IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER, INC., *et al.*,[1]	Case No. 24-11390 (TMH)
Debtors.	(Jointly Administered)

APPELLANTS' DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD ON APPEAL AND STATEMENT OF ISSUES PURSUANT TO FED. R. BANKR. P. 8009(a)

Toccata Automotive Group, Inc. ("**Toccata**") and Phil Harrison ("**Mr. Harrison**", and together with Toccata, the "**Appellants**"), by and through undersigned counsel, pursuant to Fed. R. Bankr. P. 8009(a), and Rule 8009-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware, hereby submit their designation of the record and statement of issues on appeal in connection with their appeal from the *Order Granting Debtors' Motion (I) to Enforce Enforcement Order; (II) to Sanction Toccata Automotive Group, Inc. and Phil Harrison for Contempt for Violating the Same; and (II) for Entry of an Order Requiring Toccata to Pay All of the Costs and Expenses Incurred by the Debtors to Address this Matter* [D.I. 700] (the "**Order**"):

STATEMENT OF ISSUES ON APPEAL

1. Did the Bankruptcy Court err in finding Toccata and Mr. Harrison in civil contempt?

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

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2. Did the Bankruptcy Court err in (i) permitting the Debtors to change (during oral argument) their request for compensation for thirteen (13) previously sold cars from $16,500 to $30,000 and (ii) ruling in favor of the higher $30,000 amount without offering Appellants opportunity to be heard?

3. Did the Bankruptcy Court err in double-charging Appellants for five (5) cars that were, in fact, returned to the Debtors?

4. Did the Bankruptcy Court err in directing Appellants to pay a unliquidated and unproven legal fees, particularly in light of the limited disputes at issue in the Order?

Appellants reserve the right to supplement or amend this Statement of Issues.

DESIGNATION OF ITEMS TO BE INCLUDED
IN THE RECORD ON APPEAL

Appellants designate the following documents to be included in the Record on Appeal, which includes all exhibits and addenda attached thereto and all documents incorporated by reference therein.

Date Filed	Dkt. No.	Description
09/03/24	N/A	Toccata Automotive Group, Inc. Proof of Claim (Claim No. 2138)
09/12/24	552	Debtors' Emergency Motion to (i) Enforce the Automatic Stay and (ii) Recover Costs Related to Toccata Automotive Group, Inc.'s Violations of the Automatic Stay
09/11/24	548	Toccata's Motion for Allowance and Payment of Secured Claim
09/20/24	580	Order Granting Debtors' Emergency Motion to (I) Enforce the Automatic Stay and (II) Recover Costs Related to Toccata Automotive Group, Inc. 's Violations of the Automatic Stay

10/03/24	626	Debtors' (I) Motion to Enforce Enforcement Order; (II) to Sanction Toccata Automotive Group, Inc. and Phil Harrison for Contempt for Violating the Same; and (III) for Entry of an Order Requiring Toccata to Pay All of the Costs and Expenses Incurred by the Debtors in Addressing This Matter
10/03/24	627	Declaration of Worla Flolu as Director of Sales for the Debtors in Support of Debtors' (I) Motion to Enforce Enforcement Order; (II) to Sanction Toccata Automotive Group, Inc. and Phil Harrison for Contempt for Violating the Same; and (III) for Entry of an Order Requiring Toccata to Pay All of the Costs and Expenses Incurred by the Debtors in Addressing This Matter
10/08/24	651	Toccata Automotive Group, Inc. and Phil Harrison's Opposition to Motion for Contempt for Violating Enforcement Order
10/08/24	664	Debtors' Objection to (i) Toccata Automotive Group, Inc's Motion for Allowance and Payment of Secured Claim and (ii) to Toccata Automotive Group, Inc's Secured Claim against Debtors
10/09/24	685	Transcript of Hearing held on October 9, 2024 – Transcript attached as Exhibit "A".
10/11/24	700	Order Granting Debtors' (I) Motion to Enforce Enforcement Order; (II) to Sanction Toccata Automotive Group, Inc. and Phil Harrison for Contempt for Violating the Same; and (III) for Entry of an Order Requiring Toccata to Pay All of the Costs and Expenses Incurred by the Debtors in Addressing This Matter
10/16/24	723	Notice of Appeal
10/16/24	725	Motion To Stay Pending Appeal

[SIGNATURE PAGE TO FOLLOW]

Dated: Wilmington, Delaware
October 30, 2024

AKERMAN LLP

/s/Andrew S. Dupre

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CERTIFICATE OF SERVICE

I, Andrew S. Dupre, hereby certify that on October 30, 2024, a true and correct copy of the foregoing *Appellants' Designation of Items to be Included in the Record on Appeal and Statement of Issues Pursuant to Fed. R. Bankr. P. 8009(a)* was served upon all interested parties by CM/ECF and the parties listed below by electronic mail.

/s/Andrew S. Dupre
Andrew S. Dupre

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	. Chapter 11
	. Case No. 24-11390 (TMH)
FISKER, INC., *et al.*,	.
	. (Jointly Administered)
	.
	. Courtroom No. 7
	. 824 Market Street
Debtors.	. Wilmington, Delaware 19801
	.
	. Wednesday, October 9, 2024
. . . . .	. 10:11 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE THOMAS M. HORAN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Brian M. Resnick, Esquire
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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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For American Lease, LLC:	Lon M. Singer, Esquire RIEMER & BRAUNSTEIN, LLP Times Square Tower 7 Times Square Suite 2506 New York, New York 10036
For CVI Investments, Inc.:	Scott Greissman, Esquire WHITE & CASE, LLP 1221 Avenue of the Americas New York, New York 10020
For Fisker Owners Association:	Daniel S. Shamah, Esquire COOLEY, LLP 55 Hudson Yards New York, New York 10001
For the National Highway Traffic Safety Administration:	Cortney Robinson, Esquire UNITED STATES DEPARTMENT OF JUSTICE CIVIL DIVISION P.O. Box 875 Benjamin Franklin Station Washington, DC 20044
For the Official Committee of Unsecured Creditors:	Benjamin W. Butterfield, Esquire MORRISON & FOERSTER, LLP 250 West 55th Street New York, New York 10019

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EXHIBITS

(Proceedings commenced at 10:11 a.m.)

THE CLERK: All rise.

THE COURT: Good morning. Please be seated.

Mr. Resnick, good morning.

MR. RESNICK: Good morning, Your Honor. Brian Resnick of Davis Polk & Wardwell, on behalf of the debtors. I'm here today with my colleagues Jim McClammy, Richard Steinberg, Amber Leary, Kevin Winiarski, and our co-counsel from Morris Nichols, Mr. Dehney, Mr. Remming, and their colleagues.

Your Honor, there are two items on the agenda today: confirmation of the debtors' plan of liquidation and final approval of the disclosure statement, as well as the motion to enforce the automatic stay with respect to the Toccata dealership. Your Honor, we'd propose beginning with confirmation, if that works?

THE COURT: It does.

Before you start, I want to offer a bit of a confession --

MR. RESNICK: Sure.

THE COURT: -- and offer some comments.

MR. RESNICK: Sure.

THE COURT: We're doing this hearing. I don't feel adequately prepared and there's a reason for that. And the reason for that is that I received 470 pages of documents

that were filed between 4:30 and 11:30 last night. So I'm not entirely clear on what the expectation was, not only about when and how I would meaningful have an opportunity to read, understand, digest, know what it is that I'm being asked to approve, specifically, especially with respect to the order, but also what opportunity to give to the parties to whom you're responding, to review, understand, digest, and adequately prepare for the hearing.

It, frankly, was shocking to me that documents of that significance and so voluminous that you gave the -- well, you gave me and the parties no meaningful opportunity to actually review them. So we'll do the best that we can --

MR. RESNICK: Yeah.

THE COURT: -- but understand, as a result, I'm not sure exactly what I'm going to do in terms of being able to issue a ruling today.

Because I take my preparation seriously --

MR. RESNICK: Yeah.

THE COURT: -- and when you cite cases that are important to you, I want to be able to look at those cases, understand them. I haven't got a chance to do any of that, so...

MR. RESNICK: That is fair, Your Honor.

And, respectfully, it was, on our side, it was necessitated by a lot of the last-minute negotiations between

the parties, as well as a very late-filed objection to the plan by American Lease, that we only had, you know, it was like 36 hours ago.

But, Your Honor, that is very fair. We did come prepared today to walk Your Honor through the changes. I understand the point on the cases. I'd also note that I believe we've been in constant contact with all the parties who have been at the table. I understand that's not the general public, but there has been incredibly active participation by everybody in the courtroom, all of whom have had the documents, iterations going back-and-forth and back-and-forth, you know, by the hour for the last few days.

But I understand Your Honor's point and it sounds like you may have some support here.

THE COURT: Yeah, I think there were some people who want to have something to say.

Ms. Richenderfer?

MS. RICHENDERFER: Good morning, Your Honor. Linda Richenderfer, on behalf of the United States Trustee's Office.

Your Honor, we feel that we are in the same position that Your Honor just expressed. I mean, our concern is everything that's in the plan and how it fits together.

And we had some discussions last week with debtors' counsel. There were representations made to us.

There were so many back-and-forth discrete sections that until last night way after close of business -- I mean, I left my office at 8 o'clock last night and things were just starting to come in.

We have not had a chance to go through and see if the issues, as we think we've resolved them, are set forth therein. I know that there's a couple of other issues that have popped up. I've been told some of them have already been resolved, but it's hard to keep track of all of this.

And last night, while we received a draft previously, last night was the first filed form of confirmation order.

THE COURT: Uh-huh.

MS. RICHENDERFER: So, Your Honor, due to my schedule and everybody else's schedule, I don't look at things until they get filed, quite frankly, Your Honor, until I know that this is what's going forward. And I saw that very late last night, and there are just numerous, very unusual issues that divide some of the objecting parties that are going to cause Your Honor to have to make some very unique decisions.

THE COURT: Uh-huh.

MS. RICHENDERFER: And I don't feel like Mr. Bates and I have had sufficient time to go over this or even to discuss this with our client, quite frankly.

And I also question whether we do confirmation first, because as I read the objection that was filed by American Lease, if they are correct, if they get relief, it's going to impact, I think, whether or not the plan can be confirmed today. I don't know how much about the Toccata one, but may that also has an impact because that concerns whether or not, I guess, all the terms of the sale agreement are being fulfilled because there's vehicles that aren't available to be delivered to American Lease.

So for what it's worth, Your Honor, I see those two issues as precursors to confirmation of the plan. Maybe they're not -- I don't know -- that would have to be explained, I would think. But, especially, the American Lease one really gave us pause in the office, I know, when we read it and thought, well, I don't know if there's money still being held back or not, but if there is, that's monies needed to fund this plan.

THE COURT: Yeah, look, I'm really concerned about the issues that are implicated by the American Lease objection, but --

Do you represent American Lease? Would you like to be heard, sir?

MR. SINGER: I do, Your Honor.

THE COURT: Yeah.

MR. SINGER: Lon Singer of Riemer & Braunstein on

behalf of American Lease.

So we share His Honor's concerns. We share the trustee's concerns. It's extraordinary to us in many ways that we find ourselves in this position; nevertheless, we were compelled because of a material change of position by Fisker at the eleventh hour, Friday night past. The October surprise, we at least wanted to experience.

We negotiated around the clock for 72 hours. I have to say my client has the cleanest hands in this process. They're the white knight that rode in with $45 million uniquely positioned to buy the vehicles, but it's compelling to us that they get the benefit of their bargain.

And I know the Court wants to do equity and ensure that outcome, also, at least I'm confident that that's the case, so I will want to reserve the right if we go there today, to explore or objection in detail and also to address Mr. Resnick's response to our objection. We've worked through the night to digest and be able to address it if that's His Honor's wish today, but we really feel like a little time and a little breather here is necessary.

Because we would rather achieve resolution here and a positive outcome for everyone than to throw this matter into disarray.

THE COURT: You know, I did get an opportunity to read your objection and the debtors' reply to it and, you

know, it seems to me that the most basic issue here is, are these cars bricked if you don't get the data transfer.

MR. SINGER: Exactly, Your Honor.

And people have talked in papers about things like parol evidence. His Honor knows very well that customary use in an industry and in a practice are a clear exception to parol evidence and that in this particular case, the contract is very explicit about requiring the delivery of source code and other data that's really only usable in the context of over-air communication with the fleet.

In addition, everybody in the room --

THE COURT: Yeah.

MR. SINGER: -- knows that our client operates the business of a fleet.

THE COURT: Yeah.

MR. SINGER: So, yes, the risk of $45 million for a pig in a poke is a very grave concern. I'm confident the Court doesn't want to countenance that out, though.

THE COURT: So your request, Mr. Singer, is -- well, you made it in your objection to the plan -- you want more time.

MR. SINGER: Indeed, the parties have been working around the clock in good faith to try to deal with some final technical nuances and make things work. But to me, it's disingenuous to say, you know, the phrase "as-is, where-is"

is in your agreement, therefore, you know, roll the dice.

We all know that it were truly nothing but "as-is, where-is," that would imply that the covenants of the seller are meaningless. We wouldn't even need a contract; we'd have a bill of sale and a wire transfer.

But that's not what's at stake here. This is a bespoke agreement, as the Court's acknowledged. The parties have worked very carefully to make this work for everyone. We're gravely concerned on our client's behalf at this juncture.

THE COURT: Okay. I appreciate those comments.

And Mr. Resnick, there's no need to respond --

MR. RESNICK: Okay.

THE COURT: -- to the substantive arguments made. At this point, I am certainly most concerned about the scheduling.

But you sort of answered my question, my concern about whether it is your view that the cars are going to be nonfunctional as a result of this development and it sounds like that's your concern.

MR. SINGER: They will be, if not fully and nonfunctional, certainly, not the commercial, a reality that my client bargained for here.

THE COURT: I understand. Okay.

MR. SINGER: Thank you, Your Honor.

THE COURT: Yes, sir?

MR. GREISSMAN: Your Honor, Scott Greissman, White & Case --

THE COURT: Good morning. It's good to see you, Mr. Greissman.

MR. GREISSMAN: -- for CVII.

Hi, how are you?

I'm here with Lisa Feld and Kim Havlin, my partners from New York, and obviously Rich Beck.

We're not party to the AI agreement (phonetic), the American Lease agreement. We think it's pretty straightforward on its face. We'll let the debtors sort of argue their points.

I just think it's incumbent for the Court to understand that I'm incredibly sympathetic to the short notice and the voluminous number of filings. We didn't have anything to do with that -- and I'm not blaming anyone; it's just sort of how it came together -- but the reality is that there's not enough money to keep this case going much further.

It does relate a little bit to the American Lease objection; what they thought they were getting and what they didn't think they were getting. This was -- the as-is nature of the contract reflects the purchase price paid -- just leave it at that -- and as a result of the purchase price,

which was very low, a certain amount of proceeds came in, which we expected wouldn't be enough to sustain Chapter 11. And as a matter of fact, we have sort of eaten into non-fleet sale assets to keep this thing going.

Again, we're not crying over spilled milk; we are where we are, but cash collateral runs out on Friday and every hour that passes is money out of the pockets of creditors. And so one way or the other, this has to get resolved, respectfully, and subject to the Court's indulgence on timing and scheduling and how much time everyone needs, like, ASAP, because every -- we're already negative, okay, and we've been for a while and it's just going to keep going if this extends out. And that's really, I think, the practical overlay of all of this.

THE COURT: Thank you, Mr. Greissman.

Mr. Shamah, would you like to be heard?

MR. SHAMAH: Very briefly, Your Honor. Daniel Shamah of Cooley, on behalf of Fisker Owners Association.

Just to chime in, with respect to Mr. Singer's comments, you know, we're not a party to that transaction, but it does cause significant concerns for other vehicle owners because the way the plan is set up, there's an expectation that vehicle owners are going to continue to be able to drive their cars. And we have been talking to the debtors about what that's going to look like post-effective

date and there are a lot of questions or concerns that we have around the sustainability of the cloud connectivity, which is necessary both, for clearing the recalls, as well as the vehicle owners being able to continue to drive their cars.

And now there's a concern around the ability to even, and, again, I'm going to butcher the technological elements of this, but if there are real issues around whether the cloud can be ported over to another stand-up position, it has implications for us, as well.

And so I believe there are technical workarounds to this. I understand the parties are working around the clock to try to figure it out. We have had several dialogues with the company, as well, around that.

