UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	:	Case No. 20-30608-JCW (Jointly Administered)
ALDRICH PUMP LLC, ET AL.,	:	
Debtors,	:	Chapter 11
	:	Charlotte, North Carolina
	:	Thursday, March 3, 2022
	:	9:30 a.m.
	:	
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS,	:	AP 21-03029
Plaintiff,	:	
v.	:	
ALDRICH PUMP LLC, MURRAY BOILER LLC, TRANE TECHNOLOGIES COMPANY LLC, AND TRANE U.S. INC.,	:	
Defendants.	:	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J. CRAIG WHITLEY,
UNITED STATES BANKRUPTCY JUDGE

Audio Operator: COURT PERSONNEL

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P R O C E E D I N G S

(Call to Order of the Court)

THE COURT: Have a seat, everyone.

Okay. Back in the Aldrich Pump case. We -- my judicial assistant is out this week and, therefore, we do not have a, a parties' announcement list. So we'll do it the old-fashioned way and ask each of you to announce and if, if you're lead counsel, to the extent you can name the others that are on your side and appearing, I would appreciate it. I know we've got some folks on the telephone as well and we'll get them right after we get the folks in the courtroom.

So ready to go, Gentlemen?

MR. ERENS: Thank you, your Honor. Brad Erens, E-R-E-N-S, of Jones Day on behalf of the debtors. Also here from the Rayburn Cooper firm is Rick Rayburn and Jack Miller.

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: From the Jones Day firm, Mark Cody, Caitlin Cahow, and Amanda Johnson, and the debtors' Chief Legal Officer, Allan Tananbaum.

THE COURT: All right, very good.

Go ahead, Mr. Mascitti.

MR. ERENS: Oh. Also -- I'm sorry -- Michael Evert from the Evert Weathersby firm.

THE COURT: Okay. Thank you.

MR. MASCITTI: Good morning, your Honor. Greg Mascitti, McCarter & English, on behalf of Trane Technologies Company LLC and Trane U.S. Inc. I'm joined today by our local counsel, Stacy Cordes, as well as Trane's General Counsel, Evan Turtz.

THE COURT: Okay.

Well, let's ago ahead to this side, how about.

MR. MACLAY: Good morning, your Honor. It's Kevin Maclay back to see you again --

THE COURT: Good to see you.

MR. MACLAY: -- from Caplin & Drysdale. Joining me today are Jeffrey Liesemer, Todd Phillips, and Nate Miller from my firm. To my right are Dave Neier and Carrie Hardman, whom you're also very familiar with, from Winston & Strawn. Behind me is, is Mr. John Cordani of the Robinson Cole firm and he is joined by Annecca Smith and we also have Mr. Rob Cox, of course, with us today as well.

THE COURT: All right, very good.

Over here?

MR. GUY: Good morning, your Honor. Jonathan Guy, Orrick Herrington & Sutcliffe, for the FCR, Joseph Grier, III, who's here with me. We have no one else in the courtroom today, but we do have one colleague on the phone from Orrick Herrington & Sutcliffe, Debbie Felder, and we have our insurance counsel, Mr. Robert Horkovich from Anderson Kill, on

the phone, too.

THE COURT: Okay.

MR. GUY: Thank you, your Honor.

THE COURT: Very good.

Anyone on the, inside the well on the back?

(No response)

THE COURT: How about others in the, outside of the well in the courtroom?

(No response)

THE COURT: That got it?

(No response)

THE COURT: Telephonic appearances? Anyone?

(No response)

THE COURT: No? Okay, very good.

All right. We have a, an agenda that was filed and I don't know if y'all've had any discussions as to the batting order here this morning or whether there are any preliminary announcements. Those have become sort of traditional.

So, Mr. Erens, you want to lead off?

MR. ERENS: Sure. Thank you, your Honor.

On the order, yeah, we, our intent was to go just down the agenda in the order --

THE COURT: Okay.

MR. ERENS: -- it is provided, which is sort of the logical order, we think, for this hearing. We do have a couple

of status updates --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- mostly based on the status of orders based on the rulings from the last omnibus hearing in late January.

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: Okay.

THE COURT: All right.

MR. ERENS: So in no particular order, your Honor, as you recall, in late January you approved the bar date and PIQ motion.

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: The ACC had reached out to us. They wanted to discuss somewhat more the PIQ. If you recall, the motion itself was filed in December of 2020.

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: That was before even Bestwall approved the PIQ. The Bestwall PIQ was approved, I believe, in the spring of 2021. So the, the ACC asked for a meet and confer, mostly advertised as a discussion of changes to the form based on what was approved in Bestwall. The reality of that discussion was

there was requests for substantially more than that. I wasn't personally on the call, but many other, many others in the courtroom were. We're happy to have continued discussions with the ACC on the PIQ, but not infinite and at some point we do think that needs to get entered.

But having said that, since the PIQ process will take some time we'd like to go ahead and get the bar date portion of the motion approved. The bar date's pretty simple, especially after your Honor's ruling. So as of, I believe, Tuesday, we had sent the ACC approved, an approved or proposed, I should say, order approving the bar date and the, and the proof of claim form. We have yet to hear from the ACC. We may kind of caucus with them either at lunch or after the hearing. But we would be -- so I, I don't know where they stand on that, although, again, it should be a pretty simple matter.

But we will be coming back to your Honor shortly to get that order entered, if it's acceptable to your Honor.

THE COURT: All right.

MR. ERENS: The next item is the qualified settlement fund. That order was entered by your Honor -- I don't remember what date, but since the last hearing -- and we can report that the qualified settlement fund has been fully funded as of yesterday with the full $270 million that was requested and approved.

The third item is estimation. Even though estimation

was the debtor's motion, we got some time ago, maybe ten days ago or so, a proposed order from the ACC.

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: Without going through it specifically -- I think it'd probably be not necessarily appropriate here today -- there were some issues raised by the ACC in connection with that order. We've talked a little bit to the FCR on this. I know they have some questions and issues as to what the ACC is seeking, as do we.

So that will take a little bit more time as well, but we're hopeful that we'll later reach agreement or have to come back to your Honor shortly on that order.

And then the follow-on to that, of course, is a case management order for estimation in the case. The ACC has informed us that they're working on such an order. We're also working on such an order.

So I don't know whether they'll look similar or substantially different, but we'll find out, hopefully, soon enough and as contemplated at the hearing and otherwise, to the extent we cannot agree on a case management order, or at least there's some outstanding issues, we'll come back to your Honor. That, you know, that may be the next omnibus hearing --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- which is the end of this month. It may not. I, I'm hopeful it will be, but it's hard to say now since we haven't really started the process. But we would like to get that --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- at least that initial order entered so estimation has been approved officially.

The last item up from the January hearing is derivative standing. That's the first substantive motion on the agenda for today. So that's, obviously, where that stands.

Other than that, you know, the first actual item on the agenda is the, the motion for approval of settlement with Clark, or related to Clark. That's been continued, again, to the March 31st omnibus hearing with objections due on the 21st. We're trading information and have discussions on that.

So that's the basic update. The only other thing I'll mention, your Honor, in terms of things that have happened since the last omnibus, obviously the LTL decision came out of --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- or two decisions came out of Judge Kaplan's courtroom, first on dismissal and, second, on preliminary injunction and, and automatic stay. I assume your

Honor's at least generally familiar or maybe you're fully familiar with the opinions.

THE COURT: Sure.

MR. ERENS: You will hear, probably, from our side quite a bit, not surprisingly, on that in today's hearing.

THE COURT: Okay.

MR. ERENS: Thank you, your Honor.

THE COURT: All right.

ACC?

MR. MACLAY: Thank you. I'm pleased to report that I agreed with the vast majority of what Mr. Erens said. It's a very welcoming feeling and feels fresh and new.

With respect to the PIQ and bar date, I'd like to make a couple of, of notes to sort of supplement what Mr. Erens said. Obviously, we have had a meet and confer with them about the bar date and PIQ. At that point we hadn't gotten any sort of proposed bar date. So that wasn't part of the discussion. We look forward to opening up that discussion the next time we get together. And I'll note that we had, I believe, five of our Committee members on that call, too. So they're very engaged and interested in trying to work through these issues and I expect that'll also be the case as we add the bar date to that discussion. I won't go into the substance of the issues other than to say clearly there are some differences of opinion that we're trying to work through to avoid any unnecessary

disputes.

With respect to the, the CMOs, I likewise share Mr. Erens' hope that we can work through all that consensually as we, in fact, did do successfully in the past with respect to the preliminary injunction matters and I'm hopeful we can replicate that and I don't think it'll surprise this Court to know that although no doubt we will be hearing a lot about LTL, we don't think it has a whole lot of relevance to the fully developed factual record and different procedural posture of this case, but we look forward to seeing, you know, what, what the other side has to say about it.

And I think that's all I need to say as a matter of --

THE COURT: Very well.

MR. MACLAY: -- you know, the initial comments, your Honor.

THE COURT: How about from the FCR?

MR. GUY: Nothing to add, your Honor. Thank you.

THE COURT: Anyone else? Good-of-the-order announcements?

(No response)

THE COURT: Okay. Are we ready to move forward, Mr. Erens?

MR. ERENS: We are ready to proceed, your Honor. We would ask that we turn to Item No. 2 on the agenda, which is the Debtors' Motion to Define the Scope of the Derivative

Standing Ruling. And Mr. Rayburn will be presenting on behalf of the debtors.

THE COURT: Okay.

MR. RAYBURN: Good morning, your Honor. Are you okay with us presenting from the table in, as in the old days or go to the new-fangled podium?

THE COURT: I think you're still a North Carolinian. So I think you're entitled.

MR. RAYBURN: If I were in South Carolina --

THE COURT: No. We're, we're --

MR. RAYBURN: -- you'd be telling me to sit down.

THE COURT: -- trying to accommodate everyone's natural predilections and, and the local practice has always been to do this by counsel table. We're also happy to have the, the podium talks.

MR. RAYBURN: Good morning, your Honor. I'm Rick Rayburn of Rayburn Cooper & Durham, here to argue the Debtors' Motion to Define the Scope of Derivative Standing. I grant what you have already indicated you're going to do. We're not here to argue that you should not grant derivative standing, no, no matter how hard, how strongly we feel on that subject.

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: But what we have done is we filed a motion to limit the scope of the grant of derivative standing

as you invited in your ruling and --

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: -- and specifically ask you to limit standing today solely to pursue discovery on and potentially file a claim for an actual intentional fraudulent conveyance related to the corporate restructuring under 544 and 548. Now the precise nature of our motion and the proposed order that we've rendered, and the case law relating to that are all a matter of record. We tender the order --

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: -- and the issue has been briefed, fully briefed.

What I would like to do today at the commencement of this, the first hearing on the calendar, is to talk about the context in which we now find ourselves in the case, as was alluded to by learned counsel on the other side. The context now is somewhat different from where we've been in the past. First, I talked about how we got here; second, let's talk about what's happened since then; and then we'll argue that the current context or the scope of the grant or in the current context and the specific motion we're here on today, but the scope of the grant should be limited only to potentially colorable claims, which this Court has concluded are colorable

claims, those which were set out specifically in the ACC's motion and those that could possibly be asserted in this case. The debtors believe that the plan process should move forward, that that process will save tens of millions of dollars and commence payment to the claimants, and that the scope of the claims to which stand, for which standing should be granted should be limited commensurately with where we are in the case, the facts as they now exist, etc.

Deep background. This is primarily an asbestos-containing gasket case. In that regard, it's similar, very similar to what happened in Garlock. You're dealing with industrial equipment and folks who were exposed, primarily exposed in their workplace and by virtue of being inside a, a disassembled large piece of industrial equipment. This is not a consumer products case. It's not a do-it-yourselfer case. It's an industrial exposure case. The, the claimants who were exposed to those gaskets, etc., are similar to the claimants who were involved in the Garlock case and similar to the claimants in the Garlock case, the claimants sue multiple defendants. Everything I've said so far is all in the information brief and the affidavits submitted long ago.

As you recall, case commenced in June 2020. It began with a lengthy discovery and litigation which resulted in the Court granting the preliminary injunction on August 23, 2021. Pursuant to a 72-page decision, which is captioned Findings of

Fact and Conclusions of Law Regarding Order Declaring that the Automatic Stay Applies to Certain Actions Against Nondebtors, Preliminarily Enjoining such Actions and Granting in Part Denying in Part the Motion to Compel. Well, the, the point of that is to say from now on I'm just going to call it the PI Order, if everybody will understand what we're talking.

Based on the record before it at that time the Court concluded that certain possible claims were, in fact, colorable based on your preliminary views regarding the debtors' insolvency. More specifically in your Findings of Fact and Conclusions of Law in the PI Order, you found at Paragraph 63, again quoting, "By contrast, and disregarding the Funding Agreement (described below), Aldrich/Murray's assets were not then, and are not now, sufficient to satisfy their asbestos liabilities." And at Paragraph 76, "Otherwise, these debtors have no ability in bankruptcy to pay the asbestos claims assigned to them by the divisional merger."

To reach that conclusion or finding you cited the direct testimony of the ACC's expert, Matthew Diaz, for these findings. That's Page 397, Lines 18 through 23 of the transcript. What happened, Mr. Diaz testified in his expert report that, "The total asbestos liabilities of the Trane Companies was $508 million based on the book value of those liabilities prior to the petition date." That's the Diaz Report admitted in evidence, Page 28, Paragraph 47. That is

the evidence before you today and the only evidence that's been submitted in this case as to the estimate of the tort liabilities of the debtor by one of the experts.

Since the PI Order, an awful lot has happened. First, an agreed plan among the debtors, the FCR, Trane Technologies providing for funding of $545 million for an asbestos trust to pay claims was filed on September the 24th in 2022 [sic]. On February the 15th in 2022, the Court entered its order authorizing the debtors to establish a qualified settlement fund for payment of asbestos claims, the QSF Order we'll refer to it, pursuant to which $270 million has now been made available to pay the debtors' asbestos liabilities. That funding occurred yesterday. That move, your Honor correctly identified, the debtors and the non-debtor affiliates "putting their money on the table so everybody sees you're good for it and you're serious before you start trying to negotiate a deal." That's the January 27th transcript, Page 35, Lines 14-16.

As a result, the Court should now, should now review its previous finding as you have so many times alerted that those findings were at the time and subject to later revision and upon reviewing that finding and in deciding this motion and other motions to come before you in this case, that there is a fundamental fact now different that, even ignoring any remaining obligations under the funding agreement, the debtors'

assets are now sufficient to satisfy their asbestos liabilities, night and day different circumstances.

It should also note that with the QSF funding and the fees that have been incurred in this case compared to the hundred -- hundred dollar -- hundred-million-dollar-per-year run rate of expenses that the debtor has incurred in the tort system, the debtor is getting no benefit and the Trane entities are getting no benefit from delay in these cases. That's why, that's one of the reasons that the debtors want to move to a plan, get confirmation, and get this case over with.

Also in the PI Order you made the following observation at Paragraph 175:

"Perhaps Aldrich/Murray and New TTC and New Trane mean exactly what they say. Perhaps these jointly administered Debtors will negotiate a fair plan that is acceptable to the claimants. Perhaps New TTC and New Trane will fund that plan, and all of these liabilities will be funded. It is too early to say."

Well, it's no longer too early to say. The debtors have negotiated a fair plan with the FCR -- he represents, again, 80 percent of the claimants in this case -- and they've, they've obtained the requisite funding for the plan. Funding the plan is not only secured by the $270 million settlement fund, the debtors' assets, the debtors' insurance, and the funding agreement, but it's also now secured by the joinder of

the funders, the Trane entities, and the plan support agreement.

So the Court should now proceed to analyze the matters before it on the unrebutted fact that the debtors and the Trane entities will, in fact, carry out their announced intention in filing the case. The debtors and their funders have established the *bona fide* intent here and their purpose in these cases. The answers to your query in the Preliminary Injunction Order is, undoubtedly, that they mean exactly what they say and have said.

As, as noted by the Court, the ACC, which is seeking derivative standing here, has thus far refused to negotiate any plan of reorganization and has insisted, instead, that it should be able to bring litigation attacking the 2020 corporate restructuring, including avoidance actions, damage claims, and even proposed substantive consolidations of the debtors and their funders. Since all these litigation efforts are based upon a false hypothesis, the insolvency of the debtors, and some alleged harm to the claimants, which has not been proven, they should be reviewed as speculative. They would all be mooted by the confirmation of a current plan or any modification of the plan that provides for the payment of the debtors' current asbestos claims and future asbestos claims, indeed.

They would also be mooted by any estimate of the

current asbestos claims in the estimation proceeding that exceeds the debtors' assets, including the QSF and the insurance, etc. Any allegation by intent of the debtors and their affiliates being different from their announced intent to file, negotiate, file, and fund a full-payment plan under 524(g) or such other alternative as may be necessary can no longer pass muster. They put their money where their mouth is.

All of the ACC's claims, which they seek to assert by derivative standing having characterized as efforts to determine the "propriety" of these cases, as you noted on October the 28th, Page 39, Lines 4-12 of the transcript, "Points and principle are great, but at the end of the day the victims probably would rather be paid." Fighting the battle over principle cannot accelerate and will probably delay the receipt of the claimants of payment. Therefore, it's extremely important that the scope of the grant of standing be sufficiently limited to colorable claims.

The Court has also expressed previously in, in several hearings the concept that the debtors are litigating and that the ACC should simultaneously be allowed to litigate, presumably out of some sense of fairness or symmetry, but this misses the point. The only litigation that the debtors are pursuing is claims estimation which is necessary to plan confirmation and may also be necessary to adjudication of those other claims. Plan confirmation is supported by the debtors in

approximately 80 percent of the claimants, i.e., those represented by the FCR. Neither any kind of balance or fairness supports the idea that a minority constituency like that represented by the ACC should be allowed to conduct its preferred speculative litigation equally with the debtor and on the same timetable as the pursuit of a plan toward confirmation. The debtors and the funders deserve the opportunity to fulfill the basic purpose of chapter 11 by confirming and funding a plan of reorganization without having to both fund and defend speculative ACC litigation that serves no proper reorganization purpose. Judge Kaplan's motion to dismiss decision at Page 16 put it correctly. The two main functions of chapter 11, the first one are, is "preserving going concerns" and the second one is "maximizing property available to satisfy creditors." Nothing in the litigation that is going to increase by a dollar the money available to satisfy creditors in this case.

The purposes and the provisions of the Bankrupt Code, Bankruptcy Code itself make clear that the path toward confirmation is the primary path that every chapter 11 case should follow. The concept is embodied in the legislative history and the time limit for plans to be filed in Section 1121 and the longer two-year time interval for periods for Section 108 and Section 546 and in the various provisions, including Section 362, for example, affording creditor relief

conditioned only upon such concepts as no reorganization being reasonably in prospect. As you have stated in the PI Order at Paragraphs 224 and 225, "Courts have consistently affirmed that the public's interest in a successful reorganization, which interest may be at its greatest in mass-tort" - excuse me.

> "Courts have consistently affirmed the public's interest in a successful reorganization, which interest may be at its greatest in mass tort bankruptcies. This Court agrees.
>
> Aldrich and Murray's successful reorganization also would promote Congress's particular goal in section 524(g) by establishing an asbestos trust that would efficiently and equitably resolve tens of thousands of asbestos claims. A section 524(g) trust 'will provide all claimants — including future claimants who have yet to institute litigation — with an efficient means through which to equitably resolve their claims.'"

Here, there is a very real funded plan moving toward confirmation with overwhelming support from the largest creditor constituency and one hold-out constituency that illogically continues to assert that it is the only constituency that can approve a plan. That assertion ignores the fact that current, the facts that current claimants are not a monolith, that only one class channeled to a trust has to approve a 524(g) plan, that there may be grounds for multiple

plans within the current claimants' body, even under 524(g) and as Judge Kaplan stated, "Numerous non-asbestos mass tort cases have established trust mechanisms under confirmed plans based on other Code provisions." That's his Motion to Dismiss Ruling at Page 18.

The concept of a veto in the hands of the ACC, that doesn't fly. It is a red herring. The objective, the objective data confirmed that since Congress created the 524(g) trust concept "asbestos claimants trusts provide faster and simpler payment of asbestos claims and the so-called tort system provides, at best, delayed and inconsistent results for claimants." Dr. Mullin's expert report in the PI adversary makes this point at Paragraphs 42 and 43. Judge Kaplan made the point more emphatically in his description of the delays in the tort system, Page 20 of his dismissal decision, "The sluggish pace and substantial risks to present future claimants in the tort system," and his observations in Paragraph 42 and elsewhere of the advantages of the bankruptcy trust system over the tort system. For that, for those propositions he cites Federal-Mogul and other decisions. And the Federal-Mogul statement that, "The trusts are for fulfilling Congress' expectations in enacting 524(g)."

There's no logical argument supporting the ACC's assertion that the debtors' and funders' request to establish a 524(g) plan and trust pursuant to the current plan or an

amended plan is not a proper purpose, not in the best interest of claimants, or that the claimants should, would, if tested, oppose a plan on principle. As Judge Kaplan in his way said it in the LTI [sic] opinion denying dismissal:

> "Let's be clear. The filing of a chapter 11 case with the expressed aim of addressing the present and future liabilities associated with ongoing global personal injury claims to preserve corporate value is unquestionably a proper purpose under the Bankruptcy Code."

Kaplan's MTD Decision at Paragraph 60.

So today, where are we? Let's turn the page. The debtors are now solvent. The funders' intentions are no longer questionable. The debtors have negotiated a plan with the FCR and most recently, the propriety, quote unquote, of a bankruptcy preceded by a divisive reorganization has again been confirmed by Judge Kaplan applying a more strict, stringent good faith dismissal standard and adding his way to the similar decisions of Judge Beyer and Judge Conrad's decision in this District.

So what, so we come to the question before you on the first motion today and that is what colorable claims remain for the ACC to investigate and bring before June 18th or before larger -- long -- longer statutes run? As we point out in the brief and in the motions, the, the avoidance action two-year

rule is the rule that's, that we're dealing with for June. The other statutes are much longer. As you pointed out in the PI ruling, in your PI ruling, the scholarly works referring to the Texas divisive merger statute point to fraudulent conveyance law as the appropriate creditors' protection and as you phrased it on Page [sic] 187, "And the same is true of fraudulent conveyance actions, the primary relief for an improper divisive merger under the Texas Business Organizations Code." That, that is the focus. That's where the concept of a colorable claim is based.

The ACC in its motion at Paragraph 59 and its argument in DBMP, as, which we pointed out in the reply, asserts that there are colorable claims for actual intent, intentional fraudulent conveyance under 544. Those are the claims which we interpret you to have referred to as colorable claims in your prior order and those are the claims to which we suggest that the, and urge, that any grant of derivative standing be limited. There's no possible basis to conclude constructional fraud, constructive fraudulent plan, transfer claims are colorable based on the facts of the cases as they exist now and the ACC did not even discuss such claims in its derivative standing motion. All other potential claims mentioned or discussed or brought in the DBMP companion case are premised on a finding that some fraudulent conveyance has actually occurred, as was conceded by counsel in the DBMP hearing on

February 10th. The fraudulent conveyance allegation is at the bottom of the entire claim, set of claims that the ACC seeks to investigate and prosecute. Limitations periods for everything other than the two-year statutes associated with the Code are much longer.

So what we are suggesting in our proposed orders is that under the circumstances of this case, as it exists today in March of 2022, the Court should focus the parties on the task at hand to get the cases resolved and a plan confirmed and not on the pursuit of specious and unnecessary litigation quests. For that reason, we argue that the scope of the grant of derivative standing should be limited to the actual fraudulent conveyance claims. The actual language is in the proposed order we sent.

I will say again to the Court what we have said from the beginning of this case. The debtors want to move the plan process forward to confirm a plan of reorganization, to start paying the claimants, and to moot all of these litigation quests and successfully conclude this reorganization case.

I'll be happy to answer any questions you want to address.

THE COURT: All right. Thank you.

MR. RAYBURN: Thank you.

THE COURT: Okay. Who's next?

All right. Mr. --

MR. MASCITTI: Your Honor, Greg Mascitti --

THE COURT: All right.

MR. MASCITTI: -- McCarter & English, on behalf of the non-debtor affiliates. Just two brief points, your Honor, to add.

THE COURT: Okay.

