

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case Nos. 12-11076-shl

4 Adv. Case No. 12-01662-shl

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6 In the Matter of:

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8 ARCAPITA BANK B.S.C.(C), et al,

9

10 Debtors.

11 - - - - - x

12 HOPPER,

13 Plaintiff,

14 v.

15 FALCON GAS STORAGE COMPANY, INC.,

16 Defendant.

17 - - - - - x

18 U.S. Bankruptcy Court

19 One Bowling Green

20 New York, New York

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22 January 16, 2013

23 11:23 AM

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1 Hearing re: Doc. #757 Motion to Approve Debtors Motion for
2 Entry of an Order Pursuant to 11 U.S.C. 105(a) and Fed. R.
3 Bankr. P. 3007 Approving claim Objection Procedures

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5 Hearing re: Doc. #770 Motion to Extend Exclusivity Period
6 for Filing a Chapter 11 Plan and Disclosure

7 Statement/Debtors' Motion to Further Extend Exclusive

8 Periods to File a Plan or Plans of Reorganization and to

9 Solicit Acceptances Thereof

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11 Hearing re: Doc. #12 Motion to Authorize -- Debtors' Motion

12 for Interim and Final Orders (A) Authorizing Debtors to (I)

13 Continue Existing Cash Management System, Bank Accounts, and

14 Business Forms and (II) Continue Ordinary Course

15 Intercompany Transactions; and (B) Granting an Extension of

16 Time to Comply with the Requirements of Section 345(b) of

17 the Bankruptcy Code

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19 Hearing re: Doc. #279 Motion For Relief From Stay Re: Tide

20 Natural Gas I, LP and Tide Natural Gas Storage II, LP

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22 Hearing re: Adversary proceeding: 12-01662-shl Hopper v.

23 Falcon Gas Storage Company, Inc. Status Conference

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25 Hearing re: Doc. #11 Motion to Approve/Falcons Motion for

1 Leave to File Counterclaim and Third Party Claims

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P R O C E E D I N G S

THE COURT: Arcapita Bank B.S.C.

(Pause)

THE COURT: So let's get appearances first.

MR. ROSENTHAL: Good morning, Your Honor, Michael Rosenthal of Gibson, Dunn & Crutcher with Craig Millet and Josh Weisser, who will be here momentarily, on behalf of the debtors.

THE COURT: All right.

MR. FLECK: Good morning, Your Honor, Evan Fleck of Milbank, Tweed, Hadley & McCloy on behalf of official committee of unsecured creditors.

MR. WOOD: Good morning, Your Honor, my name is Trey Wood, I represent Tide Natural Gas Storage I Limited Partner and Tide Natural Gas Storage II Limited Partnership. We have a motion to lift stay that's separate today.

THE COURT: All right.

MR. ZDUNKEWICZ: Good morning, Your Honor, David Zdunkewicz with Andrews Kurth for the Hopper Parties.

THE COURT: All right.

MR. VAN TOL: Your Honor, good morning, Pieter Van Tol from Hogan Lovells for the punitive defendant, HSBC.

MS. HERTHER-SPIRO: Nicole Herther-Spiro, Dechert LLP for Standard Chartered Bank.

THE COURT: All right. All right, I think that's

1 everyone.

2 MR. ROSENTHAL: Your Honor, I resisted at the last
3 hearing giving you an update about the case, but I can't
4 resist -- I can't resist this time.

5 THE COURT: All right.

6 MR. ROSENTHAL: A couple points.

7 First, I wanted to let you know the DIP financing
8 is fully funded and closed. As you recall, it was
9 originally -- we had authority to borrow \$150 million, but
10 there was -- \$25 million of it was subject to some further
11 confirmatory due diligence from Fortress. So they did their
12 confirmatory due diligence and that additional amount was
13 funded on Monday.

14 THE COURT: All right.

15 MR. ROSENTHAL: So we have access to the full
16 150-.

17 You'll also remember that there was an agreement
18 that we had to transfer certain assets back to AIHL and if
19 we didn't there would have been a \$250,000 fee payable to
20 Fortress. We were able to transfer those assets back and we
21 did not have to pay the fee.

22 THE COURT: All right.

23 MR. ROSENTHAL: On the -- you also remember that
24 before the end of the year you approved a sale of our senior
25 living facilities in the UK, the Sunrise -- so-called

1 Sunrise sale. That sale has closed and we received proceeds
2 of approximately \$36 million. Those proceeds under the DIP
3 were -- were required prepayment. So they came in and they
4 repaid the DIP on -- on Monday.

5 THE COURT: All right.

6 MR. ROSENTHAL: You'll remember that we have
7 \$35 million tied up with placement banks. Well, the bad
8 news is that we haven't been successful in accessing all of
9 the placement cash. The good news is that we were able to
10 get a small piece of it, \$1.4 million back from one of the
11 banks, Ted Hammond Capital. Still working on the rest.

12 You've heard the saga about plan negotiations
13 ongoing, full blown. We can talk about that more.

14 We continue to be careful about our cash. As of
15 January 5th we had about \$148 million of cash on hand.
16 After you -- we applied the Sunrise proceeds to the DIP and
17 we added to our cash the funding from the final \$25 million
18 I think we have something in the neighborhood of
19 \$139 million -- \$138 million as we -- as we sit here today.

20 In terms of variances from our actual to budgeted
21 we are running about -- a favorable variance of about
22 \$71 million from the inception of the case.

23 So that's sort of a short -- short analysis.

24 Now, we have a number of things on the docket
25 today. What I would suggest is that we take up exclusivity

1 first.

2 THE COURT: All right.

3 MR. ROSENTHAL: As you know, Your Honor, we were
4 here on the 9th seeking an extension until the 14th and we
5 had a discussion with the Court, we had a discussion in
6 court about whether that was sufficient time, and the
7 parties at that time were suggesting that a further
8 extension may be advisable. We kicked around a date of -- I
9 think it was the 23rd.

10 Ultimately we did, you know, have some further
11 discussions and we agreed that an extension until
12 September 28th -- September 28th -- January 28th was a more
13 appropriate date. I'm not being -- trying to be optimistic
14 here. January 28th.

15 And so we filed a motion on Friday, the Court
16 entered a bridge order extending exclusivity until today.

17 I'm not aware of any parties that have objected to
18 the extension. The UCC supports the extension. The ad hoc
19 group supports the extension. The ad hoc group has agreed
20 that their -- that the date by which we would have to
21 cleanse them of any material non-public information will be
22 extended until the 28th as well.

23 THE COURT: All right.

24 MR. ROSENTHAL: So there are no questions there.

25 As I said at the prior hearing, Your Honor, the

1 debtors are ready, willing, and able, you know, right this
2 minute file a Chapter 11 plan, but at the same time we think
3 that it's beneficial to have input from the unsecured
4 creditors' committee and from the ad hoc group, if possible,
5 about the potential splits.

6 And while we've tried to incorporate what we think
7 is a reasonable resolution of the allocation issues and the
8 various compromises, it -- we'd like, if possible, to have
9 further input from the UCC.

10 As you know the UCC itself is in discussions, they
11 haven't yet reached an internal consensus about what would
12 be an acceptable allocation, but they -- those discussions
13 are ongoing daily I am told.

14 So we believe that there is sufficient cause that
15 has been shown to extend exclusivity, an extension is in the
16 best interest of the estates, there's no intent to delay
17 creditors. In fact, as you know, the committee and the ad
18 hoc group supports the extension. And this enables the
19 debtors to be able to file a more informed plan, we believe,
20 by the 28th.

21 THE COURT: All right. Anyone wish to be heard on
22 this request for an extension of exclusivity?

23 MR. FLECK: Your Honor, Evan Fleck once again on
24 behalf of official creditors' committee.

25 On behalf of the committee I agree with everything

1 that Mr. Rosenthal said, and my partner, Mr. Dunn, was here
2 at the prior hearing and gave the Court hopefully some
3 helpful color on the deliberations that are taking place at
4 the committee level as well as at the ad hoc group. In fact
5 there is a call with the committee members that is beginning
6 -- began two minutes ago, so it is a very active dialogue,
7 people understand that a lot of time and money that is being
8 used to facilitate these discussions, but we think that
9 they're important and that is why we support the request.

10 I'd also note that the committee is in discussions
11 with Standard Chartered Bank as well, we think that's an
12 important component of the creditors' support for the plan,
13 and together with the debtors, we have been having a
14 constructive dialogue with Standard Chartered Bank as well.

15 THE COURT: All right.

16 MR. FLECK: I'd be happy to answer any questions
17 the Court has.

18 THE COURT: No, that's fine. Thank you.

19 MR. FLECK: Thank you, Your Honor.

20 THE COURT: Anyone else wish to be heard?

21 All right, based on what I have before me in the
22 papers and equally, if not more so, the discussion we had at
23 the last hearing about where things were, which was I think
24 very informative and fulsome, I will grant the request to
25 extend the exclusive periods for cause under Section 11

1 U.S.C. 1121(d).

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

3 We will -- I think we have a hard copy of the
4 order, but we also have it on disk.

5 THE COURT: All right.

6 MR. ROSENTHAL: Now, I'd like to -- I think we
7 should turn our attention to the claim objection procedures
8 motion.

9 THE COURT: All right.

10 MR. ROSENTHAL: And I'm going turn the podium over
11 to my colleague, Josh Weisser.

12 MR. WEISSER: Good morning, Your Honor, Josh
13 Weisser, Gibson, Dunn & Crutcher on behalf of the debtors.

14 As my colleague, Mr. Rosenthal mentioned, the next
15 thing up for hearing is the motion for a claims objection
16 procedures, I think it's number 1 on your agenda.

17 The purpose of this I would hope is pretty
18 straightforward. It's just to establish some additional
19 procedures for -- that will govern the claims administration
20 process and be in addition to the things that are set forth
21 in Bankruptcy Rule 3007.

22 The rationale is simply the claims pool. We've
23 looked at the claims pool, there's over 550 claims or proofs
24 of claim, and I think they're asserting approximately
25 \$6 billion in claim amount. And having looked at that claim

1 pool and how we categorize different potential objections
2 we've looked at, you know, what potential categories we
3 like. I think we set forth as additional permitted
4 categories, which is probably the first of the two main
5 components of our motion.

6 The first would be that it's the additional
7 permitted categories. There are approximately ten I think
8 categories in the order which we think that we would
9 potentially be objecting to claims on an omnibus basis.

10 The second key component is notice. Rather than
11 provide a copy of the full objection to every claimant we
12 would propose to be providing them with just a simple notice
13 that's been attached to our order or substantially in that
14 form, potentially a little bit more individualized. We'd
15 let every creditor know their -- you know, give them a
16 warning by saying your creditor name or your identification
17 number, claim number, amount, classification, provide people
18 with a sense of the process itself and any important dates
19 that would apply to their particular claim in that
20 objection.