But I'm sympathetic to the fact that this is a very tight budget and a very tight case and I get the timeline that they're operating under, but there are real world implications here and people, there are thousands of people driving cars right now that are depending on this technology to remain in place for at least some period of time so that an orderly transition can take place and we just don't have that in place right now.

And American's objection raises real concerns for us that there are real technological issues that have not been fully thought through. And so, Your Honor, I don't know

that we need a lot of time, but I do believe we need a little more time to work through these issues.

THE COURT: Okay. Thank you, Mr. Shamah.

Mr. Resnick?

MR. RESNICK: Yes. So, look, I respect all the concerns and, once again, apologize, Your Honor, for the late filings. It was out of our effort to try to make things as consensual as possible and I believe we've already succeeded in that with respect to most of the issues with the parties. But I respect the fact that Your Honor has not had a lot of time to look at this.

We have, we're prepared to do a few things. We are prepared to walk through the changes now, if that's helpful. We're also prepared to litigate the substance of American Lease's objection. And we are prepared to litigate the third-party releases and related issues that the U.S. Trustee has raised.

And so, subject to Your Honor's views, our proposal would be that we move forward in whatever order of those three things Your Honor believes is appropriate and then based on where we are after Your Honor hears things, if you believe a break is appropriate or more time or whatever, of course, we would defer to Your Honor.

But as you've heard from Mr. Greissman, this case is under tremendous liquidity pressure and our strong goal is

to emerge on Friday, which is when cash collateral runs out. So that would be our preference, subject to Your Honor.

THE COURT: Well, Ms. Richenderfer, you raised the point, which I think is a very valid one, about needing to look at the plan, needing to look at the order that you saw for the first time this morning and you have a client.

MS. RICHENDERFER: I do.

THE COURT: So, you know, Mr. Resnick has made a proposal on things that, perhaps, we could handle now.

What is your view on that? Do you feel that you'd be aptly prepared, because some of this does implicate your objection to the plan.

MS. RICHENDERFER: Your Honor, the answer is, I do not feel like I am prepared to go forward on those issues. For instance, I thought we had an agreement with the debtors as to how things were going to be handled with respect to the recall costs. The U.S. Trustee's position is that those are not prepetition claims; they should not be coming out of the post-effective date liquidating trust.

And I am now looking at entirely new sections of the plan that talk about how these costs are going to be covered from -- there's going to be -- there's a $750,000 amount that was set aside in that settlement agreement from way back when, but apparently, it's very well-known that that's not going to be nearly enough, as I understand it,

because they have to keep the cloud up and there's other costs.

And so it says here that after that amount is paid, then the costs are going to be covered from cash and other proceeds of non-IP assets and the proceeds of the estate claims from the liquidating trust. And so, money is coming from the unsecured creditors to pay claims for recall fixes that were, didn't come into existence until after the petition date.

Now, I've had many discussions with counsel from the DOJ who represents NHTSA and, Your Honor, we're not at odds with each other; we just have two different statutes that apply. And there's a statute for NHTSA that talks about how important these are and priorities, but then we have a Bankruptcy Code that doesn't talk about NHTSA claims and it doesn't fit into any of the nice, neat categories.

And so, unfortunately, that's going to be an issue for Your Honor, but I've got a plan here that says the trust is going to pay them. I haven't even finished reading the additional provisions.

THE COURT: Well, the issue that you raise is one that I've been thinking about over the past few days --

MS. RICHENDERFER: Okay.

THE COURT: -- and that's that I have the Department of Justice here in two different capacities. And

based on my reading --

Good morning, Ms. Robinson.

MS. ROBINSON: Good morning, Your Honor.

THE COURT: -- and based on my reading of the revisions to the plan, the debtors did deal with NHTSA --

MS. RICHENDERFER: Right.

THE COURT: -- yet the Department of Justice, through the Office of the United States Trustee, appears to still have an objection.

MS. RICHENDERFER: Right.

THE COURT: And it does seem that they're at odds.

And I know that that's a policy issue that I can't resolve and, too, you probably can't resolve --

MS. RICHENDERFER: Right.

THE COURT: -- but the Government is typically to speak with one voice and not two voices.

MS. RICHENDERFER: Right.

THE COURT: So, see, there are issues --

MS. RICHENDERFER: Uh-huh.

THE COURT: -- between NHTSA and the Office of the United States Trustee that really should be resolved, because otherwise, I don't know what Mr. Resnick has to respond to.

MS. RICHENDERFER: And, Your Honor, we have gone to our clients and we don't have an answer of how to reconcile the two issues.

And the other thing is we're a little bit hampered by the fact that we don't know exactly what it is that we're looking at here. I don't know if we're looking at costs that are going to be such that it's going to totally deplete the liquidating trust. I've got no idea, especially when I hear from the buyer and the problems they're having with the fleet, which were just mentioned and remarked on by the representative of the Fisker Owners Association.

So I don't know. This is a plan that went out and it didn't include this provision. And I thought last week I had -- we had reconciled this with the debtor and what got filed last night is not what we understood the resolution was going to be, and I've got to go back to my client, and it goes on from here. There were several other issues that I need to check on that we raised that I thought were resolved, but I need to check on every single one of them now.

THE COURT: Ms. Robinson, good morning and welcome.

MS. ROBINSON: Good morning, Your Honor.

Cortney Robinson, on behalf of The United States, specifically, the National Highway Traffic Safety Administration.

I think the trustee has adequately explained NHTSA's position, which has been consistent that whatever happens in these proceedings, the debtors need to comply with

the SAFETY Act, because it's very important that the vehicles on the road are operating safely and within compliance.

And we have had a lot of conversations with debtors' counsel to get plan language. We've also had some conversations with the United States Trustee in an attempt to, of course, be one with the United States, on these issues. But there is a natural conflict that probably is a policy issue with complying with the Code here and complying with the Bankruptcy Code, or -- sorry -- complying with the SAFETY Act and complying with the Bankruptcy Code. And our position doesn't really extend further than what we said in the objection.

How the debtors reach compliance with both of those somewhat competing regulations is an interesting challenge, but to the extent that things need to be worked or wordsmithed in order to do that, our concern, again, is just that the plan complies with the SAFETY Act and that recalls are going to continue to be addressed.

THE COURT: Well, let me ask you this, the language that is contained in the plan, because it's not apparent to me, is that something that you've signed off on?

MS. ROBINSON: Yes. Yes.

THE COURT: So it resolves your objection?

MS. ROBINSON: It does resolve our objection.

THE COURT: Okay.

MS. ROBINSON: But we do appreciate and understand the trustee's concerns, as well --

THE COURT: Certainly.

MS. ROBINSON: -- and if we need to continue to work together, we absolutely will and can.

THE COURT: And nothing I said should be -- I hope that neither of you take it as a criticism of any of the work that you're doing. I appreciate that this is very difficult.

MS. ROBINSON: No. It's been fun to be on the other side of The United States.

THE COURT: But I know that there's also, just -- there's a policy issue about what happens when different parts of the Government --

MS. ROBINSON: Uh-huh.

THE COURT: -- have different interests, and this is what's happening here, but also the policy requirement that the Department of Justice speaks with one voice.

MS. RICHENDERFER: Your Honor, to take that a step further, I guess, and I know you just said something that triggered this in my mind and I know that Ms. Robinson and I talked about this, also, this is the debtors' obligation. So if the plan was going to take the debtors' obligation to do this and take it out of the unsecured creditors, out of the GUCs' pockets, that's the plan that should have been solicited.

That's not the plan that was solicited. The disclosure statement should have very, very clearly set forth that that's what was happening and I don't recall, I could be wrong, but if it said it in such plain terms, we would have made remarks upon it at that point in time. And so I've got concerns on the resolution that is set forth here and I don't know if unsecured creditors -- that's another issue that I plan to cross-examine our agent on -- but I don't know to what extent this was clear to the people voting on the plan. I have to go back and look at the disclosure statement, but certainly, these were not the terms that were solicited.

THE COURT: Understood.

Mr. Butterfield, good morning.

MR. BUTTERFIELD: Good morning, Your Honor. Ben Butterfield, Morrison & Foerster for the Committee.

So, thanks for hearing us, and I apologize for the fact that the documents were filed late last night; I understand that makes things difficult.

So I just want to start off by first echoing Scott, Mr. Greissman's comments. We have very limited money. All the professionals in this case are working under fee caps that we're up against that are not getting lifted, so there is a limitation on how much more time we can spend in Chapter 11 and what we can do; that's reality.

And I think that when people stand up here and

raise objections about this plan, about the timing, about getting crunched, they have to keep in mind that the alternative is a Chapter 7 conversion that is, like, probably going to happen if we don't go effective this week. That's what we've been told, right.

So when we think about the impact on creditors, the fact that people are getting a last-minute notice, a couple of things to keep in mind. Everyone who is a major stakeholder in this case is in this room and has looked at documents.

I understand that the U.S. Trustee's Office doesn't feel like they've been kept up to speed, but the language that she's complaining about was negotiating for DOJ. And like Your Honor just pointed out, this DOJ-DOJ, we can't be stuck in the middle of this. The DOJ, fighting with itself, can't risk creditor recoveries.

So we just need to keep in mind that the alternative is a shutdown where nothing gets done for the owners and claims are put out into the ether to be pursued or not pursued. It's a horrible situation, right.

The issue that they're raising, I think, is better suited for the discussion that we're going to have on confirmation. It's a novel issue, right. Let's let everyone make their arguments and Your Honor can decide. This isn't an issue that's been hidden; it was addressed in the first

version of the plan.

The language actually hasn't changed. Ms. Richenderfer said it has. It hasn't changed. The basic concept has existed when we did our cash collateral stipulation with the secured lender. The idea is that $750,000 is set aside to cover costs that relate to the vehicle owners, to the remediation, to the stop-sales, okay?

THE COURT: Uh-huh.

MR. BUTTERFIELD: There is the ability of the trust -- the trustees, who are -- are responsible and accountable to unsecured creditors, to raise that cap if they need to, but they don't have to. And the decision to raise it is in their sole discretion.

So we don't think that this is changing the deal at all. I do think the discussion on it is better suited for when we're actually looking at the plan language and walking through it and not this preliminary discussion about whether we should even have a confirmation hearing today.

So, I will say while we're on the topic, though, that the resolution that was reached in the plan is a settlement of a complex issue. There is a question about whether this is a prepetition claim or a post-petition claim, right. This is a settlement of that issue.

Ms. Richenderfer seems to think that it's a prepetition claim. Well, okay, but we have someone else in

the DOJ saying it's a post-petition claim, so we settled it this way. And that's what plans have to do.

It's on a crunched timeline, I understand, but we're here where we are and we have to do the best we can with what we have.

THE COURT: Okay. Thank you, Mr. Butterfield.

Real quick.

MS. RICHENDERFER: Real quick.

Your Honor, to be clear, I think it's a post-petition claim; that's the problem. If it was a prepetition claim, it would be an unsecured claim and coming out of the trust is fine.

THE COURT: Yeah, I understood your position.

MS. RICHENDERFER: I have been -- I was not here at the prior hearing and Mr. Bates has corrected me that some of the changes -- I mean, this is what I got last night -- this morning, that some of the changes that are in here were in a version that was filed one hour before the prior hearing on the disclosure statement/plan and he had reserved all rights because he had no opportunity at that point in time to talk to our client about the changes.

And what I just heard is that it's up to the discretion of the trustee whether or not to pay anything above the 750. And to be clear, I have no problem with the 750, but if it's up to the discretion --

THE COURT: Okay. I'm going to interrupt you, because we're getting into substantive argument --

MS. RICHENDERFER: You're right, Your Honor.

THE COURT: -- and, really, that's not what I want to do here at this point.

MS. RICHENDERFER: Yeah, I apologize. It's just something, I guess, we all feel very strongly about.

And here's another member who represents the DOJ.

(Laughter)

MR. BADDLEY: No. Your Honor, actually, David Baddley for the Securities and Exchange Commission.

THE COURT: Yes?

(Laughter)

MR. BADDLEY: For the record, we are not part of the DOJ, so you don't have three divisions of the same department on the same issue.

THE COURT: And you've got sharper suits, as well.

(Laughter)

MR. BADDLEY: So, Your Honor, we had two objections to the plan.

THE COURT: Yes.

MR. BADDLEY: One of them has been resolved by language that is basically about a two-paragraph provision, half a page, that, in our view, says that whatever is in the other, I guess, 472 and a half pages is irrelevant and this

is what governs our issues.

I would still like the opportunity to at least review an order before it gets entered, you know, just to make sure that there's no inconsistency, but I think that's issue has been resolved. And where we're left is with the third-party release.

You know, I came here today -- I'm not from this area -- to deal with that. I hoped that we could do that. If this confirmation hearing is going to be a four-act play and only Act 1 can happen today, I don't know if Your Honor is up for, you know, piecemealing it that way, I'm prepared to do that, if necessary, but also, I have to -- you know, the U.S. Trustee did also have a broader objection to the opt-out and I don't know if they feel the same way, that they would be prepared to go on that, but I am today on that issue. Thank you.

THE COURT: Thank you very much.

Okay. Look, here's what I think we need to do both, for my benefit and the benefit of the parties. On the plan stuff, we're going to come back at 2:00, okay.

In the meantime, I think we can probably deal with the Toccata issue if you'd like to do that at this point. But I'm sensitive to the timing here, I really am, but, you know, sometimes --

MR. RESNICK: 2 o'clock is perfect.

THE COURT: -- you've got to slow down the game because things move fast and I've got to be ready and they've got to be ready.

MR. RESNICK: Absolutely, Your Honor.

2 o'clock is perfect.

THE COURT: Okay.

MR. RESNICK: And we're happy to go forward with Toccata right now.

THE COURT: Okay. That's great.

Would that be Mr. McClammy?

MR. MCCLAMMY: Yes, Your Honor.

THE COURT: Yeah, good morning.

MR. MCCLAMMY: Good morning, Your Honor.

THE COURT: If there's a -- because there is so much work to do for some people, if anybody wishes to be excused while we deal with the Toccata issue, you're free to walk out. It won't hurt my feelings.

MR. MCCLAMMY: Thank you, Your Honor.

Jim McClammy of Davis Polk, on behalf of the debtors. With respect to the Toccata issue, there are two items on the agenda, the first of which is found as Agenda Item 5, which was Toccata's motion for allowance and payment of secured claim.

They had submitted an affidavit for Mr. Harrison, who is the owner of the dealership. I spoke with Mr. Dupre,

counsel for Toccata. My understanding is that for any number of reasons, Mr. Harrison is actually not present, here in the courtroom.

It had been my intention to cross-examine Mr. Harrison and I think some of those issues would have obviously gone to whether or not there was sufficient factual support for this motion, but also would have gone to a number of the issues underlying where these vehicles are, whether or not there's been any gamesmanship with the debtors over the course of, you know, these cases, in saying that they were possessed by Toccata at particular points in time or not.

Given the inability to have Mr. Harrison here and under oath and given that the motion relied on his affidavit, I would -- if we're -- the reasons set forth in our papers, and also for the fact that Mr. Harrison is not here in the court, ask that this motion be denied and that we move on to talk about the motion for contempt that had been filed by the debtors.

THE COURT: Okay. Let me hear from Mr. Dupre.

MR. DUPRE: Hello, Your Honor.

THE COURT: Good morning.

MR. DUPRE: Andrew Dupre of Akerman for Toccata.

Your Honor, I'll be very brief because my client is the flea on the tail of the dog on this rump.

We have the motion that's at Agenda Item is two-

part motion for a secured claim on certain warranty work; $13,000 of it was to put the cars onto the semitruck and deliver them to American Lease. We don't think it's disputed that we did that, because American Lease has the cars, as was directed by the debtor.

The other $45,000 is the other same warranty-type work that the U.S. Trustee just discussed at length. We're in the same boat as everyone else. We've submitted a sworn proof of claim. We've submitted ordinary course invoicing for that and the debtors are well aware that we surrendered the cars, charged them up, unbricked them with our own technicians, and put them on the semi to be delivered.

I can't produce Mr. Harrison. He had to handle some hurricane preparation down in a different business he has in Naples, Florida, so I don't have him to present; Mr. McClammy is correct. All I can do is rely on the evidence that we've already put into the record for this motion.

THE COURT: Well, it's not in evidence until it's been admitted and it sounds like there would be some impediments to securing admission, as I am fairly confident Mr. McClammy would object.

MR. DUPRE: I believe that's correct, Your Honor; we have discussed it.

THE COURT: Okay. On the motion for allowance of

payment of the secured claim, I'm just -- we're just going to adjourn it. I'll give you one more chance to get Mr. Harrison here. If he wants to come and prosecute his motion, he can do that. I'll give him that chance.