MR. MASCITTI: First, your Honor, I do believe that there are new facts that have developed since the Court's decision, not the least of which is the establishment of a $270-million qualified settlement fund for the payment of asbestos claims. We believe that that fact affects, should affect the Court's analysis as to the colorability of the claims identified in the motion and further establishes that the prosecution of such claims by a minority interest of creditors in this case would not be beneficial to the estates.

Secondly, your Honor, just briefly again with respect to the claims that weren't identified in the motion, I'm not aware of any case -- and I haven't seen any case cited -- where a court has determined that a claim is colorable without that claim having been identified in the motion seeking standing and logic suggests, your Honor, that such an analysis would be impossible 'cause the Court could not analyze the colorability of a claim that's not before it.

Therefore, your Honor, we respectfully request that any grant of standing to the Committee be limited as requested

in the debtors' motion.

Thank you.

THE COURT: Thank you, Mr. Mascitti.

How about over on this side? Mr. Guy? Get all the proponents first.

MR. GUY: Thank you, your Honor. Jonathan Guy for the FCR, Joseph Grier, III.

Your Honor, there was reference to Mr. Diaz's testimony on the $508 million number --

THE COURT: Uh-huh (indicating an affirmative response).

MR. GUY: -- which is the basis for your findings. That is a nominal number, your Honor. So the fact that we have a settlement at $545 million, which will be an NPV number on the effective date, shows that there's much more on the table than even Mr. Diaz thought was necessary.

Your Honor, I'm going to talk a little longer today than I normally do.

MR. NEIER: Your Honor, I'm sorry to interrupt and I apologize.

I should have said I don't believe that there were any pleadings filed by Mr. Guy in this.

THE COURT: Nevertheless, I'll hear him.

MR. NEIER: Okay. Thank you, your Honor.

THE COURT: Thank you.

MR. GUY: And to Mr. Neier's points, your Honor, I'm going to be talking about the same issues when it relates to the motion to dismiss where we did file a statement.

So we don't want to duplicate, but I think this is the appropriate time to raise it.

Your Honor, what I'm going to ask the Court to do today is to do what's best for asbestos creditors. Simple as that. What is best for asbestos creditors? 'Cause that's why we're here. That is the touchstone of every decision in every bankruptcy case. Is this going to be good for the creditors or not? I want the Court to ignore the noise. There's going to be a lot of noise. The complaints about level playing fields, what's happening in other cases, I want to ask the Court to focus on this case, the facts of this case and what's best for creditors in this case.

It is irrefutable, undeniable that the best thing for creditors in this case is the creation of an asbestos trust that will pay valid claims under transparent and objective procedures quickly and fairly. No asbestos fiduciary anywhere can suggest otherwise, even though Mr. Grier seems to be the only asbestos creditor or fiduciary who's saying that with the exception of the Canadian class in the LTA, LTL case. Your Honor, Judge Kaplan said, "The interests of asbestos creditors are not served by a return to the tort system." That's a fact. They're not and that's especially true for the futures.

Properly managed with proper protections, a trust will pay similarly situated claims, present and future, till the end of the trust. That's what we're trying to do here. That's exactly what Congress envisaged we would be doing here and court after court from the Supreme Court to the Fourth Circuit to the Third Circuit to this Court have said that. We agree. It doesn't make one jot of difference, one jot of difference that the debtor engaged in a pre-petition restructuring that isolated its asbestos liabilities if there is money there to pay them. If there is no money there to pay them, that would be a fraud, but, if the money is there, it isn't. That's just simple Bankruptcy 101. It's not bad faith. It's good business judgment and it's good for the asbestos creditors.

Your Honor, the reason why I want us to focus on the facts of our case is because our case has encapsulated products. DBMP does not. Bestwall does not. LTL does not. This case has asbestos products, encapsulated products. That's not the other cases. Why is that relevant? Because we don't have to run very far or look very hard to find a case that's very like this one where we had a model of a successful reorganization, where we had a successful trust that was accepted by all the players here and, most importantly, approved by this Court. We don't have to look very far because that's Garlock. Garlock had $480,000 million in funding, plus the $20,000 that the debtors paid directly to Motley Rice. It

has a fair transparent TDP. It pays by reference to objective factors, your Honor, objective factors that the Court approved and the parties approved, age, dependents, type of disease, duration of exposure, type of occupation, and it has the anti-fraud provisions that were important to the Court and important to Judge Hodges.

This trust -- and we've heard a lot about "it's terrible, it's awful, we hate it, we don't like it" -- it works exactly as intended and I can speak to that because I'm counsel for Joe Grier, who knows exactly what's going on in that trust. Valid claims are being paid. There are fewer valid claims than everybody's experts expected, but that is not shocking to me. Why? Because the products are encapsulated. As Judge Hodges found in his ruling, there's only so many ways you could possibly get exposed to asbestos fibers from those products. They're the same products in this case with the exception of a very small number of friable boiler blankets. The trust is working exactly as it's supposed to and it's not going to ox the gore, gore the ox of the futures. In fact, the values have gone up. They've doubled. That is a great result for valid asbestos creditors.

We could have that result in this case before the end of the year with the right will and good faith. We could have it. How do I know that, your Honor? Because in Paddock that case, big dusty, friable asbestos, much, much larger asbestos

liabilities. That's happily on its way to confirmation. Disclosure statement approved, it's going out. Same players, same law firms. We know about the products in this case, your Honor. We know about the exposure past. We know about the occupations who worked around those products. We've already negotiated and agreed a TDP which is being modified, by the way, your Honor, postpetition at the request of the plaintiffs' firms. The way it works is if they think it's not working in the way that results in fair compensation, unintended consequences, they go back to the trustee, Lewis Sifford, who has control. And that was very important. Lewis Sifford has control, not me, not the ACC, and they say, "Well, we'd like to change it." Every request that they have made has been granted. There is not a single outstanding request from the CAC, the Advisory Committee, to change anything about that trust. And I say that, your Honor, because you've heard in this Court and you've heard in DBMP, "Well, Garlock is terrible. Garlock is terrible." How terrible can it be if the fiduciaries who are responsible for the current claimants are happy with it and they're not requesting any more changes?

Your Honor, here, to the new facts. We have a commitment to the 545. It's clean of insurance. We have a plan and we have it modeled on Garlock and the CIP will be modeled on Garlock, too. It has the support of the debtors, the debtors' parents, the debtors' affiliate, and 80 percent of

the people who matter, the asbestos creditors. The class of future claims want this case to be confirmed and we don't want to be sitting in purgatory forever and ever and ever. That doesn't serve anybody's interest. There's a lot of fees to be billed. That is not the point why we're here, your Honor. We're here to help asbestos creditors and make sure they get paid quickly, promptly, and fairly. As Ms. Ramsey said earlier, this case is all about the futures. The currents are a tiny proportion of that. She's right.

So what is holding this up? Why aren't we moving forward? Why isn't the ACC onboard? Is it because the number's not big enough? Well, we don't know 'cause they haven't told us. They don't know what the number is. They only just recently hired their own claims expert two years into the case. We know the number's reasonable, your Honor. We know it's reasonable by reference to Garlock. It's significantly more than the Garlock number that was accepted. We know it's reasonable by reference to Paddock, imminently reasonable.

So why are the creditor fiduciaries here saying, "No, we want to go back to the tort system. We like that"? Why is the representative of the class of current asbestos claims saying, "We want to go back to the tort system," when everybody else, every court, every independent fiduciary says, "That's actually not a good idea"? "That's not going to be helpful."

Your Honor, the answer is simple and I raised it at the last time we spoke in December and it's in Judge Silverstein's opinion, which I, which I know you have and I'm not going to go through it all again. But she says:

> "I will not suspend reality and ignore the role plaintiff law firms play in mass tort bankruptcy cases. Because of the relatively few law firms that appear to dominate this landscape and the hundreds or thousands of claimants each purports to represent and thereby influence in a given case, plaintiff law firms appear to have taken an outside role in the representations of their individual clients on committees apparently supplanting or replacing them as acting committee members."

And then she gives all the reasons why. That's not my view, your Honor. That's Judge Silverstein's view and as we know, she's a very, very smart and incredibly hard-working jurist.

You heard Mr. Maclay saying five committee members were on the call. That was a slip of the tongue. There were no committee members on that call. There were five law firms on that call, the same law firms that dominate all these committees. So why, why do those law firms not want to go to an asbestos trust system? I mean, we've had, what, a hundred cases that have, we've created trusts and they've been signed

off on and there's been, they've been approved by many of these same firms. It's because the powerful firms make more money in settlements outside of the asbestos trust process than other firms. There's more money to be made for them because of their influence, because of their smarts, because of the location, because of the judges, whatever it may be. They do better outside the tort system. That is the only reason this case has been held up.

And it's relevant, your Honor, because prepetition, as far as I know, there's only been one case that went to trial. So we hear all the time about, "Well, we want the right to go to trial." One, one case. So what was happening prepetition? There were settlements, settlement after settlement after settlement. That's exactly what the asbestos trust does, your Honor, but the big difference is you get to approve it. You get to make sure it's fair, it's transparent, it's objective, and no one is getting prejudiced. That's the difference.

So everybody who's similarly situated by reference to their disease, not their lawyer, not the Court, not the relationships, not leverage, it's how sick you are, how strong is your claim by objective factors. All those people are going to get paid the same amount for similarly situated claimants.

This brings me to the fraudulent transfer claim, your Honor. I know there is no valid fraudulent transfer claim here. How do I know that? Because this case got to where it

is under identical circumstances to the Paddock case, same law firms, many of the same committee counsel. Are they arguing it's a fraudulent transfer in Paddock? No. How can they argue to you, your Honor, that it's a fraudulent transfer and they should have this rowing commission to do whatever they want with unlimited, it's not even limited to fraudulent transfer, anything they want, conspiracy, da, da, da. How can they argue that to you, your Honor, when before Judge Silverstein they're saying, "Please confirm a plan that was the result of a pre-petition divisive merger"?

Someone is being taken down a garden path. How could this even be fraud?. Fraud is wrongful deception intended to result in improper gain. Where's the wrongful deception? This has been extremely transparent and public from Day 1. Where's the improper gain? There is $545 million on the table to pay valid claimants. The ACC can come in and say that's not enough, but it's not enough to say, "Well, no. We want to go back to the tort system because that is actually the good result for the seven or eight law firms that control this Committee." That's not acceptable, your Honor.

Talk about, I'll talk about subcon later, but it's the same issue. That is not a valid claim. The fraudulent transfer under the facts of the case that's before the Court today is not a valid claim and the same would be true of subcon. But none of this is a joke to the asbestos creditors

'cause they're sitting waiting to be paid. There's members on this Committee, they've been on the Committee. They had claims in 2019, meso claims, 2020. I'm not going to mention their names 'cause it, even though it's a matter of public record. I don't need to put it on the record. These are people who are dying and have probably died of mesothelioma. I'm not aware that any substitution is to be made of anyone who may have died from mesothelioma. Those people want to be paid. The class of creditors want to be paid. They're not interested in fighting about this, you know, principle that, no, no one should ever file for bankruptcy unless you're insolvent. They want to be paid and that's why we're here. But instead, what we hear from the ACC is delay, delay, delay, delay, no, no, no. "We won't talk to you. We refuse to negotiate." No, no, no. The reason they do that, your Honor, is because so long as they have a chance to take this case back to the tort system, either through the fraudulent transfer case or through the subcon, as long as there's a chance they will not come to the table and work for the best interest of asbestos creditors in this case. They will run those cases out. They will spend tens of millions of dollars on them. It will take years and years and years and at the end of it there will be no case because there's no fraudulent transfer here and subcon just makes no sense when you have a solvent entity.

So, your Honor, on the fraudulent transfer, I know the

Court has ruled on derivative standing. I think the facts have changed. The basis for the Court's ruling have been overtaken by the facts in the case. That happens all the time. I don't, I don't think there's a colorable basis for a fraudulent transfer case, but at the very minimum if it is allowed to go forward, it should be corralled to the only possible claim that it could be, the remedy that, that Texas said this is what, if you have a problem, this is your remedy, and let's get it done. Let's get it done quickly. They've had the discovery. They know all the facts. We know all the facts. There's been findings. Let's get a ruling. Let's get it done. Let's move on.

I want, seriously want this Court to put us, please, on a path to estimation and confirmation. These things are sideshows that are prejudicial to the interest of asbestos creditors, path to confirmation the same way we've done with hundreds of other trusts. And no one's getting their ox gored here. The ACC will tell you, "We have the absolute right to veto." I disagree with that, but they don't need a more level playing field. This is an iceberg that's already tilting over here like this (demonstrating) and the asbestos creditors are all sliding off because no one's tried to balance the level playing field. I'm going to ask the Court to give something to the asbestos creditors to level our playing field so that we can get to a confirmed plan by yearend and we can get a trust

in place.

Your Honor, a couple of things that I want to just clear up because they've come up in other, other discussions in some of the other cases. It's been suggested that we're in the same place now as we were in Garlock, but we're not in the same place. Because in Garlock, remember, there was a full-fledged estimation hearing, a lot of testimony about the claims processes and the concerns and problems and difficulties with that and we had Judge Hodges' opinion. Following the estimation -- we're not even close to that, haven't even got, we don't even know when estimation's going to be -- we had the PIQs. We had the trust discovery in Garlock and it was only after the, Judge Hodges' opinion that we were able to, the FCR, was able to negotiate a deal with the debtors and it was only after that deal had been presented that the ACC said, "Well, maybe we should come onboard."

So, so we're not, we're not there yet, but we need to get there. We need to get, we need to figure out how many claims there are. We need to have estimation. We need to have the Court tell us, "This is what I think the right number is," and this is the right path to follow, your Honor.

Your Honor, in DBMP, I'm, frankly, frustrated by hearing about DBMP and like we have to be DBMP and we have to follow DBMP. We're not DBMP. We are so different from DBMP. It's a different product line. They don't have the history of

an estimation hearing on the same product line. They don't have rulings from the Court on the product line. They don't have an agreed TDP on the product line. They don't have an agreed plan with the FCR. The FCR there wants to go back to the tort system. They don't have funding. They don't have any of that. We are so far advanced from DBMP that we are entitled to the chance to confirm this plan promptly.

Your Honor, the last thing I would say, unless you have any questions, is I was reading the Court's rulings on the automatic stay and the injunction and the Court knows better than anyone why you ruled the way you did, but my takeaway from that was we're not dismissing this case. This case is proceeding. I'm not gong to let you dismiss it by other means and we need the automatic stay in place to prevent disruption of the bankruptcy, disruption of the process, and the same thing with the injunction and that's exactly the same thing that Judge Kaplan did in his ruling. We're not going to be derailed.

Your Honor, these complaints that the ACC want to pursue now, even though the facts have changed, they are clear and have said it many times. "We want to disrupt this case. We want to stop this case in its tracks. We're going to do anything we can to force this back into the tort system whether it be fraudulent transfer, whether it be subcon, whatever it may be." That is completely antithetical and cannot be

reconciled with your ruling and the rulings of other courts that have said, "No. We're in bankruptcy. You're legally in bankruptcy. It's a legitimate vehicle to use to address asbestos liabilities. We're going ahead." If it's, if it's right and proper to have the automatic stay in place and an injunction in place to encourage development and completion of a plan of reorganization and get to confirmation, allowing the ACC to do another, yet another back-door attempt to sort of get the case dismissed, they can't be reconciled. We're either here and we're going to confirmation, or we're not.

So, your Honor, I would urge that the Court look at the facts as they are and determine what is in the best interest of asbestos creditors here and I say it's not going off on sideshows that won't change anything. I say it's getting to confirmation.

Thank you, your Honor.

THE COURT: Thank you.

Just for the benefit of the group and out of fairness for all, if you're going to argue a matter, I want some kind of written submission, objection, or, or joinder or whatever in the future.

MR. GUY: Yes, sir.

THE COURT: If for any reason, Mr. Neier, the, your group believes that you need to respond to what was said here based on new arguments that have been made, I'll let you do a

post-hearing brief on it, so. Okay?

All right. Ready to go?

MR. NEIER: Thank you, your Honor. David Neier on behalf of the ACC.

Your Honor, a lot of what was raised here today is not in our wheelhouse. So it's, you know, we're special litigation counsel and they've raised other cases which we're not involved in. So -- and -- and we're -- and have not been involved in.

THE COURT: I, I meant the ACC, in, in general, not, not you specifically.

MR. NEIER: Yes.

THE COURT: So.

MR. NEIER: And thank you, your Honor. But, but I would, I would invite some of my colleagues, Mr. Maclay and others, if they want to address some of the points that were raised today --

THE COURT: Certainly.

MR. NEIER: -- because they are aware of those facts and they're not in our wheelhouse. I'm really only here to talk about standing and the motion for, for defining the scope or reconsideration, whatever it is.

Your Honor, the debtors did not submit a competing order to, to this Court until they filed their motion and they refused to provide, despite many requests that they provide it, they refused to provide a competing order to the ACC when we

had meet and confers on this. And so it really wasn't until we had their motion that we knew exactly what their issues were. And, you know, they claim in their pleadings, in a footnote in their reply -- I think it's on Page 3 -- but they claim in their pleadings that, you know, this order is different from the order in DBMP because it has the words "investigate and commence," but if you look at the order that they attached to their motion, that includes the words "investigate and commence." They're agreeing to all that language. What they've done in their motion is they said, "You can investigate, commence, prosecute," etc., "as long as it's limited to actual fraudulent transfer claims." That's what this is really about. And this is really just a re-argument of the motion that we already had that was fully briefed. It was fully argued. It was heard by the Court. The Court made its ruling and they're really not asserting any new facts.

To give you an example, a lot was mentioned today about how there was this settlement, but the settlement was filed on September 24th, Docket 834. That was the QSF motion, I guess it's called.

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: We filed our motion for standing on October 18th, Docket 995. That's the motion that was originally filed before your Honor that you ruled on.

So the idea that there's somehow a new fact because of this settlement -- and I'm not sure what the settlement or the QSF has anything to do with standing -- but it happened before. It's not a new fact.

And the idea, just talking about the merits of it for a second, the idea that we would only be allowed to pursue actual fraudulent transfer claims and everything else would be, quote unquote, deferred is wildly impractical. First of all, let's, let's say what it really is. It's also impermissible under the Bankruptcy Code. First of all, under 546(a) the statute of limitations for constructive fraud and actual fraud is two years from the date of the petition. It's the exact same statute of limitations. So it's not like the clock isn't running on constructive fraud.

Secondly, 550(d) of the Bankruptcy Code says that you can only have a single satisfaction of a claim under subsection (a). 550(a) says that all 548 actions have to be brought, essentially, at the same time. You can't split your causes of action. You can't have an actual fraudulent transfer claim proceed while a constructive fraudulent transfer claim is stayed.

And also, this is completely impractical. This is completely impractical. How are we supposed to -- are we supposed to have multiple briefings? Are we supposed to have two sets of pleadings? Are we supposed to have one case and

then the other case followed by another case? How do we, how do we manage discovery? How does the Court manage its caseload? How do we all control costs in this case? It's wildly impractical.

And then with respect to other causes of action, of course, there's the 108. There's the two-year toll under 108 and they're asking for everything else to be deferred, but they're not talking about the fact of the statute of limitations. And, and it's quite natural since we're a Committee. We've been, we are going to be granted standing for something. We're an estate fiduciary. We have to be mindful of 108 and to bring causes of action timely, if, you know, if at all possible.

So I'm not really sure how this is permissible under the Bankruptcy Code, to split causes of action. I'm not sure how it's practical and I think it's just a re-argument of what was said before after we've already had a full hearing on -- and -- on the merits of it.

And, you know, with respect to the other causes of action, the breach of fiduciary duty causes of action, as the debtors themselves point out the breach of fiduciary duty action is really, and, and causes of action similar to that, of that nature, they're really all based on the same event, the corporate restructuring and the follow-on bankruptcies. It would be wildly impractical to have separate pleadings,

separate cases, and, and separate discovery proceedings with respect to those other causes of action from having a consolidated process. And I will say that in DBMP we've made substantial progress talking about case management in that case and trying to work through all the issues in that case about consolidated discovery, whether or not some actions are stayed or deferred, but allowing parties to participate in discovery.

So we've all talked about that. We've had no such discussions here nor was the, the idea of it even raised before the filing of this motion.

You know, they, they claim that somehow it'll be more efficient for the Committee to be limited to actual fraudulent transfer, but they don't say why. They don't say why and I've named all the reasons why it's not practical to do so and not efficient to do so because the causes of action all are rooted in the same corporate restructuring and follow-on bankruptcies. It makes sense and it's probably legally required to bring all those causes of action substantially the same and to have consolidated proceedings. Makes sense for the Court, makes sense for the parties, but it's also pretty much the law.

Now they argue that estimation must somehow precede constructive fraudulent transfer claims. I'm not sure I really understand that. The basis for the, the constructive fraudulent transfer claim is, really, that when you allocated the liabilities to the debtors and you allocated all the assets

to the, the newly created non-debtor affiliates, that that was a fraudulent transfer. The argument will be that, on the other side, the argument will be, of course, that the funding agreement constitutes reasonably equivalent value. That's, that's a question for experts. I don't see how estimation plays any role in that. Either it is or it is not reasonably equivalent value and, therefore, I'm not sure why one needs to proceed to the other.

And, of course, this is strategic, not legal. They want the estimation to go forward. They want their process to go forward faster than the litigation claims, but the litigation claims do not stay or somehow prevent the debtors from proceeding on their plan process. They can proceed on their plan process. They can proceed how they, how they wish on estimation pursuant to your Honor's rulings. What, what they really want to do is they want to have -- and we've talked about this before -- they really, have their proceedings go first and our proceedings be delayed and that's not really going to be efficient and it's not going to -- it's going to result in a substantial delay and, and time and expense if both proceedings can't all be done in a constructive manner at the same time. It would be strange to have the Court proceeding on estimation and the plan process without at least allowing what the Court has already said, there may be viable claims in this case, to have that tested to see if that is, that could be

asserted by an estate fiduciary and see if there are, in fact, claims involving the corporate restructuring and the follow-on bankruptcies.

And, you know, there's been a lot of talk about, about LTL. LTL was a motion to dismiss. We didn't make a motion to dismiss in this case and there's been no motion, as far as I know, for standing in LTL/Johnson & Johnson. There's been no motion for derivative standing in this case. There certainly hasn't been a hearing on it and there certainly hasn't been a ruling on it.

So what the LTL case has to do with what's before your Honor today, I'm not really sure. It's a significant case. It's a significant decision, but it really has nothing to do with what's before the Court today.

You know, I want to address some of the other comments that are with, you know, at least within my knowledge, but I, I want to give the opportunity to others to address some of the other points that were raised. First of all, Mr. Diaz did not testify as to the amount of asbestos liabilities, as your Honor probably remembers. He testified as to the book value in the public find, in the public filings of the debtors, not of the debtors, of the non-debtor affiliates with respect to asbestos liability. And the FCR agreed to a settlement without hiring an expert, but we've hired an expert to find out what the liabilities are. And that, I believe that's pending before

your Honor, in fact.

The -- I think the Court has already ruled on this, but, but just re-emphasize the point. The FCR is not a creditor and is not entitled to vote on a plan.

There's an awful lot of accusations that have been made, some of these accusations about like why aren't you settling? And I, I sort of feel like this is sort of like when Russia lays siege to cities in Ukraine and surrounds them and says, "Okay. Now we're ready to have peace talks," you know. There -- there -- it doesn't create the right atmosphere for settlement when we have a process moving forward and we don't have both processes being, being explored. And we've talked about that here, too.

And lastly, I just want to say that I really think that the bad faith arguments need to stop. They're not productive, they're not helpful, and they're downright rude. And, and, you know, saying things about people, that they're somehow acting in bad faith, that they're, they're wanting delay, that's really improper and it's, it's not only untrue, but it's not the kind of arguments that should be made to this Court, especially on a motion for re-argument on standing. What does it have to do with standing? It has absolutely nothing to do with standing. And accusing various lawyers of not working to the best interests of their clients, that, that's, that's accusing lawyers of ethical violations and I

can't believe that somebody would say that in federal court without, without a basis for it. And it really, it needs to stop. We have made progress in DBMP 'cause certain personalities have changed and, and things are on a much more sensible level. That's obviously not going to happen in this case, but the bad faith arguments before this Court without any basis need to stop.

Thank you, your Honor.

THE COURT: Thank you.

I assume the, you had comments as well, Mr. Maclay?