21 So other than that we would like to adhere to
22 3007.

23 THE COURT: All right.

24 MR. WEISSER: The committee has reviewed the
25 proposed form of order. Monday we submitted a notice with

1 the revised order attached. I believe that reflects all of
2 the committees' comments. Their comments are primarily two.
3 I can walk through the proposed changes.

4 THE COURT: Yeah, that would be helpful.

5 MR. WEISSER: Okay. There are two basic changes I
6 guess, and Mr. Fleck can maybe disagree by the first if he'd
7 like to or chime in.

8 The first is in a number of different categories
9 -- or paragraphs initially we simply provided that the
10 debtors had the ability to object on an omnibus basis for
11 these reasons, or they pertained to how the debtors would
12 handle the claims administration process.

13 The committees' comments were also -- also wanted
14 to confirm that other parties in interest were also included
15 in those procedures. We believe that this is consistent
16 with 502 and 3007.

17 Their second change was more of a confirmation
18 also, and it just said that they confirmed that normal
19 discovery rules and normal burdens of proof still applied to
20 the actual process itself.

21 THE COURT: All right.

22 MR. WEISSER: And with that we believe that the
23 committee supports entry of this motion and we would ask
24 that Your Honor approve it.

25 THE COURT: All right. Anyone wish to be heard in

1 connection with the claims objection procedures motion?

2 All right. Yes, I always obviously take a look at
3 this and would have a different reaction if in fact it
4 changed any of the burdens of proof or things of that sort,
5 but I understand it to be a procedural mechanism for teeing
6 these things up in a sensible way and efficient way.

7 So with that I will grant the request for claims
8 objection procedures here.

9 MR. WEISSER: Thank you, Your Honor.

10 THE COURT: Thank you.

11 MR. WEISSER: With that I'll turn it back over to
12 Mr. Rosenthal to address cash management.

13 MR. ROSENTHAL: Your Honor, if you'd turn to the
14 cash management issues. We're here today on another interim
15 cash management order.

16 As with all of them before we think we have an
17 agreement on the cash management issues. We've submitted a
18 budget. There are -- there are two points I want to
19 highlight for the Court.

20 One is that this budget includes -- if you look at
21 deal funding -- includes deal funding for a project called
22 Honinton (ph), one of our portfolio companies. The deal
23 funding for this project was previously approved by the
24 committee in a prior budget, but the money was never spent.
25 I think it was \$1.3 million that was previously approved.

1 Our agreement with the committee is that we can spend that
2 \$1.3 million without any further consultation, but the
3 payments in excess of that amount -- and there are -- there
4 is an amount in excess of that in this budget -- cannot be
5 spent without further committee approval or further Court
6 order.

7 And then if you -- the budget includes a large
8 line item for, you know, in the many millions of dollars, I
9 think it's somewhere close to ten, for the costs of -- the
10 fees incurred in the Euro Log IPO, that as you know was
11 withdrawn, and we have that whole history about -- of those
12 fees.

13 Although in this budget we've agreed with the
14 committee that those would not be paid unless we have
15 committee approval or again a further order of this Court.

16 Now, we have been in active discussions with the
17 committee on these fees, which are owed to a number of
18 professionals. They're not debtor professionals so they're
19 not subject to fee applications, but they're -- they're at
20 subsidiary levels, and of course the Euro Log assets,
21 ultimately the value of those assets flows up to the
22 debtors.

23 And while we hope to received committee approval
24 for payment of some or all of those fees we're not sure if
25 that will be forthcoming.

1 So what I would like to do is what we've done in
2 the past, which is I don't think we're going to be able to
3 bring this for hearing if this is unresolved at the next
4 omnibus, which is February 20th. What I'd like to shoot for
5 is that we would bring it for hearing on any fees that are
6 unresolved at the March omnibus. I'm not even sure the
7 Court has set a March omnibus, but we would expect it to be
8 set mid to late March.

9 I think the best course of action is that we spend
10 the next couple of weeks not litigating but continuing our
11 discussions with the committee, and at the same time we can
12 negotiate with the committee a scheduling order so that if
13 litigation has to proceed we can -- we can -- we have an
14 orderly process for that with a goal that things would
15 either be resolved by the March omnibus hearing or
16 unresolved matters could be presented to the Court at the
17 March omnibus.

18 THE COURT: All right. That sounds like a
19 sensible way to proceed.

20 So you figure the discussions will essentially
21 probably take place for another three or four weeks and then
22 you'll have the schedule set for briefing after that time to
23 tee up for the March hearing.

24 MR. ROSENTHAL: Yes, Your Honor. And what I don't
25 want, is I think it's an enormous waste of time for everyone

1 to, you know, immediately go into a litigation mode when --
2 we've kicked around some solutions, they're not finalized,
3 but we've kicked some solutions, and if we can let them -- I
4 heard the word marinade in a call this morning -- so if we
5 let that marinade for a little while maybe we can come to a
6 conclusion.

7 THE COURT: All right. Certainly I found that
8 procedure has worked well here either to resolve matters or
9 sometimes to narrow them significantly, which is also
10 helpful. So it's always helpful when judges get the benefit
11 of the narrowing before the pleadings are filed as opposed
12 to having pleadings filed and then people show up and say,
13 well, we have a slightly different circumstance, and so it's
14 always helpful for me if that's done in advance.

15 So I'm happy to sign onto a schedule that allows
16 you all to do what you need to do.

17 MR. ROSENTHAL: Fine, Your Honor. And based on
18 that we'd propose the cash management order be entered again
19 as another interim order.

20 THE COURT: All right. Anyone wish to be heard on
21 the cash management order?

22 MR. FLECK: Very briefly, Your Honor. Evan Fleck
23 on behalf of the official committee.

24 I agree with what Mr. Rosenthal said. The
25 committee is fine with the approach.

1 On the IPO related fees I do think we need -- we
2 need more time. I think the debtors -- the debtors have
3 given thought to ways to come up with an appropriate
4 proposal to the committee. The committee -- I think we
5 received the -- notwithstanding the fact that the IPO was
6 pulled some time in November -- just this past Thursday or
7 Friday we got the numbers and so we have some diligence
8 requests, and -- but we do hope, as we did in the last round
9 with Linklaters on the same issue or very similar issue, we
10 hope to get to a resolution, if not the approach that
11 Mr. Rosenthal set out and that I think Your Honor thought
12 was appropriate, we agree that it's sensible, and we're
13 happy to sign onto that.

14 THE COURT: All right. Thank you. Anyone else
15 wish to be heard on cash management?

16 All right, I'm happy to approve the next interim.
17 I don't remember which number it is.

18 MR. ROSENTHAL: I think it's twelfth.

19 THE COURT: Twelfth interim, and I think pretty
20 soon you will have set the record, if you have not already.
21 Thank you.

22 MR. ROSENTHAL: Thank you, Your Honor. And now
23 I'll turn it over to Craig Millet for the Tide, Falcon,
24 Hopper litigation.

25 THE COURT: All right. Let me just share a couple

1 of thoughts after reading the papers that maybe can help
2 focus people on -- in their presentation.

3 I had read a while back and took a look again at
4 the decisions that were issued by the District Court and I
5 think I have a -- the parties did a very good job of
6 explaining exactly factually what's here in front of me and
7 how the different parties of interest interrelate, suffice
8 it to say I think that we really are talking about Falcon,
9 Tide, and Topper. I think that HSBC did a fairly persuasive
10 job of saying it's not our problem, and I wasn't surprised
11 to see that either.

12 I have a couple of thoughts. Certainly there is a
13 subordination issue as to how you would consider various
14 claims in a bankruptcy forum. But separate and apart from
15 that you have the issue of what is the claim? Is there a
16 claim -- right now there isn't a claim, there's a lawsuit.

17 It seemed pretty clear from my reading of the
18 District Court's opinion the District Court has spent a
19 significant amount of time parsing through this -- these
20 issues, both the causes of action, the particular causes of
21 action, the pleadings and what their allegations are, as
22 well as additional facts and summary judgments for other
23 issues, particularly the escrows and the conditions of the
24 escrows and various things like that. And I couldn't help
25 but notice that some of those things sort of end up creeping

1 into the papers that I have in front of me. Which raises an
2 interesting question.

3 If things went in front of me am I trying to
4 channel the District Court and the conclusions its made thus
5 far as to these issues? That's a bit of a -- sort of a red
6 herring in the sense it's just to demonstrate my concern
7 about litigating the issues the District Court has a firm
8 hand on here. It's not to say that things wouldn't come
9 back here for the core bankruptcy issues about subordination
10 if you get to that. I can certainly see that and I can
11 imagine that -- that the district judge would be not
12 particularly enthused about weighing in on subordination.

13 But my initial impression, I got to tell you, is
14 to let the district judge do her job and for me to do my
15 job.

16 Originally when this was all teed up in the summer
17 I understood that the concern was we're not there yet, we
18 need the classic stay argument, we should wait, and that I
19 thought was very persuasive.

20 Certainly the plan is coming around the corner any
21 day now in light of discussions and the serious progress
22 that's been made, and the escrow is really the -- seems to
23 be the big asset of the Falcon debtors.

24 So somebody has got to figure out whether this
25 asset does belong to the debtor or whether it belongs to

1 somebody else, and if so, who has what priority to whoever.

2 So it no longer seems to be an issue, and people
3 can correct me if I'm wrong, that we should wait in the
4 classic bankruptcy situation saying we should wait because
5 we're not there yet, but rather it seems to be where should
6 we do this?

7 But I do have a great concern about jumping into a
8 litigation in progress in front of a District Court that has
9 issued not one, but two different opinions that are -- I
10 mean the reconsideration is a fairly short opinion, but the
11 fact that you got a reconsideration decision at all, given
12 what the standards for reconsideration says something about
13 the District Court's thoughtful approach to the issues.

14 So that's my reaction after reading the papers is
15 that -- and I just wanted to be candid about where I was
16 coming from so parties can address my issues in their
17 presentations -- is that, you know, why doesn't the District
18 Court resolve the underlying disputed issues, that is the
19 claims of Tide with the understanding that Hopper would
20 essentially have a motion to intervene would no longer be
21 opposed, because I don't think you can have it both ways,
22 and then come back to decide the competing issues of the
23 stakeholders and issues of subordination after there's any
24 sort of judgment, but before any funds have been released.

25 So that's my initial inclination here. And so

1 with that I'd appreciate any enlightenment, including people
2 telling me that I've got it horribly wrong.

3 MR. MILLET: Very well, Your Honor. For the
4 record, Craig Millet for the Falcon debtor.

5 And yes, Your Honor, I'm prepared to address
6 exactly that, because what we're proposing here is not that
7 this Court necessarily take up or take over the liquidation
8 or the allowance of the claim itself, which may be pending
9 in front of the District Court, but that there are clearly
10 important bankruptcy issues that really this Court only can
11 decide, and those should be decided first before we get to
12 those other merits issues as to the fraud claim for several
13 reasons.

14 One, the most important of which is under some of
15 the authority that we've cited in our papers, that if this
16 claim is in fact subordinated and in fact super-
17 subordinated, if you will, under the U.S.A. Diversified
18 Capital decision that we cited, then there is no need, there
19 will be no need to liquidate the claim, there will be no
20 need for the District Court proceeding at all, or for any
21 reason to have the amount of the claim determined.

