25 baby with the bath water on large Chapter 11 cases?

1 MS. ADLER: No, I don't think so. I think that --
2 I think the Supreme Court is ultimately going to have to
3 decide this, and I think that when you look at the use of
4 foreign commerce and everything else in the RICO statues and
5 in the alien tort statutes, and the language that was held
6 insufficient to have -- insufficient to indicate Congress'
7 intent that a statute extraterritorial apply, you have that.
8 But I think on this case, Your Honor, just so you
9 don't get worried about -- get worried unnecessarily, I
10 think that these transfers under Maxwell are so clearly non-
11 domestic, that you don't get there in any event. I don't
12 think --
13 THE COURT: Well, that's an extraterritoriality
14 argument, right?
15 MS. ADLER: It is.
16 THE COURT: Well, I mean, here's my problem, much
17 like the argument earlier that someone said and usually this
18 is how this goes, right, someone says, this is a very narrow
19 request I'm making in this case under these specific set of
20 facts, and somebody else, the consequences for this decision
21 are horrible.
22 And in that earlier case, the argument was about
23 what a plan means or doesn't mean. And here if parties are
24 -- if the idea that there's a dispute about whose funds,
25 they are somehow undoes the ability to address the property

1 of the estate, either turnover or automatic stay, I --
2 MS. ADLER: Let me say it a different way and I
3 think that this is what Judge Scheindlin said in the
4 district court Maxwell decision. If you have a case -- and
5 she was quoting Judge Brozman, if you have transfers between
6 foreign debtors and foreign entities where the center of
7 gravity of that transfer is clearly foreign as I think is
8 indisputable in the case here, notwithstanding other
9 opinions.
10 It is not -- the bankruptcy law doesn't give you
11 and the wherever located doesn't give you carte blanche to
12 go get all property all over the world.
13 THE COURT: But that's in the preference context,
14 isn't it?
15 MS. ADLER: No, I think it's in all contexts. I
16 think it would be --
17 THE COURT: But that case was in the preference
18 context, wasn't it?
19 MS. ADLER: No, there were also avoidance claims,
20 they're not directly addressed, but they actually are
21 addressed at some point. Hold on just one minute. There
22 were avoidance claims raised as well, and they're kind of
23 subsumed in that discussion.
24 But she talks about --
25 THE COURT: I thought your response was going to

1 be that under the facts and circumstances, if there's no
2 dispute, based on the allegations, and a Court is able to
3 make a determination something is or isn't property, that
4 that's -- you can decide whether the turnover and you can
5 look at the territoriality at that point, but I'm just --
6 I'd be interested in what you're pointing to tell me that
7 that. I understand that rationale and the context of
8 preference, and I would just --
9 MS. ADLER: No, I would point Your Honor to again
10 some of the same language that we looked at a moment ago
11 when counsel was up here. But if you look at footnote 16
12 and some of the language that follows it in Judge
13 Scheindlin's decision, and I so I'm at 170 B.R. at 812, note
14 16.
15 She talks about 362 is dinged because of property
16 of the estate wherever located, and she uses the word
17 relocated. In that footnote, she distinguishes a case
18 that's In Re Bevel, and she says that since the transferred
19 property was property of the estate and our bankruptcy laws
20 permit recovery of estate property wherever located, there
21 was rationale.
22 But she says that that case is distinguishable,
23 and that was in a securities setting. And we now know that
24 the securities laws 10(b)(5) are not extraterritorial, may
25 not -- do not have a sufficient indication of Congress'

1 intent. So I think that, you know, you get there.

2 THE COURT: I'm not following that last part. Why

3 her statement basically saying is -- seems to be supporting

4 the notion that if it's property of the estate, 362 gives --

5 MS. ADLER: Let me say --

6 THE COURT: -- the ability to do this --

7 MS. ADLER: Let me even give --

8 THE COURT: -- and I don't --

9 MS. ADLER: Let me even give you a better quote

10 that's perhaps clearer, Your Honor.