MR. MACLAY: Yeah. Your Honor, a lot of what you've heard so far today, it really has nothing to do with the issues that Mr. Neier was just talking about, this motion to, essentially, reargue the, the grant of authority. And so I would propose, your Honor, although I have lots to say about what I heard, that I wait to say it at the appropriate time with respect to the, the, the item that I'll be handing, handling on the agenda, your Honor, which is the motion to dismiss the subcon matter.

THE COURT: Okay.

Anyone else on this particular matter?

(No response)

THE COURT: Any rejoinder?

MR. RAYBURN: Your Honor, with respect to a reply, is that, is that what your Honor is asking at this point?

THE COURT: Well, I was hoping to get everyone out, one opportunity to speak first, but it sounds like that's where we are.

Anyone else who has not had a chance to at least join the discussion?

(No response)

THE COURT: All right. Now rebuttal.

MR. RAYBURN: Your Honor, very, very simply. What we are arguing to you today is that any grant of standing authority under all, I mean, any grant of standing to the Committee has to be premised upon the finding of colorable claims and we submit to your Honor that the colorable claims that have been identified, both by your Honor and by the Committee in their people, their papers, the colorable claims are the actual intent to hinder or delay or defraud claims. The other claims that they keep wanting to investigating [sic] presume the impropriety of the whole process by which we wound up here and the impropriety of the process has not been ruled upon by you except in the PI motion, which granted it, in Judge Beyer's case and Judge Conrad in his affirmance opinion and by Judge Kaplan.

So it is, it seems to us that you are not prepared to find today that there are colorable claims beyond the actual fraudulent conveyance claim. If you are, then you can grant them standing. But if you can't find that there are actual

colorable claims beyond actual fraudulent conveyance, then you shouldn't grant standing today.

THE COURT: So you don't think --

MR. RAYBURN: Thank you, your Honor.

THE COURT: -- alter ego or piercing the corporate veil or those other state remedies that the, that are envisioned by the Texas statute --

MR. RAYBURN: I --

THE COURT: -- those, those are not colorable, either?

MR. RAYBURN: I -- all I can say, your Honor, is I don't think they're asking in their papers to bring alter ego, etc., claims. It -- it -- and I don't think you have ruled that they're colorable. Now you've mused abut it in your --

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: -- preliminary injunction hearing.

THE COURT: Right.

MR. RAYBURN: And secondly, but in order to have an alter ego claim you've got to have an unpaid debt of the, of the debtor and we, the evidence, once again, Mr. Diaz's estimate is the only basis you have for what the debtors' obligations are and there's no basis to find that the debtor can't pay them.

So all of those other remedies -- remember, alter ego, etc., those are remedy claims. Those are remedies for claims

which are based on the inability of the debtor to pay the debts, which you don't have here. The only one that can survive that fact, we believe, the only claim that can survive that fact that is colorable based on your own ruling is the actual intent to hinder, delay, or defraud claim, which we think you intended to grant them standing to bring.

THE COURT: And what happens if we get down the road two years in either an estimation or in some other way we find out that the aggregate liabilities are twice or three times what we, we're talking about today?

MR. RAYBURN: Well, I think you're going to then look at the funding agreement and how much money that, that has been put up and, and the good faith and fair, I mean, good faith of the funding agreement. I mean, remember, when you entered the PI Order you had a lot of problems in the funding agreement and you were making observations about whether they would actually do what they said they were going to do.

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: That's no longer a question. I mean, you would have to find something beyond the net worth of the two Trane funding entities to be the estimate of liability in order to have any argument that the, that the debtor was left unable to pay.

THE COURT: Well, what I'm really asking you is are

you proposing that we would toll or, or, basically, these other causes of action that they have asserted or might still yet assert? You're suggesting we just hold those in abeyance until we get in the end? Because if the number turns out to be two or three times what we're talking about today, then maybe the debtor is insolvent, then maybe all the other remedies would apply, right?

MR. RAYBURN: Well, first of all, as we say in the papers, the, the claims that they have asserted -- and once again, all we can go by is what they filed --

THE COURT: Right.

MR. RAYBURN: -- seek, requesting permission to do and what they've done in DBMP.

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: And what we said in the papers the DBMP claims, the additional claims in DBMP don't suffer from the same two-year statute of limitations, okay?

THE COURT: But they would, some of them, arguably, would suffer from a three-year statute of limitations.

MR. RAYBURN: That's correct. And it's -- correct, which would not, would not run until the third anniversary of the corporate restructuring the way they pled it, which is a long way out, okay?

THE COURT: Uh-huh (indicating an affirmative

response).

MR. RAYBURN: But secondly, your Honor, if, if tolling will solve your concern about the running of the statute, we'll go back to the clients and see if we can get tolling. Remember, Mr. Neier's proposed causes of action involve a whole lot of people, a lot of individuals.

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: This is not just the Trane entities --

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: -- and the debtor. You're talking about suing on breach of fiduciary claims people who are officers of entities that did not exist at the time the actions took place. So it's kind of an interesting stretch.

But the point is there are a bunch of individuals named and in order to go --

THE COURT: Right.

MR. RAYBURN: -- in order to toll, I can't propose that they toll, but if, if tolling will solve your concerns, we'll go to them and ask.

THE COURT: At this point I'm just asking what's being proposed.

MR. RAYBURN: I understand.

THE COURT: It is a, a curiosity that we're talking

about causes of action which have not been filed as yet and making reference to DBMP as well as LTL and, and Bestwall and every other case in this general area.

MR. RAYBURN: Right.

THE COURT: We -- it's, it's almost like trying to navigate in the dark, so.

MR. RAYBURN: Well, as your Honor, as you've heard -- and the candor of the other side of the table is admirable.

THE COURT: Uh-huh (indicating an affirmative response).

MR. RAYBURN: We've not cast any aspersions on the other, the other side of this table at all, the other table in this case. What we're saying is their candor is frank. They've said it here and they've said it in DBMP. If the essence of this thing is a concept that there's a fraudulent conveyance involved in the corporate restructuring and we think you are intending to say that's a colorable claim and go forward and, we're, we haven't heard anybody rule that anything else is colorable. And I don't, and I don't know how to get to such a ruling on the papers that are in front of you now.

THE COURT: Okay.

MR. MASCITTI: Your Honor, I would just --

THE COURT: Mr. Mascitti.

MR. MASCITTI: -- like to address a couple of the questions that your Honor asked and then a couple of points

that Mr. Neier made.

First of all, your Honor, with respect to the, your question about the alter ego claims, are they colorable?

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: I think in the first instance my response to that question would be, no, they're not colorable because there's no benefit to the estate from prosecuting those claims.

But the other point I wanted to make with respect to your question is that any alter ego claim under state law would have to take into account the fact that the Texas state legislature has adopted a statute that allows companies to do a divisional merger. So alter ego has to be interpreted in connection with the statute that's been adopted by the state legislature.

So, you know, it's a unique statute and, you know, if you look at alter ego and say, well, this company used to be that company and, therefore, it's the alter ego, there's a nuance here in applying state law that I think doesn't necessarily generally apply when we refer to alter ego claims, in general.

Secondly, with respect to the question your Honor proposed about, well, what if the liabilities --

THE COURT: Uh-huh (indicating an affirmative

response).

MR. MASCITTI: -- are ultimately higher, well, that's, that's a hypothetical fact. That's a contingency. We don't know what the result will be, but what we do know is that the Committee had the burden of making its case to the Court. Committee had an opportunity to present the Court with evidence that the liability is higher than the assets that the debtor has available and that the resources are available to the debtor. They didn't provide any evidence on that issue, your Honor, and, and that's the burden. The Court should not make an assumption that at some point in the future the liabilities will be higher when there's no evidence that was presented to the Court for that Court, for the Court to make that determination.

And, and just as an observation on a third point, your Honor, if the Court were willing to entertain some type of tolling arrangement as a means to resolve this, this incoming wave of litigation that the Committee would like to bring --

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: -- I think, you know, that is a, certainly, a, from my perspective, very reasonable way to resolve these issues and would be happy to discuss that with my client.

Thank you, your Honor.

THE COURT: Okay.

MR. NEIER: I would just respond very briefly, your Honor.

First of all, as you know and I think you put in your rulings, there is a carveout in the Texas divisional merger statute and the Texas Business Organization Code, the TBOC, 10.901, for creditor rights, creditor remedies. And there's been no evidence on the amount of claims at all before your Honor. There's been a lot of talk about it, but there hasn't been evidence yet. So we'll see what that is.

And with respect to tolling arrangements, we would talk about it, but we, we have clients on our side as well that we'll have to talk to about. We did do some tolling arrangements in DBMP. So there are some toll, tolling agreements in effect there. There were some people who we advised the debtor in DBMP not to bother and go and get a tolling agreement and they did so, anyway. And, and there were some people that we made, that we elected mostly to keep them on track with respect to discovery. So we've got consolidated discovery proceedings.

But we all, we all realize that the basis for any other claims and the only basis that this Court has granted is that it has to involve the corporate restructuring and the follow-on bankruptcies. So we are limited to that.

And with respect to whatever --

(Telephone ringing)

THE COURT: Can we isolate that?

Go ahead. Whenever you're ready, Mr. Neier.

MR. NEIER: And my colleague, Ms. Hardman, points out that if we're going to enter into tolling agreements, we actually need standing to toll --

THE COURT: Right.

MR. NEIER: -- the causes of actions.

THE COURT: Good point.

Let me ask this, then. Do you agree with the premise that's being advanced on the other side that if sufficient money is on the table, then none of this is really, none of these claims should be brought at all? The general concept is, normally, in a fraudulent conveyance you're trying to bring more money to pay the claimants. We can argue in Congress about whether or not divisive mergers should be followed by bankruptcies, but at the end of the day isn't it about the dollars?

MR. NEIER: Well, the primary remedy that we're seeking, your Honor, and it's the primary remedy in the subcon case as well is avoidance of the transaction --

THE COURT: Right.

MR. NEIER: -- to put Humpty Dumpty back together again.

THE COURT: Uh-huh (indicating an affirmative

response).

MR. NEIER: So that would be our primary remedy because that way, everybody has their rights that they had prior to the bankruptcy, you know. As to, you know, as to other remedies, that's really for another day.

But the primary remedy we are seeking is avoidance of the transaction. That's why I've always viewed the other causes of action involving breach of fiduciary duty as, really, you know, something that should, should not go forward until we've resolved the, the, the primary issue, which is is this a valid transaction? Is this something that should survive?

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: Can you create a debtor and, and do what's being done here? And if you can, how do you do that?

THE COURT: Well, begging the question, though, if you're going to put Humpty Dumpty back together again -- and obviously, it will take a great deal of work -- to what purpose? Are we going to do it whether there's enough money to pay claimants in full or, or not, or is it just a matter of principle at the end of the day?

MR. NEIER: Well, it, you know, this, obviously, this does present a, a new phase of bankruptcy. If it's -- if it's -- if it's --

THE COURT: Uh-huh (indicating an affirmative

response).

MR. NEIER: -- going to be permitted -- and I -- I -- I don't know if the ruling in Johnson & Johnson and LTL is going to be appealed, but I suspect it will be --

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: -- and I expect the appellate courts are going to have to rule as to whether or not you can do this kind of Texas two-step procedure. If, if you can, that'll change bankruptcy, certainly change it from what I think should be the case, but that hasn't been ruled on yet and hasn't been, it's not decided law yet.

But putting that aside, from our perspective -- and I'm, I'm just going back to, you know, Butner, Supreme Court precedent, you -- you -- somebody should not benefit from the happenstance of bankruptcy.

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: And this is a benefit from the happenstance of bankruptcy. It's, you know, we hear a lot of arguments, "Oh, this is a more efficient and more effective way of paying claims." Not sure that's right, but, if it is right --

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: -- it's for Congress to decide, not for the courts to decide on what is an efficient and creative process to pay claimants and they have not, I think, approved this particular way and didn't even contemplate this particular way of taking advantage of 524(g). Congress does lots of interesting things and there are lots of ways of, of settling claims, you know.

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: I always go back to like black lung disease and things like that, you know. Congress created a way of, of handling those kind of claims. Congress could do that here. Whether it will or not, I don't know, but I don't think that the Court should be changing the fundamental nature of bankruptcy the way it's being changed here and I think the best remedy would be to say to everybody, "Okay. Bankruptcy is not the way to go. The way to go is to resolve your issues under existing case law."

THE COURT: Okay. All right.

MR. NEIER: And if, and if Congress changes the law, then so be it.

THE COURT: Or, perhaps, you file the motion to dismiss in this case and we see where we go there.

MR. NEIER: We could do that, your Honor. If -- if you -- if you ask us to do that, we could, but we declined in

this case and DBMP and, and, and these cases to do so based on existing Fourth Circuit law.

THE COURT: Right.

MR. NEIER: And, and your Honor's already commented on that.

THE COURT: Well --

MR. NEIER: And we'll see what happens in the Third Circuit.

THE COURT: Okay.

MR. MACLAY: Could I just make one follow-on comment --

THE COURT: Go ahead, Mr. Maclay.

MR. MACLAY: -- to Mr. Neier, your Honor?

The other issue is, your Honor, it is not necessarily clear that a ruling on a motion to dismiss would resolve the underlying appropriateness of the transaction because of the clear and governing standards that control a motion to dismiss --

THE COURT: Uh-huh (indicating an affirmative response).

MR. MACLAY: -- which is why we have discussed with you on numerous occasions in this case potential paths forward to get an ultimate resolution --

THE COURT: Right.

MR. MACLAY: -- that will determine that issue.

THE COURT: Yeah. Without sticking my nose in other people's business, I was curious as to whether, since it was a denial of the motion to dismiss in LTL, whether that's appealable or not, so.

MR. NEIER: Your Honor, I, I don't know they're going to -- I think they have to make a motion for leave --

THE COURT: Yeah.

MR. NEIER: -- to appeal, but I'm not involved in the case. So I really don't know what's going on there.

THE COURT: Well, and you know we, that was attempted in Bestwall and it, it didn't work. The Circuit wasn't interested at this --

MR. NEIER: Right.

THE COURT: -- point, so.

MR. GUY: Your Honor, I only stand because I can't see you from behind the screen, so.

THE COURT: Sorry.

MR. GUY: Just a couple of things.

Mr. Neier wasn't involved in the discussions with the debtors that led to the, the consensual plan. We do have a claims expert, Ankura, which is the claims expert in Paddock and also is the claims --

THE COURT: Okay.

MR. GUY: -- expert for the Garlock bankruptcy. So they're very familiar with these liabilities.

Your Honor, I would draw your attention to the issue about, well, what is the judge going to do in New Jersey on these issues?

THE COURT: Uh-huh (indicating an affirmative response).

MR. GUY: And I'm sure the Court noted it, but it said, "The Court." He said at the very end of his opinion on the dismissal, "The Court, nonetheless, agrees that there is a need for independent scrutiny of possible claims while the case progresses through the appointment of a Future Talc" --

THE COURT: Uh-huh (indicating an affirmative response).

MR. GUY: -- "Claims Representative, mediation, and towards the plan formulation process. The Court will take up these issues at the upcoming March 8, 2022 hearing." So --

THE COURT: Okay.

MR. GUY: -- he has some --

MR. NEIER: Your Honor, on that, on that one sentence, I would just say that there's been a lot of, you know, this is sort of like a bear walks into a restaurant, eats shoots and leaves, and it's where you put the commas in the sentence that really matter. But it might be that the court is asking for independent review of the transaction or it might not.

But, but the way I read it, it's, the court is inviting independent review of the transaction.

THE COURT: Well, let's just confine ourselves to our case --

MR. NEIER: Yes.

THE COURT: -- and not worry --

MR. NEIER: I, I only raised it because it was raised.

THE COURT: We'll let Mike Kaplan try to figure out the other one, so.

Mr. Mascitti.

MR. MASCITTI: Your Honor, could I, just brief response to the question that your Honor had posed regarding what's to be gained from the prosecution of the litigation --

THE COURT: Yeah.

MR. MASCITTI: -- if the assets are already sufficient and the response was, "Well, we're going to put Humpty Dumpty back together again so that the same rights that" --

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: -- "existed prior to are, are now back in place." But creditors, the rights that we're talking about, it's a right to payment.

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: So if the assets are sufficient to pay the claim, that's the right that exists. As unsecured creditors, there's no right to be paid from a specific piece of

collateral. That's reserved for secured creditors that have interests in specific pieces of collateral.

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: So the only issue is a right to payment and if the assets are sufficient, your Honor, there is no benefit to be gained.

MR. NEIER: You know, as your Honor is familiar, the Bankruptcy Code specifically says that a primary remedy for an actual fraudulent transfer or a constructive fraudulent transfer is avoidance. That's what the Bankruptcy Code says. It's only if the Court feels like an alternative remedy is available that we, you start talking about money.

But the primary remedy of the statute is avoidance and, of course --

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: -- the primary remedy for subcon is putting Humpty Dumpty back together again as well --

THE COURT: Uh-huh (indicating an affirmative response).

MR. NEIER: -- or saying that Humpty Dumpty never separated.

THE COURT: Y'all aren't going to agree with one another on this. So I think --

MR. MASCITTI: Your Honor, I, I can beat a dead horse all day and if we -- if we --

THE COURT: Well, we -- the trouble is we have a couple other motions saying we don't have all day, so.

MR. MASCITTI: I will just say, your Honor, if, if you end up with an entity that has more assets than liabilities, the benefit there flows to equity. It doesn't --

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: -- flow to the unsecured creditors.

THE COURT: Mr. Maclay, you want one more shot at it?

MR. MACLAY: No. I think this conversation has run its course, your Honor. I am just standing to correct the record on a misstatement that was made to your Honor.

You were told, your Honor, that Mr. Diaz, the expert for the Committee, had opined on the amount of the liabilities. That's the only evidence in the record. I'd like to read, your Honor, two very pertinent statements from Mr. Diaz that were, thankfully, texted to me from someone on the phone who had the ability to look this up --

THE COURT: Uh-huh (indicating an affirmative response).

MR. MACLAY: -- while I was here in court. The Diaz preliminary injunction direct examination from 5/6/2021 at Page 397:

"The Aldrich liabilities as disclosed -- and as discussed, this is just the debtors' numbers, not my point of view -- is $315 million of asbestos liabilities...."

And again, your Honor, at Page 390 of that transcript: "And I'll just preface this, you know. Whenever in my remarks today I mention asbestos liabilities, these are numbers the debtors put in their public filings, their public records, and I used those just for illustrative purposes."

So the assertion that has been made to you today that the ACC's expert, you know, subscribed to that number and it's the only number in front of your Honor is simply false.

THE COURT: Okay.

MR. MACLAY: Thank you, your Honor.

THE COURT: All right.

MR. RAYBURN: All right, your Honor, reading from the same page what you cited when you entered the words:

"By contrast and disregarding the Funding Agreement (described below), Aldrich/Murray's assets were not then, and are not now, sufficient to satisfy their liabilities."

Footnote 95, citing the same hearing transcript, the testimony of Mr. Diaz.

The only number that has ever been put in front of you

with regard to liabilities is the debtors' book number, period. That's all I said, okay?

THE COURT: Okay.

MR. RAYBURN: No. 2, there is a statute. The statute's called 524(g) and it talks about 524(g) as being a method for providing an injunction against the liability of a predecessor of the debtor. What could be more clear that corporate reorganizations are actually contemplated by 524(g)? And I will stop at that.

THE COURT: Let's all stop at that. We'll take our mid-morning recess and pick up with the next motion.

Mr. Erens?

MR. ERENS: Yeah. Can I just ask a, sort of a logistical question? So I think subcon's going to take a while --

THE COURT: Okay.

MR. ERENS: -- but we'll see. So it may be we get it done before a late lunch. It may not be. I know it's also not necessarily your practice to hear the arguments and go back -- sometimes Judge Beyer does this -- and make a ruling.

If you thought that was possible, it might be better, actually, to have a ruling on this motion, break for maybe an earlier lunch, and then do subcon without a break, but obviously totally up to your Honor.

THE COURT: Well, I have not made up my own mind as to

when I'm going to make a ruling on this matter, whether it's going to be at the end of the day or whether it would be -- it's not going to be at the moment, but -- or whether I want to think about that some further.

So I think what we'll do is we'll hear them all out and then I'll, I'll give you decisions as best I can, if I can.

MR. ERENS: Okay. Thank you.

MR. MACLAY: And I would just remind my opposing counsel and your Honor that I had mentioned a few minutes ago that there were some arguments made that I viewed as more pertinent to the second motion.

So the idea that you would rule before I got to those arguments would seem a little unfair.

THE COURT: Well, we're not doing it, anyway.

By the way, Mr. Maclay, you missed it the other day. I had suggested we might have sped all this up if you had taken Mr. Gordon with you to Congress to testify, so.

MR. MACLAY: Oh, I was listening in, your Honor. I, I didn't miss it.

THE COURT: So in any event. Credible presentation of your view of, of all this, it would be nice to get a little direction from them.

We'll take a ten-minute recess and then we'll come back.

(Recess from 11:02 a.m., until 11:15 a.m.)

AFTER RECESS

(Call to Order of the Court)

THE COURT: Have a seat, all.

We were discussing housekeeping. We can run up to about 1:00 and then I'll be obliged to take a, a lunch recess. I don't know how the, the arguments break down on the next matter or the next two motions, I believe, will probably be argued together.

But for at least the proponents' side of that, just kind of bear in mind that we'll need to take a break at some time before 1:00, okay?

So we're moving on to the motions of Trane Technologies and Trane U.S. to dismiss and then, presumably, the debtors' motion to dismiss and the responses.

Do y'all see a reason to argue those separately or has everyone agreed they go together?

MR. ERENS: We would suggest that they be argued together, your Honor.

We do have a prior, Item No. 3, on the agenda --

THE COURT: Oh.

MR. ERENS: -- motion to seal.

THE COURT: Missed one?

MR. ERENS: Yeah, just --

THE COURT: Okay.

MR. ERENS: I think that's all been taken care of,

but --

THE COURT: Well, let's, let's back up and talk about the motion to file under seal.

MR. ERENS: Okay. Okay. From the debtors' side, Mr. Miller will be handling it.

THE COURT: Okay.

MR. COX: Your, your Honor, Rob Cox appearing on behalf of the ACC. Is it okay if I stand here?

THE COURT: You may.

AUDIO OPERATOR: At a microphone.

MR. COX: Okay. I'm going to step around.

AUDIO OPERATOR: Thank you.

MR. COX: Again, Rob Cox appearing on behalf of the ACC.

Your Honor, this is the ACC's motion to seal. It relates to the -- the -- a subcon complaint and also the motion for substantive consolidation. There were two exhibits that were attached to the complaint. They were deposition excerpts. There was Exhibit 4 and Exhibit 27. A portion of those had been designated as Confidential by either the debtors or the non-debtor affiliates. And then there were two exhibits attached to the motion, Exhibits 2 and 3, and those were also designated as, or marked as Confidential by either the debtors or the non-debtor affiliates.

So we filed the motion to allow those to be filed

under seal and we did file those under seal in the complaint and in the motion that we filed pursuant to the Court's protective order entered in, in the, in the case. We have sent an unredacted version of both the complaint and the motion to the Court pursuant to that court order and obviously, have provided unredacted versions to the other side. As far as I know, your Honor, I don't think there's been any agreement to unseal those items. I believe those -- those were -- that the designations of those as confidential remain unless the, the debtor or the non-debtor affiliates, you know, can, can speak to that.

But there hasn't been an opposition to the motion. So we would ask the Court to allow those to be, remain under seal on the court docket.

THE COURT: Anyone need to be heard?

Mr. Miller.

MR. MILLER: Your Honor, Jack Miller on behalf of the debtors.

We, we did, when we were putting together the agenda that, you know, the fact that that motion had been filed, did kind of come back to the fore. We did take a look and, and go back and look at those exhibits and deposition transcripts and determined that with respect to Exhibits 2 and 3, those did, indeed, contain confidential information. I think they were settlement agreements with claimants that had some personal

information in it that was redacted.

My understanding is that with respect to Exhibit 27, which was Mr. Kuehn's deposition, I think Trane had, had marked that as Confidential and I believe that they want to stand on those confidentiality provisions. With respect to Mr. Tananbaum's deposition testimony, went back and looked at that and determined that we really actually, probably, don't need to, to stand on those confidentiality designations. And so we would be fine if, if the Court and the, and the Committee wanted to, wanted to have those, that particular exhibit refiled in an unredacted form or, or, you know, with, without any, without any confidentiality protections or sealing, that would be fine.