I'll take you at your word that he needs to be on the ground in Naples today and can't be here. So, I'm just going to adjourn it and I'm going to need to figure out a time.

MR. DUPRE: I appreciate that grace, Your Honor. Thank you.

THE COURT: Okay. Mr. McClammy?

MR. MCCLAMMY: Thank you, Your Honor.

For the record, Jim McClammy, on behalf of the debtors.

With respect to the motion for contempt, Your Honor, we've been over a number of these facts in the course of these cases, but just as a housekeeping matter first, I would like to note that we submitted the declaration of Mr. Worla Flolu, who's here in the courtroom, in support of our motion for sanctions against both, the dealership and Mr. Harrison himself and I'd like to move that into evidence at this time if there's no objection.

THE COURT: Okay. Does anybody have objection to admission of the declaration in support of the motion?

(No verbal response)

THE COURT: Okay. Hearing no response, it is admitted.

(Flolu Declaration received in evidence)

THE COURT: Is there anybody who would like to cross-examine?

(No verbal response)

THE COURT: Okay. I hear no response.

MR. MCCLAMMY: Thank you, Your Honor.

So, Your Honor, factually, as this Court is aware, we've been dealing with this dealership at the helm of Mr. Harrison for some time, from at the beginning of the bankruptcy, sending notices that, you know, we are in possession of these cars and that we need to have them picked up. The response, then, was, we're concerned. We believe we have a lien on these vehicles, tied exclusively to our possession of these vehicles and have been talked about as 31 vehicles being possessed at that time.

As Your Honor knows, we entered into a stipulation with Toccata for 31 vehicles to be turned over to the debtors and at that time, the Toccata dealership had its counsel sign that there were 31 vehicles; the VIN numbers are listed there.

They were not turned over and, again, the concern that was raised was, I'm concerned that if I give these vehicles up, I'm not going to have the liens that I want to

have protected.

We had to come to this Court to get a motion to enforce the automatic stay. It was then that we went to pick the vehicles up. We were able to get six of those vehicles initially or seven of those vehicles, initially, leaving 24, or so we thought.

As is set out in the declaration, it wasn't until later that we go to the dealership that we are told, No, you only have 11 more vehicles out of that 24 to pick up. What's happened to the other 13?

We get the response to our motion for contempt that puts in some evidence that's not sworn to, as to the legitimacy of the documentation at all, and it says, here is the certificate of ownership, the manufacturer's certificate of origin, or the "MCO." And here it is showing that it has been signed over.

And the statement is that these have been done well in advance of the petition date. And the dates on them are just the dates of the MCOs themselves: April. Well, if that's the case, why have we been talking about it as though these vehicles were there and why is it that Mr. Harrison, under penalty of perjury, submitted a claim to this proceeding that said, I have a secured interest that needs to be protected. I have a secured claim and a lien premised upon my possession of these 31 vehicles and, again, listed

them by VIN as part of the proof of claim.

THE COURT: And entered into a stipulation that was approved by this Court --

MR. MCCLAMMY: That's exactly right.

THE COURT: -- regarding the subject of those vehicles.

MR. MCCLAMMY: That's exactly right.

So either two things were true: those vehicles were there on the lot at the time that the proof of claim was filed and the stipulation was entered into and further discussions about the potential purchase of all of these vehicles by Mr. Harrison ensued to try to resolve this or they weren't.

At this point, the debtors are left not knowing, but those vehicles were either vehicles that needed to be purchased by Mr. Harrison if he, in fact, sold them on to other customers and sold -- at that time, if you were to accept what they've got in their papers, purchased at a price to us that's not the $16,500, but the $30,119 that they should have owed as having these cars available to them under the display agreement.

THE COURT: Uh-huh.

MR. MCCLAMMY: So to add to that, and this is unbelievable to me, Your Honor, that a party that's aware that it's under a court order to return vehicles, when we go

back -- and this is set forth in Mr. Flolu's declaration -- to pick up the very last of the vehicles and five of them have been stripped of parts. Two of them did not have the solar panel roofs on them any longer. A number of them had suspension parts and other parts removed from them.

And the technician that reports to Mr. Flolu is that he saw the cars there in good condition to be picked up. This is something that would have had to have happened after the tech which initially went there to prep these vehicles to be delivered to us.

THE COURT: Uh-huh.

MR. MCCLAMMY: Under those circumstances, Your Honor, we believe that this Court has no choice but to enforce its orders, protect the jurisdiction of this Court, enforce the automatic stay, and find both, the dealership and Mr. Harrison for his direct participation in this, in connection with all of that.

In addition to that, we've set out in our papers, we believe we are entitled to our costs. It has come at great cost to these estates to have to continue to deal with these issues. As Your Honor knows, we worked very hard to try to find a resolution where we can, which is why we entered into the stipulation when we thought it wasn't needed.

We tried to avoid coming to this Court with the

motion to seek, to enforce the automatic stay, but we didn't have the ability to avoid that. We certainly didn't want to have to trouble this Court and go the further expense of bringing these contempt proceedings, but when we have a situation where we believe we have an additional 13 vehicles that should be sold to American Lease if they're not going to be purchased by this dealer, that's money that needs to come into these states that didn't.

In light of where we are, Your Honor, I believe in our papers, at the time, when we thought there was still some possibility that these cars were in Mr. Harrison's possession, we still don't know whether that's true or not, but the statement suggests that these were cars that were let go much earlier in the process. We would ask that the fine be tied to the costs that should have been paid at the time, which is the $391,000, which is 13 times the 300 -- the $30,000 amount.

The five vehicles that have been damaged that we were able to pick up cannot be sold to American Lease for the sixteen-five. We can maybe, at the most, get $2500, if at all. But I would say that the amount should be sixteen-five for each of those vehicles. So five times the sixteen-five that we're not able to bring in.

We reserve our rights because we haven't been able to fully figure out the vehicles that we have been able to

pick up, if American Lease will find that many of them have been previously titled, therefore, destroying their value.

And then we would also ask to be able to put in the amount of money that has been incurred by these estates for the attorneys' time that has been spent in connection with both, the stipulation, the further motion to enforce, and the motion to seek contempt here, Your Honor. And we would do that within the span of 10 days. We would ask that the order be entered to have the money come into these estates immediately with respect to the vehicles.

THE COURT: When we spoke last week I think it was over Zoom --

MR. MCCLAMMY: Yes.

THE COURT: -- I raised the point that I thought was, you know, fairly self-evident that one of the ways they could figure out, like, what cars are we talking about, was to reconcile what was on the lot versus the VIN numbers.

Do you know if there were any efforts made to do that? Do we know anything more?

MR. MCCLAMMY: Unfortunately, Your Honor, we don't, and, unfortunately, the debtors, we have not been able to manage that.

THE COURT: Understood, yeah.

MR. MCCLAMMY: We've been able to check the list of VINs that are on the dockets that were submitted and tie

that to all but one of the vehicles that was on the list in the stipulation. But whether or not there's been some moving of vehicles during the period of time that we've been talking about, it's been impossible for us to tell.

THE COURT: Okay. And I take it Mr. Flolu's declaration is the sole evidence that you're relying upon in support of the motion?

MR. MCCLAMMY: So, it would be that, Your Honor, plus the proof-of-claim form that was submitted by Toccata in connection with the --

THE COURT: Right.

MR. MCCLAMMY: -- with their motion to seek payment of their claim.

THE COURT: Right.

MR. MCCLAMMY: And then, Your Honor, I know you've adjourned the hearing with respect to their request, but in light of all of this, we would suggest that it's proper that that claim just be straight-out denied, given the lack of forthcoming, the lack of odyssey (phonetic) with this Court, and the clear, you know, fact that the proof of claim that underlies that could not have been truthfully entered into if they're now saying that these were vehicles that were not in their possession well in advance.

THE COURT: Okay.

MR. MCCLAMMY: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Dupre?

MR. DUPRE: Thank you, Your Honor. I'll be brief.

It is correct, as Mr. McClammy said, we did try to negotiate a sale. Toccata is in the same boat as everybody else; we can't buy bricked cars, so, therefore, we have to surrender them. So our negotiations went south, the same as other people in this courtroom seem to have occurred.

The dealer has already surrendered all the cars that it has. Your Honor, there were semitrucks sent, including these allegedly damaged cars; they were put on the semi, as well, and were taken.

So, of the total 31 cars that have ever been talked about, 18 have been carted away. Those are all the ones that the dealer has. Thirteen were past sales.

So the claim on the contempt motion is, effectively -- I'm being slightly colloquial -- but throw somebody in jail until they turn over the keys to the cars. The dealer cannot turn over these cars, because third parties own them and we've put the title evidence of who these third parties are and where the cars are and which VIN numbers that the third parties --

THE COURT: Where is that in evidence? I'm sorry.

MR. DUPRE: It's attached to our contempt opposition at Exhibit A, Your Honor, which is excuse me, 628.

THE COURT: Are you moving those documents into evidence? They're not in evidence right now.

MR. DUPRE: I don't have a witness to be able to move them into evidence, Your Honor.

THE COURT: That's a problem.

MR. DUPRE: I don't have Mr. Harrison. Yes, that's what we've got. But they are car titles, so they're government documents that are self-authenticating, Your Honor.

THE COURT: Mr. McClammy?

MR. MCCLAMMY: Your Honor, these are actually not car titles; these are the manufacturer's certificates of origin.

THE COURT: Uh-huh.

MR. MCCLAMMY: They would have to have been separately titled if they're going to go to an individual as part of the sale. So we do not believe that these documents are, one, self-executing [sic]. We have questions about the information that has been included on them, including who handwrote in, you know, the names, addresses, et cetera, and when. There's nothing in evidence that shows that these cars were sold in advance of the petition date, for example, as opposed to this having been done and manufactured more recently.

THE COURT: Yeah, there's no way those documents

can be authenticated. I'm not going to admit them.

MR. DUPRE: Yeah, I understand, Your Honor.

So the motion is a contempt sanction: give us the cars or go to jail. That's actually not the correct relief here.

The correct relief, as Mr. McClammy just said, is we have a claim for money for past sales, whether that's sixteen-five, as it says in the motion at paragraph 38, or for the first time, I think we're hearing it's $30,100. I don't think that's in the papers, but that is the past sale evidence, plus fees. But we also don't have a fees affidavit, so we don't know what we're dealing with.

The right answer is not give debtor the cars so they can go on a semi to American Lease. We don't have the cars. We don't have the ability to let ourselves out of the jail of the contempt sanction. We would have to pay money on the claim, as Mr. McClammy has said, and it's of conflicting amounts, as we just heard. It's either $300,000 or $215,000, plus whatever Mr. McClammy wants in costs.

THE COURT: And how on earth are these cars included in a proof of claim and agreed to be provided back to the debtors under a stipulation that your client entered into and sought approval of by this Court? I just don't know what to -- and having no evidence from your side, I don't know what to believe. I don't know what to think.

I mean, it's immensely frustrating and I, frankly, have just gotten the feeling that Toccata has simply tried to avoid showing up, except through your good work, but, you know, they're just not here.

MR. DUPRE: That is correct, Your Honor.

I don't have a witness to present for this matter, but I think the parties are in agreement, at least what I'm hearing from today, is if we can't cough up the cars, we have to pay. Toccata broadly agrees with that statement. We would owe past money on a sale agreement. It's simply a matter of money, net money that's not reduced to a sum certain in any of these papers.

What I can represent, and Your Honor will take my sudden new appearance in this case for the implication that it is, we -- I am told, although it sounds like a backseat driver -- that there were errors in past inventory sheets and filings and stuff like that. I wasn't there and can't say, but I am told that.

THE COURT: Okay. Well, I think what I hear Mr. McClammy to say that there were -- and correct me if this is not your understanding of the state of affairs -- but that there were 13 cars returned in good condition. There were 5 that were returned that were damaged. And then there were the 13 that I'm hearing may have been the subject of sales before the bankruptcy case filed.

Is that right?

MR. DUPRE: Uh-huh.

THE COURT: So 18 returned, 5 of them were damaged, 13 were okay, I guess, and then 13 that were sold prepetition; is that correct?

MR. DUPRE: All of those numbers are correct and the categories are correct, Your Honor.

Toccata doesn't cop to these damages allegations, but other than that, yes.

THE COURT: And did Toccata pay the debtors for the 13 cars or -- yeah, the 13 cars that were sold prepetition or are those amounts still outstanding?

MR. DUPRE: Those are outstanding amounts, Your Honor. Thirteen cars are outstanding amounts from the debtor to Toccata.

THE COURT: Okay. Thank you, Mr. Dupre.

Let me hear from Mr. McClammy, please.

It sounds to me, Mr. McClammy, like there's at least broad agreement on the disposition of the 31 cars, and we agreed that there were 13 cars that were apparently sold prepetition for which the debtor has not received payment.

And if queried whether an order requiring payment is appropriate for a contempt order, or rather that's a cause of action that the debtor has against Toccata for nonpayment of the debt, I guess that's my concern about whether granting

the relief that you requested, as a subject of this contempt order, they be required to pay for 13 cars at $30,100 each.

MR. MCCLAMMY: Your Honor, I think that it's appropriate as a sanction here, because we actually don't know if these cars were transferred prepetition. We are using that as a proxy for what the amounts should be, but we are left with the situation where we've been told all along that these cars were actually in his possession.

And it's possible that he, in violation of the automatic stay, has, you know, absconded with these cars and we just don't know. And that should not be something that they should be allowed to get away with, especially because they came to this Court seeking the protections so that they could turn over 31 cars to us and filed a proof of claim saying that we have 31 cars, allow us to have our security interest here.

So, Your Honor, I think what the record shows is there were, in fact, 31 cars and now, they're not willing to give 13 cars up, and maybe they have, in fact, put those 13 cars in the hands of someone else. But the debtor shouldn't be responsible for having to track that down and perhaps go after other folks to get these cars back.

At this point, the only sanction that the debtors think can be handed out by this Court is to have them pay, where they otherwise, you know, should have actually turned

the cars back.

THE COURT: Okay. Thank you.

Do you have any response to any of the other comments that Mr. Dupre made?

MR. MCCLAMMY: The only one I would say, briefly, Your Honor, is, again, to mention that when we thought that we might be able to get these cars and they were available to be picked up, we used the proxy of sixteen-five, which was the American Lease amount, because if they were on the lot at the time, if we're going to accept somehow or another that they've sold these cars, you know, prepetition, then the amount should be the thirty-thousand-dollar amount that we would have been entitled to have received if they had done it that way.

THE COURT: Okay. All right.

I'm prepared to rule on this. I'm going to grant the motion. For the five cars that were received back damaged, I think the sixteen-five is an appropriate measure of the damages, because otherwise, they would have been sold to American Lease at that price.

And, you know, on the 13 cars -- and I appreciate you answering my question and addressing my concerns about whether that's appropriate in the contempt order -- but I'm persuaded that it is. And the reason is that the undertakings that I've had from Toccata prior to now in their

proof of claim that was submitted under penalty of perjury, was that those 13 cars were there. And, again, the parties entered into a stipulation which was submitted to this Court for approval, so there was an order of this Court that also reflected that those cars were there and available for turnover.

I don't know where they are and I have no evidence as to their location or their disposition. And the $30,100 figure is an appropriate proxy, I suppose, for Toccata's failure to turn over those vehicles, as they were required to do. So I do agree with you that it is appropriate to order that relief.

So I'm immensely frustrated with Toccata, because I don't feel that -- and this is no aspersion at all on Mr. Dupre, who I think is doing fine work under what, apparently, are difficult circumstances -- but I don't think that Toccata has been very candid or forthcoming here. And there were ordered of this Court to enforce and enforce them, I will; that's my job.

So I'm satisfied that the relief is appropriate and I will order it. And I'll ask you to revise the form of order and submit it under certification of counsel so that I may enter it as promptly as I can upon receipt.

MR. MCCLAMMY: Thank you, Your Honor.

And with respect to the motion, their motion to

get paid on their claim, we thought as --

THE COURT: The secured claim?

Yeah, I mean, I --

MR. MCCLAMMY: -- part of the sanctions, that that motion would be denied.

THE COURT: No. Yeah, I'm going to have a hearing on that --

MR. MCCLAMMY: Okay.

THE COURT: -- later, as I promised Mr. Dupre. So any language dealing with that motion should be stricken from the order --

MR. MCCLAMMY: Okay.

THE COURT: -- and I appreciate you raising that with me.

MR. MCCLAMMY: Thank you, Your Honor.