22 We clearly have the subordination issue as the
23 Court mentioned, we have the property of the estate issue,
24 those are intertwined, and we also have Tide asserting by
25 filing a proof of claim a secured claim as to that

1 \$70 million, but in the District Court telling the District
2 Court it didn't assert a lien.

3 So now we also have the core issue of this Court
4 determining the nature and extent of the lien that Tide
5 claims.

6 THE COURT: Right. Well, I understand, and that's
7 why I sort of separated the two issues. And I guess in your
8 view the subordination issue would resolve -- or not would
9 resolve, but as a practical matter might go a long way
10 towards resolving or actually resolve everything else in
11 litigation.

12 But I guess the other view one could say is, well,
13 if the District Court finds that Tide has no claim then Tide
14 has no claim. In other words, it rejects -- I mean all it
15 had before on that front was a complaint, and looked at
16 12(b)(6) classic, what's been alleged, has it been properly
17 alleged? Trombley, Iqbal, legal form of particularity it's
18 the sort of standard drill and it's not -- it's not a --
19 it's not a judgment on what's going to happen when folks put
20 their evidence up, it's a judgment on what does the
21 complaint say and how good a set of lawyers do people have
22 in drafting complaints and recognizing what their
23 requirements are.

24 So -- but certainly if that -- if those issues are
25 resolved in a way putting aside the escrow, but if the

1 claims are rejected then I mean it's another way for this
2 whole thing to go away, so.

3 MR. MILLET: Perhaps, Your Honor, but that's
4 something that is going to be 12 months, 24 months down the
5 road after the expenditure of a tremendous amount of money
6 considering the discovery that needs to be done that has not
7 even been commenced, and we're not going to know the result
8 of that for a long time. And that doesn't really make the
9 subordination go away. Because whether or not the
10 subordination claims and the other claims we've requested be
11 added to the Hopper case or whether they're filed in a
12 separate adversary action, which we could have done and I
13 guess still could do, they're going come to this Court
14 because we need to get this resolved for our plan. Our plan
15 provides for the super-subordination of the claim. It
16 provides for dealing with the security interest. And we
17 want to get those issues resolved.

18 This Court can deal with those issues without
19 having to get into the merits of the fraud claim, because
20 the allegation here is that whether or not there is a fraud,
21 assuming in fact that fraud is even proven, is this property
22 property of the estate? And that can be determined, we
23 assert and we will prove in our case based the undisputed
24 facts in the case, the occurrence of the escrow breakage
25 trigger and the contents of undisputed agreements, which are

1 -- the interpretation of which is a question of law for this
2 Court.

3 THE COURT: Well, go back to what you just said,
4 you were talking about the escrow circumstance. Are you
5 saying that it has to do with whether those conditions have
6 been satisfied?

7 Again, I'm concerned about the blurring of some of
8 the -- some of the lines and the circumstances to which I'm
9 asked to sort of channel what the District Court may or may
10 not have been thinking.

11 Certainly there is a request to the District Court
12 to release the escrow, so there was a -- there was a motion
13 made -- and I forget exactly the title of it.

14 MR. MILLET: There were several. There was a
15 motion for judgment on the pleading. They're all pleadings
16 based motions.

17 THE COURT: Right. But there was I think
18 originally a motion that said Tide -- a summary judgment
19 motion saying Tide wasn't entitled to a permanent injunction
20 against release of the escrowed funds and then Tide cross-
21 moved for an attachment.

22 So the District Court has already opined about
23 release of the escrow in connection with the other
24 allegations of the complaint.

25 So to the extent that -- and this is one of my

1 concerns -- is what is the argument that you're asking me to
2 look at in connection with the escrow issues? How does it
3 relate, if at all, to what's been in front of the District
4 Court and the District Court's pronouncements? Am I going
5 to run into those? Because it's -- it's a bit of an awkward
6 dance in that context, because there hasn't been any ruling
7 on the merits, but there certainly have been rulings on the
8 litigation, and I don't think one thing, you know, no court
9 wants is to sort of start just doing these things over and
10 over and over again, it doesn't benefit anybody. So how do
11 those two relate?

12 MR. MILLET: I understand, Your Honor. And all
13 the District Court got into was whether or not at that point
14 Tide could force by essentially a mandatory injunction at
15 that point to sign the escrow instruction and instruct HSBC
16 to release the funds. Even the District Court cited to New
17 York and said, normally when you have a fulfilled escrow the
18 Court is not inclined to get into the issues here.

19 Here we have the escrow breakage trigger event
20 occurring, everyone agrees that, so we have to look to see
21 if there's some reason to hold this up.

22 And the Court wasn't making a decision as to
23 whether or not this is property of the estate or whether or
24 not it should be released, but simply said I'm not prepared
25 at this juncture to say that Tide can be forced by an order

1 to go give the instruction to HSBC that it claims that it's
2 excused from giving. This is strictly a release condition,
3 not an ownership condition. The Court did not get into look
4 into whether or not this is property of the estate.

5 And we're not asking this Court to make some
6 ruling releasing the property necessarily. We'd like to see
7 it out of HSBC because we're no longer getting interest and
8 we're paying attorneys' fees which is hurting everybody in
9 this case and that's a new event.

10 THE COURT: Well, I'm sure HSBC would probably be
11 happy to get out of the middle of this.

12 MR. MILLET: Sure, and we'd be fine with that.

13 THE COURT: There may be, separate and apart from
14 this, but I'll mention it now so I don't forget, there may
15 be a way that all parties can work out a condition for how
16 the funds should be held that may be more advantageous to
17 all stakeholders, but I'll leave that to you all to think
18 about.

19 MR. MILLET: But there's nothing in the District
20 Court opinion that reaches issues of ownership, it strictly
21 has do with disposition or a release of it. In fact it
22 appears that the District Court, and even for that matter
23 Tide, was presuming that at that point the property was
24 owned by Falcon, but that Tide said, I want to get it back,
25 I'm entitled to have my ownership revested in me if I prove

1 fraud. Well, that may or may not have worked under state
2 law, but bankruptcy law has now intervened and have changed
3 the way things work here since that District Court ruling on
4 property of the estate issues and subordination issues and
5 whether or not liens exist are different now that we have
6 bankruptcy law interposed here.

7 And therefore, the decision that this Court will
8 have to make is even if fraud is proven, even assuming it's
9 proven, based upon what has occurred, that is undisputed,
10 and based upon the undisputed language of two agreements, is
11 this property of the estate?

12 And then second, assuming it is, assuming the
13 Court reaches that decision, does fraud change that? Does
14 fraud mean that somehow title can be revested and passed
15 back to Tide in that event?

16 We submit that based upon the pleadings and what
17 Tide itself has admitted that we'll be able to show that
18 this property is the property of Tide and -- pardon me -- of
19 Falcon -- very careful -- of Falcon, and also then that the
20 claim should be subordinated.

21 Now, if we get to the super-subordination we're
22 talking about this can be decided on a summary judgment
23 issue by the Court reading the cases and looking at the
24 facts and it'll decide what it decides, but it won't take
25 very long to do that and it won't be very expensive to do

1 that.

2 If that does result in the ruling that Falcon
3 seeks then we'll avoid that very expensive litigation and
4 all that discovery and the many, many witnesses and the
5 documents that we're talking about producing and eDiscovery
6 and everything that's going to cost both Tide and Falcon a
7 great deal of money, and in the meantime Falcon's property
8 is tied up in this HSBC escrow so it's going to have
9 difficulty paying its administrative expenses, including
10 paying for its defense of the case.

11 If we go the cheap route, the quick route, and at
12 least determine whether or not we have subordination and to
13 what level, including super-subordination -- and that
14 intertwines with the property of the estate arguments -- and
15 then also the lien issues, and the Court at least make it is
16 preliminary decision on that, we may be able to avoid the
17 necessary expense of litigation that would otherwise occur
18 in the District Court and get that done quickly.

19 THE COURT: So in your view the subordination
20 issues do not -- would not run into the merits of the
21 underlying District Court case? I'll use that as a -- sort
22 of a shorthand for the merits of Tide's claim that -- sort
23 of fill in the blank for everything that's in there.

24 Because my concern is that when I hear the
25 explanation I'm still not sure where the dividing line is.

1 Because we started out talking about subordination. Saying,
2 well, even if this, that, and the other thing it still goes
3 to the Bankruptcy Court and then we sort of begin to segway
4 into conditions for release of the escrow and things that
5 sound a little like merits arguments.

6 So if you could give me maybe a little more of a
7 road map as to why or how these things don't -- wouldn't in
8 your mind intersect if the subordination issue moves forward
9 here in the Bankruptcy Court.

10 MR. MILLET: Under 510(b), Your Honor, we think
11 it's pretty clear that we have a claim arising as a result
12 of the purchase of membership interest of an affiliate of
13 the debtor.

14 Looking at 510(b) and simply applying that to the
15 clear facts of where this claim came from without regard to
16 whether the claim is based on fraud, a contract, or
17 whatever, it's a claim for damages based upon purchase of a
18 security, here in this case these membership interests,
19 that's to be subordinated under 510(b).

20 THE COURT: And subordinated here to whom?

21 MR. MILLET: To all other interests in the case,
22 including those even equal to the Tide claim under the
23 U.S.A. Diversified case.

24 THE COURT: And who is that here?

25 MR. MILLET: That here would be all other claims

1 including Hopper, the Thromson (ph) claims, the tax claims,
2 the employee claims, the general unsecured claims, and even
3 the equity claim that is held by Arcapita itself in Tide --
4 or pardon me -- in Falcon. Excuse me, Your Honor.

5 THE COURT: And that's what you're relying on
6 Diversified --

7 MR. MILLET: Right.

8 THE COURT: -- the Diversified decision for.

9 MR. MILLET: Relying on the Diversified case for
10 that point. So --

11 THE COURT: So does it -- so it doesn't matter --
12 you're telling me for your analysis it doesn't matter, I
13 don't have to parse the validity of any of those claims,
14 vis-à-vis, Hopper, Tide, I can just simply say that they --
15 that it's subordinated and therefore that's the end of the
16 issue?

17 MR. MILLET: Well, that's certainly --

18 THE COURT: Because I mean my concern is when you
19 say it's subordinated to other claims am I going to run into
20 an issue where folks are going to say, well, those claims in
21 fact are contested and they're contested on the basis of the
22 allegations and the lawsuit in District Court and therefore
23 you can't have a subordination because it presumes the
24 validity of these claims, i.e., presumes that Falcon has the
25 ownership interest, that Hopper has the ownership interest,

1 and that's exactly what's contested?

2 MR. MILLET: The ownership of the common stock of
3 Falcon, (indiscernible - 01:44:27) Arcapita is not disputed,
4 it's not at issue in the -- in the District Court case,
5 Hopper's settlement and its right to be paid is not at issue
6 in the District Court case. So those are not disputed.