But otherwise, we do need to stand on the confidentiality provisions.

THE COURT: Okay.

Anyone else?

(No response)

THE COURT: Mr. Cox, does that work for you, those two documents?

MR. COX: It, it does, your Honor. We'll submit an order as to the three that remain under seal. And I think in, in past practice we've actually filed sort of a notice of the redacted version. A lot of things have become unsealed after the pleading that was filed. So we'll just follow that same

practice in this case.

THE COURT: Okay, very good.

MR. COX: Thank you, your Honor.

THE COURT: Send me an order.

Any other preliminaries before we hear the motions to dismiss?

MR. ERENS: No, your Honor.

THE COURT: Okay, all right.

Let's move along, then. Who will be leading off? Technically, on the calendar, Mr. Mascitti, you're up.

MR. MASCITTI: Good morning, again, Mr. -- good morning, your Honor. Greg Mascitti on behalf of the non-debtor affiliates.

Your Honor, I recognize that you have already issued a decision on a similar issue in DBMP.

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: However, this case is not that case. For starters, this case involves different products. A vast majority of the asbestos claims in this case relate to gaskets encapsulated and equipment, similar to the claims and products at issue in Garlock and as your Honor knows, the court in Garlock estimated the total asbestos liabilities for mesothelioma claims of current and future to be $125 million and while that is certainly not determinative, it is a

datapoint.

THE COURT: Uh-huh (indicating an affirmative response).

MR. MASCITTI: Unlike DBMP, the debtors' assets in this case include substantial insurance assets worth hundreds of millions of dollars. Unlike DBMP, the debtors' assets in this case include a qualified settlement fund of $270 million designated for the payment of asbestos claims. Unliked DBMP, the debtors in this case have filed a plan that is supported by the Future Claims' Representative, Mr. Grier, who represents approximately 80 percent of the total asbestos claimants. Unlike DBMP, the FCR in this case opposes substantive consolidation. Unlike DBMP, your Honor, the FCR in this case believes that implementation of a 524(g) trust is a better result for all asbestos claimants rather than a return to the tort system, a view supported by Judge Kaplan's recent decision in LTL.

We could be near the finish line in this case, your Honor, potentially weeks away from finalizing the proposed plan, except that one party has refused to work with all of the others in reaching a consensual resolution. Committee has not negotiated with respect to a plan for the very simple reason they prefer asbestos claims to be resolved through the tort system rather than a 524(g) trust. The issue before your Honor is not the propriety of the corporate restructuring. It's the,

the propriety of having these disputed asbestos claims resolved in either the tort system or by this Court through a 524(g) plan or some other alternative. As Judge Kaplan recently noted in LTL, "Resolution of tort claims through the bankruptcy process is vastly superior to the tort system," and in this case is supported by the FCR, again representing 80 percent of the asbestos claimants.

As we'll discuss, this is not the typical substantive consolidation complaint. Your Honor had mentioned you've gone down the rabbit hole of substantive consolidation. So you know that. The Committee is not asserting substantive consolidation as a remedy to cure any alleged deficiency in assets or to make creditors of an insolvent debtor whole. The complaint does not contain a single allegation that the debtors lack sufficient assets and resources to pay their liabilities or that any creditor of the debtors is at risk of not being paid in full on any valid claim. Rather, as the Court makes clear, as the complaint makes clear, the Committee seeks substantive consolidation in an effort to achieve two results. One, to overturn the property allocations that were authorized under the Texas divisional merger statute and, two, to force the non-debtor affiliates into an involuntary bankruptcy.

I'm going to discuss the legal reasons why the Committee's complaint should be dismissed, but I would ask your Honor to also consider the practical reasons. Substantive

consolidation in this case is not necessary. It will not increase any creditor's recovery, it benefits no one, and it's only being sought by a minority of the claimants in this case who are using it as a means to force a return to the tort system contrary to the desires of every other constituency in the case.

I have 3 points, your Honor, maybe 3-1/2, and the first one is that the Committee's proposed use of substantive consolidation under the facts of this case would result in the Court exceeding the boundaries established by the supremacy clause. Corporate restructuring was a divisional merger under a Texas statute. It's undisputed that the corporate restructuring was effectuated in compliance with that statute. Pursuant to that statute, an original company can be divided into two new entities. That's authorized by the law. The assets and liabilities of that original company can be allocated separately to each of these new companies, again as authorized by the law. Those, those assets once they're allocated to the new companies and so just, hypothetically, if we have the original company with assets and liabilities and then those assets and liabilities are allocated to two new entities, Company A and Company B, and Company A has Company A's assets and liabilities and Company B has Company B's assets and liabilities, once that's effectuated, that establishes property rights under applicable state law and that's the

applicable standard for determining the property rights under the Bankruptcy Code.

The Committee complains throughout the, both motion and the complaint that their claims have been "structurally subordinated" and it uses this, uses this phrase as a means to describe its purported injury and its justification for consolidation in this case. But what does that mean? The structural subordination that the Committee complains of is nothing more than the allocation of assets and liabilities that's been authorized under Texas law. The divisional merger by its very nature structurally subordinates creditors because it authorizes the transfer of assets and liabilities to an entity other than the original entity --

THE COURT: One moment.

MR. MASCITTI: -- that held --

THE COURT: We knocked that off.

THE COURTROOM DEPUTY: Yeah. Yeah, I'm telling her right now.

(Pause)

THE COURT: Okay. Go ahead, Mr. Mascitti.

MR. MASCITTI: It's an important point. So I'm going to start again, your Honor.

THE COURT: Please.

MR. MASCITTI: The divisional merger by its very nature structurally subordinates creditors because it

authorizes the transfer and assets -- I'm sorry -- the transfer of assets and liabilities to an entity other than the original entity that held both of those assets and liabilities.

THE COURT: Okay.

MR. MASCITTI: So any creditor holding an existing claim against the original entity will have its liabilities structurally subordinated because that creditor will become a creditor of one of only those two new companies. It would either have a claim against Company A's assets or Company B's assets. But that's the effect of the statute. That's not an effect of any particular transaction other than what's been authorized by the statute.

The Committee's complaint is not with the corporate restructuring. It's with the Texas statute and the purpose for which the Committee seeks substantive consolidation is clear. Throughout the pleadings the Committee states, for example, "Substantive consolidation will effectively undo the corporate restructuring. Substantive consolidation will rescind the structural subordination of asbestos creditors. Substantive consolidation will ensure that Ingersoll-Rand's and Trane's assets will once again be available to asbestos claimants as, as they are to other unsecured creditors and will be housed within the same entities holding the Ingersoll-Rand and Trane asbestos liabilities."

Well, essentially -- and I think counsel described

earlier as putting Humpty Dumpty back together again -- just want to pretend that the divisional merger statute in Texas doesn't exist. They ask this Court essentially to wave a magic wand and zap the Texas divisional merger statute out of existence. Well, the -- well, the fenceposts of a bankruptcy court's equitable powers may be far and wide. They are not boundless and no such magic wand exists. State law and federal statutory law, not federal common law, establish the fenceposts for creditors' rights to challenge the allocation of property interests under the Texas divisional merger statute. The fact that a state statute and the allocations of property pursuant to a state statute may not comport with the bankruptcy court's view of equity is not a basis to exercise federal common law to undo the effects of that state statute.

As the Supreme Court instructed in Boyle,. "Federal common law preempts and replaces state law in only a few areas involving uniquely federal interests." The Committee argues that, here, the federal bankruptcy interests in, among other things, the absolute priority rule, equitable treatment of creditors and debtors, bringing all of their assets into bankruptcy along with their liabilities, requires a different result than what the Texas merger law provides for, but that argument, your Honor, begs the question because it assumes and presupposes that all of the property at issue is the debtors' property. The debtor -- the absolute priority rule already

applies to the debtors' property and the debtors have already brought all of their assets into the bankruptcy estate.

Nor does this Committee cite a single case in support of its argument that substantive consolidation may be used to rescind an allocation of property interest expressly authorized under state law without any allegation of injury other than the structural subordination that results from the application of state law. No such case exists because this is not an area where uniquely federal interest would require a different result.

The Supreme Court's decision in Butner clearly establishes that relief sought by the Committee in the complaint exceeds the bounds of the Court's power. In Butner, the circuit courts were split as to whether a bankruptcy court could grant a mortgagee a remedy under federal common law that did not exist under state law with some circuits holding that they could use, bankruptcy courts could use their equitable powers to fill a gap in state law to provide a mortgagee with a remedy that didn't otherwise exist. The Supreme Court said, no. Bankruptcy court can't do that. Supreme Court held that, "Federal common law cannot be used to extend a creditor's rights beyond whatever right it had under state law," held that "a bankruptcy court could not grant a creditor's rights that did not exist."

Similar to the mortgagee in Butner, the Committee asks

this Court to provide it with a remedy under federal common law that does not exist under state law. In fact, the Committee in this case goes even farther than the mortgagee in Butner. The mortgagee in Butner was asking the court to fill a gap that existed in state law. The Committee here asks for federal common law to be applied to contravene a state statute.

Court's comments on substantive consolidation as being similar to state law remedies of alter ego and piercing the corporate veil, we, we talked about this. We touched on that issue earlier. Your Honor's correct and your Honor had made a statement, I believe, at one of the prior hearings that, "Well, if I can, if I can apply alter ego law and piercing the corporate veil law, I can apply substantive consolidation," but they're not the same, your Honor. And for example, the, the example I gave earlier. Alter ego law under Texas law would take into account the fact that the Texas state legislature has adopted this statute and it would -- the fenceposts, your Honor, would be different applying Texas alter ego law than they necessarily would be applying federal common law.

Second point, your Honor. Even if the Court determines that it has the power to preempt Texas, the Texas divisional merger statute, this Court still lacks subject matter jurisdiction over the Committee's claims because they are not justiciable claims. In order for a court to have subject matter jurisdiction over a claim, plaintiff must

establish that it has suffered a justiciable injury and that its claim is ripe. The Committee has the burden of proof on that issue and there's a presumption that subject matter jurisdiction does not exist.

To establish the existence of a justiciable injury, a plaintiff must show that it suffered an injury in fact that was concrete and particularized and actual or imminent, not conjectural or hypothetical. It must show a causal connection between that injury and the conduct complained of. And finally, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.

So what are the injuries at issue? What are, what's alleged in the complaint? In the opposition, the Committee cites a hodgepodge of paragraphs in the complaint in an effort to establish a justiciable injury. Boiled down, there's, as far as I can tell, three main arguments. One, structural subordination. And we've touched on this, your Honor. You know, this is a, a transfer that was authorized by state law. Even if the Court could consider a transfer authorized by state law as somehow being the cause of an injury, the injury would be hypothetical. The injury would depend, ultimately, on whether or not the assets and liabilities of the entity were sufficient to pay all creditors in full and in this complaint there is no allegation that any of the debtors' assets are not sufficient to pay creditors in full. There's no allegation of

insolvency. There's no allegation that the divisional merger process in any way resulted in the debtors lacking sufficient assets and financial resources to pay valid liabilities in full.

So, your Honor, that, that purported injury just doesn't exist as of today.

The second area where I, where I think the Committee has asserted an injury is is that they've been stayed from the tort system. And while a stay from prosecuting their claims in state court may be the present fact, there's no nexus between that stay and the corporate restructuring. The stay arose from the bankruptcy filing, not the corporate restructuring. Moreover, the relief requested, substantive consolidation, will not redress the purported injury. It doesn't lift the stay. The stay remains in effect, even if substantive consolidation is granted. If the Committee believes that it's been injured by the bankruptcy stay, Committee's remedy would be to move to dismiss the case, not seek substantive consolidation.

Third area, your Honor -- and I'm going to put a bunch of these claims together -- would -- I'll say, I will call them third-party transfers -- allegations in the complaint that the constituents, the claimants have been harmed by virtue of payments made to creditors or distributions made to shareholders. There's no allegation in the complaint that any of those payments to creditors, to other creditors, or any of

those distributions to shareholders have led to any injury. There's no allegation that those transfers resulted or impacted the debtors' ability to pay any liability. Committee, your Honor, has failed to meet its burden of establishing a justiciable injury because all of its claims to injury are hypothetical or will not be redressed by the relief requested.

Even if the Court were to determine that the Committee has sufficiently alleged a justiciable injury, the Court still lacks subject matter jurisdiction over the Committee's claims because they are not ripe for judication. Supreme Court has held that, "A claim is not ripe for adjudication if it rests upon contingent events that may not occur as anticipated or, indeed, may not occur at all." Committee argues that the corporate restructuring has already occurred and as a result the claims asserted in the complaint are ripe, but the relevant temporal question is not the time that the act occurred. It's the time of the injury and while the Committee claims that the purported injury occurred at the time of the restructuring, that's clearly not the case, certainly not from any allegation made in the complaint. There's no allegation in the complaint that any valid claim has gone unpaid, there's no allegation in the complaint that the debtors' assets are insufficient to pay any liability of any claim in full, and there's no allegation in the complaint that the resources available to the debtor would somehow even in the future be insufficient to pay any

particular claim.

Your Honor, the occurrence of the act in and of itself does not give rise to a claim for every hypothetical injury that could result from such act. We cited at least three examples of cases in our, in our motion or in the reply, including G-I Holdings, Monolithic, and the Hassel case. Just to touch on the Hassel case, that was a case where individuals had been exposed to and contracted latent tuberculosis and the court held that there were no -- court denied holding that the claims were ripe. It held that they were unripe because the future damages claims were "too speculative to adjudicate now in federal court." So even though the exposure had occurred, there was latent tuberculosis, they hadn't suffered any actual injury or harm yet. And that's the type of claim, your Honor, that's just not ripe.

The fact that the corporate restructuring occurred does not change the hypothetical nature of the Committee's claims. We've talked about these before. All of those contingencies that may or may not occur at some point in the future, there'd have to be some type of amount of liability established. That amount of liability would have to exceed the amount of the debtors' assets and financial resources and there would have to be some type of an assumption that the non-debtor affiliates would not perform their obligations under the funding agreements to fund any need for additional assets to

pay liabilities.

Your Honor, this is a motion to dismiss and while the Court can assume facts that are in the complaint to be true, cannot assume facts to be true that are not alleged in the complaint and the complaint contains no allegations as to insolvency, the amount of any liability, or that the debtors' assets are any way insufficient.

Your Honor, the products at issue, I touched on before, and claims at issue were similar, are similar to the claims and products at issue in Garlock. And just hypothetically, what if the amount of the asbestos liability in this case were similar? There'd be approximately $125 million of liability. Would a claim for substantive consolidation exist in that hypothetical scenario? What harm would be remedied by substantively consolidating two solvent estates? No one would benefit from that result. Would substantive consolidation of two solvent entities justify the enormous harm to the non-debtor affiliates being forced into bankruptcy of the harm that would arise and the damage to the employees, their suppliers, their business partners and shareholders by having to go through unnecessarily the bankruptcy process? In asking for the Court to determine what its claims are, whether its claims are ripe, the Committee asks this Court to assume future events that may or may not occur. This Court has, in fact, recognized at various times in the past the contingencies

that exist in this case. In the PI decision your Honor stated, "Perhaps that funding will be forthcoming. Thus far, New TTC and New Trane have fulfilled their obligations under the funding agreements." Your Honor also stated:

> "Perhaps Aldrich/Murray and New TTC/New Trane mean exactly what they say. Perhaps New TTC and New Trane will fund that plan, and all of these liabilities will be funded. It is too early to say."

At a January 27, 2022 hearing, your Honor stated:

> "As to cost and benefit, the argument is, well, there's a deal between the FCR, the debtor, and the affiliates and because of that deal and the trust funding and the funding agreement the estate already has uncapped access to the value of the New Trane and TTC assets. The answer to that is I hope that's all true, but I can't assume it is at this point" -- "I can't assume at" -- "I can't assume it at this point in the case."

Your Honor, the assumption that performance under the funding agreement would be necessary to pay liability is even more speculative at this stage given the recent funding of the qualified settlement fund. Committee's claims, your Honor, just are not ripe today and may not ever become ripe if the debtors' assets and financial resources are sufficient.

Third point, your Honor, the Committee has failed to

plead a plausible claims for substantive consolidation. Committee's unsupported argument that insolvency is not an element of substantive consolidation begs the practical question. If insolvency is not an element and the debtors are, in fact, solvent, why is the Committee seeking substantive consolidation? The Committee argues that insolvency is not an element because the Committee is not seeking to consolidate these entities to remedy any alleged deficiency in assets because no such deficiency has been alleged. Rather, the Committee seeks substantive consolidation regardless of the solvency or insolvency of the debtors because of its desire not to cure any deficiency, but, rather, to subject the non-debtor affiliates to the provisions of the Bankruptcy Code. Committee has stated this time and time again its desire to have the non-debtor affiliates be subject to the provisions of the Bankruptcy Code, the automatic stay, the reporting requirements, the absolute priority rule, other bankruptcy provisions, but that's not the purpose of substantive consolidation. Substantive consolidation is a remedy to enhance the value of the assets of a debtor to make creditors whole. It's not to do an end run around the provisions of 303 to subject non-debtor entities to the bankruptcy process. If a creditor wants to subject a party to the provisions of the Bankruptcy Code, then that party must proceed under Section 303, not substantive consolidation under 105.

Your Honor, I draw your attention to a case, it's Archdiocese of Saint Paul & Minneapolis, 562 B.R. 755, and in that case, your Honor, the court held that substantive consolidation or relief under Section 105 wasn't available to the committee in that case because the use of 105 would be inconsistent with the provisions of 303. And in that case the Diocese, the Committee, rather, sought to force through 105 various other charitable organizations into the bankruptcy filing and the court said, well, that would directly conflict with Section 303's prohibition against subjecting eleemosynary organizations to an involuntary bankruptcy proceeding.

As Paragraph 16 of the complaint makes clear, that would be a similar result here. The complaint alleges that the Committee's members are "individuals who assert present or pending claims against the debtors for personal injury or wrongful death arising from or attributable to exposure to asbestos or asbestos-containing products." Those claims are disputed by the debtors. Thus, the Committee's constituency is not entitled to relief under 303. Congress made the decision that involuntary bankruptcy filings are only available to creditors holding undisputed claims. Moreover, 303 has specific protections that would ensure that creditors who don't have valid claims would not seek involuntary bankruptcy filings because there's potential relief available to a debtor that's subject wrongfully to such types of claims.

Even if this Court were to determine that use of Section 105 to effectuate an involuntary bankruptcy was appropriate and that a committee comprised of disputed tort claimants could avail itself of Section 105 for substantive consolidation relief, notwithstanding the congressional intent expressed in Section 303, the complaint fails to plausibly allege any facts that would support application of the first prong in the Augie/Restivo test. First prong of Augie/Restivo is whether creditors dealt with entities as a single economic unit and did not rely on their separate identity in extending credit. There's not a single allegation that any creditor dealt with any entity as a single economic unit in the complaint. Likewise, it's devoid of any allegation that creditors did not rely on the separate identities of any entities in extending credit.

I'm not aware, your Honor, of any case where a substantive consolidation of two entities is granted based on creditors' interactions with an entity that no longer exists and without any reference to the debtor and creditor relationship of the actual entities for which substantive consolidation is being sought.

And finally, your Honor, this is my half point with respect to the Committee's claim for unconscionability. I understand that this issue was previously addressed by the Court in DBMP. In short, your Honor, the law is well settled

that a claim for unconscionability is not an affirmative cause of action. I defer to the debtors to expand further on any additional arguments on that point.

In closing, your Honor, Committee's view that substantive consolidation is somehow necessary to compel the defendants to negotiate in good faith to reach a fair resolution of asbestos claims is not based in reality. It's contrary to the undisputed facts and defies common sense and logic. The reality is that the Committee's refused every single offer to negotiate, has declined every invitation to have a seat at the table. The undisputed facts establish that the debtors have negotiated with every other constituency in the case a path to a consensual resolution, including the Future Claims' Representative representing 80 percent of the claimants. It defies logic and common sense, your Honor. The amount of a debtor's assets has no bearing on the amount of the, of the debtor's liabilities. The amount of the debtor's assets would be the same whether the debtor has $1 or a billion dollars, doesn't change.

We have a real case right now. We have had one for well over the past year and a half. Logic and common sense establish that the prosecution of this litigation will do absolutely nothing to move the case forward. It's not needed to bring the defendants to the table because they are already there sitting next to an empty chair waiting for the Committee

nor is it needed to put more assets on the table 'cause all of the assets are already on the table.

When this Court appointed Mr. Grier your Honor noted that his appointment would provide:

> "[A] fresh perspective and that we have different parties and attorneys looking at the common issues and since every debtor has an entitlement to its own reorganization case, it reduces the likelihood that the Aldrich/Murray cases simply get stuck with positions taken by an FCR in the prior case irrespective of best interest."

Your Honor, we feel like we're stuck. I understand the goose-and-gander approach. I've been locked in heated battles with adversaries before where neither of us would budge an inch and were willing to battle to the end of days and I can still recall the pain of having a judge knock our heads together until reason prevailed over rage, but that is not this case. The debtors, the FCR, the non-debtor affiliates, the insurers, we all share a common interest in reaching a fair and efficient resolution of these asbestos claims. We're at the table and arming the Committee with litigation that could last three years and cost a hundred million dollars benefits no one. It simply makes it less likely that the Committee will join us at the table. Why would they when they can continue to litigate with the hope of achieving their goal of returning to

the tort system? At some point, your Honor, the parties will need to move on from a consensual 524(g) plan to an alternative plan that would achieve the same result. Certainly, from, from our perspective that is not the preferred means of moving the case forward, but the Committee's continuing refusal to negotiate would leave us with no other choice.

Thus, your Honor, to the extent that the Court is inclined to exercise any equitable powers, we'd ask the Court to help push the plan process forward.

Thank you, your Honor.

THE COURT: Thank you.

Okay.

MR. ERENS: Thank you, your Honor.

The debtors do have a slide presentation.

THE COURT: Okay.

MR. ERENS: So we'll e-mail it and hand it out.

MS. CAHOW: May I approach?

THE COURT: You may.

(Slide presentation handed to the Court and counsel)

THE COURT: Thank you.

Would it be helpful if we tilt those screens out a little bit so the folks in the, in the gallery can hear, can see? Just -- they'll move a little bit.

MR. ERENS: I can't see that far, anyway, your Honor. So it's okay with me.

THE COURT: Okay.

MR. COX: Oh.

THE COURT: Mr. Cox, there you go.

MR. GUY: I don't want to break it.

THE COURT: That work better? Just don't stand up quickly.

MR. GUY: I expect to be warned.

MR. ERENS: The slides are good, but they're not that good.- So if you can't see them, it's okay.

All right. Thank you, your Honor. Brad Erens, again, on behalf of the debtors.

We will try not to duplicate Trane's presentation. I think we tried harder than the briefs to really, more or less, have distinct argument. We'll obviously have some overlap.

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: And as Mr. Mascitti indicated, we obviously recognize that your Honor has ruled on a similar motion in the DBMP case. We will, as a result, in part, address the ACC's arguments, but, in part, address the rationale that your Honor put forth in that hearing on February 10th, in part, perhaps, to indicate where we think appropriate that our cases are different, but in some cases to simply try to convince your Honor that we think the law is actually different than may have been --

THE COURT: You don't need to tiptoe around that. I've been known to be wrong. If need be, I can bring my wife in or have her give an affidavit.

MR. ERENS: Okay.

THE COURT: Go ahead.

MR. ERENS: Appreciate that.

All right. If you could turn to Slide 2.

I think Mr. Mascitti addressed many of the sort of high-level legal points, which, of course, we agree with. Our presentation will be a little bit nuts and bolts focusing on some of the specific issues in the actual complaint and some of the more granules, granular -- excuse me -- statements that are made therein or were made at the DBMP hearing. We have sort of four main categories, including unconscionability, which we've left to last, and I think probably since your Honor ruled for DBMP on unconscionability, we'll probably just reserve our arguments for rebuttal on that point. So really, we're just focused on the first three items.

The first category that we'll address is our belief that the allegations in the ACC's complaint are simply woefully insufficient to survive a motion to dismiss. That's our largest section. Maybe that's 50 percent of the slides you'll see. The other 50 percent is divided, more or less, evenly between the next two sections.