THE COURT: Okay. Thank you.

Is there anything else, Mr. Resnick, before we come back at 2:00?

MR. RESNICK: No, thank you, Your Honor.

THE COURT: Okay. So we'll come back at 2:00 and if anything changes with your scheduling needs, just let chambers know.

I do have a -- let me just give you my schedule and what I would intend to do. I have a hard stop at 4:30. I have time, it appears, tomorrow after noon, and if we

needed to come back tomorrow afternoon so you don't have to go home and grab a toothbrush, I would suggest that we permit appearances for out-of-town counsel by Zoom tomorrow so everybody doesn't have to go home and come back. There's nobody, I'm sure, expected to spend tonight here, as well.

So that would be, certainly, something we could do to mitigate the inconvenience of an unexpected hearing tomorrow if we needed to get there.

MR. RESNICK: Thank you, Your Honor. We'll see you at 2 o'clock.

THE COURT: Okay. Thank you.

We're adjourned.

(Recess taken at 11:10 a.m.)

(Proceedings resumed at 2:16 p.m.)

THE COURT: Please be seated. You look very happy.

MR. RESNICK: I'm not sure if I should take offense to that, but no, thank you, Your Honor. It's been a productive few hours, both in this case and the Big Lots hearing that we just had before Judge Stickles. So it's been a lot of running up and down, but we appreciate the guards out there running us up and down, arguing go through.

THE COURT: Yep, got to go through --

MR. RESNICK: Yes.

THE COURT: -- each time --

MR. RESNICK: Yes, they wave us through.

THE COURT: That's good. Yeah.

MR. RESNICK: But it has been a productive few hours, and I hope Your Honor has had an opportunity to read through some of the documents. I think we have made a little bit of progress on our side that I wanted to inform the Court over.

THE COURT: Okay.

MR. RESNICK: So we do have a temporary arrangement with American Lease to take Your Honor up on the offer for having that part go tomorrow afternoon. We have some of the greatest minds in the EV space working on a technological resolution to the porting issue or a commercial resolution between the parties. We're not sure whether that'll happen in the next 24 hours, but we are trying and hoping.

And so with respect to the American Lease issues, we would propose tabling that for today and addressing that tomorrow afternoon if need be or maybe we'll have a resolution on that issue. But we are prepared at this point to go forward with everything else, which has been narrowed a little bit.

I understand that the disparate treatment objection between the DOJ versus DOJ issue has been resolved, and my colleague, Richard Steinberg, will speak to that. I

believe the only things that are outstanding on a contested basis are the third-party releases, the exculpations, and the impermissible discharge issues from the United States Trustee's objection, which we're prepared to address today.

MR. RESNICK: So what I would propose, Your Honor, is turning the podium over to Mr. Steinberg first to walk through some of the plan issues and other resolutions.

THE COURT: Before we do that --

MR. RESNICK: Sure.

THE COURT: -- on the American Lease issue, I'm good with doing tomorrow afternoon because it's going to give you more chance to talk, and so things may develop and may turn out that you have a consensual resolution to this. But I just know that based upon the additional work that I was able to do, it's possible that it would require more factual and analytical development than we already have in the papers and the record before me.

So why don't we see where we are tomorrow afternoon, and if we need to go forward on a contested basis, and if so, whether it's appropriate to do it tomorrow, or if we just need time.

MR. RESNICK: Understood, Your Honor. Thank you.

THE COURT: I think it's the best we can do. Okay. Thank you. Mr. Steinberg, welcome. It's good to see you.

MR. STEINBERG: Good afternoon, Your Honor. For the record, Richard Steinberg, Davis Polk & Wardwell.

In a moment, Your Honor, I plan to walk through the red line that was filed last night.

THE COURT: Okay.

MR. STEINBERG: Do you need a copy of it? I can hand one up.

THE COURT: I have it in my binder.

MR. STEINBERG: Okay, great. First, as a housekeeping matter, I think we'd like to move Mr. DiDonato's declaration into evidence. Mr. DiDonato's declaration is at Docket Number 668. We would also like to move Mr. James Lee of Verita Global's declaration.

THE COURT: Okay, let's go one by one because otherwise I'll forget all the names.

MR. STEINBERG: Okay. No problem.

THE COURT: Does anybody object to the admission of Mr. DiDonato's declaration in support of the plan?

Okay, I hear no response. It is admitted.

(DiDonato Declaration received in evidence)

THE COURT: Does anybody wish to cross examine Mr. DiDonato? I hear no response. Okay.

MR. STEINBERG: Thank you.

THE COURT: Thank you.

MR. STEINBERG: So the second declaration is the

voting declaration of Mr. James Lee of Verita Global, Docket Number 667. An absent objection, we would move to move his declaration into evidence, as well.

THE COURT: Does anybody object to the admission of Mr. Lee's declaration in support of the voting tabulation?

Okay, I hear no response. It is admitted.

(Lee Declaration received in evidence)

THE COURT: Does anybody wish to cross-examine Mr. Lee?

MR. BADDLEY: Your Honor, David Baddley for the SEC. I would like to ask some questions.

THE COURT: Okay, very good. Is Mr. Lee participating by Zoom or is he in the court?

MR. STEINBERG: Mr. Lee is in the courtroom, Your Honor.

THE COURT: Oh, okay. Mr. Lee, could you please approach a witness stand, which will be up to your left.

But I guess I should note that the declaration is admitted. We're just doing cross.

THE CLERK: Will you please remain standing and raise your right hand.

JAMES LEE, DEBTORS' WITNESS, SWORN

THE WITNESS: I do.

THE CLERK: Will you please state your full name and spell your last name for the record?

THE WITNESS: James Lee, J-A-M-E-S L-E-E.

THE CLERK: Thank you. You may be seated.

MR. STEINBERG: Your Honor, can I hand Mr. Lee's declaration up to him?

THE COURT: Yes, certainly.

MR. STEINBERG: Thank you.

THE COURT: Thank you, Mr. Steinberg.

CROSS-EXAMINATION

BY MR. BADDLEY:

Q Good afternoon, Mr. Lee.

A Good afternoon.

Q My name is David Baddley. I'm an attorney with the United States Securities and Exchange Commission, and I'm representing the SEC today in connection with its objection to the third-party release that's in the debtor's plan. And just to be clear, that objection relates to whether or not the opt-out mechanism that was utilized, which I think your firm assisted with, is appropriately binding upon the company's shareholders. Okay. It's limited to that issue. You understand that?

A I understand.

Q Okay.

MR. BADDLEY: And I think before I go too far, Your Honor, one question I have is there's also a certificate of service that was filed on behalf of Verita with respect to

the opt-out ballots. And I guess I'll just ask the witness.
BY MR. BADDLEY:
Q This certificate of service is signed by Darlene Calderon. Who is Ms. Calderon?
A She's my colleague over in Verita.
Q Okay. And is she present in court today?
A No, she's not.
Q Okay. And so are you able to testify about the veracity of the various representations that are made in that certificate of service?
A I am familiar with the information contained in the certificate of service, yes.
Q Okay.
MR. BADDLEY: I don't know if this certificate of service is part of the record or evidence are being admitted, but assuming it is, I would ask to be able to cross-examine the witness on that certificate of service, as well.
THE COURT: Any response, Mr. Steinberg or Mr. McClammy?
MR. STEINBERG: Thank you, Your Honor. I'll probably be able to witness (inaudible) this. I would only ask, do you have copies to provide?
MR. BADDLEY: I do have copies, and I don't know if it's been admitted into evidence. I certainly don't have object to it, but I would like, to the extent it will be part

of the record, would want to cross-examine the witness on it.

THE COURT: Well, it's certainly part of the record of these proceedings. I'm comfortable with you going forward.

MR. BADDLEY: Thank you.

THE COURT: What's the docket number for that certificate of service? It may say it along the top.

MR. STEINBERG: I believe this is not a docketed version.

MR. BADDLEY: I think it's -- I did. Forgive me, Your Honor. 601.

THE COURT: Thank you very much.

MR. BADDLEY: And I have a copy, if I may approach the witness. And I can --

MR. STEINBERG: (Inaudible) highlighted copy?

MR. BADDLEY: Yes, I didn't intend to do that. What I have is a narrowed-down version that only has the relevant exhibit so that it was not the complete. It wasn't going to include the exhibit. So may I approach the witness and Your Honor, and I'll provide one to the Court.

THE COURT: Yes, certainly. Thank you.

MR. STEINBERG: Would you like me to approach, Judge?

THE COURT: Oh, sure, yeah. Thank you very much.

MR. BADDLEY: And while I'm at it, I'll also

provide to counsel, the Court, and the witness, basically, it's the two opt-out forms that are referenced in the certificate of service that we'll also be talking about.

THE COURT: Okay, thank you.

BY MR. BADDLEY:

Q All right. Mr. Lee, would you please take out the certificate of service that I just handed to you? And do you have that, sir?

A I do.

Q And on the second page, and I went ahead to highlight these to try to make it easier for people to find it references that there are, my understanding, two opt-out forms. There's the non-voting combined notice, which had an opt-out form. And then there's the beneficial holder non-voting combined hearing notice that also had an opt-out from; is that correct?

A That's correct.

Q Okay. And then the third was what's called a master opt-out from, as well; is that correct?

A That's correct.

Q Okay. And the exhibit numbers that are referenced on the certificate of service, Exhibits 4, 5, and 6, those correspond to the exhibits that these were attached to on the plan procedures order; is that correct?

A That's correct, yes.

Q Okay. Did Verita distribute those exact versions of these documents, or were there any modifications made?
A Well, we did customize exhibit for the non-voting combined notice with the opt-out election form to contain information regarding the non-voting class claimants information. That's the only customization that we did.
Q Help me understand what that customization involved in.
A Well, it would include a unique ID and PIN for that user to be able to go into our website and submit their opt-in or opt-out instructions electronically.
Q Okay, so your testimony is that the version of Exhibit 4 that went to various parties in the certificate of service, that opt-out form had an ID and a user ID to get into the e-portal?
A That's correct, yes.
Q Are there any copies of what that might look like for the non-voting parties?
A Well, it is for the non-voting parties.
Q Right. But I mean, has that been filed anywhere? Is that part of the record?
A No, no.
Q It's not part of the record?
A Correct.
Q Okay. Was there any sort of record date for which shareholders were going to receive an opt-out form? Do you

understand what a record date is?
A Yes, I do.
Q Could you please tell the Court what a record date is?
A The record date is the date -- it's a snapshot, basically, of a particular day that determines who held the common shares as of that particular day, and we effectuate service to those holders only.
Q Okay. And what was the record date for shareholders in this case?
A I believe it was September -- one second, please. I believe it was September 11th. Right. Yes, it is.
Q September 11. So if I owned shares on September 10 and sold them on the 10th, then I would not have gotten this?
A Possibly. It depends on when that trade settled.
Q Okay. But if it hadn't settled on the 11th, then I would not have received it.
A Well, if it didn't settle by the 11th, you would be --
Q Correct. Thank you. If it did settle, then I would not.
A Correct.
Q Okay. And then by the same token, if I had purchased on the 12th, I wouldn't have received one either.
A That's correct.
Q Okay. And as far as you know, are Fisker shares still actively trading?

A I do not know that information.
Q You don't know. Okay. When did you have to provide the nominees? Well, let me back up. Did you provide the nominees the record date by which shareholders were going to be included in this distribution?
A Yes, we did.
Q When did you provide that date to the nominees? =
A Well, we informed the nominee's agents, Broadridge and Median, with the record date a day in advance of the records date. So here, since it was September 11th, we would have informed them the day before, September 10th.
Q And those are the only parties that you informed was the record date.
A Well, and after the fact, when we effectuate service to the nominees, we would inform -- the documents would have the record date on it.
Q So if any nominee did not know by September 12th that the record date was September 11th, that nominee would not have been able to capture the correct group of beneficial owners?
A No. The vast majority of nominees use a third-party agent, a company called Broadridge.
Q Sure.
A Some also use another company called Median, right?
Q Sure.

A So we coordinate with those two proxy agents to establish that record date (inaudible) and they, in turn, will go out to the nominees and request the record date positions afterwards.

Q Okay. But my question was, if the nominee did not know of the September 11th record date until September 12th, that nominee would not be able to go back in time and figure out who the shareholders were as of the 11th in order to identify the correct group of parties to.

A I don't have knowledge of how individual nominees keep and maintain their records.

Q Okay. So in order for all this to work, we have to assume that when your company notified those two agents on September 10th, that word got out to everybody that September 11th is the date and that's what we need to go by.

A Correct.

Q Okay. Do you know -- let's walk through here the certificate of service. So again, there were basically two opt-out forms that could have gone to a shareholder, right, either Exhibit 4 or Exhibit 5?

A Yes, that's correct.

Q Exhibit 4 would have been sent directly to the shareholder and then Exhibit 5 would have been sent through a nominee.

A That's correct.

Q Okay. And then Exhibit 6, which is the master opt-out, would go to the nominee and remain with the nominee.
A That's correct.
Q So if you could turn to Page 3 of the certificate of service, Paragraph 12 should be already highlighted. I'm sorry, Paragraph 13. It says that on September 12th that the Exhibit 5 opt-out form, which is the one that goes through the nominees, was sent to nominees through various methods. And those nominees are listed on Exhibits G, H, and I. Is that correct? And that was a long question. So if you --
A Exhibits G and I list the nominees. Exhibit H are the two proxy agents.
Q Okay. And all of those recipients were supposed to send these Exhibit 5 forms on to the beneficial owners?
A That's correct, yes.
Q Okay. Do you know how many beneficial owners ultimately received this Exhibit 5 opt-out form through these parties?
A Based on the information that we were able to view on the proxy agent's website, Broadridge, as well as the quantities they've required us to produce to them, we estimate about 400,000 copies were either sent out physically or electronically.
Q There seemed to be some levels of uncertainty on that based on information that you saw on a website. By whom?

A By the proxy agent, like, Broadridge.
Q Okay.
MR. BADDLEY: Well, Your Honor, that's hearsay, so I would like for that to be excluded, clearly.
THE COURT: Okay.
BY MR. BADDLEY:
Q But even based on that, you're assuming 400,000 people got it by mail.
A No, we sent to Broadridge as the proxy agent for the vast majority of nominees, approximately 30,000 hard copies. And they've informed us that they would also deliver electronically about 350,000 or so copies to the nominee's clients.
Q Okay, and when you say the vast majority of nominees, does that include the nominees that are listed on Exhibit G and Exhibit I, or are those outside of the Broadridge group?
A No. It includes those nominees.
Q It includes those, okay. And then Exhibit or Paragraph 14, that says where the opt-out, the master opt-out, form was sent, and you identify there. Again, nominees that are listed on Exhibit G and Exhibit I. Is that correct?
A That's correct.
Q And those were not sent to the two agents on Exhibit H, the Broadridge and the other one.
A Correct.

Q Okay. And then Paragraph 15 says that on September 12th, what we'll call the Exhibit 4 opt-out form was sent by email to various non-voting parties identified on Exhibit J?
A Correct.
Q Okay. And if I'm looking at Exhibit J, which is in this packet, maybe about 10 to 15 pages back, it's a document that says Page 1 of 10 on the bottom. Are you there, sir?
A Yes, I am.
Q Okay. And at the top, it looks like that this exhibit includes all the categories of non-voting creditors, including priority creditors and secured creditors. Is that correct?
A Correct. As well as Class 6 registered equity holders.
Q How many of these individuals and entities that are listed on these 10 pages are Class 6 shareholders?
A I believe there were 43 registered equity holders.
Q And those 43 received the Exhibit 4 opt-out?
A Correct.
Q Okay. And then continuing on Paragraph 19 on the next page, this also is -- I guess this is four days later, you sent this opt-out by email to various parties on Exhibit Q; is that correct?
A That's correct.
Q And you can look, it's there. But is it your understanding that Exhibit Q also mixes together the priority

creditors, the non-voting secured creditors, and the non-voting equity holders?

A My understanding of Exhibit Q only contains Class 1, other priority claims, and Class 2, other secured claims.

Q Okay.

A And no Class 6 registered equity holders because they were all captured in the prior exhibit.

Q Okay. So then to jump ahead, because I think this is the same issue in Paragraph 23, where again, this Exhibit 4 opt-out was sent to various non-voting parties on Exhibit U, would this also not include any shareholders?

A Exhibit U reflects reservice of any bounce backs. So to the extent there's an email that we had for a shareholder and it was bounced back with a new email address, it would have been captured there. But I don't know off the top of my head whether it does include them or not.

