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 31, 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

Transcript prepared by: JANICE RUSSELL TRANSCRIPTS
1418 Red Fox Circle
Severance, CO 80550
(757) 422-9089
trussell31@tdsmail.com

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APPEARANCES:

For the Debtors/Defendants, Aldrich Pump LLC and Murray Boiler LLC:	Rayburn Cooper & Durham, P.A. BY: JOHN R. MILLER, JR., ESQ. C. RICHARD RAYBURN, JR., ESQ. MATTHEW TOMSIC, ESQ. 227 West Trade St., Suite 1200 Charlotte, NC 28202
	Jones Day BY: BRAD B. ERENS, ESQ. CAITLIN K. CAHOW, ESQ. 77 West Wacker, Suite 3500 Chicago, IL 60601
	Evert Weathersby Houff BY: C. MICHAEL EVERT, JR., ESQ. 3455 Peachtree Road NE, Ste. 1550 Atlanta, GA 30326
For the ACC:	Caplin & Drysdale BY: KEVIN MACLAY, ESQ. KEVIN M. DAVIS, ESQ. One Thomas Circle, NW, Suite 1100 Washington, DC 20005
	Winston & Strawn LLP BY: DAVID NEIER, LLP CARRIE V. HARDMAN, ESQ. 200 Park Avenue New York, NY 10166-4193
For Certain Underwriters at at Lloyd's:	Duane Morris LLP BY: RUSSELL W. ROTEN, ESQ. 865 S. Figueroa St., Suite 3100 Los Angeles, CA 90017-5440
For the FCR:	Orrick Herrington BY: JONATHAN P. GUY, ESQ. 1152 15th Street, NW Washington, D.C. 20005-1706
For Defendants, Trane Technologies Company LLC and Trane U.S. Inc.:	McCarter & English, LLP BY: GREGORY J. MASCITTI, ESQ. 825 Eighth Avenue, 31st Floor New York, NY 10019

ALSO PRESENT	JOSEPH GRIER, FCR 521 E. Morehead St, Suite 440 Charlotte, NC 28202
	ALLAN TANANBAUM Chief Legal Counsel for Debtors
	EVAN TURTZ, ESQ. General Counsel for Trane

APPEARANCES (via telephone):

For the FCR:	Orrick Herrington BY: DEBRA FELDER, ESQ. 1152 15th Street, NW Washington, D.C. 20005-1706
	Anderson Kill P.C. BY: ROBERT M. HORKOVICH, ESQ. 1251 Avenue of the Americas New York, NY 10020

P R O C E E D I N G S

(Call to Order of the Court)

THE COURT: Have a seat, everyone. Good morning.

(Counsel greet the Court)

THE COURT: I didn't envy all of you walking down here with the rain this morning. So hope no one got too wet.

Okay. We're in the Aldrich Pump case and also the adversary proceeding, 21-3029.

Let me get appearances, if you're -- I'm going to presume you're here for both or all unless you tell me otherwise, but let's go ahead and get our appearances and see where we are.

Where would you like to begin?

Mr. Rayburn.

MR. RAYBURN: Rick Rayburn, RCD. With me is Jack Miller and Matt Tomsic, I think -- yeah --

THE COURT: Okay.

MR. RAYBURN: -- for, for the debtors.

THE COURT: Okay.

Anyone else here?

Mr. Erens.

MR. ERENS: Your Honor, Brad Erens, E-R-E-N-S, of Jones Day on behalf of the debtors. I've got Caitlin Cahow here also from Jones Day on behalf of the debtors, Michael Evert from Evert Weathersby on behalf of the

debtors, and Allan Tananbaum, the debtors' Chief Legal Officer.

THE COURT: Okay, very good.

On this side?

MR. MASCITTI: Good morning, your Honor. Greg Mascitti, McCarter & English, on behalf of Trane Technologies Company LLC and Trane U.S. Inc. and I'm joined in the courtroom today by Evan Turtz, Trane's General Counsel.

THE COURT: All right, very good.

Anyone else want to announce on this side?

Let's go back over this way.

Mr. Neier?

MR. NEIER: Good morning, your Honor. David Neier, Carrie Hardman, Kevin Maclay, and various other people on behalf of the ACC.

THE COURT: Okay. Thank you.

Anyone else?

Mr. Guy.