Our position is that benefit clearly has to be

required for substantive consolidation. It cannot be the case that with the extreme remedy we're talking about that there's no benefit requirement regardless of where the fenceposts may be on this issue. And then no benefit has been alleged by the ACC nor can it.

And then, finally, your Honor, the, the third category, again, is sort of addressing what your Honor said in DBMP. If, if substantive consolidation is a hundred percent pure equity, so to speak, equity does not favor substantive consolidation based on the facts of these cases and that's where, again, we'll push more as to why this case may be different than DBMP.

Next slide, please.

So starting with the first category, the debtors' position is that the allegations in the ACC's complaint are simply woefully insufficient to state a claim here. At, at base, we would argue that what the allegation is is because a divisional merger occurred, that, itself, is sufficient for substantive consolidation. At base, all the allegations come back to, "You did a divisional merger. That's why substantive consolidation should be ordered." We would submit, your Honor, it would be legal error to hold that that is a result that's proper. The transaction itself cannot be the sole basis for substantive consolidation.

Next slide.

We obviously appreciate that we're at a motion to dismiss state and that's why we'll focus our arguments mostly on the complaint itself and the failure to state, not whether this case will ultimately wind up with a ruling for substantive consolidation. And your Honor's obviously well familiar with the standards so we won't belabor them, but the, the ACC has to make a plausible case here. It has to rise above a speculative level. So let's take a look at the complaint itself.

Next slide, please.

The complaint is divided up into six sections. The first section is a recitation of the pre-petition lawsuits. That's nice for background, but it, obviously, does not state a claim for substantive consolidation. That just indicates there's asbestos liability that's claimed.

The second section deals with Project Omega. That's the project for the planning of the divisional merger. Well, that might be sort of relevant. By itself, again it's insufficient to state a claim. If the transaction never occurred, you'd still have one entity. So it's nice background, but it doesn't state a claim for substantive consolidation.

The third section is a section reciting the divisional merger occurred. Okay. That may be relevant, but we would say -- and again, we believe -- that the whole complaint comes back to simply that, that the divisional merger occurred. We would

say -- and we'll come back to the reasons -- that the divisional merger itself is simply insufficient to state a claim for substantive consolidation.

The fourth section is a recitation of intercompany agreements. Your Honor, we would submit that this shows that the entities were separate, were treated separately, dealt with each other separately, and actually supports no substantive consolidation.

Section 5 is a section dealing with shared officers and board members. As we argued in the briefs, this is also insufficient to state a claim for substantive consolidation. It shows, again, the entities were separate and apart and it, it doesn't prove anything. It doesn't show that creditors, for instance, were confused that the two entities were actually separate. And we'll have a couple slides later showing that there was no creditor confusion. In fact, they knew exactly that there were two entities during the post-divisional period, post-divisional merger period.

And Section 6 is actually not relevant at all for this discussion. There's a section about upstream of cash by nondebtors. That would only be relevant if we got farther along here based on the ACC's request for *nunc pro tunc* relief. It's designed to support the request for *nunc pro tunc* substantive consolidation.

Next slide, please.

So as a result, as we indicated in our papers, we believe there are only two short statements in a 23-page complaint that are relevant. The ACC, I think, said in their objection, "Look, how can they say," you know, "there aren't sufficient allegations. We have a 23-page complaint. We have," I don't know, "a hundred paragraphs." I mean, there's no Rule of Federal Procedure that says if you hit a number of paragraphs, you state a claim. There has to be actual allegations that are relevant. And, your Honor, there are only two short allegations that are relevant, Paragraph 51, which states that the divisional merger occurred, that Aldrich and TTC used to be one legal entity, and Murray and New Trane used to be one legal entity. 52 is, potentially, sort of relevant. This is the overlapping directors and employees. But again, it's simply insufficient to state a claim under these circumstances.

So what about the ACC's allegations about creditor confusion, ACC's allegations regarding the creditors believing that the separate entities were one? These are the allegations, your Honor.

Slide 7.

There are none. There's simply none. It's not that there are only a few. It's not that they're sort of insufficient. There are none, your Honor. We would submit this is fatal. There could not be a claim stated for

substantive consolidation without such allegations.

Next slide.

So, your Honor, the ACC cannot assert substantive consolidation without the requisite allegations. We appreciate your Honor ruled that the fenceposts or guideposts are out there. It's you know, a little hard to tell. They may be reasonably far out there, but they do exist. I think we all would recognize they do exist. And if there were no limits, substantive consolidation would never be dismissed on a motion to dismiss. Well, we've cited to your Honor in our briefs like a half dozen cases we found. We could have found, perhaps, more where substantive consolidation was dismissed on a motion to dismiss and we would say the allegations in those complaints in those cases actually were much more extensive than here. There were allegations of creditor confusion and the like. None exist here.

Next slide, please.

Your Honor, the first part of the Augie/Restivo test -- and I know your Honor said in DBMP sort of we'll look at all the tests 'cause the Fourth Circuit hasn't necessarily ruled which test is applicable, although I think it's pretty clear based on the law that it's likely, in the Fourth Circuit, Augie/Restivo is the test. But certainly, the first part of Augie/Restivo as well as the other tests show that there are creditor reliance tests, okay? This, we would say, is the

fencepost. There has to be some creditor reliance and to do a quote out of Owens Corning we say creditor reliance and a disregard of corporate separateness prong of Owens Corning -- and this is the quote from the case itself -- "is meant to protect in bankruptcy the pre-petition expectation of those creditors."

And we hate to have sort of a, a rhyme, but we thought we came up with a good rhyme, which is if creditors did not rely, substantive consolidation should not apply. And that's what we would say, your Honor. That's why we say in the briefs that, frankly, we don't think substantive consolidation, at least the first prong, should apply to involuntary creditors at all. There is no reliance. That doesn't mean that tort creditors could never get substantive consolidation. It does mean they would have to reply on the commingling, the unable, unable to unscramble-the-eggs prong of substantive consolidation, but they can't go under only the first test, which is all they've done, because there is no reliance in this case.

Next slide.

We would submit, your Honor, that the pre-divisional merger analysis is irrelevant. What occurred pre-divisional merger is simply not relevant. If that's all you had, the situation before the divisional merger, there would be no substantive consolidation issue. You'd only have one entity.

There has to be relevant allegations from the post-divisional merger period in this case. Pre-divisional merger analysis and allegations is not a substitute for allegations concerning the actions of the entities post-divisional merger. Pre-divisional merger analysis of corporate predecessors is not supported by precedent. The ACC does not even refute this. The ACC's approach would, frankly, mean that any or every entity that underwent a pre-petition restructuring would meet the requirement. We would submit, your Honor, this is simply not the law.

Next slide.

Now we could say that the presence of one entity premerger may be relevant to show creditor confusion post merger, that creditors had one entity and now they have two and might never realize that they had two. That could be relevant for, for substantive consolidation. But again, your Honor, no creditor confusion exists here and it has not even been alleged. The corporate restructurings and divisional mergers are not new. This is the third divisional merger case that was filed in this jurisdiction in a relatively short period of time with the same set of professionals and advisors. The creditors here knew -- and, and the same -- when I say "creditors and advisors," I'm not just talking about the bankruptcy advisors. I'm talking about the same plaintiff law firms representing all the plaintiffs in all of these cases. The plaintiffs' bar knew

exactly what was going on exactly when it occurred. Lawsuits were filed against Aldrich and Murray during the 49-day period between the divisional merger and the filing, I think more than a hundred in that short period of time. And, your Honor, this is not one of the situations where there were a variety of corporate transactions that no one ever knew about and that came to light only in the bankruptcy. There were disclosures in the tort system almost immediately upon the filing, substitution of parties. And we give one example here on Slide 12, which indicates a motion, I believe, to dismiss by Aldrich and Murray in one of the tort cases. Everybody knew almost immediately after it occurred who Trane was, who New Trane was, who New TTC was, who Aldrich and who Murray were. There was no creditor confusion post-divisional merger.

Next slide, please.

So that's why, your Honor, we would say the ACC is only left with the divisional merger as the basis for substantive consolidation and we would submit it will be legal error to permit substantive consolidation to go forward solely on that basis alone. The corporate restructuring was a valid, legal state law transaction. I know you've probably heard that and probably tired of hearing, but it is a case, your Honor. And we cite Judge Kaplan a little bit here from the LTL decision and the failure, the denial of the dismissal of the case:

"There have been no improprieties or failures to comply with the Texas statute's requirements for implementation and interests of present and future talc litigation creditors have not been prejudiced."

In the LTL case, not only was the transaction legal, but it was helpful to resolve a very difficult tort situation.

Next slide.

Now your Honor in DBMP did say the following, "According to the complaint, the divisional merger is the abuse of creditors and substantive consolidation is the remedy." We would submit, your Honor, just because of that allegation, that doesn't mean substantive consolidation is available. The alleged harm doesn't mean that this remedy, substantive consolidation, is the appropriate remedy. The remedy has to be available in the first instance and, of course, other remedies are available that are contemplated, actually, by the Bankruptcy Code and the Texas statute as well as the legislative history. You heard about that already. Fraudulent transfer really is the primary remedy.

Next slide.

We, we go back now to an issue that was dealt with a little bit in Mr. Mascitti's presentation, alter ego and the like. So in DBMP the Court said, well, and raised an issue that none of the parties had raised. So we really, obviously, appreciate that because it gives us a guide as to what your

Honor's thinking. You said:

"No doubt that a bankruptcy court in appropriate circumstances can disregard the corporate separateness and grant alter ego, the state law remedy. So why couldn't a federal court apply state common" -- I'm sorry. "So why couldn't a federal court that can apply state common law, equitable doctrines, not also apply federal ones?"

Well, Mr. Mascitti, I think, addressed some of that based more on the difference between federal common law and state law, but there's another issue, which is alter ego actions are based on the actions of the parties after the state law transaction, maybe the creation of the corporate entities, whatever that may be, not the transaction itself. Here again, the allegation is because there was a divisional merger, that is sufficient to state a claim for substantive consolidation. Again, we would, we would submit that is simply not the case.

Next slide.

Your Honor also, I think, has dealt with this type of issue in this case. The Bankruptcy Code does not preempt Texas divisional law or the Texas divisional statute and your Honor so held in the preliminary injunction hearing. There is no conflict preemption here because, as Bestwall noted, "The Texas divisional merger provisions and Section 524(g) concern completely different subjects and work readily in tandem."

So there's been a ruling in this case, as well as in the Bestwall case, that the Bankruptcy Code itself does not preempt the Texas statute. If that's the case, how can substantive consolidation, which isn't statutorily provided, preempt or override the Texas statute? Now the answer or the retort might be something like, well, the Texas statute does preserve creditor rights, okay? So what about that? We would say the Texas statute, however, doesn't preserve substantive consolidation. Preserved rights are under Texas law. A Texas statute cannot preserve rights other than Texas state law rights, whether by statute or common law. Texas statutes, Texas law can't affect the law of other states nor can it affect federal law.

So the so-called savings clause, preservation clause, whatever you want to call it, of the Texas divisional merger statute also does not save substantive consolidation in this case.

Next slide.

Again, we would submit that not dismissing the substantive consolidation complaint would simply allow a bankruptcy court to use the guise of substantive consolidation to exercise what we say is roving equity to override a valid state law transaction, divisional merger or spinoff, other similar transactions. We think it would simply be legal error to permit that result.

Next slide.

Finally, we did want to deal with one statement your Honor made at the end of the hearing in DBMP, citing the Stone v. Eacho, I think. I think we misspelled that. I think it has an "A."

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: I'm just not sure how to pronounce it.

And your Honor indicated:

"It would be an irony if the recent and artificially created corporate separateness of these entities were to preclude use of the equitable remedy that would be intended to rectify the alleged injustice. Basically, you don't get too hung up on the forms. You would look at the realities."

There's a lot in there, your Honor, and obviously, we're not necessarily agreeing --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- but we would point out that Stone is from 1942 under the old Bankruptcy Act and Judge Kaplan indicated in LTL -- and again, you may agree. You may not agree -- but this is his ruling as of last week, "Bankruptcy courts may have been courts of equity under the Bankruptcy Act, but no longer so under the Bankruptcy Code."

So Stone was under the Act. We're now under the Code. We would say Stone is of no application here as a result to that extent. Of course, the facts of Stone are much different, also, than this case, as we all know.

Okay. Let's go to the next category, then. This is, this is the issue of benefit and, your Honor, we'll go through this in more detail. We submit there has to be a benefit requirement for the first prong of the Augie/Restivo test or any similar test. This is an extreme remedy, your Honor. It's hard to believe -- I mean, Congress didn't authorize this remedy because it's not statutory -- but it's hard to believe that this remedy could be pursued with no benefit whatsoever and we would submit that benefit cannot be shown here and has not been alleged.

At the end of the day -- and, and I didn't want to jump to the end -- but what we think the argument is by the ACC -- this is their benefit argument -- "if we're going to be stayed in bankruptcy, all of Trane's creditors are going to be stayed in bankruptcy." That's not a benefit argument. Maybe that's a fairness argument, at best, and we'll get to fairness and equity at the end. There's no benefit. Judge Kaplan held the contrary. It's a detriment and we've argued from the first day of the case. It would be a detriment to have a much larger, more complicated bankruptcy.

Goes back, again, to the fact that all the entities

are solvent. The asbestos creditors are not going to get paid faster. They're going to get paid slower in that circumstance. They're not, not going to get paid now in full and get paid in full under that circumstance. There's no benefit. There's only, potentially, a detriment.

Next slide.

So, your Honor, the quote from the DBMP hearing is at the top of Slide 20, "Benefit, probably, is also relevant to the second prong of Augie/Restivo and Owens Corning, but not the first." Again, I don't know if you were saying benefit's not part of it at all or probably not part of it, but we would submit benefit has to be part of the test. Your Honor made the point that these are not statutory provisions, that they're -- that they're -- it's not guideposts, but they're statements. They're flexible language. Well, we would submit benefit has to be part of that language, given how extreme the remedy is here, especially we're talking about substantive consolidation of non-debtor entities, and it would be legal error to hold that the extreme remedy can be granted without any benefit.

Now -

Next slide.

-- your Honor also said, obviously, that, even if a benefit was relevant to the Augie/Restivo first prong:

"I think there's enough factors to establish the alleged benefits. If Old CT were reunited, then all

creditors would similarly be paid going forward. That sounds like a benefit."

Okay. The point here, your Honor, is substantive consolidation is different than dismissal. The ACC can argue they want the case dismissed. They'd be out from under the automatic stay and the like. Now, of course, the recent LTL opinion says that that would be a detriment, not a benefit. That's what we've argued. That's what the FC, FCR's argued, but at least they can make that argument. But with substantive consolidation, the claimants would remain in bankruptcy. They'd still be safe. There's no benefit. They'd be paid, they wouldn't be paid faster. Again, as we've indicated, they'd be paid slower.

Next slide.

Now this is, maybe, repeating a little bit of what Mr. Mascitti indicated. So I'll go through this a little bit faster. But to the extent the ACC's response is, "Well, we have access to all these assets," that's not what's going on here, your Honor. This is not, this is not a access to non-debtor asset transaction. Matter of fact, Mr. Neier admitted that this morning. He said the purpose of this is to unwind the transactions, not to get more assets.

So substantive consolidation would not give the claimants access to additional assets. We've, we've said from the beginning based on the funding agreement they have access

to all of Trane's assets. We still stand by that, your Honor, but notwithstanding, obviously the assets would be tied to billions of dollars of liabilities. That's No. 1.

But there's no question that the debtors are solvent and the ACC did not plead insolvency. We have a proposed settlement with the FCR establishing a $545 million trust for payment of claims. The debtors already have sufficient assets, we believe, to pay all valid claims in full without regard to the funding agreement. And, of course, the ACC -- and your Honor even said this -- could say, "Well," you know, "we don't know the liability is, is what's in the deal with the FCR." Yeah, we, we don't, your Honor, but --

Next slide.

-- it's a good datapoint, okay?

So in Garlock, first Judge Hodges concluded the liability for present and future mesothelioma claims at $125 million. The, the point here is the 545 is not just an opening offer or just picked out of the blue. Mr. Neier said, I think, when we announced the deal in August that we negotiated this with ourselves. No, we negotiated with the FCR over several months representing 80 percent of the creditor constituency.

And, of course, as Mr. Guy indicated, Aldrich is similar to Garlock. We have datapoints that allowed us to negotiate a plan here, even though we would have preferred to have more information based on our bar date and PIQ motion.

The asbestos-containing components in the debtors' projects [sic] are largely the same as the sealing products at issue in Garlock. Garlock paid 370 million of a $480-million trust, the remainder being paid by nondebtors. So the debtor paid 370 million. Garlock filed ten years before these cases. So they didn't have to pay ten years of claims or we don't -- I'm sorry. Yeah. They have to pay ten years of claims that we don't have to pay.

So if anything, the trust here should be significantly smaller than in Garlock. It's significantly bigger. But also, it shows the good faith of the debtors, as has been indicated several times here. And your Honor said, "Well, what if the liability turns out to be three times?" We obviously don't think that's going to be the case here based on all of this. We think it should be substantially smaller.

But the point of all this is, again separate and apart from the, the legal minutia we're going through, let's get to a plan. Let's get to a discussion. Why are we talking about substantive consolidation? At best, if substantive consolidation doesn't get dismissed based on this motion to dismiss, it should be stayed. We should figure out what the liability is and whether we can resolve this case. This has been the theme from the beginning of this hearing. The focus should be on a plan, not this collateral litigation, especially subcon, given how tenuous it is.

Next slide.

I won't belabor this, but, of course, we believe that it's not just the debtors' assets that are relevant, but the funding agreements are fully available. And we cite Judge Kaplan on the bottom of Slide 24, indicating that, "It would be pure speculation to indicate that the nondebtors would walk away from the funding agreement," and we would say that here as well. We'd like to get a deal done. The funding agreements are available. Let's get a deal done.

Next slide.

The final reason, of course, we know that this is not about recovery of assets 'cause we've been through this recently. We filed a motion to set aside $270 million for the ACC. What do they do? They objected. They objected to putting assets into the estate to pay their claims. And they didn't just object. They objected vociferously and sort of oddly. And we point this out at the bottom of Page 25. They accused us of patricide. Don't understand it, your Honor, but that was the rhetoric at the time.

So this is not about recovery. This is about unwinding the transaction.

I'm going to skip over Slide 26 and go to Slide 27.

So as I sort of jumped ahead at the beginning, the substantive consolidation request, what is this about? It's only about staying the non-debtor creditors. That's what this

is about. That's all this could possibly be about, but the staying of the non-debtor creditors is not a benefit to the asbestos claimants. It just isn't. And actually, as we indicated, it would be a detriment. We've argued that in the past. A more complicated bankruptcy would cost everybody money, would slow down the case. I mean, the case is not exactly going quickly because we've obviously had a lot of disputes -- and we'll get through those disputes -- but this would just put it back years, potentially, and that's what Judge Kaplan ruled, also, in the, in the failure to motion, or in the denial of the motions to dismiss.

So without benefits, there's no basis for the extreme remedy of substantive consolidation, I think.

All right. Now the third category. Final retort from the ACC may be, "Well, this is only fair," okay? "It's only fair if we're going to be in bankruptcy, everybody's in bankruptcy. If we're going to be stayed, Trane's creditors have to be stayed," okay? Well, again, we believe that's not a benefit and, therefore, they failed to state a claim, but if they're going to argue that and if substantive consolidation at some level is sort of pure equity, let's look at all the equities, not just the limited equities that have been raised. The ACC is arguing, you know, all the inequities or what we did, but let's look at all the relevant equities that surround this case.

Next slide. Actually, I can skip over this. Go to Slide 30.

How did this case commence? Why is, why are we in bankruptcy? Well, the tort system. We point out, of course, what Judge Hodges found which is in 15 cases where full discovery was permitted, all 15 had demonstratable evidence of suppression of evidence in the tort system, 15 and 0.

Next slide.

The debtors were involved in some of the same cases identified in Garlock as illustrating selective and incomplete product identification practices. Case identified in Garlock and also filed against Aldrich made the typical exposure allegations to asbestos-containing components. This is in our information brief. We're just kind of going through the highlights. The claimants' recollection of insulation was limited to three solvent companies and the plaintiff named only Babcock & Wilcox as a source of exposure not named in the lawsuit. Aldrich settled the claim for several hundred thousand dollars. Later, it was determined that the plaintiff filed 20 bankruptcy trust claims referencing asbestos exposure, 17 in bankruptcy cases of companies not sued or otherwise disclosed, including insulation manufacturers and suppliers, some of which the plaintiff denied recollection during the tort lawsuit. This is what precipitated these bankruptcy cases, the inequities and the problems of the tort system. That is

relevant, we would say, your Honor, to the overall analysis.

In addition --

Next slide.

-- as we indicated in our information brief, the asbestos litigation in the tort system is a sue-and-settle factory system. We are sued repeatedly whether or not there's evidence that there's any exposure to our products. Despite an avalanche of asbestos litigation, courts dismiss, roughly, two-thirds of the meso cases against the debtors in the tort system.

Next slide.

On the more positive front -- I'd like to be positive as well as potentially negative -- the progress in this case demonstrates the debtors' good faith. The Court has recognized that a debtor's post-petition conduct matters. A statement from, actually, LTL, before it left town from your Honor:

"If the debtor is true to its word, if J&J is true to its word, and they are interested in a full and fair and final treatment of these talc claim liabilities, then there may be no reason to, to attack the corporate restructuring at all."

Your Honor has indicated and we don't want to, again, say it 15 times, the QSF demonstrates post-petition good faith. Your Honor indicated this at the January hearing:

"I think, as the debtor suggests, that the debtors are

doing this in hopes of convincing the ACC, or at least the Court of their *bona fides*. They've been accused of a lot of bad things in the course of this case, so far as the corporate restructuring and the chapter 11, and it would appear, in the first instance, to me, they're trying to, to establish that they are serious about paying claimants and using the trust appropriately."

Yes, we are, your Honor. We are trying to get this case to conclusion, as you've heard many times this morning.

Next slide.

The ACC, unfortunately, has simply refused to negotiate and your Honor pointed this out at the hearing as well:

"The debtors got to have a deal and the debtor has every incentive to negotiate and if anyone's holding things up at the moment, it's the ACC's unwillingness to negotiate."

And frankly, we heard an interesting quote, one hearing before, I guess, from the ACC, who indicated simply wanted to punish the debtors. This is from ACC counsel:

"So the idea that we're somehow seeking dismissal, no, we're seeking something that would prove far more onerous to the debtors than dismissal. And, you know, if they want to dismiss the cases, that might be okay,

but, if they don't, we're seeking something that we hope will be far worse for them."

What else is going on around the context of this case?

Next slide.

In the next courtroom, there are multiple contempt hearings going on, including this morning.

Next slide.

Several law firms that represent asbestos claimants have been held in contempt in Bestwall, including 7 of the 11 members of the ACC here. Now four have purged their contempt and maybe there will be more purging of contempt, but the fact we're even talking about contempt in this courtroom indicates what is going --

MR. MACLAY: Your Honor, I feel compelled to note for the record my objection to several things that are in these slides and that Mr. Erens is now talking about that are nowhere in the briefs and are far outside of the scope of a 12(b)(6) motion in which factual inferences and facts are not relevant. This entire presentation and these attacks on people who are not in front of you right now, I view as just extremely inappropriate, your Honor. I just needed to note that for the record.

THE COURT: Noted for the record, but overruled for now.

MR. ERENS: Okay. Again, the point, your Honor, if

it's pure equity --

THE COURT: I'll use what I can use.

MR. ERENS: -- all the equities apply.

Final slide, Slide 37.

Substantive consolidation would have no impact on negotiations, as the ACC has argued. The ACC's argument that substantive consolidation means the parties could finally negotiate is simply disingenuous. Your Honor, we've been negotiating, as you know. The ACC has failed to articulate why their assertion would or should be the case. These cases are already progressing down a path of reorganization. A plan's on file, negotiated with the majority constituent. Funding has been secured and we're starting the estimation process. This is what we should be focused on, your Honor. This is what LTL is focused on. Substantive consolidation is not a precondition to negotiations. It wasn't in Paddock or Garlock and it shouldn't be in this case, your Honor. The debtors remain willing and able and eager to start negotiations. That should be the focus, not substantive consolidation.