Q Okay. Then if you could go to Paragraph 20. This says that on September 16th that your firm sent by mail the exhibit for opt-out to parties listed on Exhibit R. And that should be the second to last at the end.

A Yes.

Q And the top here says that this is registered shareholders.

A Correct.

Q Okay. So Exhibit R contains all the registered

holders?

A Right.

Q And all of those registered holders on Exhibit R would also have been included in, I think you said it was Exhibit J.

A No, Exhibit Q.

Q Q. Thank you.

A But to the extent that we had emails for them, they will be contained in Exhibit Q.

Q No, wait. I think it might be Exhibit J, though. Exhibit J was the first one that combined all three, and you said -- I thought that that one is the one.

A Oh, I'm sorry, you're correct. You're correct.

Q Okay, so that's everybody?

A Yes.

MR. BADDLEY: Your Honor, I think when it comes to the ability of shareholders to have used the e-portal, I think without seeing the actual form that they were used, that provided that information which was needed, I think we have to object that any testimony about whether those shareholders had the ability to do that should not be allowed because we don't have the actual document that they were provided.

We don't have the best evidence of the notice that they received. All we have is something that does not

contain that information, and we're told that it was put on after the fact.

THE COURT: My understanding of the testimony was that the customization that was done is to provide the information specific to any particular party voting on the -- or well, who's being asked to decide whether to execute the opt-out or not. It's identifying information.

Was there additional text beyond that that is not contained in the exhibits that you've been referred to here?

THE WITNESS: No. The opt-out form as filed has a blank section where we would fill in customized user ID and PIN numbers.

THE COURT: But do we have the opt-out form?

MR. BADDLEY: Yes, Your Honor, that's the second group of documents that says Exhibit 4.

THE COURT: Um-hum.

MR. BADDLEY: My looking is that area where that information would be is on neither of these documents. It is on the forms that went to creditors who were allowed to vote.

But I think what Mr. Lee is saying is that they changed this form to make it look more like the voting forms to add that information in, where clearly it wasn't contemplated to be there on the approved forms.

THE COURT: Any response from the debtors, Mr. McClammy?

MR. MCCLAMMY: Thank you. Your Honor, My understanding is this is something that's used on a regular basis, that the notices are sent out, the PINs are included, just so that they have the ability to access. And we can try to get that information out through the witness, if necessary. But my understanding is that it's a fairly standardized process that's used and there's no real difference other than just including a unique ID and PIN.

THE COURT: Right. And based upon my experience, that would probably be the case. The forms that one would receive in the mail would simply provide the option, like the opt-out form here would contemplate being able to fill it out by paper and send it back in, but otherwise, it just directs you to a website where you can do the same thing, and that was provided for under the procedural order regarding voting.

MR. BADDLEY: And I think that's correct. And Your Honor, I don't have the voting opt-out form here, but that one clearly had an area where this information was put in. So I don't dispute at all that a voting creditor easily had the ability to go in and use the electronic opt-out.

We don't have any evidence that shareholders had the ability to utilize the electronic opt-out. And that would be important because I'd like to point the Court to various parts of that opt-out form where it specifically tells them, in fact, strongly encourages them to use this

electronic opt-out process. And there's no evidence that they were actually able to utilize it.

THE COURT: Weren't there something like I think I read in the pleadings, 9,000 opt-outs among equity holders?

MR. BADDLEY: We're going to get to that, Your Honor. My understanding that every single one of those opt-outs came through a nominee. Not a single shareholder who received the direct form would have gotten it. And that 9,000 might sound large. It's 125 million shares. That might sound large.

THE COURT: I understand.

MR. BADDLEY: It's 12 percent.

THE COURT: Yes. They're going to get a chance for the remainder of their evidence, and we'll see what they're able to do. But I take your point, and I'll certainly consider it when weighing the evidence and making my ruling.

MR. BADDLEY: Thank you, Your Honor.

THE COURT: Thank you, sir.

BY MR. BADDLEY:

Q So just a couple places because, you know, just to have it for the record, if you could, Mr. Lee, please turn to the Exhibit 4 opt-out. It's this clipped group of papers. And on the second page of the notice in the middle, and this is the form that went to shareholders, correct.

A The registered shareholders.
Q Registered shareholders. And it tells them to be considered valid, opt-out forms must be submitted via the e-optout portal on the case information website. And then it also tells them that they could also return it by mail, correct?
A Correct.
Q Okay. And then it also strongly encourages them to use the e-opt-out portal, correct.
A Correct.
Q Why does Verita, and this might be self-evident, but why does your firm encourage the use of the e-opt-out portal?
A Using the e-balloting portal is a more streamlined process where a submission is received instantaneously. It has an electronic timestamp, as well as we -- because they would have to access our e-balloting portal with a unique ID and PI, we would know in the backend exactly who submitted that instruction and we're able to verify that.
Q Okay. And again, the only way someone could utilize that is if they were provided a unique ID and a PIN.
A That's correct.
Q And nowhere on this form, this from, is that information available or even a space for that information to be put in.
A You're correct, yes.

Q Okay. And then if you could please turn forward two more pages. Again, this is similar information about how a shareholder could utilize the e opt-out process and again, strongly encouraging them to do so; is that correct?

A That's correct.

Q Okay. And then if you could flip to -- it's going to be Page 9 on the bottom. This is the page where the shareholder would sign and provide information.

A Correct.

Q Do you see this highlighted part that says it is -- and this is talking about if a shareholder opts out, that to the extent they are a released party, that if they opt-out, they're choosing to forego the benefits of obtaining such release and will not be considered a release party. Do you see that?

A I do.

Q Was that language included on the opt-out forms that went to the registered shareholders?

A I think there's a presumption it did, if that language is in this form.

Q You're not aware of any change.

A I'm not aware of any change.

Q Okay. And then not to get into -- if you could just flip to Exhibit 5 on the second page, this also contains the same information about the ability to utilize the e-opt-out

and strongly encouraging the beneficial owners to use that process, correct?

A Correct.

Q If you could turn to Page 4, this is talking about how -- are you on Page 4, sir?

A I am.

Q This is talking about how the beneficial owner is supposed to return it to the nominee. It says that beneficial holders and the nominee should allow sufficient time to assure delivery. When does a beneficial holder need to get their opt-out form to the nominee in order for the nominee to complete the master ballot to get it back to you?

A Each nominee has their own internal deadline. That's typically one or two days prior to the actual deadline.

Q Okay. But there's no guidance on really when they should do that?

A No.

Q And again, on the last page of the Exhibit 5 opt-out, which is the one that went through the nominees to the beneficial owners, that likewise contains that same language in bold that if you do opt-out then you don't get the benefits of the release if you are a releasing party. I'm sorry. Yeah, releasing party.

A Correct.

Q Okay. I believe Mr. Resnick gave you a copy of your

voting report.

A Yes.

Q Okay, and do you have that in front of you, sir?

A I do.

MR. BADDLEY: Your Honor. I don't have a copy of that available. I just got it last night electronically and didn't have the ability to print out copies. Does Your Honor have one?

THE COURT: Yeah, that's the report that was attached to Mr. Lee's declaration?

MR. BADDLEY: Yes, sir.

THE COURT: Yep, I've got it. I'm there. Thank you.

BY MR. BADDLEY:

Q Okay, Mr. Lee, if you could find Exhibit C to your report, which is the opt-out summary?

A Yes.

Q Okay. And that's Page 36 of 49. It's a 12-page document that lists by name various individuals and entities who opted out; is that correct?

A That's correct, yes.

Q Okay. Every individual and entity that's on these 12 pages is either a Class 1, Class 2, or a Class 4 creditor; is that right?

A Class 1, Class 2, Class 4, and there are some Class 6

registered holders, as well.
Q Could you point me to where there may be a Class 6?
A Sure. On Page 2 of 12, third record down, there's a Blue Ridge Trust Company, Inc.
Q Okay.
A And if you see the class, it's a Class 6 interest registered shareholder.
Q Okay. Bear with me. I was trying to do this search electronically, and now, I'm seeing I wasn't setting myself up to find them so I might be able to shortcut this. Okay. So are maybe three or four of these?
A I think there's three registered shareholders.
Q Thank you. And these would have been of the 43 who received the Exhibit 4?
A That's correct.
Q Okay. Then the last two pages of the opt-out summary, after those 12 pages, that contains what are labeled as custodians, correct?
A Correct.
Q And these custodians are the nominees?
A That's right.
Q And they were sent the master opt-out ballot?
A That's correct, yes.
Q As reflected on Exhibit G and I of Ms. Calderon's certificate of service?

A That's correct, yes.
Q Okay, so those exhibits of the nominees are roughly four pages. So it's about four pages of nominees that received a master ballot. And I know there's some duplications, but do you know whether every nominee that received the Exhibit 5 opt-out and the Exhibit 6 master opt-out returned something to you?
A Not everyone returned something to us, no.
Q About what percentage did?
A I don't have that information off the top of my head.
Q Do you know why a nominee wouldn't have returned a master ballot?
A Because their beneficial holder client didn't instruct them with any instructions.
Q So if no one opted out, is the instruction for them to just not respond to you?
A That's correct. Well, the instruction isn't. There's no specific instruction that says if your client didn't provide you with an opt-out form, don't send us anything. It's just that they just don't send us anything because there's nothing to send.
Q Okay, but this is speculation?
A Yes.
Q Okay, so we're again guessing that non-response means something good that we want to assume.

MR. MCCLAMMY: Objection, Your Honor. Mischaracterization of non-response. It's completely responsive to the question.

THE COURT: I agree.

MR. BADDLEY: Oh, I'm sorry. I wasn't referring to his answer as non-responsive. I was saying the non-response by the nominees. I apologize.

THE COURT: Oh, okay.

BY MR. BADDLEY:

Q I apologize, Mr. Lee. I was not referring to your answer as non-responsive. Thank you. Bear with me, Mr. Lee. I'm sorry.

Mr. Lee, do you know where the location is of the various beneficial owners? Does your firm have the ability to know where beneficial owners are located?

A No.

Q Do you know how many or what percentage of beneficial owners are outside the United States?

A No.

Q Do you know how many beneficial owners live in Florida?

A No.

Q Georgia?

A No.

Q South Carolina?

A No.

Q North Carolina?
A No.
Q Any of the areas that were hit by Hurricane Helene and don't have power or mail?
A We do not have good information.
Q Okay.
MR. BADDLEY: Your Honor, I don't have any more questions. Thank you.
THE COURT: Okay. Does anybody else wish to cross exam Mr. Lee? Mr. Bates.
MR. BATES: Good afternoon, Your Honor. Malcolm Bates on behalf of the United States trustee.
CROSS-EXAMINATION
BY MR. BATES:
Q Afternoon, Mr. Lee.
A Hello.
Q Just a few follow-up questions. I'm looking at your declaration, sir, and if you could go to Paragraph 5, please, and this is the declaration filed at Docket Number 667. Paragraph 5 provides that Verita --
THE COURT: I'm sorry, Page 5 or Paragraph 5?
MR. BATES: Page 2, Paragraph 5. I apologize.
THE COURT: Okay.
BY MR. BATES:
Q Paragraph 5 provides that Verita caused the

solicitation packages to be served on all known holders of claims in Class 3, secured notes claims, and Class 4, general unsecured claims. And those classes are defined as the voting classes. With respect to Class 4, specifically, general unsecured claims, do you know about how many solicitation packages were served on creditors in that class?

A Sure. Class four is actually bifurcated into two sections. One are the general, your trade claims, your warranty customer claims, as well as the 2026 notes claims. I believe the non-notes claims there was about 3000 packages that went out. And for the 2026 notes claims, about 150 packages went out.

Q And how were those served?

A Well, the 3000 served to the non-notes claims were served either via First Class Mail, hard copy, or if we had emails for them via email. For the 2026 notes claims, we followed the ordinary course used on the street, which is through the nominees or the proxy agents.

Q As to the group recalling the non-notes, general Unsecured Creditors, were there any for whom Verita had no mailing address and no email address?

A No.

Q Were any of the class four ballots returned as undeliverable somewhere?

A Yes.

Q Do you know about how many?
A I don't. I don't have that information off the top of my head.
Q Do you have a ballpark?
A I can't -- you know, I can't guess.
Q As to the solicitation packages that were returned as undeliverable, did Verita take any steps to attempt subsequent service?
A Yes, to the extent that forwarding addresses were provided to us, we did re-serve. We did re-serve this, I believe on September 17. At the end of the paragraph 5, you see that a supplemental certificate of service was filed on the Court on October 5, Docket No. 639. That should reflect any re-service that we did.
Q And with respect to the e-portal that was discussed during Mr. Baddley's examination, when equity holders or other parties voting are assuming they can opt out election logged into the e-portal, what did they see? Was it the Court-approved forms or something else?
A Well, the first thing they would see is a pretty blank page where they have to manually put in their unique ID and PIN number. Once they put that in and it's verified, the next page that would pop up is a facsimile of the Court-approved form.
Q With the customization that was --

A Correct. Right.
Q -- discussed during your --
A Right.
Q Okay. Was there any language in the form on the e-portal that was not in the Court-approved form other than the customization previously discussed?
A No.
Q And with respect to the opt out, in particular, was there any characterization of the effects of the opt out?
A No.
Q (Inaudible)?
A No.

MR. BATES: Okay. Nothing further, Your Honor.

THE COURT: Okay. Thank you.

Mr. McClammy, any redirect?

MR. MCCLAMMY: Good afternoon, Your Honor. Jim McClammy for the Debtors for the record.

REDIRECT EXAMINATION

BY MR. MCCLAMMY:

Q Mr. Lee, just a couple of questions to clarify. One, your declaration has been accepted into evidence. Have you had a chance to review your declaration since you've submitted it?
A Yes.
Q Okay. And is there anything in your declaration that

you wish to modify or change in any way?
A No.
Q So sitting here today, does that declaration accurately set out how Verita went about the solicitation process here?
A Yes.
Q Okay. And that was done consistent with the Court-approved order; is that correct?
A That's correct.
Q With respect to what was mentioned as the "customization", I believe you mentioned that a unique ID and PIN number were placed on the document. Is that correct?
MR. BADDLEY: I'm sorry to object. Can we find out which document counsel is referring to that this information was put on?
THE COURT: Yeah. Could you clarify which document you'd like Mr. Lee to refer to?
MR. MCCLAMMY: Yes. With respect to the solicitation notice, I believe it was that was referenced by SEC's counsel.
BY MR. MCCLAMMY:
Q Do you recall that testimony?
A This is the exhibit for non-voting combined notice.
Q That's my understanding.
MR. BADDLEY: Again, Your Honor, I'm going to object. They're having the witness testify about the

contents of the document that are in dispute and that document is not admitted. It's not here.

MR. MCCLAMMY: This is just to clarify. This is just to clarify the testimony that counsel elicited.

THE COURT: Yeah, I'm going to allow the question, overrule the objection.

BY MR. MCCLAMMY:

Q Just to clarify your testimony with respect to that. Was it your testimony that a unique ID and PIN number were added to that?

A It was either added to this document or out of, I'm looking at it, probably a slip sheet was added that included the unique ID and PIN. I mean, people must have had it to be able to go onto our website and submit instructions.

Q Okay. And is it Verita's practice to file individuals unique ID and PIN numbers?

A No.

Q And why is that?

A As the Court appointed solicitation agent, we take our duty seriously to, you know, number one, to the extent that we keep things confidential, we don't want to file unique IDs and passwords so that other people can go in and use them. Right? The whole purpose of assigning unique ID is so that we can control and identify unique users who go onto our website, and we don't want to be sharing that out into

public.

Q Thank you. You were also asked some questions about whether or not some ballots were returned as undeliverable here in this case. Do you recall that?

A Yes.

Q In your experience, is it uncommon for there to be some ballots returned as undeliverable when you're undertaking notice programs?

A No. It's not uncommon to receive some undeliverable mail.

Q Okay. And I believe you testified to this as well. But do you have a process in place to try to address the ballots when they're returned undeliverable?

A Yeah, our standard operating procedures. Again, to the extent there's a forwarding address, we'll reserve the document to that forwarding address. And to the extent, you know, time allows or requested, we might do some ancillary research to identify a better address for that particular claimant.

MR. MCCLAMMY: I have no further questions, Your Honor.

THE COURT: Okay, Mr. Baddley, any recross?

MR. BADDLEY: Nothing, Your Honor.

THE COURT: Okay, you are excused, Mr. Lee.

(Witness excused)

MR. STEINBERG: Hello again, Your Honor. Richard Steinberg, Davis, Polk & Wardwell.