7 THE COURT: Well, it's not yet, but they've sought
8 so intervene presumably to put in there word as to -- as to
9 their interest that -- but their interest, as I understand
10 it, and people will correct me if I'm wrong -- presupposes
11 that the money should stay with Falcon because it's
12 essentially saying the money should stay with Falcon and
13 then Falcon gave it to us, this all happened prepetition and
14 therefore it was all valid and therefore it presupposes that
15 Falcon is entitled to the money.

16 MR. MILLET: Hopper's claim, vis-à-vis, the
17 debtor, is not in dispute in that case. The only thing that
18 would be in dispute is whether Hopper can satisfy that claim
19 by taking a piece of the escrowed money, because it contends
20 that it was absolutely transferred, that piece, if you will,
21 prepetition. We don't dispute Hopper's claim, we do dispute
22 that the actual --

23 THE COURT: Right.

24 MR. MILLET: -- piece was transferred.

25 THE COURT: No, I guess the issue more then is it

1 presupposes Falcon's legitimate right to those funds
2 prepetition, right, and isn't that -- I don't -- again, this
3 is where it becomes a little difficult. I've read the
4 decision of the District Court, I've read both decisions, I
5 have not parsed through the District Court complaint to know
6 what exact legal theories there are or aren't about the
7 escrow and who -- who's -- whether it's seeking damages,
8 whether it's saying those monies never vested in Falcon,
9 whether -- because that involves -- you get dragged into --
10 I'm concerned about being dragged into the merits of what
11 the escrow says and this, that, and the other thing, and I
12 find myself right back to what the District Court has
13 already spent some time trying to figure out, which is what
14 the escrow is and how it operates and who has rights to
15 these funds and what state it existed in. It's almost like
16 -- what is it, Schrodinger's cat, you know, where does it
17 exist in space time at the time of the petition? And so
18 that's what I'm concerned about.

19 If the argument, the subordination argument
20 presupposes a result on that question and that question is
21 in front of the District Court -- and again, I haven't -- I
22 will not profess to have parsed the District Court complaint
23 so as to understand all the theories on whether this is
24 implicated or not -- but that's my concern.

25 MR. MILLET: And, Your Honor, if the District

1 Court does even make a ruling on this issue as to whether or
2 not the escrow has been (indiscernible - 01:47:08) for
3 release purposes that will not solve the ownership issue.
4 The ownership or title to those properties is still a
5 separate issue that's before this Court.

6 And in essence what we're trying to do is get a
7 chance to present those issues to this Court, we think we
8 can do it fast as a matter of law, we can tee it up as
9 quickly as Tide will allow, and at least get a shot at this
10 Court having a chance to look at those and either decide can
11 I rule on these as a matter of law and based upon the facts
12 before me or do I need to get too involved in the District
13 Court proceeding?

14 Staying this -- or continuing the stay for a short
15 period of time longer while this Court gets at least a
16 chance to have a preliminary look at those issues is really
17 all we're trying to do. Because we believe by putting this
18 before the Court and fully briefing it, as a matter of law
19 ,that we can cause the Court to see our point of view here
20 and that we can resolve these issues based upon
21 subordination and other issues, notwithstanding the merits
22 of the fraud claim and have them resolved here.

23 That short continuance of the stay at this point,
24 considering how long the case has been stayed, it was filed
25 over two years ago, and the fact that it's going to be very

1 expensive to pursue that case to the debtor and all the
2 parties is unbalanced. Not asking very much. And this
3 Court still would have to deal with subordination,
4 notwithstanding whatever happens over there in the District
5 Court, at least soon, because we're not going to be able to
6 wait for the two years or whatever for that litigation to go
7 on. We would either in the Hopper case, pursuant to our
8 motion for leave to file the third-party claim, or in the
9 separate adversary action, want to tee those claims up
10 before this Court.

11 THE COURT: Well, this may jump the gun a little
12 bit in terms of plan discussions, but Falcon seems to be in
13 its own sort of unique circumstances. Is the Falcon plan
14 bundled up in a way that it's part -- it has to be resolved
15 at the same time all these other plans do?

16 I mean I had been led to believe by the papers,
17 and people can correct me if I'm wrong, that really this is
18 the big asset, although there is a claim I guess that --
19 that Arcapita -- that this debtor has against Arcapita -- I
20 can't remember if it's Arcapita or Arcapita Bank -- and
21 that's the other asset, but that there's no employees,
22 there's no issues, there aren't really a whole lot of claims
23 -- there's some back and forth on that -- but that this is a
24 bit of a stand-alone entity. So -- so what can you tell me
25 about that?

1 MR. MILLET: It is intertwined, Your Honor, it is
2 in the same plan, it's part and parcel of the same plan, and
3 there is -- there are separate claims filed by Tide against
4 Arcapita Bank in which they assert \$120 million claim,
5 70 million of which is secured they say as to Arcapita. So
6 we still have that wrapped up in the Arcapita Bank case as
7 well. So that is tied. And so that's one reason we do need
8 to get these issues resolved, and as I suggested, we believe
9 that we can do it fairly quickly on motions. And if the
10 Court looks at those motions and says I can't do it --

11 THE COURT: Well, but if that issue has to get
12 resolved any -- and how is that issue going to get resolved
13 against Arcapita? On the same subordination basis?

14 MR. MILLET: Because we can show that there is no
15 secured claim here pretty easily for one reason, Your Honor,
16 and at least it relegates it to an unsecured claim if there
17 is any claim as to Arcapita Bank.

18 So --but we think if the Court were to look at
19 this and it were to say, okay, I do need to get into the
20 underlying merits of the fraud case or whatever and
21 therefore I'm not going to do that right now, fine, then it
22 can grant relief from stay and we can let that proceed and
23 go forward, but at least with some parameters or some idea
24 of what the District Court is supposed to do.

25 Because the District Court, even if it does

1 liquidate the claim, is not supposed to be deciding issues
2 of ownership of title. This Court may then take whatever
3 the District Court finds --

4 THE COURT: No, I understand that, and that's why
5 I'm not -- I'm not supposing that all of these issues would
6 go to the District Court, because the District Court
7 wouldn't want all of them frankly, and so subordination is
8 certainly not something that the District Court would have
9 in front of it. It doesn't have -- I mean you only lift the
10 stay as to what's in front of the District Court, and the
11 District Court doesn't have some of these issues in front of
12 it. So I'm not supposing that.

13 MR. MILLET: But Tide says it does.

14 THE COURT: What I'm trying to figure out is there
15 times when it's appropriate to allow something to get --
16 essentially to go to a judgment where a District Court has
17 resolved the merits of something and before any assets go
18 anywhere then you come back to the Bankruptcy Court to
19 figure out, all right, well now this has essentially been
20 liquidated, one, liability has been determined, and two, the
21 amount has been liquidated and now it goes back to the
22 Bankruptcy Court to figure out where this fits in if grand
23 bankruptcy scheme.

24 MR. MILLET: And certainly there are circumstances
25 under which that might be appropriate. This is not one.

1 Because you can go down the 12 Sonax (ph) factors, if you
2 will, and apply those to this case and tick off each one,
3 and each of those merits maintaining the stay why we at
4 least deal with this -- these important bankruptcy issues.

5 Because Tide is saying that if we go the District
6 Court and if the district finds fraud then we own the
7 property. They've combined those two and have those as a
8 complete connected matter; they're not separating them.

9 If this goes back to the District Court now
10 clearly Tide will show to the District Court I have a ruling
11 with the Bankruptcy Court who's agreed with that and has
12 said if you find fraud then Tide owns the estate.

13 THE COURT: Well, no, I'm not --

14 MR. MILLET: And subordination is irrelevant.

15 THE COURT: -- I'm not signing onto that, I'm --
16 my thought is that -- and again, it's sort of a sweat equity
17 where a Court has spent some time and is familiar with the
18 issues, and I certainly have spent some time looking at it,
19 but I won't -- I won't pretend to be as nearly far as
20 advanced as -- I believe Judge Wood has it?

21 MR. MILLET: Correct.

22 THE COURT: So I'm not saying that. I'm saying
23 that it would go to the question of liability and amount on
24 the claim, and then the issue as to what that all means
25 would have to come back to the Bankruptcy Court to parse out

1 consistent with the priority scheme in the Bankruptcy Code.

2 MR. MILLET: Recall, Your Honor, Judge Wood has
3 only dealt with the pleadings and taken them at face value
4 for what they say. She's not gotten into the evidence per
5 say.

6 THE COURT: Well, I know, but there is a
7 substantial analysis set forth in that opinion about
8 everything from securities fraud to common law fraud to
9 (indiscernible - 01:53:13) to various issues that are, you
10 know, right in the District Court's wheel house.

11 So again, I think my answer might be very
12 different if you had a complaint and you had an answer and
13 you didn't have a whole lot going on, which is oftentimes
14 the situation when these things will present themselves to
15 me and there's really no -- no benefit necessarily to
16 sending it back.

17 But -- all right. But I think I understand your
18 argument. But correct me if I'm wrong, certainly a very
19 important part, if not sort of the lynchpin of your
20 argument, is about the subordination issues, and I think I
21 have the benefit of some parties, but not all parties',
22 views about subordination. I don't know that I got a
23 response on that particular issue because of the way the
24 different pleadings went forward.

25 So I think the debtors have given me their view;

1 is that correct? But I'm trying to figure out who else has
2 weighed in on subordination.

3 MR. MILLET: No one has despite the opportunity.
4 We moved to be able to file a third-party claim that raised
5 the subordination issues, Tide did not object to that, did
6 not even address it. I presume that they agree that under
7 510(b) --

8 THE COURT: All right.

9 MR. MILLET: -- there's a major subordination
10 issue and that that has to be dealt with.

11 THE COURT: Well, I think they probably have the
12 view that the whole -- it should go in -- the stay should be
13 lifted and District Court should do what it's doing and
14 therefore we don't even get there, but I may need to hear
15 from them on that, we'll see where we end up.

16 MR. MILLET: Very well, Your Honor.

17 THE COURT: All right. Thank you.

18 All right. And who wants to weigh in next? You
19 can cast lots or dice or --

20 MR. ZDUNKEWICZ: Your Honor, David Zdunkewicz
21 again for the Hopper Parties. I'm not sure how Your Honor
22 wants to take it. We --

23 THE COURT: Well, let me hear from everybody --
24 let me do this. Let me hear from everybody who's on one
25 side and then I'll hear from folks on the other side. So I

1 guess you would be --

2 MR. ZDUNKEWICZ: Thank you.

3 THE COURT: This would be your time.

4 MR. ZDUNKEWICZ: Your Honor, again, David
5 Zdunkewicz with Andres Kurth for the Hopper Parties.

6 You mentioned you haven't read Tide's complaint,
7 but when Your Honor does, and it's Exhibit 2 of Tide's
8 exhibits, they have five claims.

9 The first claim is a fraud and fraud on the
10 inducement claim. For that claim they seek damages,
11 discouragement, and rescission. And rescission of course is
12 specifically mentioned in 510.