Unless your Honor has any questions, I would rest for now subject to rebuttal.

Thank you.

THE COURT: None for now.

Mr. Guy?

MR. GUY: Thank you, your Honor.

THE COURT: We've got about half an hour before I'm obliged to take a break. So --

MR. GUY: I'll be done by then.

THE COURT: -- does that work for you?

MR. GUY: It does.

THE COURT: Okay.

MR. GUY: I promise.

First, your Honor, I want to apologize to Mr. Neier that we didn't have a paper on the other matter. I actually had to be in the UK for personal reasons for most of February. So ordinarily, we would have filed something. But also, there's nothing new in what we argued. We've argued it before and it's consistent with what we're arguing about subcon. They're the same arguments. So I'm not going to repeat them.

The reality here is that the ACC wants to go back to the tort system, whether through the fraudulent transfer complaint or whether through the subcon complaint. They've been very clear about it. "We want to make it as miserable and horrible and difficult for you as possible. We want to force you to dismiss your case." That cannot be reconciled with the best interest of the class that they represent. It cannot be represented with the best interest of the class that I represent. That's why we're opposed to it. We incorporate everything that the debtors and the, the parents said about the technical reasons why they don't have a subcon complaint, but

the real driver for us is it's bad for asbestos creditors. It's not good.

So I'm asking the Court to save the asbestos creditors from the ACC's desire to go off and fight everything, whether there's a basis for it or not, how long it will take, how expensive it will be, and how disruptive it will be to the bankruptcy case and getting confirmation.

Your Honor, earlier it was said, "Well, the FCR is accusing the plaintiffs' counsel of not acting in their clients' best interests." They are acting in their clients' best interests, 100 percent. It is in their interest to maximize recovery for their individual clients. I'm focused on the Committee, the Committee's obligation. And this is from Mr. Kazan, who's a great lawyer and we have a huge amount of respect for him. He's on this Committee. He's on many, many, many committees. This is what he said in Imerys:

> "The members of an Official Committee owe a fiduciary duty to the Committee's constituents, the entire class of unsecured creditors. Here, the entire class of asbestos creditors. The chief purpose of an Official Committee is to maximize the distribution to this class under a confirmed plan."

And he's quoting 1102 of the Code, your Honor.

We agree. That isn't happening here.

Now I was taken to task for what I said about what

Judge Silverstein said about the outside influence of plaintiff law firms on the committees. I rest on what Judge Silverstein said. She didn't make this up, your Honor, and it's consistent with my experience in decades in the tort system.

Your Honor, the best reason that I can see as to why the Court can be comfortable there isn't a cognizable subcon complaint here is because if there were, the fiduciaries in Paddock would have failed to bring one. Because it's the same. That says it all. How can it be that a divisive merger is, results in substantive consolidation and fraudulent transfer in North Carolina and if you go 300 miles -- I may be wrong about distance, your Honor -- but you go 300 miles up to Delaware, no, no, it's all, it's all okay. It's all proper. It's kosher. No problem.

Your Honor, the last thing -- and I promised I'd be under half an hour -- I want to, I want to read what Judge Kaplan said because it really resonates with where we're coming from. He said at the end of his conclusion, in his conclusion he said:

> "For the reasons discussed, the Court denies the motions in their entirety. The Court is aware that its decision today will be met with much angst and concern. Nonetheless, the matter before the Court is so much more than an academic exercise or public policy debate. These issues impact real lives. This

Court lives with the distress in the voice of Vincent Hill, a mesothelioma plaintiff, when he testified about wanting his day in court and the need to care for his family. Sadly, Mr. Hill passed away recently and his death reaffirms for this Court the horrible truth that many of these cancer victims will not live to see their cases through the trial and the appellate systems, but certainly deserve the comfort in knowing that their families' financial needs will be addressed timely."

That's where we're coming from, your Honor. He says: "This Court remains steadfast in its belief that justice will be best served by expeditiously providing critical compensation through a court-supervised, fair and less costly settlement trust arrangement."

Your Honor, we respectfully urge the Court to not let the ACC take this case off on all these trajectories that will have no benefit for asbestos creditors and whatever the Court can do, main strength and awkwardness, whatever the Court can do to get everybody back on the path to confirmation.

Thank you, your Honor.

THE COURT: Thank you.

Are we ready for a lunch recess? Have we got all of the proponents, at least?

(No response)

THE COURT: Why don't we just stop right there and we'll pick up at 1:30?

MR. ERENS: I'm sorry. Did your Honor say 1:30?

THE COURT: Yeah.

MR. ERENS: Okay. Thank you.

(Lunch recess from 12:29 p.m., until 1:29 p.m.)

AFTER RECESS

THE COURT: Okay. Have a seat, all. Hope everyone had a nice lunch.

Are we ready to go?

MR. MACLAY: I am, your Honor.

THE COURT: Ready to hear responses.

MR. MACLAY: I'm going to be walking over to the podium.

THE COURT: Okay.

MR. MACLAY: So just give me a moment if you could, your Honor, to make sure I have all the appropriate papers gathered --

THE COURT: All right.

MR. MACLAY: -- so I don't have to go back and forth. And just to be careful, your Honor, I'm going to bring two bottles of water over, over there with me.

(Pause)

MR. MACLAY: Thank you, your Honor. This is Kevin Maclay on behalf of the ACC responding to the motions to

dismiss the substantive consolidation complaint here in Aldrich and Murray.

Your Honor, I have a lot to say because we've heard a whole lot today, including a whole lot that wasn't in the briefs, and, and, your Honor, one thing I think it's very important for us to keep in mind is what it is we're here to do. We're here to evaluate the legal sufficiency of a complaint under the governing standards of 12(b)(6). You've heard at least three or four times, I think, what those standards are, your Honor, so I won't bore you with the details unless you'd like me to. But suffice it to say, the movants do not get the benefit of factual inferences and I think the law is also clear that where the underlying law is muddy or unclear, that is also a circumstance where a motion to dismiss is inappropriate to grant.

And so you've heard a whole lot of arguments, your Honor, which, frankly, rely on facts, facts that are not in the complaint, facts that are not referenced in the complaint, some, in some cases, facts that didn't even exist when the complaint was filed and, and you're essentially being asked, your Honor, when you hear about, "Oh, the QSF is plenty of money," for example, you're asked to assume factual inferences on, in favor of the movants and that's just not appropriate, given the procedural posture of this case on this factual record.

So I think it was, I think it's very important, your Honor, to remember as we go into the argument here where we are and what we're here to do. It's just about the legal sufficiency of the complaint, nothing more.

I feel compelled, your Honor, to respond first to something I think we've heard, by my count, seven times today, which is that the ACC has refused to negotiate. I'd like to talk about that a little bit, your Honor, and I'd like to, first of all, take a step back and remind us of how this case started. Before there ever was an ACC, your Honor, there was a first day hearing. I was here for it. There were some first day filings. I read them and what they were, your Honor, was a full-scale broadside against plaintiffs, arguments about fraud in the tort system, arguments about how the debtors had, had overstated liabilities in the tort system, and, of course, all of that first day hearing was preceded by the Texas twostep, something which, of course, is, frankly, somewhat notorious across the country as being, on its face, a very questionable way of proceeding.

And, your Honor, so when people talk about how the Committee has refused to negotiate, that the Committee has chosen a litigation path, your Honor, the litigation path was chosen before the Committee even existed. It was chosen by the debtors' behavior here in numerous ways, but even beginning with the information brief itself. And so when you hear that

the ACC has refused to negotiate a plan of reorganization, well, your Honor, there's a factual misstatement embedded in that. The Committee has never refused to talk to the debtor, has never refused to talk to the FCR, and, in fact, just recently in discussions over the PIQ and bar date, as I mentioned, I think we had five committee members on that call talking with the other parties. I have never enunciated nor has the Committee ever stated that it was unwilling to negotiate. There's a difference, though, your Honor, between being willing to talk and capitulating to what the Committee views as inappropriate tactics and behavior by the other side and when you believe, your Honor -- and we've talked about this before, but just to revisit our prior discussion -- that this bankruptcy is illegitimate, that it would not have been filed absent for illegitimate actions, of course, your Honor, you don't want to capitulate. As Mr. Neier aptly put it, you know, when you're a Ukrainian city it's one thing to negotiate with the Russian tanks running your city. It's not a very appropriate mechanism or circumstance to expect to have successful, even, level playing field negotiations.

And, and that, of course, is what we have said before and what I'm repeating today. The Committee is willing to negotiate. It's always been willing to negotiate. We haven't -- no offer has been made to the Committee. When we asked the FCR during the FCR and debtor negotiations, "What are you guys

talking about," we were told, "Common interest. We can't tell you. That's, that's protected."

And so it is simply not the case that we have been sort of obstinately refusing to talk with the other parties. That is not a correct statement of the Committee's position and I just wanted to make sure the record was clear on that.

So, you know, they know our phone numbers, your Honor, but whenever -- the only time I ever hear about this is right here in front of you. It's just another example, your Honor, from my perspective, of a litigation tactic. They want to complain that we won't negotiate, but they don't actually want to negotiate. Everything that they have done in this case undermines a successful negotiation. They like to talk about the OI case, your Honor. So let's talk about it 'cause, of course, I, I'm head counsel there. So I'm very familiar with that case and I love it when they want to talk about my other cases that they're not in as if they know what's going on there.

Well, first of all, your Honor, in that case you know what didn't happen? A Texas twostep. You know what else didn't happen? Information brief full of broadsides against the plaintiffs blaming the victims. So the whole litigation strategy of this case pursued by the debtors didn't exist in OI, still doesn't, and that's why -- and, of course, they didn't even seek a preliminary injunction in OI and there isn't

one. There never has been to, to keep plaintiffs from suing affiliates, if they so chose. And so everything about OI was done differently and that's why it has been successful.

So if, if they want to complain about why OI is getting successfully resolved and this case isn't, your Honor, I have a very simple response to that. Look in the mirror. 'Cause that's the answer and I would know this because I've been in a lot of these cases as has my firm. I heard Mr. Guy talk about his decades of experience. Well, my firm, your Honor, has been involved since Manville. We're very familiar with how these cases work. We know how they can get resolved successfully and this case has not been handled, from our perspective, in a way that would, you would think would lead to that. And I stated that before there even was a committee. I, I made comments very similar to that, your Honor, on the first day, that the debtors' whole approach here was, frankly, self-defeating if they really wanted to work it out. But, of course, we don't think they really do. We think they want to do exactly what we've always said they want to do, your Honor, exert undue leverage and influence to end up paying the claimants less, as their own documents reflect, and you've seen those documents.

And, of course, our brief is full of related arguments, your Honor, about how if substantive consolidation were granted, this would then be a real reorganization with a

level playing field where negotiations would be more likely to be successful. And it's also, it's strange that this never comes up, given how much we like to hear about other cases, that, you know, there was not only extensive negotiations in the Texas twostep in Bestwall, your Honor, but there was actually an enforced mediation which extended over many months and the results of that were nothing good.

So the, the idea that the problem here is the ACC's refusal to negotiate is (a) wrong as a factual matter, but (b) it's wrong as a logical matter.

I heard, your Honor, something which I found surprising even by the standards of a hyperbole that you sometimes hear in a courtroom. I heard that, "The debtors are moving forward to confirmation with overwhelming support of 80 percent of the people who matter." I think, I tried to write that down as a direct quote. If I got it wrong, I apologize. Your Honor, they're moving forward with the support of one person, or maybe it's two if you want to talk about the FCR and their counsel as separate people. There isn't a single actual claimant that exists who supports this plan or has evidenced any support for this plan and the idea that they're moving forward with overwhelming support is just, it defies common sense.

And you've heard a lot about what's best for claimants, but, you know, there's only one party who stands

before you, your Honor, who talks to claimants, who knows what claimants think. I was sitting at a table, your Honor, as you know, a few weeks back one seat away from a claimant and do you know what you didn't hear that claimant saying, your Honor? "Oh, thank goodness. This debtor separated its assets and its liabilities so we can fully and fairly resolve all claims in bankruptcy." That's not what that claimant was saying, your Honor. That's not what any actual claimant says. That is a legal argument as part of a litigation strategy and that's all it is. It has no basis in fact, whatsoever, and the idea that they would rely upon these sort of factual assertions on a 12(b)(6) motion where all factual inferences, of course, have to be drawn in favor of the complainants here is, it's just contrary to law.

And, your Honor, it's also, I think, important to note. You've heard a lot about how we're moving forward to a confirmable plan. Well, that's, of course, part of their litigation strategy and those are their assertions, but we've already talked about that issue in this very case and in this very case after that was argued to your Honor, your Honor said, quite clearly -- and this is at *14 of the Westlaw cite, Paragraph 76 of, of the general cite from the Aldrich Pump Findings of Fact and Conclusions of Law -- "The current asbestos claimants must by a 75 percent vote approve the plan."

And, of course, your Honor didn't come up with that

out of whole cloth. There was precedent and argument cited to your Honor. For example, in the Combustion Engineering case out of the Third Circuit, the court said that a 524(g) plan "must be approved by a supermajority of current claimants." The same thing was stated in the Congoleum court case. "Section 524(g) of the Bankruptcy Code," that court said, "requires that 75 percent of current asbestos claimants approve a plan of reorganization before a channeling order may be issued." The only legislative history of relevance is exactly on point, your Honor. House Report No. 103-835, at 41 from 1994 says Section 524(g) requires "a separate creditor class be established for those with present claims which must vote by a 75 percent margin to approve the plan."

And so there is zero law in support of the proposition that an FCR can vote and have that vote determine the certain majority voting requirements of Section 524(g) and there is lots of, of very persuasive precedent, your Honor, that goes the other way, including the legislative history itself. And then there are all sorts of other problems with it, which I'm just going to touch on for 30 seconds because this isn't really the appropriate time to be talking about this because what they're really trying to do with this entire argument is get you to draw a factual inference in their favor and they're not entitled to do that.

.But how is an FCR going to certify as required for

the Bankruptcy Rules that the claims that he or she -- but in this case he -- represents have claims eligible to vote? It, it can't be done and the Rules require that. Also, an FCR has the duties and responsibilities of a committee under a code. Does a committee get to vote the claims of its constituency, your Honor? No, it does not. It's clear black letter law and your order is to the same extent. The FCR have the powers and duties of a committee as set forth in Section 1103 of the Bankruptcy Code.

I said I'll keep myself to 30 seconds, your Honor, so I will, I will stop there. But there are more things that could be said. Suffice it to say, their argument seems to rely on the assumption that you should assume that the FCR's going to be able to control the vote and that's why they're on a path to a confirmable plan and that's why you should grant the motion to dismiss and it is factually insupportable. But moreover, at this stage it's clearly inappropriate to even make the argument.

You've heard a lot about LTL, your Honor, which isn't surprising to me 'cause I know the excellent lawyers on the other side of the aisle are involved in LTL. But let me just say some obvious things, though, about why LTL is, is irrelevant here and I know some of these Mr. Neier touched upon.

One, this case has an extensive factual record

developed over the course of a year, a different factual record from whatever it is that exists in LTL. This case involves different arguments, of course, and this case has a different procedural posture. That was a motion to dismiss and in spite of the debtors' incessant invitations that we do so, your Honor, as you, your Honor well knows, the Committee hasn't brought a motion to dismiss here. As, as I mentioned a few moments ago, a motion to dismiss wouldn't necessarily resolve any of the legal issues that are pertinent here because of the, the standards that exist for a motion to dismiss. They're hard to win, your Honor, which, of course, is also pertinent to what they're trying to do here today. So it all kind of comes full circle.

And it's also important to note something else that no one has mentioned to your Honor today which is that Judge Kaplan was fully aware of the limits of the procedural posture of what he was facing in front of him because he said the following, "Moreover, remedial creditor actions addressing the pre-petition divisive merger and restructuring remain available for creditors to pursue, if necessary." And so he was not foreclosing the sort of relief that we're seeking here and, of course, he couldn't have. That would have been an advisory opinion. It wasn't in front of him, but he didn't even purport to be doing that.

We've already talked about Paddock. I don't think

there's much else to say about it, your Honor, except, you know, actual financial distress, there wasn't a preliminary injunction, and there wasn't hyperaggressive litigation being pursued by the debtors and their allies. And that's why it was a successful case.

You've heard the argument, your Honor, that -- well, hold on. Before I even get to that.

Now I don't believe Garlock was in any of their briefs, your Honor. I don't think so. I asked someone to check during a break. They couldn't find any references to it. But suffice it to say, your Honor has heard this argument so many times before about Garlock. Cherry picked a small group of cases. The opinion was written narrowly, but has been interpreted broadly, etc., etc., etc. But even beyond all of that, this is a 12(b)(6) motion. They don't get to, to get factual inferences in their favor and that's exactly what they're asking you to do by asking you to look at cases outside of the four corners of the complaint and derive inferences from them. It's just not something they get to do at this stage.

I was also quite confused about this assertion that the Garlock Trust is working well. I'm a little bit concerned, your Honor, that some of what I heard sounded like trust confidential information which, of course, as also my firm is attorney to the trust, to the Trust Advisory Committee, is something I try very strenuously to avoid, but I will tell you

in terms of what's publicly available knowledge, your Honor, the trust has grown in size. It is larger now than when it was. I think that, I know that is publicly available. And, your Honor, I think it is very difficult for someone to say, "The trust is working great. Look, they're getting more and more money." The job of a trust isn't to accumulate wealth, your Honor. It's to pay victims and a trust that's growing, I would respectfully submit, is not evidence of a properly functional trust. But again, that's a factual inference you're being asked to draw in favor of the people moving to dismiss and they don't get those factual inferences in 12(b)(6).

And I was very confused, your Honor, when Mr. Guy said in, in Garlock, as in here, the products are encapsulated. So, you know, that reduces the liability. I don't understand, your Honor, how someone who, I would think, would be aligned with the Committee in maximizing the size of the pie available to claimants would be adopting a defense side position, the so-called encapsulation defense -- it's used in tort cases across the country by a defendant trying to reduce the liabilities -- and adopting it. I don't understand it. It makes no sense. It doesn't make sense in the Garlock context. It doesn't make sense in this context. I would think that all creditors, all asbestos constituents, would be best served by maximizing the size of the pie whether it's in the tort system or in the bankruptcy system, regardless. And I just found that argument

just astonishing, your Honor.

A, a very strange argument was made that, that the amount of money here is reasonable by reference to Paddock. Your Honor, it's a completely different case with different products, different financial resources available to it. You can't just say, "Oh, look at the amount Paddock settled for. So our amount is reasonable." Again, that is just a pure request that your Honor ignore the law and draw factual inferences in favor of the movants.

I'm not going to talk about the *ad hominem* attacks levied against the law firms today, your Honor, other than to say I view them as inappropriate. They weren't briefed. Those law firms are not in front of you and the idea that the way to get to a consensual plan here is to defame your adversaries is not one that, that I think people should think is a very productive path forward, no matter how you view this case.

And the reference by Mr. Guy, your Honor, to the fact they have a claims expert who's in other cases. Well, that's great, your Honor. But guess what? None of that is in the record. None of that's attached to the complaint. None of that is appropriate for a 12(b)(6). And we will get to their claims expert. Obviously, your Honor has granted their, their motion for estimation. So we'll see what that's all about in, in due course. That's not what this hearing should be about, your Honor. It's irrelevant.

You heard Mr. Mascitti talk about the 270 million in the QSF and how, you know, there's every reason to think that's enough money. Well, your Honor, again this is a 12(b)(6). They do not get to assume and you should not draw the factual inference in their favor that the 270 million is enough. And, of course, that's only relevant because of their more general argument that, you know, the claimants haven't alleged injury. Well, your Honor, we have and let me go through some of the ways that we have just so the record is very clear. It's pretty much in our briefs, but still. Just so that doesn't go unrebutted today.

First, I'd just like to read you some of the things that your Honor said in this case, in the Aldrich case, at, at 6 of the Findings of Fact and Conclusions of Law:

> "Due to the apparent negative effects of the Divisional Merger (and these ensuing bankruptcy filings) on the legal rights of Asbestos Claimants, that Merger and its allocations may constitute avoidable fraudulent transfers and/or be subject to attack under remedial creditor doctrines like alter ego and successor liability. If so, New TTC and New Trane could eventually be held responsible for Old IRNJ and Old Trane's asbestos liabilities, in whole or in part."

At 7 of those same Findings:

"Given the potentially deleterious effects of the Divisional Merger on asbestos claimants, the necessity of the Debtors reaching agreement on a Section 524(g) Plan and trust with a supermajority of asbestos claimants, and the need to establish 'good faith' at confirmation, these reorganization attempts may or may not bear fruit."

At Heading C in between Paragraphs 149 and 150 of the Findings, your Honor:

"The 2020 Corporate Restructuring Appears Materially Prejudicial to the Rights of Asbestos Claimants, and in Accordance with the Texas Statutory Scheme, is Subject to Legal Challenge."

At Paragraph 173 of those Findings, your Honor:

"Under the TBOC, the proper question is, 'Were the rights of creditors, here asbestos claimants and ... future demands, materially affected by the ... Merger and its asset and liability allocations?' The preliminary answer to that question would have to be, 'Yes.'"

And then, finally, your Honor, at Paragraph 176, you said, your Honor -- excuse me:

"However, at the moment, it appears that the Divisional Mergers had a material, negative effect on the asbestos claimants' ability to recover on their

claims."

And so there are certainly -- and, of course, those are, are among the various things we have cited in our complaint, your Honor. But, of course, there are other issues. Because one of the ways they attempted to support the lack of injury is talking about the funding agreements. And now just to -- remember, what's (indiscernible), your Honor, in Aldrich there isn't even an amended funding agreement. We're dealing here with the original funding agreement which remains as it was when your Honor issued your original findings, the funding agreement upon which the movants would partially rely to support a lack of harm to claimants and this, these are some of the findings in this case on those topics:

"Since the Debtors have no employees of their own and are consigned to borrow staff from New TTC, under the Funding Agreements, the people who would have to enforce the agreement against New TTC and/or New Trane are in fact officers and employees of New TTC."

"Further" -- and this is at Paragraph 74:

-- "the Debtors' rights and obligations under this Agreement may not be assigned without the prior written consent of New TTC or New Trane. Therefore, arguably a Creditor's Plan could not be funded unless New TTC and/or New Trane favor that Plan."

At Paragraph 79:

"In sum, while the Funding Agreements may provide funding for a plan, they will do so only if New TTC and New Trane favor that plan. And that favor is dependent on these entities receiving permanent injunctive relief from the Aldrich/Murray Asbestos Claims—whether they are entitled to it or not."

Paragraph 80:

"New TTC/New Trane do not have to provide payments that 'exceed the aggregate amount necessary' for the Debtors to fund all 'Permitted Funding Uses,' thus giving New TTC and New Trane unilateral discretion to determine what is 'necessary' and the ability to reduce payments if either disagrees with the use of funds. And there is no dispute resolution mechanism if a funding request by a Debtor is denied."

And then, your Honor concluded:

"In sum, the Funding Agreements are not unconditional promises to pay the Aldrich/Murray Asbestos Liabilities. They are instead conditional agreements dependent on New TTC/New Trane's approval of any reorganization plan and upon New TTC/New Trane's continued good financial health."

And then we turn to the QSF, your Honor, and let's talk about the actual order entering the QSF which, for some reason, wasn't mentioned yet. Because, of course, they, they

said to your Honor back then, "Your Honor, why would they be opposing this, this, this money that we're, we're giving to you?" And we said, "Your Honor, we think it's part of a litigation strategy. We don't think it's a good faith effort to bridge any gaps. We, we don't believe it's sufficient. But moreover, we think it's part of a litigation strategy." And your Honor put this language in the order and this is at Paragraph 7:

> "For the avoidance of doubt, the entry of this order shall not constitute any determination regarding (a) the adequacy of the amount of funds contained in the QSF trust to resolve or satisfy current and future asbestos-related claims that are the subject of these bankruptcy cases or (b) the relevance of the entry of this order to any other issue in these cases whether currently pending or that may be presented in the future."

And so their attempt to use the QSF as they are now, your Honor, frankly, runs contrary to the language of that order and it sort of makes clear, your Honor, that the QSF has always been part of a litigation strategy. It's always been a tactic and the fact that they, if they funded it yesterday, the day before this argument, certainly would help support that, your Honor. And, of course, we get the benefit of all factual inferences, not them.