Your Honor, I'd like to go back to the red line that was filed last night so I can walk through some of -- some of the changes that were made as reflected in the red line. I will also flag certain changes to come that resolved issues over the break.

THE COURT: Okay, so we're looking at Docket No. 666.

MR. STEINBERG: 666-2.

THE COURT: Okay.

MR. STEINBERG: Okay. Your Honor, if you would turn to page 18, the definition of releasing party, in Clause C, where it says each released party other than the Debtors, in that parenthetical, we will be adding other than the Debtors and the Liquidating Trustee.

THE COURT: Okay.

MR. STEINBERG: Apologies, Your Honor. It should be in both Trustees, the Liquidating Trustee and the IP Assets. IP Austria Assets Trustee.

THE COURT: Okay.

MR. STEINBERG: Okay. If you would turn to page 62, Your Honor, which is the heavy red line of Article 8(d).

THE COURT: Yes.

MR. STEINBERG: So this, what's reflected here is the resolution reached with NHTSA and the DOJ. To just briefly explain what the changes that are reflected here prior to the effective date, if any existing owners came out of pocket and directly paid for recall costs, they can submit reimbursement claims to the liquidating trust following the effective date. After the effective date, there's a construct built in here where existing owners will contact the service provider, the service provider will contact the liquidating trust, and that's how the recall efforts will be funded.

THE COURT: So I'm sorry, the service provider will contact the Liquidating Trustee?

MR. STEINBERG: Correct. That is correct. So an existing owner will reach out to one of the designated service providers, and then the service provider will contact the liquidating trust. The liquidating trust would then issue payment on account of that recall or on account of the repair related to the recall, and then once payment is issued, the owner would be able to go in and get the repair done.

THE COURT: Do the service providers know about this?

MR. STEINBERG: So what we're envisioning, Your Honor, is we had two options. We could either give notice to

all existing owners and give them a form that they'd be able to fill out and submit to the Liquidating Trustee, or do that with the 14 or so service providers.

And in working with the DOJ, the DOJ's preference was that to make the process as streamlined as possible for existing owners that they don't have to be the party submitting a form to the liquidating trust, they would, just as they would do in the ordinary course, contact their service provider.

THE COURT: And if there comes a time when the liquidating trust is out of funds and the service providers have owners showing up to get work done, are the service providers compelled to provide the labor nonetheless?

MR. STEINBERG: No, not under the language here. The language here provides that a service provider would not have to perform the labor unless they're paid for it.

THE COURT: Okay. Okay, I got it. Thank you.

MR. STEINBERG: Okay, no problem.

MR. BUTTERFIELD: Your Honor, can I make one clarification?

THE COURT: Yes, please.

MR. BUTTERFIELD: Ben Butterfield, Morrison & Foerster for the Committee. So this is really important. I just want to be clear, while we're here in the Courtroom. In order to find someone who is willing to take on the

Liquidating Trustee role, which we had some trouble doing, it was necessary that we add this sentence, which is that it's a long sentence and it's at the end of the first paragraph following D.

And what that sentence says is that the Liquidating Trustee is not required to take any action if one of two conditions are met. The first is if the Liquidating Trustee believes in its discretion, that taking the action would cause it to incur liability.

And we added a parenthetical at the end that says that liability could be the fact that the Trustee is doing something on an uninsured basis and is not comfortable doing it.

The second is if there are insufficient funds in the Trustee's possession that were funded for this purpose. Right? So we've agreed on the amount of the liquidating trust additional amount. It's $750,000. We've also agreed that the two Trustees can agree in their sole discretion to fund in excess of that. But it is in their sole discretion.

And so if there's not funding either from the 750 or from any amount that they agreed to fund in their discretion, then the Trustee doesn't have to do the act. And without this language, we wouldn't be able to find a Trustee for the Trustee, is what they were insisting on.

THE COURT: Sure, but it would mean, ultimately,

that the owner, in the event that either of these events occurs, the owner will be paying out of their own pocket.

MR. BUTTERFIELD: It would mean that the trust would not be paying it.

THE COURT: Okay, so what are the other options? Who's stepping forward to pay if not the owner?

MR. SHAMAH: Your Honor, may I have you heard?

THE COURT: Sure, Mr. Shamah.

MR. SHAMAH: Thank you, Your Honor. Daniel Shamah on behalf of Cooley on behalf of Fisker Owners Association.

Your Honor, this is a difficult situation because on the one hand, we appreciate the fact that the original plan construct had owners coming in, getting the label, paying out of pocket for the work, and submitting reimbursement for the trust, which we have a lot of concerns around on two levels.

One, whether that's really fair, and two, there has been a lot of resistance by service providers even doing the labor and asking owners to pay for it. Because under -- and Your Honor knows, this is Fisker's responsibility. And under not just several laws and the like, but under 28 U.S.C. 959(b), the Debtor is obligated to comply with the law.

So in one respect this is an improvement so that owners don't have to come out of pocket post-petition, on the

other hand -- excuse me, post-effective date -- on the other hand, you already heard right now there isn't enough money to do all this work in the trust.

And we're hearing a lot of, you know, well, we think we're going to get there and we have line of sight to another million some odd dollars that it's going to take. And we do have real concerns that if the money runs out and these trusts can't agree or (inaudible) won't agree to whatever it is, won't agree to make additional funds available to cover these costs, owners won't even have the option of paying for it because service providers may say, I don't want to do it, and charge owners when it's not their responsibility.

And so we only saw this language in the confirmation. We had hoped there'd be language in the confirmation order to sort of address that issue. You know, I only saw the confirmation order at 9 o'clock in the morning. I ask that we, you know, between today and tomorrow -- sounds like we're not getting the confirmation order today, entered today anyway. But we'd like that to get addressed. It's a real issue.

THE COURT: Okay. Ms. Robinson.

MS. ROBINSON: Good afternoon, Your Honor. Cortney Robinson on behalf of the United States and in particular NHTSA here. I would, for just possibly helpful

context, the concept of a consumer contacting a service provider and then the service provider either reaching out to the manufacturer, in this case, when the manufacturer doesn't have a brick and mortar setup, or otherwise receiving that reimbursement service provider to manufacturer is not new. It's pretty typical in these situations, so if that provides any comfort to the Court that we're not creating an entirely unique process there.

NHTSA's primary concern there was that the customers have already gone through plenty in these proceedings, and we did not want to add an additional step for them, especially when the money would essentially be going from the Trustee to the customer back to the service provider. Let's cut the customer out as the middleman.

I mean, similarly, in an ideal world, there's enough money to fund the recalls moving forward, and we don't have any concerns about what happens in a world where funding runs out. I think that the language as it stands now, at least provides for, if money comes in, whether or not that's coming in in the near future or coming in from proceeds from claims litigated at some other time, that there's a pathway for the Liquidating Trustee to continue to follow the safety app obligations, which was paramount for my client.

And so, yeah, I could appreciate the Fiscal Owners Association's concerns about what happens next, but that our

primary concern was making sure that there wasn't something preempting the Trustees from just moving forward, if there is the funding to do so.

THE COURT: Right. And like you say, you're not writing on a blank page here, you've done this before, and this is -- this has worked in other situations.

MS. ROBINSON: Well, this is -- these bankruptcies are somewhat unique, but yes, for, at least for the idea of a manufacturer that doesn't have their own dealerships operating, the idea of a service provider being the point of contact for reimbursement has been done before, from my understanding.

THE COURT: That's very helpful context. I appreciate that, Ms. Robinson.

MS. ROBINSON: You're welcome.

THE COURT: Okay, Mr. Butterfield.

MR. BUTTERFIELD: Thanks, Your Honor. So, look, I just want to be clear on the record, the Committee is very sympathetic towards these owners. Right? I mean, these are the people who went out and bought Fiskers earlier this year.

THE COURT: Right.

MR. BUTTERFIELD: And paid full price. And now those cars are probably worth a fraction. I hope they're not, but it's probably -- the evidence is that they're worth a fraction. And so these folks are in a horrible spot. I

want to point out the fact that staying in Chapter 11 has helped them. Right?

So we talked two months ago about a reserve to pay for this, exactly this type of thing, and it was $750,000. And now we are two months later, and we're still, $750,000 is still on the table. And what happened in between those two times? Well, we spent the last two months fixing recalls. Right.

So the fact that we stayed in -- and pushing out software to customers. So the fact that we have been able to stay in Chapter 11 has been enormously beneficial to these people. The money that was on the table when we were considering conversion was $750,000. We ended up spending much more than that if you think about what we spent since that point, plus the 750. Right?

And if we convert today or Friday or Tuesday, the 750 is off the table. And so this is a, you know, bankruptcy. This is a -- bankruptcy is tough, but this is a really tough case. And this is the best we could do. It was the way -- it was a construct that NHTSA agreed to, which was critical to the Committee.

And so from our perspective, you know, nothing is going to be perfect about this process, but we have to kind of accept what's available and this is what's available.

THE COURT: I appreciate that. Thank you,

Mr. Butterfield.

Okay, Mr. Steinberg.

MR. STEINBERG: Thank you.

THE COURT: Thank you.

MR. STEINBERG: So if you turn the page -- one page to page 63 of the red line, as Mr. Resnick said at the start of this afternoon's hearing, it was a productive break, and we were able to come to agreement with the United States Trustee and the DOJ.

Part of that agreement was adding at the end of the first paragraph on this page, adding the words as provided for above. The purpose being that there's some broad language in the United States Trustee's Office. I don't want to speak for yourself, Mr. Bates, but my understanding is wanted to just tie it to the rest of the agreement and the parameters set forth above.

THE COURT: Those would be the final words of paragraph D.

MR. STEINBERG: Final words -- before you get to one and two of paragraph D.

THE COURT: Yeah, before we get to and two. Okay, great. Understand.

MR. STEINBERG: I'm sorry for flipping around, Your Honor, but I'm going to go back to page 16 of the red line.

THE COURT: Okay.

MR. STEINBERG: On the bottom of page 16, you'll see a footnote was added in the latest version filed regarding professional fees and the timing of the effective date. An agreement has been reached to remove that footnote with the understanding that estate professionals can seek, to the extent the effective date is delayed, estate professionals can seek payment of their fees, but all rights are reserved to object to any application for fees.

Okay. To those fees. Correct. Mr. Resnick is correct. The agreement in the settlement reached between the parties is that you can't -- no party can object to fees prior to an October 11th effective date. The parties to the settlement.

THE COURT: Whoa, whoa, whoa. What -- you're saying people are waiving their rights to object to anybody else's professional fees from the inception of the case? That can't be what you've agreed to.

MR. STEINBERG: The Committee, the Debtors, and the parties to the global settlement and Heights agreed not to the reasonableness. Well, not to the reasonableness of the fees, but the quantum of fees. Because that's what we agreed to. The professional fee caps.

THE COURT: Okay, but I mean, if you review. I mean, it never happens. Right? But you review the

Committee's fee application and you think Mr. Butterfield spent too much time preparing for this hearing you can object to on reasonableness grounds.

MR. STEINBERG: Correct. Sorry. Correct.

THE COURT: Not going to happen, right?

MR. STEINBERG: Correct, but we go --

THE COURT: Because you spent the appropriate amount of time, but --

MR. STEINBERG: Correct.

MR. BUTTERFIELD: Less than normal.

THE COURT: Yeah. Yeah. I don't mean -- I'm not picking up Mr. Butterfield.

MR. STEINBERG: That's correct.

THE COURT: Okay. Okay. I thought you were agreeing to something quite different that made me very uncomfortable.

MS. GREISSMAN: Your Honor, Scott Greissman, I just -- just to clarify, completely agree. My client has agreed not to object to the fees. The Committee has agreed to support the case as I think the support is well founded. As Mr. Butterfield just explained, this was a very difficult situation.

But there is a cap, so obviously we're not -- even this agreement to seek fees is separate and apart from the fact that fees incurred up to Friday are subject to a cap.

And we do expect to hold everybody to that. And our understanding is that's mostly held. But I don't know, and I guess we'll find out. But that's the only caveat.

THE COURT: Okay. So long as it's about the cap and not reasonableness, I -- then that's a very different issue. And I appreciate the clarification on that.

MR. STEINBERG: Okay, thank you, Your Honor. If you would. Next turn to page 76.

THE COURT: Okay, I'm there.

MR. STEINBERG: So, in Section b, which is the third party releases in clause Z. Well, it's AA, where it says other directors and officers, after the word whatsoever, there's language that reads including any derivative claims asserted or assertable on behalf of the Debtors or their estates, that language will be removed.

And this was a comment that came from the Committee. In the other -- that set of directors and officers, they are not receiving estate releases, although any recovery is subject to an insurance cap, but they are not receiving estate releases. And that language should not have been reflected in this provision here.

THE COURT: Okay.

MR. STEINBERG: Okay. Your Honor, I'd like to next turn because you have the red line open, and I'd like to point out a few provisions in the plan to the United States

Trustee's objection to -- based on an impermissible discharge. And I'm going to stay on the same page and just flagging the language that starts Section B, which says, except as otherwise provided in the plan, and it also says and to the fullest extent authorized by applicable law.

And then, Your Honor, I'd like to turn to page 81 of the red line. And the last sentence of clause G reads, notwithstanding any other provision of this plan, the Debtor shall not receive a discharge pursuant to Section 1141(d)(3) of the code.

So, taken together, Your Honor, this language here that I just read would trump the language in the release. Well, worked together, it means the Debtors will not be receiving a discharge. The release provision does not provide for a discharge of the Debtors in violation of 1141(d)(3).

With that, and the precedent cited in our confirmation brief, we'll rest on those papers.

THE COURT: Okay. Okay.

MR. BUTTERFIELD: Your Honor, may I say one word on the injunction and the discharge point?

THE COURT: Yes, please do.

MR. BUTTERFIELD: Your Honor. Ben Butterfield Morrison Foerster for the Committee.

So one of the concerns the Committee identified,

and we identified this, like, really late because this was all coming together at the last second, as you know --

THE COURT: Sure.

MR. BUTTERFIELD: - is the fact that for insurance purposes and to give the Liquidating Trustee the greatest flexibility to implement this plan, we may need to leave assets at the Debtor rather than move them to the liquidating trust.

For example, some of the vehicle functions and vehicle assets may stay at the trust and be used kind of in a -- the trust will direct the use, but, sorry, they'll stay at the Debtors. These assets stay at the Debtors will be directed by the Trustee. But if we move them to the trust now, we have to get new insurance, and that could be really expensive and hard to get. It's going to be a problem.

So if we're leaving assets at the Debtor after the effective date and we don't have a discharge and people can pursue claims against the Debtor, they could potentially attach those assets and interfere with the ability of the Trustee to implement the plan.

And so one thing we put in the injunction, and we put it in several places, is this concept that, and you'll see it in -- I'm looking at the red line 79, page 79. At the very bottom, you'll see this concept. Take any other action that adversely affects any assets held or functions

maintained by the Debtors for the purpose of implementing the plan, including the professional fee reserve. And now we go through the assets that potentially could stay behind at the Debtors but be used by the Trustee to implement the plan.

So you see the claims reserves and then assets or functions of the Debtors relating to the fleet sale and the stop sale holds. That's the lemon law of fixing the problems with the cars.

THE COURT: Yes, right.

MR. BUTTERFIELD: So we may need to -- we can talk to you tomorrow when we come back. But we may need to tweak this language. There is no intention at all to give the Debtors a discharge. But what we do need is flexibility to leave a few select assets at the Debtors and kind of like wall them off so that the trust doesn't incur all this additional expense trying to get insurance and all these other problems that could be unanticipated.

THE COURT: Okay, I'll trust you to work on that issue. Clearly, it's a liquidating company. There's no entitlement to a discharge, and the inclusion of the language on the 1141(d)(3) is appropriate and really necessary, I think, here. But I have every confidence that you will all be able to work up language that will effectuate the goals that you're trying to meet, which I think are reasonable ones.

MR. BUTTERFIELD: Okay, great. Thank you, Your Honor. Appreciate it.

MR. STEINBERG: Okay, Your Honor, one more issue from me, and then I will pass it to Mr. McClammy.

THE COURT: Okay.

MR. STEINBERG: And that is the exculpation issue. The United States has objected to the exculpations in the plan. In a prior iteration of the plan, we bifurcated the exculpations where non-estate fiduciaries are now defined as 1125 parties. We believe this construct is consistent. I should say Section 1125 provides for a more limited exculpation. We believe this construct is consistent with precedent and the code, with non-estate fiduciaries being exculpated in this way.