13 Their second and third claims are contractual. A
14 breach of warranty and a breach of contract seeking damages
15 and attorneys' fees.

16 Fourth claim is a classic 10(b)(5).

17 The fifth claim is a claim for an injunction.
18 Nowhere in their complaint, Your Honor, and nowhere is there
19 any mention of the money is mine, the money belongs to Tide.
20 It's nowhere in there. So whatever Judge Wood might said or
21 thought in her rulings there was no pleading before her by
22 Tide seeking title or ownership of the funds. So --

23 THE COURT: But seeking the money is an award of
24 damages for its claims.

25 MR. ZDUNKEWICZ: Correct. Absolutely.

1 So I would suggest, Your Honor, not get too tied
2 up in what she said, but you have to look at the claims of
3 Tide. Nowhere in their complaint is there an allegation
4 that that money is mine.

5 And so we agree with the debtor, Your Honor, that
6 the minute the bankruptcies hit in 2012 the money becomes
7 property of the estate.

8 Now, we of course have our claim that well the
9 conditions arose prior to all this so that we think a
10 portion of the money is ours, but the point is, Your Honor,
11 there should be really no dispute.

12 And what I want to I guess get Your Honor's
13 classification a little bit, if I may, if you do lift the
14 stay what is -- what are you lifting it as to? And --

15 THE COURT: I think it would be for a ruling on
16 the liability on the underlying claims filed by Tide so that
17 I know what claim there is with the intervention of the
18 Hopper claims.

19 Because again, I think if you're going to do that
20 you've got to do it. Whether it's here or whether it's in
21 the District Court. And then once that claim has been
22 decided on liability and on damages then to come back and
23 figure out what should be paid where.

24 I think the escrow shouldn't be released if there
25 are arguments about subordination that says that

1 notwithstanding any claim that is now decided on liability
2 and has been liquidated that it still doesn't get paid,
3 first, second, third, whatever it is, because that would
4 violate the Bankruptcy Code, and I think that's clearly --
5 one, it's not even in front of Judge Wood so I don't think
6 she could opine on it given what she has in front of her any
7 way, and two, I think if somebody asked her she would -- she
8 would send you on Broadway and tell you to keep walking
9 until you hit this building and go in there and come up to
10 the 7th floor, because she would say that's not my problem,
11 I have enough problems in life, and I think -- I think that
12 that's how the system would work.

13 So it would -- it would just be as to liability
14 and amount and then it would have to come back here to
15 figure out what the rest of it and how it works in terms of
16 the operation of the Code.

17 MR. ZDUNKEWICZ: Okay. We want to make that very
18 clear. Because I have a feeling, Your Honor, that based
19 upon the pleadings I've seen from Tide thus far they're
20 going to certainly tell Judge Wood that you have the power
21 to say is it our money or --

22 THE COURT: Well, if I do lift the stay it would
23 be on those terms, because I think those are the appropriate
24 terms. And you could say in a world without a bankruptcy,
25 all right, you've won say hypothetically, Tide, you've won,

1 and there are these monies available to satisfy that
2 judgment, and consistent with other law it's appropriate to
3 use those monies that are available to pay the judgment and
4 here's how it all works and that will be fine. But if -- if
5 it is a claim in bankruptcy then it has to be analyzed as
6 part of the Bankruptcy Code as to what that claim is in the
7 priority scheme, how it relates to other claims, and if the
8 money is something that is essentially an asset to satisfy a
9 judgment as opposed to something -- and even if it is,
10 somebody may say, well, the money actually belonged to us
11 before the petition date, certainly the debtors have an
12 interest in it.

13 I mean there are bankruptcy issues to address.
14 And if I sent it on that basis perhaps that doesn't really
15 advance Tide's interest, I don't know, but I don't think
16 that it's appropriate to address the issue of subordination
17 there. I don't think Judge Wood would think it is either.

18 MR. ZDUNKEWICZ: Okay.

19 THE COURT: All right.

20 MR. ZDUNKEWICZ: Thank you, Your Honor.

21 THE COURT: Thank you. All right, anyone else on
22 that side of the issue?

23 All right, so let me turn it over to the folks who
24 are advocating for lifting the stay and opposing the
25 requests to amend the adversary proceeding.

1 MR. WOOD: Thank you, Your Honor. Trey Wood on
2 behalf of the Tide entities. May I proceed?

3 THE COURT: Sure.

4 MR. WOOD: Your Honor, I had a full presentation
5 to address the Sonax factors. In light of the Court's
6 comments, unless you want me to go through those factors, I
7 was going to shortcut it and go directly to the issues
8 presented that the Court has raised.

9 THE COURT: Well, we may get to Sonax at a certain
10 point, but I'd appreciate it if you would address the things
11 we've been chatting about, that would probably be more
12 helpful.

13 MR. WOOD: Happy to do that, Your Honor.

14 I will be referring to some of my exhibits, and so
15 may I approach the Court to give the Court in case --

16 THE COURT: Certainly. I have -- I have the
17 things that were attached to the pleadings in front of me.
18 I actually have Exhibit B-2 open to that, which is the May
19 decision, so, of Judge Wood. So if they're new I'm happy to
20 take them, if not I think I have them.

21 MR. WOOD: Your Honor, there may be some new, so
22 just in case may I approach the bench?

23 THE COURT: All right.

24 MR. WOOD: Thank you, Your Honor.

25 THE COURT: Obviously if there's anything new that

1 other folks haven't seen make sure they've seen this.

2 MR. WOOD: Oh, Your Honor, we exchanged all of
3 this --

4 THE COURT: All right.

5 MR. WOOD: -- on Monday.

6 THE COURT: All right.

7 MR. WOOD: And we received no objection so far.

8 Your Honor, for the record, can I move -- would it
9 be appropriate if I just moved to the admission of those
10 exhibits at this point?

11 THE COURT: Well, is there any objection?

12 MR. MILLET: Well, Your Honor, We really haven't
13 had a chance to review them. A lot of them are simply
14 pleadings, I'm not sure that they're proper to actually
15 admit.

16 MR. WOOD: Your Honor can take judicial notice.

17 MR. MILLET: Is it important that they be actually
18 admitted for evidence for purposes of considering this
19 matter?

20 THE COURT: Well, let me -- let me -- let me see
21 if I can shortcut it if there's no quick answer from the
22 parties.

23 There was an affidavit of service, I don't think
24 it bears on the merits of it.

25 Two is the complaint. I can take judicial notice

1 of the complaint.

2 Three is the answer. I can take judicial notice
3 of the answer.

4 Four is also an answer.

5 A motion to intervene is Exhibit 5. I think all
6 parties have discussed that. And it's a motion and also a
7 complaint and intervention by Falcon Gas Storage.

8 Then there's a Hopper's Parties memorandum of law
9 as part of their motion to intervene.

10 Exhibit 6, I will admit that only to the extent
11 that it is relevant for purposes of the positions a party
12 may have taken in litigation, not for purposes of really
13 considering those arguments on the merits. It's just -- I
14 know there's a distinction there, but it's only relevant to
15 the extent that someone says, well, I took that position
16 with the District Court and someone says, no, you didn't,
17 that's the only reason I care about.

18 MR. MILLET: All of the exhibits are subject, so
19 if that's the condition, Your Honor, then that's fine. We
20 just don't want to have admitted --

21 THE COURT: Yeah. No, I have pleadings in front
22 of me and people can argue what they want to argue here. I
23 don't know that it's relevant, given what I've heard thus
24 far what people have argued, that there's any dispute about
25 what people have argued in front of the District Court such

1 that I would have to resort to pleadings to suss that out,
2 but that's what I'm going to take any pleadings in the
3 District Court in connection with.

4 MR. MILLET: And that's fine, Your Honor.

5 THE COURT: Although I will tell you that I'll
6 probably look first to Judge Wood's first two opinions, and
7 those are in here and obviously I don't think anybody
8 objects to that.

9 So let me just flip through it to see if there's
10 anything that's not of a character that we've already
11 discussed.

12 The rest of them I think are pleadings in this
13 Court, which are pleadings in this Court, and so obviously I
14 have notice of those.

15 The pleading schedule of assets and liabilities.
16 Statement of financial affairs. Periodic reporting, monthly
17 operating statements.

18 And then I have -- I think that dispenses with
19 everything but Exhibit 21, which is a letter from Gibson,
20 Dunn to counsel for Tide. And so what's the relevance of
21 the letter?

22 MR. WOOD: Your Honor, our position -- the Court
23 has already stated on the record that there's really no
24 activity in this bankruptcy case, there's really no
25 creditor, there's no operation, no other assets, and under

1 our agreement with the debtor they're required any time they
2 receive an asset or they incur a cost that they notify us.
3 And that -- the relevance of that is just to show the lack
4 of activity in this bankruptcy, the lack of need of
5 reorganization, which is really the factors --

6 THE COURT: Well, boy that's a whole -- that's a
7 whole other kettle of fish in terms of reorganization. So I
8 don't want to get -- I don't think I need to go there, so --
9 and I don't like to generally get into letters back and
10 forth as evidence, because after all it makes all of you
11 witnesses, so I don't think anybody really wants that. I
12 know it's a practice in Bankruptcy Court and lawyers love to
13 do that. If you actually leave New York and you start
14 attaching exhibits to lawyer's declarations most judges in
15 other jurisdictions will scratch their head after they
16 finish yelling at you for submitting a letter in the first
17 place.

18 So -- so I'm not going to -- I'm not going to take
19 the letter for anything, I think I can suss out what the
20 situation of the debtor is and I don't know that I need to
21 figure that out dispositively for purposes of any of the
22 motions I have in front of me. But --

23 MR. WOOD: Thank you.

24 THE COURT: -- I'll take the rest of the documents
25 essentially as either pleadings in this Court or pleadings

1 in the District Court which are relevant to the extent that
2 they suss out what the parties' positions are in that court.

3 (Tide's Exhibits were admitted)

4 MR. WOOD: Thank you, Your Honor. May I proceed?

5 THE COURT: Certainly.

6 MR. WOOD: Your Honor, to -- again, focusing on
7 the narrow issue that the Court has asked us to I want to
8 start with the confusion over whether ownership of this
9 escrow money is pending before the District Court, and
10 clearly it is. Both Hopper and --

11 THE COURT: But in what connection is it?

12 MR. WOOD: And I'm happy --

13 THE COURT: There are different kinds of arguments
14 about ownership, right? You say, well, you should pay me
15 those money -- and I understood her comment and I was trying
16 to find it but I couldn't find it on the fly --

17 MR. WOOD: Your Honor, I'll point it out to the
18 Court.

19 THE COURT: All right.

20 MR. WOOD: It's found in their counterclaim.
21 Hopper's counsel comes up here and says it's not in our
22 direct complaint. What the Hopper Parties failed to tell
23 the Court is that after we filed the complaint the debtor
24 filed a counterclaim and we asserted affirmative action -- I
25 mean affirmative defenses to that counterclaim. And it's

1 actually addressed in the Court's opinion, the
2 September 28th opinion on page 3 of that, and I believe
3 that's one of our exhibits, Your Honor. The opinion is
4 Exhibit 8, Your Honor. And if you go to page 3 on the
5 right-hand side of the column on page 3, now, Judge Wood
6 specifically notes that there's a counterclaim and cross
7 claim number one, seeking a declaratory judgment ordering
8 the disbursement of the funds in the escrow account. Later
9 on on that -- in that same paragraph the Court notes,
10 Falcon's claims -- that Tide asserts that Falcon's claims
11 fail because it's not entitled to enforce the provisions of
12 the agreements procured by fraud. That put the ownership of
13 the escrow monies and Falcon's entitlement into direct play
14 in the District Court.