And your Honor also noted, of course, on January 27th of 2022 that the amount in the QSF is "an opening bid and like all offers, it would be foolish to start with your top-dollar amount." And so the idea that the QSF order somehow establishes that that's the amount that's necessary to properly protect claimants is not substantiable.

And I think your Honor made a good point when you said, "What if the amount is much larger in the future?" Well, exactly, your Honor. And again, factual inferences go in the favor of the Committee here, not in favor of the movants and the defendants.

You heard from, I believe it was, Mr. Mascitti that, "It is undisputed that the divisional merger was in compliance with the Texas statute," undisputed. And in that regard, your Honor, I'd like to note two things. First of all, I'd like to note your Honor's -- well, I'd like to note three things. First of all, the language of the statute, which is that the Texas divisional merger law, "does not abridge any right or rights of any creditor under existing laws." And just to be clear, your Honor, that "existing laws" is not qualified by under existing state laws and, in fact, the Curtis Huff article that we briefed for your Honor at your request a while back expressly said it includes the Bankruptcy Code. And so this argument you've heard today that, no, "existing laws" only mean state laws is unsupportable and has zero support. But again,

if the law is muddy, motions to dismiss should be denied as the unrebutted case law makes clear.

Your Honor also held back on August 23rd of 2021 that the corporate restructuring "may well have been improper. For while the TBOC" -- and that stands, of course, for the Texas Business Organizations Code -- "permits a company to engage in a divisional merger, it does not permit that company to thereby prejudice its creditors." In other words, any divisional merger effected under this law remains subject to the rights of creditors under existing laws. And so, of course, there is a dispute about whether the divisional merger in this case was in compliance with the Texas statute. And that's in our brief, too. It's, it's quite explicit. We talked about how the federal interests need to be respected, but we also talked about how what they're doing is also inconsistent, in our view, with the Texas statute itself. And so it is not true that the Texas statute itself leads to structural subordination of creditors. In fact, it seems to try to prevent that from being the outcome in its language.

One of the arguments you heard from Mr. Erens, your Honor, was that only two paragraphs of the complaint are relevant and I was sitting in my chair, your Honor, trying to figure out what, what the heck is he talking about? We have a whole complaint of many paragraphs, all of which are about why relief is appropriate in various ways. And then I realized

what he was saying. He was saying it's only after the divisional merger takes place. It's only during that 49-day period that's relevant and that's how -- that's -- that's the source of many of the slides in that presentation when they talked about what's relevant and what isn't. But of course, your Honor addressed this legal issue very recently, although it wasn't mentioned in the argument so far, in the CertainTeed case. And so I'd like to read to your Honor from Page 198 of that transcript:

> "And let's remember that, according to the complaint, it was the creation of these two entities out of Old CT that is the abuse of creditors and that substantive consolidation is the remedy. It would be an irony if the recent and artificially created corporate separateness of these entities, all these liabilities having been Old CT's, were to preclude use of the equitable remedy that would be intended to rectify the alleged injustice or as my Circuit said a long time ago, although talking about two debtor estates, courts look through corporate forms and behind corporate entities 'not only for the purpose of holding a stockholder or parent for the debts created by an insolvent corporate agent or subsidiary which is a mere instrumentality, but also for purpose of allowing creditors of the stockholder or parent to reach assets

held by their subsidiary.'"

From Stone v. Eacho, your Honor.

So basically, you don't get too hung up on the forms, you look at the realities. We all are aware, your Honor, 'cause the law on this is very clear, substantive consolidation is an equitable remedy. It's designed to evade crafty evasions. It existed before the Code and it existed after the Code as the majority of case law and Collier's make clear, as your Honor recently ruled. 'Cause what they're also saying, your Honor, as part of their arguments here today is substantive consolidation doesn't exist because they say bankruptcy courts aren't courts of equity anymore.

So even Congress knew, for example, that substantive consolidation existed pre-Code, their silence, they implicitly are arguing, should be held to eliminate substantive consolidation, but the law is to the contrary, as the Mid-Atlantic court and the Supreme Court has already ruled, your Honor, and we've already cited that in our briefs.

So there is a lot of -- you have to parse the arguments they are making, your Honor, sometimes because they're not always so clearcut and transparent, but what they're really arguing there, your Honor, is that substantive consolidation doesn't exist as a remedy post Bankruptcy Code enactment and that is just contrary to your recent ruling and to an entire body of case law, including from the Supreme Court

and the Fourth Circuit.

And I think, your Honor, just the general concept, now, now, Judge Kaplan had a different procedural posture in front of him, again motion to dismiss context. I don't know what he meant by saying "bankruptcy courts are not courts of equity," but I think there are a whole lot of bankruptcy court judges and Congress would be surprised by that pronouncement, your Honor. I don't know what it means to Judge Kaplan, but it doesn't mean what they want it to mean here. It can't.

They make this argument that subcon, we haven't argued that subcon would give claimants access to additional assets. Well, of course it would, your Honor. There are all those assets that they took away from the claimants and they stuck them somewhere else. If you put the assets back together, of course the claimants have access to additional assets and I've already read, your Honor, all the problems with the funding agreements, which are what they used to try to rebut that. But, of course, they don't get factual inferences in their favor, anyway. So we shouldn't even have to go down that path, but they brought it up. So I rebutted it.

They remade the Section 303 argument, again. So I'll, I'll talk about it, again. Majority of courts don't think that 303 is inconsistent with substantive consolidation. We fully briefed that and nothing they've said today rebuts what we've already briefed and said.

And your Honor, I think, made the very excellent observation as part of your ruling in the CertainTeed bankruptcy that if they were right, they would also be implicitly saying that state law doctrines like alter ego and successor liability and piercing the corporate veil would also be unavailable and there is just no argument under the case law that that's true. So there's also a logical inconsistency with the argument that they're making and it's, it's clearly just inconsistent with the law as it actually exists.

The fact that the debtors have a plan is irrelevant to the sufficiency of the complaint. Again, they're asking you to draw legal inferences in their favor that the complaint [sic] is some, that the complaint [sic] is somehow appropriate. We have strong doubts about that, but regardless, that's not in front of you here today and they don't, and they shouldn't ask you to assume that they're correct that that plan is appropriate. There are no facts in the records or definitely, there's no facts in the complaint about that.

We've already addressed this before, but they brought it up again. So I guess I need to bring it up again, too, your Honor. This isn't a *de facto* dismissal. This is the opposite of that. This is bringing an entity into bankruptcy that should have been there in the first place. That's obviously an appropriate, just sort of logical response to inappropriate separation of assets from liabilities and filing for bankruptcy

without the assets. Fundamental bankruptcy principles say you got to come into bankruptcy with your assets and your liabilities and what they have done here violates that.

So we're not seeking a dismissal. We're seeking what they should have done in the first place. And what Mr. -- and what they referenced, too, about how this would be worse for them than dismissal. What that is talking about, your Honor, is they didn't want to file for bankruptcy. Your Honor's findings recognized that. So it would be worse for them in the sense, your Honor, they didn't want to file for bankruptcy through the historically appropriate mechanisms. They didn't want to do it the way 40 years of precedent have led to a series of, of successfully confirmed cases. They want to do it a different way. They want to do it a way that maximized their leverage in a way that disadvantages the claimants and that is what they did.

And so, of course, it is simply the case that this isn't a *de facto* dismissal at all. This is seeking to enforce fundamental notions of justice and appropriate treatment and appropriate use of the Bankruptcy Code and those are all perfectly appropriate goals, your Honor.

Your Honor has also heard today, essentially, "We have our proposed approach, your Honor" -- "we" being the debtors in this context -- "and you should let us go forward, but you should make them wait." Your Honor, that is, of course, just

on the face of it, not a particularly equitable suggestion, but I guess they don't think you're a court of equity. So, in that sense, it makes sense. But, your Honor, substantive consolidation, we believe, is an appropriate legal remedy. We believe it's potentially available. We believe we have the opportunity to prove that. We're not at the trial stage yet, but we think we have a right to get there and that's what this hearing today is about. And, of course, to the extent they're relying on the issue of, well, there's other remedies like fraudulent transfer, well, the Supreme Court case itself of Sampsell, as your Honor pointed out, was a consolidation as a result of a punitive fraudulent transfer.

So the Supreme Court itself disagrees with them. That should be pretty powerful evidence that they're wrong. And many courts -- and these are in our brief -- have rejected the availability of fraudulent transfer as foreclosing substantive consolidation, SG&G Financials Services, Colonial Realty, Munford, James River, etc.

And, and they've said several times today that your Honor should stay substantive consolidation in favor of estimation. Again, "Let us do our litigation approach, your Honor, but don't let them do what they think is necessary." But your Honor already considered that and rejected it in this case. In January 27th of 2022, Transcript Page 11, 22, to Transcript Page 12, Line 4:

"The ACC wants to litigate the corporate restructuring. The debtor wants to estimate.... I'm not going to tell one party that we can do one side's preferred course, but not the other. Both are, effectively, litigation."

So this is the same issue you've already decided in this case that they're now, essentially, trying to reargue again, your Honor.

They talk about how the ACC wants to go back to the tort system and I guess that's just sort of an article of faith for them, that going back to the tort system is wrong because they don't think the tort system works or is fair. Well, the tort system is what the tort system is, your Honor, but this is ultimately a legal question, which is is a substantive consolidation complaint legally valid on its face, giving the benefit of factual inferences to the Committee? That's the legal question in front of your Honor today, I respectfully submit, and their, essentially, desire to paint the motives of the Committee aa being wrongful because its alleged desire to go back to the tort system, well, first of all, your Honor, again, as I said, I'm the one that's actually talked to asbestos claimants. I think I have a better sense of what they actually want than the other people who purport to be speaking in their best interests and the fact is they want what's best for them. It makes just, I don't want to go too deeply down

this rabbit hole, but when they talk about how plaintiffs' lawyers are incentivized contrary to their clients because they make more money in the tort system, think about what that actually means, your Honor. Because plaintiffs' lawyers get paid on contingency.

So if they make more money in the tort system, so do their clients. Like, like the logic just falls apart when you think about it. Now it wasn't in the briefs, which we've been discussing. It's irrelevant under 12(b)(6), but still, even on the face of it, it makes no sense. The argument makes no sense.

But, of course, this Committee has never said they wouldn't negotiate. This Committee has never ruled out conclusively that we could come up with a potential reorganization plan, but what we have said is look at OI. Look at how it's worked out and then look at this case. Look what's happened. It shouldn't be a surprise to anyone that it's not really going down the best path. The Committee doesn't like the way it's going, your Honor, but before the Committee even existed they started this path, you know. It's, it's a complete blaming-the-victim exercise here. The Committee hopes that we can get to a level playing field so that negotiations will be more likely to be fruitful when they've got some skin in the game. Sure, we're willing to talk before then, but is it going to be, likely to be successful? Look at Bestwall and

there's your answer. We're trying to do things, your Honor, in a way that's more designed to be successful. That's a very legitimate goal and it's certainly one that's in the interest of the asbestos constituency.

And nothing makes me more frustrated, your Honor, than by hearing people on the defense side talk about how asbestos claimants and their claims, you know, and what happens impacts real lives. I know that far more than they do. I have committee meetings with people who two days later are dead, you know, and I hear their concerns and, and that's why the Committee is here in this case, that's why it exists, and that's why we're doing what we're doing, to protect the interests of the asbestos claimants and any, any factual inferences they'd seek to have you draw to the contrary are unwarranted and inappropriate. And I'll just leave it at that because if I go down that path much longer, I'm going to get unduly worked up, your Honor.

Now a lot of things were said today, your Honor, even though I view a lot of them as being irrelevant. So let me just quickly flip through my notes to make sure I'm not missing any point that I need to address. One second, your Honor.

(Pause)

MR. MACLAY: Well, to state the obvious, your Honor, you recently considered a motion to dismiss, a substantive consolidation complaint in the context of the DBMP case. We

agree with your ruling in that case that substantive consolidation is available and we note that the complaint that we're talking about here today that the Committee drafted is substantially similar in its legal and factual allegations to that complaint in DBMP. And we also note, your Honor, you know, the Fourth -- I think it might be worth, you know, quoting this again from Stone v. Eacho. And I hope I'm pronouncing that correctly, your Honor. It's from --

THE COURT: I wasn't there.

MR. MACLAY: -- 1942. So who could be, who could say for sure. Do you know, your Honor? I, I don't know.

THE COURT: Not offhand, no.

MR. MACLAY: Okay. (Reading):

"It is well settled that courts will not be blinded by corporate forms nor permit them to be used to defeat public convenience, justify wrong, or perpetrate fraud, but will look through the forms to deal with a situation as justice may require."

What they're essentially asking you to do is to rule as a matter of law that that principle is no longer viable, that those remedies are no longer available, that justice can no longer be pursued under circumstances that they have contrived. And that's not the law and it shouldn't be the law, your Honor, and I would urge you not to rewrite the law in that fashion pursuant to their invitation.

I, I don't know that they've talked much today about the Committee's standing, your Honor. I'll just say this. Lots of cases say the Committee has standing. The Rules itself say we can be heard on any, any issue, any issue in the case. I think there's about 15 cases that say that in our brief. So I'm just going to leave that there.

To go back to the, the harm, your Honor, for a moment, they talk about how these harms are future harms. We've already briefed, I think, pretty thoroughly that they're not, that they, that they relate to the past conduct. For example, just turning to Page -- hold on one second. What is this? I think this is our -- yeah -- our opposition to the affiliates' motion to dismiss:

> "Here, an actual controversy exists because all the facts giving rise to the Committee's request for substantive consolidation have already occurred. These facts include Ingersoll-Rand's and Trane's long history of defending against and paying asbestos claims in the tort system." Complaint ¶¶ 21-23.
>
> "The decades in which Ingersoll-Rand and Trane were each a single economic unit." Same paragraphs.
>
> "Management's objective of capping the asbestos liabilities and paying less to tort victims in bankruptcy." ¶ 26.
>
> "The secret planning and implementation of the

divisional mergers under code name Project Omega." ¶¶ 24-32.

"Whose terms were not the product of arm's-length bargaining." ¶ 33.

"The shared officers and board members. ¶¶ 45-46.

"The billions of dollars distributed to equity holders ahead of asbestos creditors." ¶¶ 47-49.

"And the follow-on chapter 11 filings."

And, of course, as your Honor noted in the context of CertainTeed, but the same exact logic would apply here, your Honor. If this were a real bankruptcy, from the Committee's perspective, where the assets and liabilities were in front of you, we think that case would last a lot less long because the debtors would have a reason to remove it from bankruptcy as would the affiliate, the now -- the new -- what I'll call the, the Fixedco. And so -- as opposed to the Brokenco, your Honor. The Humpty Dumpty analogy, of course, is what I'm referencing.

And so, your Honor, it is certainly true and we know this from, of course, the factual record in this case that this corporate restructuring was designed to, to isolate -- that's the word they used, your Honor -- the asbestos liabilities and bring the enterprise into bankruptcy. It was, as your Honor has noted, just "an empty vehicle," or words to that effect, an "inert" -- that's right -- "an inert vehicle," your Honor

We allege deeply funding features, deeply troubling

features of the funding agreements, which I've already gone through in detail and won't repeat. And, of course, your Honor has already noted, as I already went through also in detail, the various ways in which those harms might accrue.

So at this 12(b)(6) stage, your Honor, more than enough has been alleged, more than enough has been shown.

They cited a bunch of cases, your Honor, that were not substantive consolidation cases alleging that we had, by the way, to, to make some sort of an extra showing about standing. But again, those weren't substantive consolidation cases. Those were cases that involved declaratory judgment relief or injunctions where the standards are different and much higher in those sorts of cases. And, of course, they weren't at a motion-to-dismiss phase, either, and there is different burdens of proof at a summary judgment phase like Clapper was at or Proctor or requesting a PI, even a higher standard, as in the South Carolina or Penn Voters All. case

So to conclude all of that, your Honor, the harm to asbestos victims has already occurred.

Your Honor, with respect to the, the Texas law issues, I've already explained why, in our view, Texas law, in fact, is inconsistent with what they've done here. So we're not seeking to override Texas law, but we also put forth in our brief, your Honor, the substantial authorities that even if Texas law were inconsistent with substantive consolidation, it would have to

give way and there are, of course, cases directly on point like NM Holdings where the court rejected the argument made here by the movants and held that substantive consolidation was supported by "an overriding federal interest in the equitable and efficient distribution of a debtor's property among its creditors." So state law interests that "cannot be reconciled with this major goal of federal bankruptcy law must give way to substantive consolidation."

But this is all in the briefs, your Honor, and you have all that available to you and there's not much more to be said about it here today.

And so, your Honor, to, to sort of conclude with where I started, we're here to decide a 12(b)(6) motion. It's a very limited context. You don't have to decide whether substantive consolidation will ultimately be successful. That's not what's in front of you. It's just whether the complaint is legally sufficient drawing all inferences in the Committee's favor and recognizing that where the law is muddy, motion to dismiss isn't the right context to, to decide those issues against a complainant.

Thank you, your Honor.

THE COURT: Thank you.

Whenever you're ready.

MR. CORDANI: Your Honor, John Cordani from Robison & Cole. I'm going, I'm going to address the unconscionability

argument.

THE COURT: Okay.

MR. CORDANI: All right. I'll, I'll aim to address it in a, in an efficient manner knowing that your Honor ruled on this matter in DBMP. But first, I understand from your Honor's ruling that the, the issue with this complaint is likely not in the factual allegations as --

THE COURT: Uh-huh (indicating an affirmative response).

MR. CORDANI: -- as relates to unconscionability. You stated in your ruling in DBMP that you agreed that the facts were sufficiently pled so that if we went that way, that there's enough material there to meet the Iqbal-Twombly standard. I don't think that states a claim upon which relief can be granted, but you also observed there's plenty of facts. The same facts that were pled in support of substantive consolidation also would apply here, but they don't support an independent cause of action for unconscionability, in my mind.

And so, so given your Honor's observations, I, I'd like to focus my argument today on the three potential legal stumbling blocks that I think you identified in DBMP and whether that -- whether that is a -- would prevent unconscionability from coming into play in this case.

So from your Honor's ruling, it seemed to me that the three, the three stumbling blocks are as follows: You stated

that:

"Unconscionability is an affirmative defense under state laws and I don't think that couching it in a declaratory judgment action works, at least when you're not a party to the contracts and at least not as to the merger plan itself, which isn't even a contract."

And so, so I think that there are those three legal issues that I want to address here today.

So No. 1 is, is unconscionability purely an affirmative defense or can a plaintiff seek a declaratory judgment that a contract is unconscionable to obtain some definite and concrete relief?

No. 2, can, can a third party have standing to challenge the unconscionability of a contract? And if so, what type of relationship to the contract can confer such standing?

And No. 3, was the plan of divisional merger that allocated the asbestos liabilities to the debtors and purported to lift them on the non-debtor affiliates sufficiently contractual in nature such that the doctrine of unconscionability can be invoked?

So, so the first issue, can unconscionability be, only be raised as an affirmative defense? So I think, I think, your Honor, the -- the -- the cases that the debtors and debtors' affiliates cite in their brief don't deal with a declaratory

judgment of unconscionability. They cite Kennedy v. Harber. It was not a declaratory judgment action. That was an action where unconscionability was pled as some sort of freestanding, coercive form of relief. And I, I don't think that that, that that would bind whether a declaratory judgment action's appropriate.

They cite Garcia v. Universal Mortgage Corp. and they say that that case held that a party may assert unconscionability only as a defense to the enforcement of a contract. That's, that's not what the case said. It, it actually assumes that you can raise it and only, it says that, generally, it's raised as an affirmative defense. And then that case goes on to consider the unconscionability issues on the merits.

And, and they, they also cite a case called Lopez v. Garbage Man, Inc. and that case, unconscionability was only raised as an affirmative defense in that case. So it has nothing to do with this case.

So this case is really about whether you can have a declaratory judgment of unconscionability. And so I'd first like to point out that I, I think this case is quite similar to a situation the Supreme Court addressed in MedImmune v. Genentech in 2007. And that case involved a license for a patent and there's a, there's an affirmative defense in patent law where you can say that the patent's invalid, but there's a,

there's a doctrine in patent law that says that if you're a licensee to a patent, you can, you can go to court and you can, you can file a motion, file a declaratory judgment action and say that the patent's invalid and, and, therefore, that, that would make the promise to pay the royalties unenforceable. And so, so just, just as how invalidity is typically an affirmative defense -- and, and I agree that unconscionability, typically an affirmative defense -- in the MedImmune context the Supreme Court held that, that this can be raised in the context of a declaratory judgment action when the, the legal relationships between the parties would be affected by the declaration that a patent's invalid. So, so the declaration that a patent's invalid leads to the nonpayment of royalties in that case, so.

And so we also -- so based on those general principles we also cited a case called Hanjy v. Arvest Bank in our briefs. And that case involved the situation where, where unconscionability needs to be raised in the context of a declaratory judgment action because the unconscionable consideration or the unconscionable payment have, has already been accomplished under the contract. And in that case it was a, it was a matter of, of a bank overcharging overdraft fees on, on a bank account. And so, obviously, the bank, you know, has this contract that's claimed to be unconscionable, but they just take, they, they just withdraw the, the overdraft charges and, and so they, they're in possession of those fees. And so

they're never going to file a breach of contract action for the fees. All that can be filed is a declaratory judgment action by the customer saying that the, that these fees were taken from them on an unconscionable basis. And so that -- under those circumstances -- under the circumstances of that case the court said that an unconscionability, a declaratory judgment of unconscionability would be allowed.

So I think that's the first -- your Honor's ruling sort of lumped the three issues together. And so I think that's the first stumbling block, but I think we can overcome that.

The second, the second stumbling block is can a third party have standing to challenge the unconscionability of a contract? And so -- so I think -- I think, your Honor, for that question we should bring it back to what the Declaratory Judgment Act says is required for standing. And the, the Supreme Court in MedImmune says that the standing requirements go all the way to the limit of Article III. As long as you can show that there's a case or controversy under Article III of the Constitution, you can have standing to -- to make -- to make a challenge and receive a declaratory judgment.

And so the, the, the basic standard is, No. 1, that the plaintiff has to have suffered an injury in fact that is concrete and particularized and actual and imminent; and, No. 2, that the injury is clearly traceable to the challenged

conduct; and, No. 3, that a favorable decision is likely to redress that injury. And I think all three of those, those factors are met in this case. We -- we have -- we have asserted a, a concrete and particularized injury that resulted from a very specific and, and discretely identified transaction that allocated liabilities and, and assets in the, in the restructuring transaction and the divisional merger. That, that injury is traceable to that exact conduct, that, that once that, once the divisional merger occurred, that, that's what caused the injury. And No. 3, a decision by your Honor awarding a declaratory judgment would be able to redress the situation.

So a declaratory judgment that, that, that that transaction resulted from an unconscionable contract would, would allow it to be redressed. It would be the, the unscrambling of the egg or the putting Humpty Dumpty back together again, but it is something that is a concrete form of relief.

And in terms of the case law in this, in this regard, we, we would rely on the Great West v. Packaging Corp. case that we cited in our brief from the, the Middle District of North Carolina. The -- the -- the debtors and the non-debtor affiliates try to distinguish that case and say that that only had to deal with the interpretation of a contract and that's not true. The -- the -- the quote from the court says that,

that:

"PCA argues that Great West lacks standing to seek declaratory relief as to the application and enforceability of the indemnification clause in the transportation agreement."

So, so there, the transportation agreement essentially created an indemnification obligation and the question was whether, whether that indemnification obligation was enforceable because it required, it required one party to indemnify another potentially for their own misconduct. And so that, that could be an unenforceable promise to indemnify and, and, therefore, the insurer, who was sitting behind the party who had the obligation to indemnify, can say that, that, "My insured actually made an unenforceable promise here." So -- so -- so that allows -- the unenforceability of the underlying contract allowed the insurer to seek a declaratory judgment and obtain the, obtain the appropriate relief.

So in light of your Honor's ruling, I also looked, looked at the law more closely on that point and I also wanted to cite for your Honor a case from the Ninth Circuit from 2008 called Newcal Industries v. IKON. And that's 513 F.3d 1038 at 1056. Now that case involved contracts for copier services and Newcal sought a declaratory judgment that all of the, all of the IKON contracts that IKON had with their customers were procured through fraud. And the court in that case found that

Newcal had standing as a third party to those contracts to come into court and seek a declaratory judgment that, that those contracts were, were void for fraud and it did that because, because IKON was threatening Newcal and saying that they were interfering with those contracts. So there was a, there was a particularized legal interest at stake and it allowed Newcal to say, "Well, you're accusing us of interfering with a contract, but that contract itself is unenforceable."