11 THE COURT: All right.

12 MS. ADLER: Further down on the same page, so I'm

13 at 170 B.R. -- but now I'm in the text, 812, this is Judge

14 Brozman, I'm sorry, says, "I do not agree however that in

15 permitting foreign debtors to avail themselves of our law

16 Congress unquestionably must have meant to imbue those

17 debtors with the right to apply our avoidance laws

18 extraterritorially. To embrace the reigning of those making

19 that argument," in that case, the joint administrators and

20 the examiner, "would be to ignore Ramco (ph)," which you may

21 remember was a predicate, "which requires an unambiguous

22 expression of Congressional intent gleamed from the language

23 of the statute or other guides to its interpretation."

24 Here, there is no such unmistakable evidence of

25 Congressional intent.

1 THE COURT: But you're referring to avoidance
2 actions, right?
3 MS. ADLER: I am. I thought that's what you were
4 asking me.
5 THE COURT: No, I was asking about 362, the
6 automatic stay --
7 MS. ADLER: Well, 362 again we get back to the
8 property of the estate, if you don't buy into it being
9 property of the estate.
10 THE COURT: Yeah, but that's what I'm saying. But
11 how do I --
12 MS. ADLER: That property of the estate has the
13 same wherever located language. And that language --
14 THE COURT: Let me back up. Let me see if I can
15 frame the -- my understanding is that there's a body of law
16 about preferences that says, can it be extraterritorial
17 because you're bringing something into the estate, it's not
18 property of the estate, Congress did not make clear that
19 that applied extraterritorially, and therefore, I've been
20 here long enough, I know that word rolls off my tongue
21 unlike earlier, so that's something that's -- the plaintiffs
22 disagree with that, but that's one way certainly to read
23 those cases. All right.
24 But 362 and turnover are all about they're defined
25 as property of the estate. So my question for you is how do

1 you get there? I --
2 MS. ADLER: But you need again --
3 THE COURT: -- can see that you are essentially
4 saying it's not property of the estate, but is that a motion
5 to dismiss inquiry?
6 MS. ADLER: No, that is a challenge to whether
7 wherever located is good enough to meet the Morrison
8 standard for clear Congressional intent.
9 THE COURT: Yeah. And I'm -- but I'm -- I mean, I
10 see you frame --
11 MS. ADLER: And I don't think there's any case, by
12 the way, that says it is.
13 THE COURT: I've got to say I have a real problem
14 with that.
15 MS. ADLER: And --
16 THE COURT: I understand augmentation of the
17 estate, and I understand your argument to say this isn't
18 property of the estate, let's get to Bahraini law. Bahraini
19 law, that's the substance law. But if you open -- there is
20 a floodgates argument to make that would say that people
21 then, for any dispute --
22 MS. ADLER: Agreed.
23 THE COURT: -- in any large 11 will say, we say
24 it's not property of the estate for whatever reason, you
25 have no jurisdiction, you have no ability to look at this

1 extraterritorially.

2 MS. ADLER: I hear you, Your Honor, but I think in

3 this case, and I don't know if this would be a floodgate

4 thinner downer as it were, because you've got these foreign

5 things without jurisdiction in the first instance, you

6 probably never get to that question.

7 THE COURT: But isn't that a --

8 MS. ADLER: No, because you --

9 THE COURT: Wait, say that --

10 MS. ADLER: Someone --

11 THE COURT: -- again.

12 MS. ADLER: A debtor could not be asserting 362

13 claims in setting or the Court could not be hearing them,

14 determining them, if the Court did not have personal

15 jurisdiction over those defendants.

16 THE COURT: Yeah, but those are two separate

17 things.

18 MS. ADLER: Agreed.

19 THE COURT: You've done them in the alternative.

20 MS. ADLER: I agree.

21 THE COURT: My problem is taking them individually

22 as an independent basis. We may have gone as far as we can

23 with this.