15 This is further noted in the Court's opinion. And
16 I would refer the Court to page 11 of the Court's opinion --
17 Judge Wood's opinion again on the right-hand side column
18 right under Subsection B, Judge Wood notes, "Falcon contends
19 Tide's further performance under the agreements cannot be
20 excused because Tide" --

21 THE COURT: Hold it a second, where are you?

22 MR. WOOD: I'm sorry.

23 THE COURT: I see -- I'm working on --

24 MR. WOOD: Page 11.

25 THE COURT: -- version that's Exhibit 8.

1 MR. WOOD: It should be page 11 of the opinion.

2 THE COURT: Page 11 right-hand side I see small b.

3 MR. WOOD: The first paragraph.

4 THE COURT: First paragraph. How far down?

5 MR. WOOD: No, just in that first paragraph I'm
6 about to read to the Court. I apologize --

7 THE COURT: No, not at all. It's fine.

8 MR. WOOD: -- for going too fast, Your Honor.

9 THE COURT: What's the first couple of words it
10 says?

11 MR. WOOD: "Falcon contends that Tide's
12 performance -- further performance under the agreements
13 cannot be excused because Tide has already fully performed."
14 And here's the important one, "And" --

15 THE COURT: I'm -- but let me -- just so I'm not
16 distracted by finding it, I'm not finding it in the first
17 paragraph under small b.

18 MR. WOOD: Yes, Your Honor.

19 THE COURT: So how many sentences in on the right-
20 hand side, how far down the page of that column should I be
21 looking?

22 MR. WOOD: May I approach the bench?

23 THE COURT: Sure. Because I want to make sure.
24 Every once in a while I don't have the --

25 MR. WOOD: Oh, I think the Court has the wrong --

1 THE COURT: Well, that says page 11.

2 MR. WOOD: That's the --

3 THE COURT: That's Exhibit 8.

4 MR. WOOD: Oh, Your Honor, I was working from --

5 THE COURT: Oh, you're working -- oh, all right.

6 All right, so let's see. That's why it's always good to
7 figure these things out. So you said Exhibit 8, page 11. I
8 see, that ends up on a different -- ends up on a different
9 column. Okay. All right. So, "Falcon contends ..." All
10 right. Proceed, thank you.

11 MR. WOOD: And the important is the latter part of
12 that sentence that says, "Falcon contends the money in the
13 escrow account belong to Falcon as soon as the escrow
14 conditions were met."

15 And so the issue of who owns that account and the
16 money therein is plainly in front of the Court, and Judge
17 Wood so notes.

18 She goes on further, if you turn the page, on
19 page 12, paragraph -- I mean footnote 7, Judge Wood --
20 that's on the left hand -- I mean the left-hand column about
21 three quarters down, footnote 7, Judge Wood again notes that
22 Falcon cites Marriott Court and includes the cite for
23 Marriott Court, and the Court notes, "Falcon cites Marriott
24 Court for the proposition that the escrowed amount" -- and
25 again Judge Wood starts quoting Falcon -- "belong to Falcon

1 subject only to the satisfaction of the escrow conditions."

2 Importantly Judge Wood then notes "that as the
3 Court has noted however, the escrow conditions have not been
4 satisfied."

5 So clearly in Judge Wood's eyes, and properly so,
6 the ownership of this escrow is before her and she so notes
7 in the opinion she's already -- she already has written on
8 this subject.

9 Why is that relevant? The debtors and Hopper want
10 to create an appearance that there is some type of
11 bankruptcy issue to be decided by this Court, but when you
12 take a closer look at the bankruptcy issues that they're
13 raising, the issue is one, decided by State Court -- excuse
14 me -- state law and not bankruptcy law. And specifically
15 they're claims under 541 and 542, it is fundamental in
16 settled bankruptcy law that in determining what property of
17 the estate is the Court looks to the state law and not
18 bankruptcy law. It also is fundamental law --

19 THE COURT: Well, but let me ask then the
20 question, because I certainly could do it here. I mean I
21 don't think there's any doubt that this is not some sort of
22 a Stern versus Marshall issue, I think I certainly would
23 have jurisdiction to have all these things here just as
24 obvious Judge Wood has jurisdiction for all things that are
25 in front of her.

1 So in your mind why should it be in the District
2 Court as opposed to the Bankruptcy Court if Bankruptcy
3 Courts decides all the time what's property of the estate
4 and what's not?

5 MR. WOOD: Well, for the reasons the Court has
6 already noted. Is what they really want you to do is
7 revisit the holdings that Judge Wood has already made.

8 And specifically -- and I'll cite the Court to In
9 re: Royal Business School, Inc., it's 157 B.R. 932, it's an
10 Eastern District of New York bankruptcy case of 1993, that
11 involved turnover under 541 and 542 of escrow funds. And in
12 there the Eastern District notes that one, that you have to
13 look to state law to determine whether it's property of the
14 estate. Two, the established law that the estate takes no
15 greater interest in property after the filing than the
16 debtor had prior to the filing. And then the Court goes on
17 to note that under New York law legal title does not
18 transfer until conditions for the escrow have been
19 satisfied. And therefore under -- most courts have
20 interpreted that under New York law escrow accounts are not
21 property.

22 Now, this is important, because in going back to
23 Judge Wood's opinion she agrees with that and she's already
24 ruled that.

25 THE COURT: Well, let me ask you who --

1 MR. WOOD: And so --

2 THE COURT: -- if in your view the escrow
3 conditions have not been satisfied and therefore doesn't
4 belong to Falcon who does it belong to?

5 MR. WOOD: It belongs to Tide. That is --
6 under --

7 THE COURT: And what's your basis for that?

8 MR. WOOD: Because we were the grantor, we created
9 that, the money came from us, and that's what New York law
10 says, is that if you -- if you cannot satisfy the conditions
11 of the escrow it will go back, the title never transfers.
12 That's our position.

13 That's why and to their counterclaim and Judge
14 Wood, that's why when they asserted we are entitled to these
15 proceeds, to these funds that we own these funds we
16 countered as an affirmative defense, no, you do not, because
17 you cannot enforce the contract because of your fraud. And
18 that's what Judge Wood agreed with us on a summary judgment
19 basis. I'll recognize that.

20 But Judge Wood has already ruled that the
21 instrument -- the instructions -- their position in District
22 Court was hey, the conditions have been met. Judge Wood
23 said, no, they haven't all been met, you had to give joint
24 instructions and you haven't done that. And then they said,
25 well, that's just ministerial, Tide doesn't have to perform

1 -- I mean Tide should perform, please make them perform.
2 They sued us for breach of contract and asked for summary
3 judgment on that issue and she said, no, they have presented
4 a prima facie case of fraud, and so therefore you cannot
5 make Tide give those instructions.

6 And so that's why -- that's the intersection the
7 Court was asking about to determine whether this is property
8 of the estate, and that's what they're asking you to do in
9 this -- in this amended complaint that they want to file in
10 the Hopper adversary. They want the Court to determine
11 that's property of the estate.

12 Under Royal Business School to do that you have to
13 go to state law, and the Court is going to have to determine
14 the same issues that Judge Wood has already decided. You're
15 going to have to bring that money into this estate without
16 trying our fraud claims, you are going to have to overrule
17 Judge Wood because she's already spoken that if -- in order
18 for the debtor to get these funds you must first try the
19 fraud claims.

20 THE COURT: Well, I'll -- let me just sort of set
21 forth how I see what's in front of the District Court, and
22 folks can correct me if I'm wrong, is that the escrow funds
23 are their own particular argument, right? The escrow funds
24 are -- there are conditions that have to be satisfied for
25 certain things to happen, and so that's its own sort of

1 inquiry, and that's certainly something that I'm very
2 worried about the intersection of bankruptcy with the
3 opinions that exist.

4 Again, they're not on the merits, they're on what
5 was presented to Judge Wood. Saying there's enough evidence
6 to go to trial on this for summary judgment purposes.

7 Certainly for the remaining claims you're talking
8 about claims that really are just for award of damages, and
9 that's -- so there's not the same worry about the
10 intersection, I think, they're claims, and they're not
11 liquidated, nobody knows whether there's liability or the
12 amount. But certainly -- and the liability on one though
13 obviously is hinged directly with the liability on the
14 other. So, all right.

15 So in your view the escrow conditions and whether
16 they've been satisfied are not -- would tell me whether this
17 should be property of the estate as of the time of the
18 bankruptcy filing.

19 MR. WOOD: That's exactly right, Your Honor.

20 THE COURT: All right.

21 MR. WOOD: The -- let me address quickly the
22 subordination argument. The subordination argument doesn't
23 apply to whether it's property of the estate, and that's the
24 first issue. I think the Court is correct, that's the first
25 issue that we've got to decide. Whose property this is and

1 is the debtor entitled to it? That's pending before Judge
2 Wood, it's been pending before Judge Wood for two and a half
3 years, she's issued two substantive opinions on that issue.
4 That's what we would go up there and try.

5 If Judge Wood says there's no fraud, they're
6 entitled to the escrow funds we would come back to this
7 Court, she would also rule on whatever other claims we would
8 have, and then the Court is correct, we would come back here
9 and disburse whatever is property of the estate.

10 At that time we could address the 510 issues. The
11 510 issues does not come into play in determining whether
12 it's property of the estate. The reason that is, is because
13 510 is very specific on its face. It reads for purposes of
14 distribution our claims are subordinated.

15 And for the record we're not admitting that it's
16 subordinated at all, but for the sake of the argument, we're
17 saying even if they're correct that we are subordinated then
18 it's only subordinated for distribution. That preproposes
19 (sic) that there is something to be disbursed. Judge Wood
20 says you can't force us, can't -- Judge Wood says, Falcon,
21 you can't force Tide to give those instructions if they have
22 a fraud claim. 510 doesn't say Tide you must give those
23 instructions. It does not -- it does not say that. It says
24 for distribution. It doesn't say for any other purposes.
25 So --

1 THE COURT: And your view is distribution
2 presupposes property of the estate.

3 MR. WOOD: Yes. Yes.

4 And finally, Your Honor, on the -- the other
5 reason why 510 should be heard afterwards.

6 The Court asked the exact right question early on,
7 and that question is, who are we going to be subordinated
8 to? And that's why we attached the schedules and statement
9 of financial affairs.