So I -- I think -- I, I cite these cases because I think it's not, it doesn't throw us out of court just to say that it's a third party trying to, trying to attack a contract and say that it's, it actually contains an unconscionable term or an unenforceable term.

Now, now the, the debtors and the debtor affiliates on this point cite a few cases in their brief. One is Morlock v. Bank of New York. And that case is distinguishable because that case held that a third party lacked standing to challenge a voidable defect in a contract. And, and, and the court rested on that, that distinction between a void contract and a voidable contract. And here, unconscionability renders a contract void. It's not just voidable. If a, if a contract really rises to the level of an unconscionable construct, you know, it's one that no, no reasonable party would, would enter into. It's, it's one that's so, so one-sided it's unconscionable to enforce. That, that contract's void. It's

not just voidable. And Texas law supports that. I would cite the case, In re Poly-America, L.P., which is at 262 S.W.3d 337 at 360 (Tex. 2008).

So I, I do think that that, that that case is distinguishable in that a third party can, can have standing to challenge a void contract if their legal relationships are going to be sufficiently connected to the declaration by the court that the contract is void.

Now No. 3, your Honor, from your ruling in, in DBMP is, is this, is this merger actually contractual in nature such that unconscionability can be alleged? And I think, your Honor, you would have to -- it is contractual in nature if you view the transaction as a whole. So -- and what you have here is, is a merger, a divisional merger which is somewhat unique, but, but I think debtors' affiliates' counsel mentioned that it's something that affects property rights. Once you have a merger, property changes hands. And that's true. Once the merger occurs, property has changed under, under the state law.

But what comes before that is a plan of merger and a plan of merger is contractual in nature. It -- it is -- it is the step up to that property exchange, just like any, any other agreement. And, your Honor, this particular plan of merger was accompanied by and contemplated a funding agreement. And so, so I think if you look at, if you look at that plan of merger as a whole, I, I think it is contractual in nature and, and,

therefore, unconscionability can come into play if you look at that, that transaction that contemplated the creation of two entities and you were to say the entity that got all the liabilities, no rational person who, who was contemplating that transaction would take all the, all these asbestos liabilities and not get any, not get sufficient assets. That deal is completely one-sided and, and not, not something someone would accept outside the context of, of this, this construct.

And in that regard I would also point to -- to -- to one, one provision of the Texas statute, which is Section 10.201 of, of the, the Business Act in Texas, and that, that section deals with what happens if you abandon a plan of merger and you don't go forward with the merger. And it says, it says:

> "After a merger ... is approved as provided by this code, and at any time before the merger, interest exchange, or conversion takes effect, the plan of merger, interest exchange, or conversion may be abandoned" -- and then here's, here's the key quote -- "subject to any contractual rights, by any of the domestic entities that are a party to the merger...."

And so, so I think, your Honor, that, that suggests an understanding that the plan of merger is contractual in nature and then once, one you effectuate the merger, that's, that's

the parties acting upon their promises in the plan of merger to, to actually transfer the property and, and the liabilities.

So I think, your Honor, those are the three stumbling blocks, the three legal stumbling blocks you mentioned in DBMP. I -- No. 1, I, I do think unconscionability can be raised as a declaratory judgment. No. 2, I think a third party can assert unconscionability, which is, which is a void, a voiding of the contract. It shows that the contract was void from the start when the legal interests are going to be affected by it, as it will be here. And No. 3, I think a plan of merger in this context is sufficiently contractual in nature to bring unconscionability into play.

And the final point is the debtors and debtor affiliates cite a case called, I think it's Chemours Co. v. DowDuPont, Inc. from Delaware and say, they say that there, when you have affiliates contracting with each other, there can't -- they -- they say that it holds there can't be unconscionability. That's not true. The case actually says that there can't be procedural unconscionability in that context because you don't expect parties with, you know, affiliate subsidiary relationships to be following the normal procedures to, to lead to a contract. But -- but the court -- the court was very clear that substantive unconscionability is still, is still at play.

So I think, your Honor, that's, that's our argument,

your Honor. I know -- I know that -- you know, I tried to be upfront that -- I don't think any of the facts are different here. I'm, I'm just trying to address your Honor's legal concerns from that case and, and preserve our argument that unconscionability should be allowed to proceed.

THE COURT: Understood.

MR. CORDANI: Thank you, your Honor.

THE COURT: All right.

Anyone else? Do we need a break or we got any rejoinder arguments?

You draw the short straw, Mr. Mascitti?

MR. MASCITTI: Apparently, your Honor.

THE COURT: Looking at your side, it looked like you got the nod, so.

MR. MASCITTI: So, your Honor, I'd like to address some of the comments that Mr. Maclay made. I'm not sure I'm going to get them in the right order.

First of all, Mr. Maclay said a number of times that we were asking the Court to make an inappropriate inference in favor of the defendants regarding the sufficiency of the QSF and, and because it's a 12(b)(6) motion, that somehow that was, that was inappropriate. I want to be clear. We're not asking the Court to make an inference that the QSF is sufficient. What we've said is that the complaint fails because it asks, the Committee's asking the Court to make an inference that the

assets are insufficient and that there is some need for litigation in the absence of any allegation in the complaint.

So -- so it's -- he's just missing the point, frankly. The Court can't make an inference that there's an insolvent corporation or debtor or that the assets as they exist are somehow insufficient without any allegation in the complaint to make that inference from. That's the point. We're not asking the Court to make an inference in our favor. It's the deficiency of the complaint that's at issue.

Another, another point I'd like to address. Mr. Maclay suggested that we don't want to negotiate, that somehow this was just part of our legal strategy to say that we're willing to negotiate. Mr. Turtz is here. I probably have to hold him back from taking the stand to testify that Trane's intent in this case is to fairly and efficiently resolve all of the asbestos claims. Trane is a good corporate citizen. It's not trying to avoid or reduce any of its liabilities to anyone who's been harmed by any of its products.

Mr. Maclay took issue with the QSF being funded yesterday as part of some grand legal strategy. The QSF was funded yesterday, your Honor, because that was the first day that the order approving the QSF had become final and had the Committee stipulated to that relief months ago, we could have done it much earlier.

Mr. Maclay said a few times that, that we're arguing

that substantive consolidation doesn't exist as a remedy. I'm, I'm not sure. I certainly didn't make that argument and I didn't hear it today from anyone on our side. What we did argue is that substantive consolidation and federal common law is not available specifically to grant the Court some type of power to veto state law or to use as a substitute for 303 to force a party into an involuntary bankruptcy case.

Mr. Maclay also said that the majority of the courts that have considered substantive consolidation and 105 and 303 have found those provisions to not be inconsistent, but those are cases, those are the traditional cases where there's a need, where there's an alleged deficiency in assets, where a debtor's insolvent when, and, and, and the bankruptcy court needs to bring in assets from another entity in order to make creditors whole. Those cases that Mr. Maclay refers to don't involve cases where the complaint has not alleged any harm, but seeks substantive consolidation to, essentially, force the Bankruptcy Code provisions on to a nondebtor or cases where a committee is comprised of entirely disputed tort claimants who wouldn't have Section 303 available to them and are trying to do an end run by using 105.

Your Honor, I think those are the main points I wanted to address.

Thank you.

THE COURT: Okay. Thank you.

Mr. Erens.

MR. ERENS: Thank you, your Honor. There's a number of things I think I could respond to, but I'll, I'll try to take the most important things since it's getting late in the day.

I heard a statement by Mr. Maclay that we're always will, that they are always willing to talk, but at the same time he said, "Well, yeah, but we're not interested in going to mediation. So we're not going to do that. And we're not really willing to talk today, but don't worry. We're always willing to talk." Well, to me, that's completely inconsistent. You know, we invited the ACC to discussions early in the case. Their response is, "Let's get rid of the preliminaries," which was --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- really, "Let's get through the PI," okay? So this is back in the end of 2020. Well, we got through the PI. It's been six months. They're still not willing to talk. I would suggest, your Honor, now is the time to talk. This case is in an inflexion point. That's a lot of what this hearing is about today, which direction we're going to go. But 18 months in the case, it's certainly time to talk.

So them saying they're willing to talk, but they don't want to do mediation, they don't want to talk today, we think

is inconsistent.

Secondly, we have to respond to the fact that they've said a couple of times and they've said it in pleadings that the debtors are really in need of an incentive to negotiate. The debtors need an incentive to get out of bankruptcy. The facts are completely to the contrary. We've negotiated a deal with a party who was willing to talk to us. As you heard from the FCR, we think this case could confirm by the end of the year. If we had had discussions early on, we may already have been out of bankruptcy.

So it's just simply untrue to say the debtors need an incentive to negotiate and get out of bankruptcy.

I would simply stand by the points we raised in our, the main points we raised in our presentation. The transaction itself can simply not be a basis for substantive consolidation. That's No. 1.

Two, there has to be a benefit. And again, at the end of the day all the ACC is saying is, "If we're going to be stayed, the rest of the creditors, the Trane creditors, have to be stayed." That's not a benefit, your Honor. Maybe that's some subjective sense by them of what's fair, but that's not a benefit for all the reasons we indicated. And think about it, your Honor. Imagine the next case where this happens. Corporate family, part of the corporate family files for bankruptcy, okay? Part of it doesn't. That happens all the

time. Without the traditional factors for substantive consolidation, commingling, uncertainty about who owes what, someone's going to come in and say, "No. Let's, let's substantively consolidate the rest of the corporate family." You know why? Not because it's justified, but because, "If we're going to be stayed, if we're going to be caught in this bankruptcy, we want the creditors of the other side of the corporate family to be stayed in part of this bankruptcy," even though it's not justified. That's simply not the law.

Or look at preference law. The Code speaks for itself. One of the *prima facie* standards for a preference is that there's some benefit, that there were -- I think this is (b)(5), 547(b)(5), that the creditor, that there's some benefit to the estate, that the creditor got paid more than it would if it got stuck in the bankruptcy. The -- the -- Congress could have said, "You know what? Anybody paid within 90 days of the bankruptcy, or for insiders within one year prior to the bankruptcy, bring it all back. You're going to be part of the bankruptcy. You're going to be part of the stay whether it's a benefit or not." That was not the decision of Congress. We think this is the same point here.

What I did hear, though, what was interesting to me was the ACC acknowledging this bankruptcy is going to remain. We've said repeatedly they want the case dismissed. They said not. They said they're not going to seek dismissal and they

recognize this case is going to exist. So we would say okay, let's get on with it. They want to bring a whole bunch of litigation that we think isn't going to be productive. We've indicated why that shouldn't be allowed or, at the very least, should be stayed.

But again, it's time to talk. It's time to see where we can go productively in this case if it's not going to be pursued to get rid of the case, which is what we heard today, which I think is a little bit different than we've heard in the past. I heard repeatedly both from Mr. Neier and Mr. Maclay they recognize this bankruptcy exists and it's going to continue and it's got to reach an ultimate resolution.

So again, we would indicate to your Honor that our preference and we think for the benefit of all parties we should get to negotiations.

They did raise unconscionability. As I said, we, we rested on our arguments and just reserve time for rebuttal. I think we've just got one or two minutes on that. I'm going to turn that over to Mr. Cody for the actual response.

THE COURT: All right.

Go ahead, sir.

By the way, during the lunchbreak I saw that Judge Chapman had managed to negotiate a settlement in Purdue. So maybe all things are possible in the world.

MR. CODY: Good afternoon, your Honor. Mark Cody,

Jones Day, here on behalf of the debtors. As, as Mr. Erens indicated, I think we adequately addressed these issues in our papers, but a couple of quick points.

We still believe that unconscionability is, is an affirmative, is just simply an affirmative defense to a contract enforcement and it's not an independent cause of action. We don't believe the ACC has standing here. Asserting the claim and, and asserting it pursuant to declaratory judgment, I don't believe, we don't believe that that cures that, that defect. They're not a party to the agreements that they question. Merger in and of itself is a corporate act. It's not a -- it -- it is not a contract.

And lastly, your Honor, I think, fundamentally, what, what was not addressed today is that they just simply haven't hit the, sufficiently, the high burden to satisfy and establish unconscionability. As they quote in their papers, you know:

> "In order for an agreement to be deemed unconscionable, the terms have to be so oppressive that no reasonable person would make them and no fair and honest person would accept them."

That's simply not the case here nor were any facts alleged in their, in their papers to, to support that notion.

So fundamentally, your Honor, I think that as was done in the DBMP matter, the unconscionability count should be dismissed.

Thank you.

THE COURT: Thank you.

Mr. Guy.

MR. GUY: Thank you, your Honor.

A couple of things. What I heard the ACC say is, "Look, you've just got to look at the complaint. You, the bankruptcy court, cannot consider anything else, even if it's in the record." I don't think that's right. I think Federal Rule of Evidence 201 let's you take judicial notice of public filings and the like. The Paddock case is a public filing. The information brief in Paddock is a public filing. That made the same allegations and concerns about the tort system that were made in other debtors' information briefs. It's a matter of public record that Owens-Illinois, OI, has a market cap today of 1.95 billion. That is not a beleaguered financial company. It's in the public record that the restructuring in Paddock followed a pre-petition corporate restructuring almost identical to what happened here. It wasn't under the Texas law. It was under Delaware law. It's the same thing.

So the Court would be well within its rights to say, "Well, we've got the same parties, the same players here." In one case they're not saying this is so horrible it needs to be substantively consolidated. In this case, they are. They, they simply cannot reconcile that.

Your Honor, I got a dig against me as being a part of

the defense bar. I'm Mr. Grier's lawyer. I think we've shared our *bona fides* on that many, many, many times.

But the point about the encapsulated product is there was a detailed evidentiary hearing over many weeks in this court -- Judge Hodges made rulings -- about how you get exposed to fibers from encapsulated products. You have to cut them and grade them. It's not rocket science. It's logical. It would be remiss of me to create a trust that allows someone to assert a claim because they're sick without a direct relationship to being sick on the product that the debtors made and that's what we've done and that's what we will do here and that's what we will continue to do and I think it's fully appropriate.

Your Honor, there's been a lot of criticism about Garlock and that's why we have to respond to it. If it hadn't been criticized, we wouldn't be required to say, look, these issues that have been raised have been addressed and the fact there have been changes to the CIP, it's all a matter of public record, your Honor, plus the fact that the values have been doubled is a matter of public record.

Your Honor, I, I'm not sure. I know what I'd like the Court to do with these motions. I'm not sure what the Court is going to do, but I would urge that we have some sort of common sense response in terms of how can we move the case forward. I don't see estimation as like some radical litigation move that is prejudicing the ACC. It's not. It's trying to figure out

how big the liability pool is. We made a judgment about that. We reached a settlement with the debtors as to a number. People make fun of it, but it's like, it's not 545 on down. It's 545 potentially on up. If the ACC is convinced, is able to convince the Court the number is bigger, they will get a big handshake from me and a Christmas card, but we think it's a fair number. We think it's a reasonable number and no one in this court can say that it isn't when you look at Garlock, when you look at Paddock, when you look at the products. No one can say that.

So I would urge whatever the Court feels it can do within its power and authority, if the Court decides that these case complaints have to go forward, that we figure out a way to toll them, stay them, preserve their rights so they don't lose them, but we move forward and focus on the estimation.

Thank you, your Honor.

THE COURT: Thank you.

That got it?

MR. MACLAY: Your Honor, a couple of responses.

THE COURT: Please.

MR. MACLAY: And these will be short, your Honor. So I will stay at my, in my chair in North Carolinian fashion.

Your Honor, we heard from Mr. Mascitti just a few minutes ago that there's nowhere in the complaint that suggests that, that there isn't enough money to pay claimants. And I

would just like to direct your Honor to Paragraph 35, last sentence, which says, "According to the debtors' own metrics, the debtors' assets (without the funding agreements) are already insufficient as they are less than their asbestos liabilities." And, your Honor, the following paragraphs talk about the deficiencies with the funding agreements.

So it is quite clear, your Honor, in the complaint -- the assertion is in there -- that there's not enough money.

And I just heard Mr. Guy say, "No one can say that it's not enough." Oh, yes, I can, your Honor, and I am, but this is a 12(b)(6) context. You don't have any evidence in front of you about the amount of money given in the OI case, whether it's sufficient or not, whether it's evidence of financial distress or not. I actually happen to know all about that. I have all the expert reports.

So it's so frustrating to hear what I know to be clear misstatements of fact, but it doesn't even matter. This is a 12(b)(6) and there's nothing in the record on this, on a 12(b)(6).

Secondly, and the same thing about Garlock. Garlock had a similar product. We all know about Garlock on both of these tables. We're quite familiar with Garlock. We understand the financial metrics behind Garlock and what led to the number, which had no relationship to the estimation, but which, of course, had a relationship to certain other things

that I don't really feel free to talk about 'cause they're not public knowledge.

But the assertion by Mr. Guy that you can look at two numbers in the abstract and the ether from two other different cases and say, "Yeah, this number's probably right," that is legally, legally unsupportable. And this is a 12(b)(6) motion, again. They don't get all these factual inferences and that's all they're doing, is seeking factual inferences. It's blatantly, facially illegitimate.

And, your Honor, Purdue, it's an interesting case that you mentioned. I'm in Purdue, too, and the fact of the matter is in Purdue, what Purdue did at the very beginning of that case was come into court and say, "'Fess, we 'fess up. We're giving all of our assets to the claimants," and obviously, when you, when you bring all of your assets into court, it makes it easier. And then, of course, when you get assets from other people who are individuals, etc., that also all helps. A lot of things have happened to make Purdue successful and it would be great if things like that would happen here. I look forward to, hopefully, seeing some positive developments in those regards, your Honor.

But with that, the, the complaint is legally sufficient. A 12(b)(6) motion, both of them that have been raised should be rejected.

I thank you, your Honor.

THE COURT: Reckon Judge Chapman's available right now? She might be tired from her exertions.

All right. We got it?

(No response)

THE COURT: Again, I think this is one y'all've given me some new arguments. So I want to think about some of the, the new things that have been stated before I give a ruling on this.

We had the last motion that dealt with the, the motions for a 2004 and the, the creditor, creditor addresses, but that's all dependent on the substantive consolidation motion. Do y'all want to hear that now or would you rather wait, find out whether the complaint survives?

MR. MASCITTI: Your Honor, I think it makes most sense to wait until we receive a ruling on the motion to dismiss. I, I don't think there's any need to argue something that's not ripe for argument.

THE COURT: What do you think?

MR. CORDANI: Your Honor, I can present that to you in about ten minutes. I think it's -- we've had a long day and I know the 2004 discovery is the main event, but I can be very quick about it.

MR. ERENS: Your Honor, for the debtors' perspective, we agree with Trane. I mean, we have longer than ten minutes. I think they do as well. Maybe what your Honor says influences

the motion. I know we're all here, but --

THE COURT: Well, I just hate for you to have to prepare twice for the same argument, is the, the question.

MR. ERENS: Yeah. I mean, I mean we'll be back here at the end of the month. So --

THE COURT: Uh-huh (indicating an affirmative response).

MR. ERENS: -- it won't be long. So we would prefer to hear what your Honor has to say, but it's obviously up to you.

MR. MACLAY: Just to make a factual note, your Honor. As your Honor is aware, in CertainTeed -- and it's on the record in CertainTeed in several places -- there was an agreement with that debtor that 14 days after the ruling --

THE COURT: Uh-huh (indicating an affirmative response).

MR. MACLAY: -- we would get the list of names. The concern that we would have with putting this off is we're then going to hear, "Oh, we can't possibly do this in 14 days after the ruling now." So this is just another potential example of delay.

So at least it would be nice to get a representation on the record that if we're going to put this argument off, if successful on this argument, on the 2004 argument, they'll be ready to go with a list. They're going to start getting it

ready now so it would be in a position to be presented to us expeditiously and not be a delaying situation.

MR. MASCITTI: No, your Honor. I mean, the idea that -- your Honor has suggested that there are a lot of issues that we've given the Court today to consider. And I, I refer back to a, a comment that your Honor made earlier, something about bringing your wife in because sometimes your Honor may get something wrong. There are a lot of issues here for each party, each side to consider and I think the idea that we would receive a decision from the Court and just immediately rush out and send notice to 90,000 creditors is just not consistent with how we view the process moving forward. I think there needs to be some thought given to that, certainly more so than just agreeing to give, give a list of creditors within "X" number of days after to send out some notice.

THE COURT: Well, the irony here, Gentlemen and Ladies, is that while I've got some things to think about on the first motion, I think I know how the last motion comes out. So I'm not sure that it matters one way or the other. What I'd like to do is give you a decision on, on the other matters we've heard today at that second hearing in March.

So I'll just keep the powder dry and we'll wait until then with the understanding that I'll be happy to listen to you, but I think I know what I want to do, already. So again, I told you before that I'd went down the rabbit hole and got

fascinated with these substantive consolidation rulings and read as many of them as I could find and one of the things I was looking at in that was, well, what do you do about the notice to these third parties? So what there is out there, I've already taken a look at, for the most part.

Any other matters we need to discuss today?

So for the clerk's benefit, we're carrying the last motion over to the, what is it, the 31st? 30?

THE COURTROOM DEPUTY: Yep, 31st.

THE COURT: 31st. Okay, very good.

Any other matters we need to talk about?

MR. ERENS: Not from the debtors' perspective, your Honor.

THE COURT: Well, let me just circle around to that last point. We started hearing some talk about, you know, maybe it is time to negotiate and I understand. I, we've talked about this before, but it does strike me, having observed from a distance a little bit of what's going on in Bestwall, that we are at a bit of a turning point in these cases and we're about to start getting into some heavy-duty discovery and litigation and the like, potentially. It might be harder to settle when all that starts going on.

Has -- if the parties want to think about a, a negotiating period, I'm happy to, to endorse that. At the end of the day, I, I think for all the hyperbole, which doesn't

really impress me too much, and the *ad hominems*, which are, impress me even less, at the end of the day what you've got are some public policy decisions as well as, you know, some contentions about is doing this, which is potentially in my best interest, also improper vis-à-vis the, the claimants and vice versa and reasonable people can disagree on that.

And I was only being half facetious when I said I wish Gordon had gone with you, Mr. Maclay, to Congress. We could have cut some of the time out of all this.

But, but the reality is at the end of the day there are some public policy decisions that have to be made as to who and when can you access chapter 11 and, in particular, the 524 relief. So I doubt it's going to be me that makes the final decision about any of that or my colleague in New Jersey or Judge Beyer.

So if y'all think -- I mentioned this before in one of the cases -- that negotiating now would help you, you can keep all your powder dry. You can continue to fight over, over this is it proper to do the twostep and file chapter 11 while you negotiate about the dollars. But it seems to me that there's going to be a test case that goes up somewhere. Judge Conrad's order, I think, is being appealed in Bestwall. Someone's going to surely file the same in LTL and we've got DBMP in, in front of you here. If there is really a likelihood that a number could be arrived at that would pay all the claimants in this

case, these cases, it might be well to let those others be the test case and work out the number and get everyone paid in this one. That way, the, the policy concerns can be addressed and maybe some of these people and their families could get paid in, in short order.

Just a thought. Not my job to make you settle, but I -- I -- like you, I'm getting a little frustrated with us spinning around in circles and never coming out with any final orders that can get you to a point where that, that underlying issue can be addressed by a higher court, so. And I hate to see you spend as much client money as you're having to do to, to go through the exercise.

So just a thought. You might want to talk amongst yourselves and see if, with everyone reserving rights, that there might be an appropriate time to, to chat and, if so, we can make accommodations here. But that's just a, a third party's observation that I understand how it gets when you're, you're in the middle of heated litigation and how entrenched people can get. But at the end of the day, there's some folks who need some money here, the ones who are the victims, and we need to do what we can, whether it's here or in the tort system, or wherever, to get them compensated as quickly as possible.

All right. Nothing else, we'll recess.

Thank you, all.

MR. MACLAY: Thank you, your Honor.

MR. RAYBURN: Thank you, your Honor.

MR. MASCITTI: Thank you.

(Proceedings concluded at 2:57 p.m.)

CERTIFICATE

I, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Janice Russell* March 16, 2022

Janice Russell, Transcriber Date