24 MS. ADLER: But again, and I guess the other point

25 is one I made earlier --

1 THE COURT: I --
2 MS. ADLER: -- which is if you've got a debtor
3 with foreign parties in foreign transactions were foreign
4 law is going to govern, then the remedy is over there. It's
5 in the foreign states.
6 THE COURT: Well, that's a comity argument.
7 MS. ADLER: No, but it also speaks --
8 THE COURT: But --
9 MS. ADLER: -- to your concern that a bankruptcy
10 court or a debtor might not have a remedy, that's where I'm
11 going with it.
12 THE COURT: No, that's not my concern.
13 MS. ADLER: Okay.
14 THE COURT: No. My concern is taking each one of
15 these arguments in isolation as an independent basis that
16 has been asserted for dismissal, that I have concerns
17 looking independently at your argument that 362 and turnover
18 should be dismissed because of lack of -- because of
19 extraterritoriality.
20 MS. ADLER: But --
21 THE COURT: And I understand you've raised --
22 MS. ADLER: I am.
23 THE COURT: -- you've now talked about it when I
24 respond -- when I've raised that, you mention personal
25 jurisdiction, you've mentioned sort of comity concerns.

1 You've mentioned -- I'm not asking you to agree --

2 MS. ADLER: And I --

3 THE COURT: -- with me on the results here. I'm

4 just trying to isolate something and there are times when

5 counsel doesn't want to answer a question because it's not a

6 wonderful way to --

7 MS. ADLER: No, no, no, no.

8 THE COURT: -- debate the issue.

9 MS. ADLER: And again, and again, 362 is dealt

10 with in, you know, Judge Brozman's decision on --

11 THE COURT: I think we've gone as far as we'll go

12 on that.

13 MS. ADLER: Okay. Let me just see if there's

14 anything else that work making you stay any longer for.

15 We've discussed the exchange of -- I think the real point is

16 that the jurisdictional stuff is all of that bootstrapped

17 onto defendant's by Arcapita. And that's not good enough,

18 it has to be independent. I don't see the purposeful

19 availment. I don't believe you -- we have facts that

20 warrant what would indeed be a fishing expedition here.

21 I don't -- Leechy provides no authority for it.

22 In Leechy, there was no discovery contrary to counsel's

23 suggestion, and I think you can wholly distinguish as we've

24 just discussed the Madoff cases. Thank you.

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

1 Briefly.

2 MR. LEBLANC: Sure. Thank you, Your Honor, I

3 greatly appreciate it.

4 Less than two minutes I suspect, Your Honor.

5 THE COURT: All right.

6 MR. LEBLANC: Let me -- I just want to make I

7 think three points. The first, Your Honor, I think Your

8 Honor is correctly thinking about the jurisdictional

9 question as to whether or not -- what is the relevant

10 transaction. The point in the Leechy discussion is there

11 were dozens and dozens of transactions, of which they were

12 all complained. They complained about the transfer of

13 dozens and dozens of things. Here, we complain about one

14 transfer.

15 Now, with respect to our preference claims, the

16 question in the preference claim is whether the transfer is

17 wrongful. That's the question. That's the very transfer.

18 So the connection between the wrongful act and the

19 purposeful availment is entirely direct.

20 With respect to the set off argument, under

21 553(a)(3) the question that we're -- if they defend on the

22 basis of a set-off, we will respond by saying that the

23 transfer was done for the purpose of creating set off, which

24 means they can't set off against that debt. And again,

25 that's the transfer that was done entirely in New York.