THE COURT: I'll hear arguments on that. I think the PWS Court was pretty clear about what's permitted in the circuit, but I'll consider all the arguments on that.

MR. STEINBERG: Understood, Your Honor. I didn't -- I actually have one more. My apologies.

THE COURT: Yes, that's fine.

MR. STEINBERG: In conversations with the SEC prior to today's hearing, we agreed to language, and I think it was referenced at the beginning of the hearing. We agreed to language to be included in the confirmation order.

And that language, in effect, what it says is

nothing in any of the plan documents or the confirmation order would preclude the SEC from enforcing its police or regulatory powers or continuing or commencing any claims, including filing a proof of claim. And there is also a second paragraph that requires the maintenance of books and records.

THE COURT: Okay.

MR. STEINBERG: Okay, Your Honor, so that should address two of the three open objections from the United States Trustee and also -- from the United States Trustee, and I will pass to Mr. McClammy to handle the releases argument.

THE COURT: Okay. Mr. Greissman, it looks like you will whether he lies it or not anyway. But here we are.

(Cross-talk between participants)

MS. GREISSMAN: Your Honor. Scott Greissman for CVI/Heights. Obviously, as the primary beneficiary of the exculpation, even as limited as just described, we understand the legal issues. I would just add a couple of very quick points.

One is we're not an estate fiduciary. We understand that. But we have worked very, very hard with parties here and provided a lot of economic support for a plan that is, I think, best described as a very difficult one under the circumstances. Very complicated case with a

deteriorating asset base and a very complex management and operational structure. And that could not have happened without our continued support on continued use of cash collateral one, two, three, four, five times.

So I would just submit to Your Honor that this is a very, very unusual situation. And if the exception would be made at any point in time like this is -- this would be the time. And we'll rest, obviously, on the Debtor's pleadings and the like, and Your Honor's judgment.

But what I would add is the idea that given the costs here and how they are ongoing, cash collateral does terminate today if a confirmation order is not entered. Obviously we will not -- we will extend that milestone and Friday if the plan doesn't go effective.

As I said earlier, and I think it's a good opportunity now to, I guess, reassert, there really isn't much left in the tank. And you shouldn't expect, respectfully, a consensual extension of cash collateral past Friday. Whatever has to get wrapped up, really does have to get wrapped up week. Thank you, Your Honor.

THE COURT: Okay, Mr. McClammy.

MR. MCCLAMMY: Thank you, Your Honor. Jim McClammy for the Debtors for the record, and I know we've gone over this in a bit of detail when we were here addressing the disclosure statement before it went out.

THE COURT: Yes.

MR. MCCLAMMY: And I think where I will pick up starts at where I began a little bit last time, especially in light of the filings of the SEC and the US Trustee here, with respect to the third party releases, and that is, first and foremost, these are consensual releases that we're talking about. The concept of whether or not an opt out release is permissible, or whether or not we've met the standards operates within the construct of a consensual release.

And that is not something that was addressed by the Court, the Supreme Court in the Purdue Pharma matter. We noted that in our papers. But I don't want to reiterate that here.

So the suggestion that somehow or another, the decision there operates to change the construct of what is and is not permissible with respect to opt outs is directly contrary to the language of the decision that was issued by the Supreme Court, where they made it clear that they were not addressing consensual releases or the standards applicable to consensual releases.

With that, Your Honor, we believe the longstanding precedent from this Court and within this circuit remains intact, and that the arguments that are advanced by both the SEC and the United States Trustee with respect to these releases fall flat because we have made sure we have set up a

structure here where we have provided notice.

You know, this case is one that has gotten substantial attention both in the press and as a result of the notices that have been provided here. The releases are the result of really hard fought, difficult compromises by all the parties to bring this case to a workable resolution. And I think you've heard that, you know, many fold and from various different parties, both from the Secured Lender, from the Unsecured Creditors Committee, the ability to have gotten to where we are today would not have happened but for all of the compromises that were made by the parties, including the compromises that were tied to the ability to at least have the possibility of being released by parties in these cases, and the opt out mechanism was an integral part of that.

I will say that the cases have, with few exceptions, continued very much to hold to the idea that opt out third party releases are completely permissible and acceptable. We cited, Your Honor, to decisions in -- for example, In Re Robert Shaw U.S. Holdings from the Bankruptcy Court of the Southern District of Texas, making it clear again, that nothing in Purdue can be construed to question consensual third party releases offered in connection with the Chapter 11 plan.

In Re BowFlex from the Bankruptcy Court of the District of New Jersey, again noting that there was nothing

in those decisions and the decision from the Supreme Court to challenge the consensual nature of third party releases.

We'll note, also, as we did last time, I believe it more recently come out then, but In Re Giga Monster Networks, Judge Stickles analyzed this very issue in this district and ruled that the legal landscape on opt out mechanisms had not been altered.

And just this week we've seen a similar mechanism having been approved by Judge Dorsey in In Re FTX Trading.

To be sure, Your Honor, there have been decisions going the other way, but those, I believe, are readily distinguishable. And I will note that to the extent that they are departing from what I believe is the core nature here of due process and the collective nature of the bankruptcy proceeding, and the fact that these are provisions that are incorporated into the plan of reorganization makes them a standout. And to the extent that they are looking to state law to fill what I believe is a nonexistent void, they should not be followed or adopted by this Court.

I will note, of course, however, that to the extent this Court were to apply Delaware law, we believe that these releases have met the standards to allow for silence as acceptance under Delaware law, especially given the consideration that they are -- that's backed them with respect to all the compromises that have been made by the

parties here and the benefit that the creditors, for example, will be receiving as a result of that. And the fact that, in fact, here the process has worked.

We've seen that among the -- and I'll go into the numbers a little bit later, but there are meaningful numbers of folks that have opted out here after having received these notices, both within the creditor ranks and within the equity holder ranks. So I don't think that there can be any question but that the fact that people were, in fact, receiving notice, paying attention, and making an actual decision as to whether or not to be bound by the releases here.

THE COURT: I think this is a good time for me to jump in, because there are -- one of the points that you just made was that the creditors are receiving a benefit. Equity holders, they're not receiving any benefit, are they, from the plan? Their equity interests are being canceled, and they walk away with nothing.

And so I think that it would benefit me to hear your breakdown of the analyses between creditors on one hand, and equity interest holders on the other hand, because I don't think the analysis is the same.

And while I'm not aware of anything written on it, in this district, at least, at least I know that there are instances where some of my colleagues have applied a

different standard to requests for opt outs as to equity holders. And how do you address the, I guess, the failure of any consideration for the releases, along with what I think is the emerging practice in this court not to permit opt outs in the context of equity holders?

MR. MCCLAMMY: And Your Honor, I think Your Honor is correct that there are some cases that have, in fact, found that even where there's no consideration flowing to equity holders, that the Courts have still approved the opt out mechanism.

But to take Your Honor's question in parts, I do believe that there could be a reasoned basis for separating them out here. And for sure, I think there can be no question that the Unsecured Creditors are benefiting from all of the consideration that is flowing to them from these integrated compromises that the releases are an essential part of.

And that, to me, says that there is clear consideration that they are, that they are receiving direct benefit as a result of the parties that are asking for the releases, having presented that and having made that available to the creditors here.

So I think that satisfies that. I think Your Honor is correct with respect to the -- there can be no denying that there's no straight monetary consideration

flowing through to the equity holders here. But I do believe that to the extent that all parties, all constituents are generally benefiting from the fact that this has moved through to a reorganization that could not have otherwise been achieved, is a general benefit, and that as far as due process is concerned, everyone has received adequate notice, been fully informed of the provisions in the plan and the need to get this done for the benefit of all stakeholders.

And to the extent that one of the benefits is from the standpoint of could this have gotten done but for the idea that we'd be attempting to obtain these releases for the parties that are providing the benefit to the creditors here, I think the answer to that is no. And that this is an integrated part of that.

And as a result, given that we have fully satisfied the notice requirements and we've seen that it's been effective, we have, I guess, the most updated total with respect to entrance holders that have opted out, over 9000, close to 10,000 have elected to opt out.

So you have substantial numbers that are paying attention, making it clear that they understand the importance of it and electing to opt out. So we believe that that also would be permissible here.

THE COURT: The, you know, I've been thinking a lot about this, and it strikes me that when we're talking

about opt outs in the context of creditor releases, okay, when there's some benefit in a plan, and certainly as proposed, this plan provides benefits to creditors that would not be available in a Chapter 7. Absolutely.

But for an equity holder, they're going to be totally agnostic as to whether this case converts or, or the plan gets confirmed because it doesn't affect their outcome a single bit.

And it would nearly be irrational, I think, for an equity interest holder to, if we were in opt in land for an interest holder to opt into a release of third parties against whom maybe they have claims, maybe they don't, but why would they even spend a moment to go online and submit a ballot or to lick a stamp and stick a letter in the mail to say I'm getting nothing, but by God, these people deserve their releases from me? It seems irrational.

And so to infer that under those circumstances, that silence means that, yes, they made that irrational decision, it seems to me to maybe just be a bridge too far.

MR. MCCLAMMY: Understood, Your Honor. And I think that picks up a little bit on what we were touching on at the end of our time together last time, which is in this construct. Can there be different outcomes with respect to the opt out releases as they pertain to creditors and the opt out releases as they pertain to the equity holders? And I

believe it's possible, although I believe we've satisfied the standards, as I said, for both.

But for this Court to find that the opt out mechanism itself is, in fact, a permissible mechanism, that it has been satisfied with respect to all of the creditors here, given the consideration flowing to them, given the fact that there has been more than sufficient notice, given the fact that we know that it's worked because the number of creditors, even that have opted out, and to find a different result pertains even under the permissible construct that maybe we haven't met our burden, that we may not have met our burden there.

THE COURT: Okay. Thank you. I appreciate those thoughtful comments.

MR. MCCLAMMY: Thank you, Your Honor. That's all I have for now, but I'll reserve in case I have anything further on rebuttal.

THE COURT: Okay. Okay. Very good. Objectors, who'd like to go first?

MR. BATES: Hello, again, Your Honor.

THE COURT: Hi, Mr. Bates.

MR. BATES: Malcolm Bates, on behalf of the U.S. Trustee. Like Mr. McClammy, I'll try and quickly get through what hasn't changed since the last time we spoke and get to the things that maybe have changed.

Just as a quick housekeeping matter, our office filed an objection to final approval of the disclosure statement and confirmation of the plan at Docket No. 636. We've asserted four objections to confirmation: the exculpation provisions, discharge for liquidating Debtor third party releases, and I guess a catch-all objection for certain other concepts that we were still in conversation with the Debtors about. In that last category, I believe all those issues have been resolved, so it's really limited to what's in our brief and actually analyzed there.

THE COURT: Okay.

MR. BATES: And I'd like to thank the Debtors for continuing to work with us, including up to and during the recess of this hearing today. I agree that it was productive and narrowed the cone for us.

THE COURT: Good.

MR. BATES: And just as I did at the disclosure statement hearing, I'll start with the exculpation and discharge objections and then get to the release.

On exculpation, Your Honor, we would urge the Court to follow the Court's universal practice of courts in this district and to limit exculpation in two ways. First is that exculpation should be limited to estate fiduciaries, and their capacity as such, which would include only the Debtors, their professionals, the Committee, and the Committee's

professionals.

Second, we believe exculpation should be limited to conduct that occurs between the petition date and the effective date.

THE COURT: Is that a question simply of practice in this district, or is that a question of stare decisis in this district?

MR. BATES: I don't know that I have given that particular question much thought, Your Honor. I think that our position that we've taken in the brief is that to the extent exculpation is allowed beyond what is provided expressly in 1125(e), the practice of courts in the Third Circuit is to limit it in those two ways.

I think the Courts have been extremely uniform and consistent in applying those limitations, in particular in cases where the issue was actually litigated. And so we would just urge the Court to continue that trend today.

THE COURT: Okay.

MR. BATES: The authority in support of these limitations is well known to the Court and parties, and we cite it in our brief. These cases include PWS Holding Corp, Indianapolis Downs, TribuneCo, WAMU, PTL Holdings, and Mallinckrodt, and those are all cited in our brief at paragraphs 88 to 91.

And I would also note that this Court reaffirmed

those two restrictions on exculpation recently in the Charge Enterprises case, which is at case number 241-10349. But the exculpation provisions in this plan violate both limitations.

As to estate fiduciaries, exculpated parties includes secured note holders, directors, and officers who may not have served during the Chapter 11 cases, parties in the Debtors assert are entitled to exculpation under Section 1125(e) of the Code, and the related parties of all exculpated parties, which includes at least 36 categories of unidentified third parties with no apparent connection to these cases, much less a fiduciary duty to the estate.

And with respect to the 1125(e) parties, in particular, Your Honor, this strikes me as similar to when parties seek to characterize provisions like 364(e) in a DIP order or 363(m) in a sale order. The code says what it says, and I don't think it's proper to be reading specific parties into the text of these statutes. They should stand on their own. If the Debtors want to include a reference to the code section of the plan, I think that's something we can get comfortable with. But naming specific 1125(e) parties, I think, is likely a step too far.

As to the time limits, Your Honor, the exculpation provision also protects both the Liquidating Trustee and the IP Austria assets Trustee by the terms of the plan, neither of these Trustees will come into existence until after the

effective date, so they're not entitled to exculpation.

The point about the lenders' contributions to these cases, in particular, I think is well taken. I would also note that the lender, and I believe most, if not all, of the remaining 1125(e) parties will also be receiving two sets of releases in this case, and that's the lender, specifically, I suspect that we're going to be seeing a final cash collateral order with a third set of releases.

So on top of being improper to read these parties into the code section, specifically, it just seems like a hat on a hat.

As far as the impermissible discharge for Liquidating Debtors' argument, again, counsel's point is well taken that we do have what appears to be limiting language in one provision of a plan. I would point out, and we cite in our brief that there are at least ten other provisions of the plan that don't have a comparable limitation. And the effect of the third party release from which Debtors will benefit, and the injunction taken together is to grant a discharge whether or not the plan purports to limit that.

I understand the point raised by a Committee counsel. I think in a liquidating plan, it's often seen that claims against estate property, the Debtor's property, are entitled to some kind of protection releasing injunction provisions. But as to the Debtors themselves, it's just

simply not permitted under 1141(d)(3), and that's the practical function of this plan.

THE COURT: Do you think that having an explicit statement that reaffirms the effect of 1141(d)(3) and provides that there's nothing in this plan is varying from 1141(d)(3), do you think that's adequate to achieve the goals that you're concerned about?

MR. BATES: I think the concern, Your Honor, would be in subsequent proceeding a party saying, well, we didn't get a discharge, but we are a beneficiary of this release, you are enjoined from being in this claim.

And so while the claim might be extant or is not discharged by virtue of the plan, these other provisions of the plan entitle us to an affirmative defense, essentially blocking these claims. And so again, the point is well taken. There is this language in there, but that's the perspective for the concern from our office.

THE COURT: Understood.

MR. BATES: As for the third party releases, Your Honor.

THE COURT: Yes.

MR. BATES: The United States Trustee's position, as we articulated at the disclosure statement hearing, is that third party releases based on inaction, such as a failure to opt out, are nonconsensual and nonconsensual third

party releases are no longer authorized following Purdue Pharma.

Moreover, following Purdue, the Court must look to state contract law to determine whether a release is consensual, and that's because no federal law applies to the question of whether non-Debtor third parties have agreed to release other non-Debtor third parties. This is essentially a settlement between two groups of non-Debtors.

Moreover, no code provision authorizes the Court to deem a non-Debtor to consent to a release where consent would not exist under state law, and that includes Section 105(a), which can't grant new substantive rights.

This plan would be governed by Delaware state law, under which silence can only be deemed consent under limited circumstances that do not apply here. First is where the offeree silently takes offered benefits and the releasing parties here are not getting any benefits from the released parties. I think that's an important distinction that needs to be made based on colloquy with Debtor's counsel.

There are benefits being provided to the estates by the parties who are parties to this global settlement, but the releasing parties are not parties to that settlement. Their vote on the plan is their expression of their consent, or lack thereof, to the treatment of their claims against the Debtors. But these releases are ancillary to that. It's a

separate agreement between two sets of non-Debtors.

And so I think it's improper to collapse the distinction in the middle there of the Debtor as the intermediary between any benefits that creditors might receive under this plan. And of course, we agree with the Court that equity holders receive no benefit from this plan. That's the first scenario where silence can be imputed to consent.