10 There is nobody else out there to be subordinated.
11 If -- because of where our claim fits we have a claim
12 arising from the sale of an affiliate of the debtor, a
13 wholly-owned subsidiary.

14 The super-subordination of U.S. Commercial
15 Mortgage dealt with sale of the debtor's equity.

16 So I would agree that if we were dealing with sale
17 of the debtors' equity there might be an issue of super-
18 subordination. We are not.

19 THE COURT: When you say debtor you mean Arcapita
20 as opposed to Falcon.

21 MR. WOOD: I'm talking -- no, Falcon.

22 THE COURT: Okay.

23 MR. WOOD: We -- our claim does not arise --
24 Falcon is the debtor -- our claim does not arise from the
25 sale of Falcon's equity, and that's what happened in U.S.

1 Commercial Mortgage that they cite. It involved claims
2 arising from sale of the debtor's LLC interest. And so they
3 were structurally subordinated, and they correctly said that
4 you are super-subordinated.

5 Why that's relevant in this case is because the --
6 if you look at their schedules there's only two other groups
7 that -- other than Tide that is in this case. One is
8 Hopper. Who is Hopper? Hopper is equity of the debtor.
9 Their claims arise from being a shareholder of the debtor.
10 Their claims --

11 THE COURT: Well, I suspect they may disagree with
12 you about that characterization, because I think they're
13 separate -- I mean there's classic equity claims. I own
14 equity and therefore I -- you know, but this I understand is
15 a separate lawsuit which led to a separate escrow and then
16 led to various other things. So they sued as I guess its
17 minority owners of -- here, but I don't think that that
18 means that they have the classic equity ownership.

19 MR. WOOD: But their claim -- if the Court is
20 correct on that argument their claim arises out of the same
21 sale that we have a claim about. They -- we were
22 complaining that we got defrauded, we paid too much. They
23 were complaining that they got defrauded, you paid too
24 little.

25 So if our claim is subordinated their claim is

1 subordinated. And so at best for Hopper there's going to be
2 a pari passu distribution. So there is no super-
3 subordination in this case.

4 The only other group that the debtor has scheduled
5 is employee stock option claims. In Enron and other cases
6 in this district said those too are subordinated under 510.
7 We take the position that they should be super-subordinated
8 to us. I understand the Court is not willing to make that
9 ruling today. But again, at best they're going to share
10 pari passu.

11 The answer to that question is our fraud claim is
12 not going to go away. The suggestion that we first deal
13 with the subordination argument is putting the cart before
14 the horse. It's -- we're talking about wasted money, that's
15 going to be a complete waste of money.

16 What we need to first do is determine who owns
17 this. That's pending before Judge Wood. Then we can come
18 back, if there's anything to be disburse, then we can come
19 back and fight over where that money should go.

20 And I respectfully disagree with the Court -- with
21 their assertion that there is any kind of super-
22 subordination for our claims.

23 And I'd like to, because I haven't had an
24 opportunity to brief that issue, I would like to refer the
25 Court to two cases just briefly. It's VF Brands, Inc., 275

1 B.R. 725, it is a Bankruptcy Court in Delaware, a 2002
2 decision. And then Wisconsin Barge Line, Inc., 76 B.R. 142,
3 bankruptcy of Eastern District of Missouri 1987.

4 The relevance of those two cases, Your Honor, is
5 those two cases dealt with the sale of a wholly-owned
6 subsidiary of the debtor. And what did those two cases say?
7 They said, yes, you may be subordinated to general unsecured
8 creditors, but you are not super-subordinated to equity.
9 That is -- and those cases are distinguishable from U.S.
10 Commercial Mortgage that dealt with the super-subordination,
11 because -- and those two cases I cited to the Court -- they
12 dealt with sale of a wholly-owned subsidiary of the debtor
13 versus U.S. Commercial Mortgage that dealt with sale of the
14 debtor's stock.

15 THE COURT: All right.

16 MR. WOOD: Your Honor, for those reasons we agree
17 with the Court that the stay should be lifted to allow the
18 District Court to proceed and then we can come back to this
19 Court at a later date and decide if there is anything to
20 disburse how that should be disbursed.

21 THE COURT: Well, let me ask you two questions on
22 details.

23 Is it -- what's your position on the Hopper
24 Parties' motion to intervene in the District Court? I know
25 the parties took various positions quite a while and a lot

1 has happened since then. So what's your position now on
2 that?

3 MR. WOOD: Your Honor, we have agreed -- that's
4 one of the reasons we admitted Exhibit 7, which was our
5 reply to the objections to our motion to lift stay. I
6 admitted that -- or offered that for the sole purpose of
7 showing that we have judicially admitted that we will
8 withdraw our opposition to their motion to intervene and
9 allow them to participate.

10 THE COURT: All right.

11 And when you talk about what should happen in the
12 District Court I just want to be very clear what position
13 you're advocating. So if you would be so kind just to state
14 it again.

15 You're saying that the stay should be lifted so
16 that the District Court can decide whether the escrow -- who
17 the escrow belongs to and would just tie it up with the
18 conditions being met, and may -- appears to, but may not
19 necessarily be tied up with the underlying fraud claim. And
20 -- but you are not proposing that any money be awarded --
21 I'm sorry -- be paid, including money paid out of the
22 escrows, until it comes back to the Bankruptcy Court to
23 decide the -- how the District Court's rulings would apply
24 in the priority scheme of the Bankruptcy Code as to other
25 complaints in the bankruptcy and other entities in the case.

1 MR. WOOD: Yes, Your Honor. We -- I believe
2 that's correct. We propose that we do liquidate our claims,
3 our fraud claims up in District Court. So she will
4 determine what our claims are, the amount of the claims.
5 She will determine their -- Falcon's counterclaims that
6 they're entitled to the proceeds.

7 So if we win our hope is that she will issue an
8 opinion that says, Falcon, you are not entitled to those
9 proceeds, those proceeds or those escrow funds belong to
10 Tide.

11 If the Court is saying we don't enforce that order
12 until we come back here for further relief from the stay I
13 don't have an opposition to that, I'm happy to come back.

14 But I think there may be ramifications from the
15 Court's ruling if she says you have no interest -- Falcon
16 has no interest in these funds then we'll come back to this
17 Court and say that.

18 THE COURT: Well, I mean one of the things that is
19 always in this overlap of courts is that a Court doesn't
20 know exactly how it's going to play out in the other court,
21 and there's too many permutations to say, well, if this
22 happens then we should do this. I'm not -- I will not
23 profess to be smart enough to write that flowchart.

24 So my view is that since there's certainly a
25 significant number of outcomes would require further action

1 by the Bankruptcy Court to determine what should happen I
2 would say that in any event it should come back here before
3 anybody goes anywhere. And if the answer is, well, it's
4 plain as day, Your Honor, it says right here X, Y, and Y
5 it's not property of the estate, and you know, if it's we
6 need an order then so be it. If it's clear as day -- the
7 debtors get up and say it's clear as day, because right here
8 it says I reject all the fraud claims now that we've had a
9 trial and the conditions of the escrow are satisfied, it's
10 all ours, and therefore, you know, this should happen.

11 It may be very plain to one party or the other
12 what the outcome is, but I don't think that it's very wise
13 to -- for me to try to forecast that now, and I think it
14 would make all parties very nervous as to how things could
15 be construed, because they say, well, does this mean that or
16 -- sometimes minor changes in wording can lend people to
17 have serious anxiety attacks as you're afraid of assets
18 being moved somewhere and once they're gone they may be
19 gone.

20 So, but what I hear you saying is that you don't
21 have any opposition to an approach whereby any -- no money
22 goes anywhere until folks come back to the Bankruptcy Court
23 and decide what the impact of any District Court ruling is
24 on the escrow funds and really anything else relating to the
25 estate.

1 MR. WOOD: That's correct, Your Honor.

2 THE COURT: All right.

3 MR. WOOD: Thank you, Your Honor.

4 THE COURT: Thank you.

5 All right, anyone else on that side of the issue
6 who wants to be heard?

7 MR. VAN TOL: Well, Your Honor, Pieter Van Tol for
8 HSBC --

9 THE COURT: I guess you're on no side of the
10 issue.

11 MR. VAN TOL: I'm on no side, Your Honor. Good
12 afternoon, Your Honor, Pieter Van Tol from Hogan Lovells for
13 HSBC.

14 As the Court noted, HSBC just wants out of this
15 matter; however, we want to make sure that whatever exit we
16 have is an effective one.

17 I think the -- I heard the Court mention a
18 consensual arrangement. We are certainly amenable to that,
19 and I think that's probably the best way forward is to work
20 with the parties to maybe amend the escrow agreement.

21 But I wanted to speak to the Court in the event
22 that that doesn't work, and if it doesn't work we're going
23 to have to seek interpleader relief.

24 Now, I think if we're in the District Court we're
25 able to do so because the pleadings are properly framed.

1 Our issue, Your Honor, is a very limited one.

2 THE COURT: You want to deposit the funds and be
3 done with it.

4 MR. VAN TOL: And be done with it. But the
5 problem is if we're in Bankruptcy Court, Your Honor, we
6 don't believe Falcon has pled a case in controversy, it's
7 not properly pled.

8 So the last thing that HSBC wants to happen is
9 interpleader relief granted and then there's an allegation
10 later on appeal that there was never jurisdiction.

11 So I have a simple solution, Your Honor, which is
12 in Exhibit 3 in your binder, which is the -- contains the
13 answer of Falcon. They asserted a cross-claim, and what
14 they did, Your Honor, is they asked for two things. One was
15 a declaration that they get the money, because there was the
16 controversy between Falcon and Tide. The second cause of
17 action was a breach of contract.

18 In neither one of those causes of action was HSBC
19 alleged to have done anything wrong. HSBC was included
20 simply as --

21 THE COURT: Of it being at the wrong place at the
22 wrong time.

23 MR. VAN TOL: Exactly, Your Honor. HSBC was a
24 nominal defendant.

25 I think that's how this case should be pled if it

1 goes forward in the Bankruptcy Court.

2 Our issue with the current pleading is Falcon is
3 alleging that we have an issue with them about whether or
4 not the escrow funds are property of the estate. We have no
5 such issue, Your Honor. There's no -- there's no debate,
6 we're neutral. And that's it, Your Honor.

7 THE COURT: All right.

8 MR. VAN TOL: That's solely to note that if we go
9 forward here we'd like the pleading to be amended so we can
10 get effective relief.

11 THE COURT: Here's what I'd like to do is I'm
12 going to make up my mind about what to do with this case and
13 this particular set of motions. In the meantime I'll ask
14 the parties who have separately and independently, if they
15 with work something out, it may be that -- it sounds like
16 there's no interest being accrued, and may be in the benefit
17 of all parties to try to work out some sort of other
18 arrangement that is mutually beneficial wherever the funds
19 end up and that will get your client out, because I'm sure
20 any -- there's really no benefit for your client in the
21 current circumstance. So folks can work on that.