1 Two other points, Your Honor, I think. We cite
2 these in our papers, but I'm not sure that there's any
3 confusion left about the question of extraterritoriality
4 reach, but if there is, we cite in our papers the
5 legislative history where Congress expressly stated its
6 addition to add wherever located, those very words, made
7 clear that a trustee in bankruptcy is vested with the title
8 of the bankrupt in property which is located without, as
9 well as within, the United States. And that's cited in our
10 brief at page 24.
11 The last point, I don't -- there seemed to be a
12 suggestion, and I thought it was odd for two Bahraini banks
13 to be making the suggestion, but that these contracts --
14 Your Honor knows what these contracts are. They are a
15 Sharia compliant way of lending money. There's a series of
16 transactions, a commodities transactions to generate a
17 profit, predetermined profit amount for the purpose of
18 substituting for what otherwise would be interest.
19 Now, if the suggestion is that the consequence --
20 the consequential acts with respect to a lending transaction
21 like that structured in a Sharia compliant way is really the
22 commodities transactions that occur outside, and it's not
23 simply a lending arrangement between parties, where the loan
24 was made in the United States, and where the very document
25 signed by them calls for the loan to be repaid in the United

1 States, that the consequential acts with respect to that
2 transaction are the underlying commodities trades, that
3 would be an extraordinary decision with respect to a Sharia
4 compliant facility.
5 Because I think it would blow the thing out of the
6 water, because Sharia -- the purpose of this is to avoid
7 having a contract that pays interest. And instead, they
8 substitute a series of transactions that are not
9 meaningfully at risk for the purpose of creating a profit
10 margin, so that they can pay the equivalent of interest.
11 And I think it's astonishing to say that the
12 nexus, the corpus, the substance of this transaction is
13 anything other than the lending and the repaying with
14 interest or profit because it's Sharia compliant. That's
15 just wrong.
16 And I think Your Honor -- Your Honor knows that
17 from the history of this case, that the functional events in
18 this transaction were the lending of money and the repayment
19 of money, both of which were called for to occur in New
20 York, the first of which occurred in New York, the second of
21 which didn't occur because of their breach.
22 There's no question on those facts, Your Honor,
23 that there's -- on those allegations, which are assumed to
24 be true, that there is jurisdiction here. So we'd ask the
25 Court to dismiss -- to deny the motion to dismiss. Thank

1 you very much for all of your time today.

2 THE COURT: Thank you.

3 MR. LEBLANC: I've spent a lot of time talking to

4 you and I apologize.

5 THE COURT: That's all right.

6 MS. ADLER: Your Honor, I just want to point out

7 that the legislative history argument was made and rejected

8 in Maxwell, and that I believe on a motion to dismiss, with

9 undisputed facts it is wholly inappropriate for counsel to

10 be testifying about the nature of the transaction, much

11 less, you know, has he been qualified as an expert.

12 THE COURT: Well, the record is what it is. I'll

13 consider what I'm supposed to consider, and take it from

14 there.

15 MS. ADLER: Thank you, Your Honor.

16 THE COURT: All right. I'd like to thank the

17 parties for their excellent arguments and very good

18 briefing, even though you disagree on many, many things. I

19 will take it under advisement and I can't promise that I

20 won't have a follow-up question, I won't let pride stand in

21 the way of trying to get it right, to the extent I do,

22 rather than whistle in the dark and issue something that has

23 both sides scratching their heads, I reserve the right to

24 call you up and ask a follow-up question or two in an

25 appropriate setting. But hopefully it won't come to that,

1 and thank you again for your efforts.

2 MS. ADLER: Thank you very much, Your Honor.

3 MR. LEBLANC: Thank you, Your Honor.

4 (Proceedings concluded at 2:01 PM)

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1 I N D E X

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3 R U L I N G S

4 IDENTIFICATION PAGE

5 Doc. #1766 Motion to Object to Claim No. 254 9

6

7 Doc. #1771 Motion to Approve/Motion for Order 12

8 Pursuant to Rule 9019 Approving Settlement

9 Agreement With Thronson Parties

10

11 Doc. #1707 Motion for Omnibus Objection to 13

12 Claim(s)/Ninth Omnibus Objection to Claims filed

13 by Evan R. Fleck on behalf of Reorganized

14 Debtors and the New Holding Companies (Claim 577)

15

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

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I, Sheila G. Orms, certify that the foregoing is a

3 correct transcript from the official electronic sound

4 recording of the proceedings in the above-entitled matter.

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6 Dated: March 20, 2014

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8 Shelia G. Orms

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