The second is where a party relies on the other party's manifestation of their intention that silence may operate as acceptance, which again, for similar reasons, is not present here. And just because an offer states that silence will constitute acceptance does not prevent the offeree from remaining silent without accepting. That's from the restatement of contracts, Section 69, which is cited approvingly in the Delaware case law referenced in our brief.

Neither the Debtors nor any other party in interest offers any basis in contract law for the Court to find these opt out procedures satisfy Purdue, and in particular Delaware, follows the mirror image rule, which requires that the acceptance be identical to the offer. Failing to check the box on an opt out form can't clear that hurdle.

So the bottom line is that in applying state contract law, the Court cannot find that failure to check a

box on an opt out form, i.e. silence, is deemed consent to a release.

So that's all likely familiar to the Court. It's the same argument we raised at the disclosure statement phase, and since then, in particular in connection with solicitation, the Debtors have not taken any steps to address our objections to the opt out procedures, so we would submit they apply with equal force.

However, since the disclosure statement hearing, Judge Goldblatt issued his decision in the In Re Smallhold case that abrogated his prior decision in Arsenal, and that's Smallhold Inc., case number 24-10267. The Westlaw site is 2024 WL 4296938 and issued on September 25th, 2024.

And unsurprisingly, the parties disagree about what Smallhold means for this case, but I would like to quickly run through our office's position on that.

THE COURT: Certainly. Yeah.

MR. BATES: Judge Goldblatt held that following Purdue, and I'm quoting from the decision here, releases cannot be described as consensual on the ground that the creditors' failure to assert an objection effectively allowed the release to be imposed by virtue of the creditors' default and the absence of some sort of affirmative expression of consent that would be sufficient as a matter of contract law.

The creditors' silence in the face of a plan and

form of ballot can no longer be sufficient. And that's from page star 11 on the Westlaw version. We agree with Judge Goldblatt's holding that silence cannot be deemed consent and that consent to a third party release requires an affirmative expression of consent that would be sufficient as a matter of contract.

Again, perhaps unsurprisingly, we further agree with Judge Goldblatt's application of that holding and finding that parties whose votes are not solicited or who do not vote cannot be deemed by their silence to have consented to a release.

However, we respectfully disagree with Judge Goldblatt's conclusion that a party can be deemed to consent to a release by returning a ballot voting on the plan but failing to complete the opt out form. That's because the Smallhold decision fails to identify which exception to the state law rule that silence cannot equal consent would apply in that context, and none does, whether the creditor votes to accept or reject the plan.

Where a creditor votes to accept the plan, again, that vote represents the creditor's consent to the proposed treatment of its claims against the Debtor. That consent should not be imputed to a totally separate and ancillary agreement between that creditor and third parties regarding the settlement and release of the creditor's potential claims

against those parties.

Where a creditor votes to reject the plan, there's not even a mutual agreement as to the creditor's proposed treatment under the plan. So it makes even less sense to deem that creditor as having accepted a release by silence.

As Judge Goldblatt notes in the Smallhold decision as to the creditor's rights against third parties which belong to the creditor and not the bankruptcy estate, a creditor should not expect that those rights are even subject to being given away through the Debtor's bankruptcy. And that's at page Star 12.

So against that backdrop, Your Honor, there are six categories of proposed releasing parties in these cases, and we respectfully submit that the Court cannot find that failing to check the opt out box constitutes the affirmative expression of consent required to satisfy Purdue as to any of them.

I would like to address several of the points that were raised during the colloquy today. I think they're important. The first is this concept that there's no need to reconsider prior precedent in these cases, or that prior precedent approving opt outs, it just simply remains good law following Purdue.

I think this is actually addressed in some detail in Smallhold, where Judge Goldblatt points out that the prior

theories justifying an approval of opt outs rely on a default theory that following Purdue has no limiting principle and requires the application of a contract construct, essentially.

Debtor's counsel pointed out that due process is satisfied here because they provided notice. Of course, as we noted at the disclosure statement hearing, no notice was provided to the related parties who are granting releases under this plan. And as elicited by Mr. Baddley during cross examination of the voting agent, it sounds like notice was deficient as to at least the equity holders, if not the creditors as well.

The Debtors point out that the releases were hard fought, the result of hard fought settlement negotiations, and that they're necessary for the reorganization. One of the points we made at the disclosure statement hearing was that the Court in Ebix, considering this very argument, held that even where a release is necessary to a reorganization, that alone is not enough for it to be deemed -- for the Court to find that it can deem consent to the release. They're totally separate issues.

Debtor's counsel relies on certain post Purdue cases continuing the trend of acceptable opt outs. They cite to Robert Shaw, for example, BowFlex, and Giga Monster. And I think the Smallhold decision, in particular, points out why

each of those lacks -- is no longer persuasive or should not be deemed persuasive with respect to the opt out issue.

At page 13, Star 13 of the Smallhold decision, for example, Judge Goldblatt writes that none of these cases, however, articulates a limiting principle. This court does not believe that the Courts in BowFlex, Robert Shaw, or Invitae would have confirmed a plan that required creditors to donate to the college education fund.

The reasoning of those cases, however, suggests no principle that would distinguish the consensual third party releases they approved from a plan provision requiring such a contribution. And as to Robert Shaw in particular, Judge Goldblatt goes into some detail in footnote 53 of that decision about why that case is not persuasive on the issue of whether opt outs can be deemed consent.

The third case Debtor's Counsel referenced was Giga Monster. We discussed that case in some detail at the disclosure statement hearing. I think what's relevant for today's purposes is as we read into the record at that hearing, Judge Stickles specifically limited her holding in that case to Giga Monster, and said it was without prejudice to her ability to reconsider the issue in subsequent cases. So we think it's of limited persuasive value for today's purpose.

And then the last point I want to make, Your

Honor, is this idea that notice was effective and we've got all these parties adopted out here. And that weighs in favor of the Court finding that at least the parties who submitted ballots or submitted non-voting notices can be deemed to consent, whether or not if they didn't check the opt out box.

And I would only point out that the voting agent's testimony today is that about 3,000 of these ballots went out to call them non 2026-note general Unsecured Creditors, and about 150 went out to 2026 note Unsecured Creditors.

And if you look at the tabulation report, the Debtors received about 900 ballots back from the non-note creditors and about 60 ballots back from the 2026 note creditors, which is about one-third of the parties who were solicited. So that means that two-thirds of general Unsecured Creditors who are actually solicited in this case threw their ballot in the trash. And under the releases that are proposed through this plan, every single one of them is granting a release.

So we think that's a bridge too far. We think that none of the releasing parties should be deemed to release based on an opt out. I'm happy to address any questions, but otherwise I can close my presentation.

THE COURT: I don't have any questions at this point.

MR. BATES: Thank you, Your Honor.

THE COURT: Thank you, Mr. Bates.

MR. BADDLEY: Good afternoon, Your Honor. David Baddley for the SEC. A couple points. Debtor's counsel referenced Judge Dorsey's FTX ruling, and I -- my understanding in that case is that the opt out mechanism was not applicable to non-voting parties in the case.

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

MR. BADDLEY: And counsel is correct that the Purdue case didn't make any conclusive ruling on opt out. If it did, we wouldn't be here. I will say, though, that the single case that the Court cited when it discussed this with Specialty Electronics, and I would like to think that that was a tip -- showing of the Court's hand on what it would ultimately rule is consent, which is voting to accept a plan. That's the type of action that could be interpreted.

Obviously, that's reading between lines. It's probably not fair, but it's noteworthy there was no other example of consent mentioned in the Court's opinion.

I think Your Honor's correct. I mean, look, you know, does state law apply? Is there this sort of general consent, you know, concept of consent out there that applies? I think, for a starting point, Your Honor is right that there kind of has to be this common sense review of the case to say what person would agree to this. You know, I cannot see a single benefit, a single reason why someone would voluntarily

do this. And if you can't even get over that baseline, then why are we even doing this? It's not even an intelligent question, really, to be asking someone or a reasonable offer to be asking someone.

And I think that's where we are in this case. And Judge Dorsey has, in Trizeta and AAC Holdings said the same thing. Like, if that's where we are, if there's just no benefit at all to the non-voting parties, we're not even going to go through this, why are we even going to do it? And I think that sort of simplifies it.

Setting that aside, there still has to be basic concepts of some sort of manifestation of assent. What the Debtors are, in essence, asking this Court to do is to look at the evidentiary record and to make a -- either a finding of fact or a conclusion of law that the hundreds of thousands of retail investors who did not return an opt out form gave their consent.

Obviously, if I wanted the Court to make a finding of that nature, I could present evidence such as signed documents, something where that's clear, you could read it. Oh, someone obviously understood this. They signed their name, they checked an opt in box. That would be pretty compelling evidence to support that finding or that conclusion.

And that process was available to the Debtors.

They just chose not to do it. And it wasn't from not wanting to have to go through this solicitation process. They did that. It was the way that they wanted to structure it, that they didn't want to make them have to opt in to be bound. They wanted the silence to infer that.

But when you have the record of, let's say, it's not the plainest of notices, the clearest of notices, the record shows that Verita served these opt out forms on maybe 100 entities, nominees. There's no record of when they were sent after, by whom, when, how. That's a mystery. That's not evidence. That cannot support a finding of fact or conclusion of law in that magnitude.

And you know, these releases are important. You know, obviously when the Supreme Court was faced with it, they recognized the -- how significant it is for a bankruptcy court to be disposing of claims between non Debtors. It's not -- shouldn't be normal.

I was involved in the Ascena Retail case which went to the district court judge in the Eastern District of Virginia, and that judge put out an 80-plus page ruling on this issue, not favorably upon the process, raising not only due process and noticing issues, but constitutional issues, jurisdictional issues.

And I understand that in certain cases, it can be administratively convenient, necessary, but it needs to be

reasonable, and we don't have that here.

So Ms. Robinson said something about not making the vehicle owners have to jump through an additional hoop in order to have to deal with some of the issues on their plate. What we are asking the Court to do is to give that same indulgence to the shareholders. Don't make them have to jump through additional hoops just to avoid having to release claims against buckets of people. These people have invested enormous amounts of money, and they've lost it all. They have nothing. They're walking away with nothing. It's not fair, and it shouldn't be upheld in this case. Thank you.

THE COURT: Okay, thank you Mr. Baddley.

Anybody else like to be heard in objection to the plan? Okay, Mr. McClammy, any response to the comments that you've heard?

MR. MCCLAMMY: Thank you, Your Honor. Jim McClammy, Davis Polk on behalf of the Debtors, just briefly Your Honor. And I think just to level set on a couple things, and some of this is set out in our papers in much greater detail, but with respect to the idea of pre-Purdue, post-Purdue, I think courts looking at this question have always treated this as an issue of whether or not the opt outs are permitted as a form of a consensual release, not a nonconsensual release.

And then as we noted in our papers, the construct

for that has not been one of state law, but really one of bankruptcy law and of due process that was set out in 2020 by Judge Sanchez in the Extraction Oil and Gas case. We cited to the hearing transcript in our papers. Third party releases and opt out mechanisms being proper subjects of federal bankruptcy rather than state law is further supported by other decisions issued by the judges of this and other bankruptcy courts.

For example, In Re Avadim Health, Bankruptcy Court, District of Delaware, October 27th of 2021. That's case number 21-10883. In Re Topps Holding 2 Corp., Bankruptcy, Southern District of New York from November 8th of 2018. And that continued on with this Court decision in the FTX decision, saying, again, that rather the question is one of notice, not one of state law construction when you're talking about whether or not these forms of opt out releases are permitted.

And with that, Your Honor, I think I will rest on the record that we've presented with respect to all of the benefits that have been achieved, especially with respect to the Unsecured Creditors here at the -- at the hands of the parties that are being released.

And given the notice that have gone out, the fact that people have, in fact, responded well, the numbers of opt outs that we have seen shows that people are paying attention

does not give any indication. I believe it's completely outside the record and in the evidence that, for example, people are -- that it's evidence somehow or another that people were throwing them in the trash.

Rather, I think the, the record is clear that people read them, responded, opted out. And that's exactly what one would expect as a matter of due process in a case of this nature.

So we would ask that Your Honor approve the opt out form of release as a general matter, and of course understand Your Honor taking a look at the releases from both the perspective of the creditors and the equity holders, are.

THE COURT: Are you aware of any authority, at least in this Court, finding that an opt out is an appropriate mechanism for an equity holder to grant a release?

MR. MCCLAMMY: I believe we cited one in our papers. But let me confirm that, Your Honor.

THE COURT: Was that Judge Stickles' case. Clovis?

MR. BADDLEY: Your Honor, as an officer of the Court, I will give the Court the information it requests since I was the SEC counsel in the Clovis case.

THE COURT: Well, let me ask you this. Wasn't there an equity committee in that case?

MR. BADDLEY: There was, Your Honor, and they were receiving contingent value rights under the plan because there were some downstream possibility for payments. One other thing I'll say on that, though, is I do think one thing that Purdue did say is that a third party release is not an appropriate plan provision. It's not authorized. So the only way you can get it is by consent. And that's the 1141(d)(1) theory or the 1141 theory that, you know, if it's part of the plan and you don't object to it, you're bound to it.

I think what Purdue changed is that that theory no longer upholds, because you can't be bound by an invalid provision that is not authorized in the first place just by simply not rejecting. And our position would be that whatever 1141 rule, you know, basis of doing that pre-Purdue no longer applies. That there has to be -- it can't just be, you know, and Judge Goldblatt, I think, explained that quite well in the Smallhold ruling about that.

THE COURT: Smallhold.

MR. BADDLEY: Yeah. So I will say it was pre-Purdue, and I think it could be distinguished on that. But also, yes, there was an equity committee and there was contingent of your rights under the plan.

THE COURT: Okay, thank you. That's helpful, Mr. Baddley.

Mr. McClammy.

MR. MCCLAMMY: And then I believe the other -- the other case where this may have been done is in the Amyris.

THE COURT: Amyris?

MR. MCCLAMMY: Yes.

THE COURT: That was me.

MR. MCCLAMMY: Which was before Your Honor.

THE COURT: Yeah. I don't recall -- well, I'd have to go back. I don't recall the issue being raised.

MR. MCCLAMMY: And I believe in that case that the parties there, the releases were either from voting on the plan, abstained from voting on the plan, and similar to here, kind of with the opt out structure. So we would refer Your Honor back to that. I know Your Honor knows that one well.

THE COURT: If I did it once, it had to have been right. Should I repeat my mistakes or correct them? That's the question, right?

MR. MCCLAMMY: I won't give my personal answer on that because I know I have to ask myself that question too.

THE COURT: Yes, we all do. Okay. There are a few issues that I want to just think about a little bit tomorrow. So I'll just look at my ruling on those issues at the outset of the hearing tomorrow.

What I suggest we do is come back tomorrow at 2:30. I've got a 10:00. I've got an 11:00 that's going to

be contested evidentiary. It's going to take a few hours, so I think 2:30 is the best I can do. But I get a -- I'm sorry, Mr. Baddley.

MR. BADDLEY: Is there any reason that you need me present appearing tomorrow for our issues --

THE COURT: No. Yeah, and I'll say it again, that any out of town counsel who'd like to participate by Zoom tomorrow is certainly welcome to. And I think that we're only dealing with American Lease tomorrow, so all are welcome to attend by Zoom.

MR. STEINBERG: Your Honor, this came up earlier in the hearing, and we've been emailing with counsel to the FOA, Mr. Shamah, and to address a concern that he raised earlier that certain service providers have been reluctant to accept payment directly from owners, he's requested some proposed language in the confirmation order that the Debtors think is reasonable, but to be fair, has not been previewed with any other parties yet.

That language would say, to the extent the Liquidating Trustee is not in a position, whether it's insufficient funds or any of the other categories, to pay for the labor related to recalls, that service providers are authorized to accept payment directly from customers.

THE COURT: Okay. I would certainly ask you to talk to Ms. Robinson about that, as it affects her

resolution. You know, I will note that there's no evidence before me saying that any auto shop has been unwilling. My experience is that they're delighted to have cash on the barrelhead. But, you know, I guess there's somebody out there, on principle, might not want to take your money.

MR. STEINBERG: Yeah. Understood, Your Honor. And we will do so.

THE COURT: Yeah. Okay. Thank you. All right. Well, then, anything else before we part?

MR. BUTTERFIELD: No, Your Honor.

THE COURT: Okay. Well, have a good evening, everybody. See you tomorrow. We're adjourned.

(Proceedings concluded at 4:18 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

/s/ William J. Garling October 10, 2024

William J. Garling, CET-543

Certified Court Transcriptionist

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