22 If -- I think if I lift the stay to let it go back
23 to the District Court under the circumstances that we've
24 discussed then I think it may be as simple as a stipulation
25 to deposit the funds in the District Court. If it stays

1 here my goal would be to resolve your concerns, if we can,
2 as quickly as possible, meaning at the next omnibus.

3 So let me -- let me try to figure out what I'm
4 going do. I have a thought, but I want to think it over a
5 little bit more. But we're not going let your issue linger
6 to the extent it can be resolved.

7 MR. VAN TOL: Thank you very much, Your Honor.

8 THE COURT: All right, thank you.

9 MR. MILLET: Briefly, Your Honor.

10 Tide has certainly informed everyone here in the
11 courtroom that it truly believes the ownership issue is
12 pending before the District Court, and therefore, whatever
13 is decided there will decide the ownership. So in essence
14 it's saying the District Court is going to be deciding the
15 property of the estate issue. Again, we think that's an
16 important issue that should be decided here.

17 But in saying so just based upon simply the fraud
18 allegations or simply proving fraud, many creditors come
19 into bankruptcy cases and file fraud claims and then want to
20 say that because it's fraud as opposed to breach of contract
21 I have a superior right of recovery or I have a right to
22 rescind or pull back what I gave you, and that's in effect
23 what's happening here. So --

24 THE COURT: Well, the problem you have is one of a
25 pending federal District Court action where a Court has

1 already spoken twice on the issues. And if I keep it here
2 what do I do with those pronouncements? They're not on the
3 merits, but there are certain pronouncements, and a couple
4 of which have been point the out here, particularly the one
5 about the escrow requirements have not been satisfied and
6 therefore this is -- this is my view as a judge.

7 What I hear you saying is that that may be a
8 little out of whack with what's been pled, but it's there
9 nonetheless. What -- so what do I do with it?

10 And so it's always a bit awkward when you have
11 that overlap, and it's not particularly judicially efficient
12 for me to start -- I can't start from square one I don't
13 think, and I do run the risk of -- and I think it's a
14 jeopardy not only to a Court but also to the parties.
15 Because one thing that the parties don't want is
16 uncertainty, and to the extent that I start wading into
17 things where there have already been certain -- there are
18 already certain icebergs out there of things that I might
19 run into inadvertently that's an appellate lawyer's dream.
20 Someone will say, well, you know, sort of had that right but
21 there's this language that says this and the judge shouldn't
22 have done that any way.

23 Clearly I have jurisdiction to decide what's
24 property of the estate, but at the end of the day between
25 that problem and the problem of what additional value do I

1 add -- because that's a question I always ask myself in the
2 circumstances -- I'm not sure on this particular issue I do
3 add any value where a Court is certainly much further in
4 front of me in resolving those issues.

5 So -- so that's the concern I have. I don't --
6 I'm not construing the arguments here to be open season on
7 folks coming into Bankruptcy Court and say, well, this claim
8 and that claim are fraud and to tie up the system. I don't
9 think that that's something that is at all what I mean. I'm
10 just looking at the facts and circumstances here and I don't
11 know that there's a good answer as to how to construe that.

12 Because, I mean, how would you have me construe
13 that line in the opinion that says -- I think it was pointed
14 out by Tide's counsel -- that says Falcon cites Marriott
15 Court for the proposition that the escrowed amount belongs
16 to Falcon subject only to satisfaction of the escrow
17 conditions. As the Court has noted however the escrow
18 conditions here have not been satisfied.

19 And what -- what would you have me do with that
20 particular language is my -- is the question?

21 MR. MILLET: Clearly, Your Honor, the Court was
22 distinguishing a case there and was not looking at it for
23 purposes of release, it was not looking at the entire
24 factual pattern and saying whether or not it was relevant,
25 even whether that specific issue had been completed or that

1 specific instruction had been given. It wasn't saying
2 therefore I find that unless this condition is met --

3 THE COURT: Well, but then --

4 MR. MILLET: -- title must go, title does not
5 pass.

6 THE COURT: And again, there's always an issue as
7 to what a Court says and the procedural context it says it,
8 but when it says the Court has noted the escrow conditions
9 here have not been satisfied. Nothing has changed between
10 now and then. And it appears that in other parts of the
11 opinion that there -- the Court is saying that, well, the
12 instructions need to be given, you've asked me to order them
13 to give the instructions, I'm refusing to do so because of
14 the fraud issue, and therefore is fraud issue is therefore
15 that big impediment, and that's certainly law of the case in
16 the District Court.

17 So is this like a situation where it's a removal
18 and I take the case where it is? I mean or do I ignore
19 that? I mean I -- you know, that's the problem and that
20 also tells me juris prudentially that starting from square
21 one and looking at issues, such as the escrow, that I do run
22 the risk of -- you know, I think that the fact that I'm
23 worried about running into this sort of language in the
24 various findings of the District Court and various
25 conclusions that she's reached thus far on the things before

1 her sort of I think councils me to have cautious as to going
2 ahead here on those exact same issues.

3 MR. MILLET: I understand, Your Honor. My point
4 is the Court there did find that that final event had not
5 occurred. We'd stipulate to that. Our point is that is not
6 a necessary element of causing title to transfer to Falcon.
7 That not only did it transfer under the escrow instructions
8 but also under the express language of the escrow Tide
9 acquired title -- pardon me, I did it again -- Falcon
10 acquired title to the escrowed money upon the closing of the
11 transaction, and that's what we would prove there.

12 I don't -- I'm concerned that this ruling that
13 you're about to make would be portrayed to the District
14 Court as this Court agreeing that if fraud is simply proven
15 ownership is also resolved.

16 THE COURT: No, first of all I think the word
17 proven is wrong. It's a 12(b)(6) motion as to whether the
18 complaint there satisfied the allegations, and that's -- you
19 know, that's a standard thing, and they always -- those
20 rulings always come across as unduly -- like an undue
21 hardship on the party who's the defendant because it makes
22 it sounds like something has been proven. Nothing has been
23 proven. Something has been pled. So I'll make that
24 absolutely clear. It's just -- but that's what happens.
25 You take all the allegations as true and you look to see

1 whether it's been properly pled.

2 And the only thing that I understand the Court
3 then to do on the summary judgment issues, which dealt with
4 escrow, is to say, well, there's an impediment given the
5 pleadings that I have here that are well pled to me taking
6 that step, which is part and parcel of the ultimate
7 resolution of the case.

8 And so she doesn't say it, but I think it's fairly
9 implied, that she would say to both parties you may be
10 right, you may be wrong, we just don't know yet.

11 So I'm not -- to the extent that my comments or
12 anything I do here could remotely be construed as saying
13 that I think anyone has committed fraud I will -- just for
14 the record I will categorically reject that.

15 Again, it's just -- it is a -- the language is a
16 function of the pleading and the procedural posture that the
17 -- that that case is in. But it does mean that that Court
18 has spent significant time and has said various things in
19 connection with the motions that it had. So --

20 MR. MILLET: One last question, Your Honor, and
21 I'll sit down.

22 Assuming the Court does make the ruling that
23 relief from stay is granted, does that mean that Falcon is
24 precluded from filing a separate action with respect to
25 subordination? Or maybe better put, would the Court be

1 distressed to see us proceed and try to deal with the
2 subordination issue as well as the -- this court action
3 is --

4 THE COURT: Well, I'm concerned about what I could
5 actually do. Because if the question is about ownership of
6 who owns the asset and whether it's property of the estate,
7 subordination I understand goes to payment of -- of an asset
8 of the estate out and who gets in and in what order. So --
9 and that's why I think my questions to you when you first
10 came up were in that nature about the intersection of these
11 issues.

12 So distress may be too strong a word, because I
13 certainly understand that to the extent that this for Falcon
14 presents, you know, an impediment to the bankruptcy case
15 going forward, I understand your desire to move things
16 along. But I don't know that there's anything I can do
17 until we have an understanding of what that issue -- what
18 the outcome is of that issue.

19 So I don't make a habit of telling people they
20 can't file things --

21 MR. MILLET: I understand.

22 THE COURT: -- because sometimes folks that may
23 have a more -- a more developed position than they've been
24 able to present and changes my mind.

25 But sitting here right now I have trouble

1 imagining that that's a beneficial exercise until we know
2 whether these funds are property of the estate.

3 MR. MILLET: Very well, Your Honor.

4 THE COURT: So, anything else?

5 MR. MILLET: No, that's it.

6 THE COURT: All right. Let me ask one question of
7 all the parties. I do before I make a ruling, and you can
8 tell I certainly am leaning a particular way, the issue of
9 subordination was not completely briefed, and I don't want
10 to brief it in a way that will essentially have us conduct
11 the proceedings that one side is advocating versus the other
12 side, but I would like a short statement from Tide on
13 subordination just so Tide has the opportunity, not more
14 than ten pages, and I'll give the debtors an equal
15 opportunity to file a reply, no more than ten pages.

16 I think I've got the gist from -- from the
17 arguments here today. There were some citations to cases
18 that I just want to -- that's really the point of the
19 pleading is just so I get a chance to get the benefit of
20 your thinking about how the cases are relevant.

21 As you can tell I do have a lean as to what I'm
22 thinking of doing, but I just want to make sure that issue
23 is fully vetted as it -- I think is sort of a lynchpin of
24 the debtors' argument here.

25 So if I could get those -- I don't want them -- I

1 want to have them fairly soon. So when would Tide be
2 comfortable filing a short pleading on that issue?

3 MR. WOOD: A week from Friday? Is that enough
4 time?

5 THE COURT: That would be fine. And the debtors
6 for a response?

7 MR. MILLET: A week thereafter.

8 THE COURT: That would be fine. And then what I'd
9 like to do is remind me when our omnibus is in February?

10 MR. ROSENTHAL: The 20th, Your Honor.

11 THE COURT: The 20th. All right. That will be
12 the outside date for me ruling on this. If I'm in a
13 position to give you a ruling, and I don't think that a
14 written opinion will add any value, which is my current
15 thinking, I may call you all up and just say I'm going issue
16 a decision from the bench and folks can make themselves
17 available and we'll pick a date before the 20th.

18 My ability to do that is going depend on some
19 other things going on in the courthouse, but I have -- I
20 understand that delay is not a good thing. So if I can get
21 it done sooner than the 20th I will -- I will do that.

22 All right. Thank you.

23 MR. ROSENTHAL: Your Honor, before we adjourn I
24 can just make sure that the record is clear that you have so
25 ordered the extension of exclusivity until the 28th?

1 Because you'll be filing the order after the --

2 THE COURT: Yes, absolutely. If -- I guess we
3 have a bridge order through the hearing today --

4 MR. ROSENTHAL: Correct.

5 THE COURT: -- it is so ordered that exclusivity
6 is extended and I will enter an order that removes all
7 doubts as quickly as I can.

8 MR. ROSENTHAL: Thank you, Your Honor.

9 THE COURT: Thank you very much.

10 (Whereupon these proceedings were concluded at 1:02 PM)

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

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

AAERT Certified Electronic Transcriber CET**D-408

Veritext

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Date: January 17, 2013