MR. GUY: Good morning, your Honor. Jonathan Guy for the FCR. I'm here with the FCR, Mr. Grier. And I believe Mr. Horkovich is on the phone --

THE COURT: All right.

MR. GUY: -- our insurance counsel, and my colleague, Debra Felder.

Thank you.

THE COURT: Okay, very good.

MR. NEIER: I should have added Mr. Davis is also sitting here at counsel table for the ACC.

THE COURT: Okay. Thank you.

Mr. Davis.

All right. Anyone else in the courtroom needing to announce not previously? Anyone?

(No response)

THE COURT: Okay. Who do we have on the telephone, then?

Star 6 if you need to say something.

Anyone?

(No response)

THE COURT: Okay. Well, maybe we don't.

We've got a Notice of Proposed Agenda that's been tendered.

Are there any preliminaries before we get into what's on the agenda this morning or do we need to have a case update?

Mr. Erens.

MR. ERENS: Your Honor, again Brad Erens.

No preliminaries or case update. Our intent was just to go down the order of the agenda. Item No. 1, again, has been continued. That's the Clark matter.

So we'd go right into the, Item No. 2, which is the tolling, stay and tolling motion.

THE COURT: Everyone content with that? Any other

preliminaries? Anyone feel the need to say anything?

MR. NEIER: Your Honor, we may address the agenda in our remarks.

THE COURT: Okay , excellent.

Any other preliminary thoughts? Anyone on the telephone?

Mr. Roten, did you need to announce?

MR. ROTEN: Good morning, your Honor. It was a little tricky coming down the mountain this morning, but I finally got here. I don't reckon I'll say anything, but I'll be here.

THE COURT: All right. And again, you're representing the Certain Insurers?

MR. ROTEN: Certain Insurers.

THE COURT: Okay.

MR. ROTEN: Thank you.

THE COURT: All right.

We wanted to talk about the, the proposed agenda and which order we take it in?

Mr. Neier, do you want to say something?

MR. ERENS: Again, your Honor, from the debtors' perspective, we were just planning on going down the order.

THE COURT: All right. Okay.

How's that work?

MR. NEIER: Your Honor, it's -- it -- you know, we have problems with the agenda, but it's, it's fine to proceed

in that way and we'll just address it when we get there.

THE COURT: Okay.

Well, I may well make my decisions after I hear all these motions, but we'll just see where we go.

There's no objection to the first matter, the Clark matter, being carried over to April 28th?

(No response)

THE COURT: So ordered.

Okay. Let's pick up with No. 2, then, which on the agenda is 2, but we both have the, what it looks like, an objection to the shorten notice as well as the underlying motion for tolling and staying. I entered the order, frankly, under the assumption that that, that was agreed to. But as all our *ex parte* orders are entered subject to reconsideration, if there's an objection to hearing that today, I'll, I would start with the, the objection to the shorten notice.

Mr. Neier.

MR. NEIER: Your Honor, we were going to, we were going to address the motion to shorten in our comments as well.

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

MR. NEIER: I don't know if you need to take it out of turn going first. We're here.

THE COURT: Okay.

MR. NEIER: It's been fully briefed, but, you know, we

do think that there are no exigent circumstances that, that justified us being here today. We think that the reasons were strategic, not exigent.

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

MR. NEIER: And we thought we'd address that and the way the agenda was crafted to put this first ahead of your Honor's rulings, which were continued from the last hearing --

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

MR. NEIER: -- till today.

But as I said, we would address that at the time. I may have already addressed it.

THE COURT: Okay.

Everyone good with that arrangement?

(No response)

THE COURT: Any other controversies as to the batting order of what we're going to hear?

(No response)

THE COURT: Okay. Let's start right there, the debtor and affiliates' motion effectively for a tolling agreement and staying litigation.

Mr. Rayburn.

MR. RAYBURN: Good morning, your Honor. Rick Rayburn for the debtors here.

THE COURT: Okay.

MR. RAYBURN: As you recall, on March the 3rd we were arguing the clarification motion --

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

MR. RAYBURN: -- and which our point was that you should only grant derivative standing now in the current circumstances in the case for the intentional fraudulent conveyance claims because they were the only claims that you could find colorable.

In response to that argument and which we characterized other claims as speculative you at Pages 53 and 54 of the transcript asked about the other potential claims and asked, "Are you proposing that we should toll?" The response at that time was "we will go ask" and we have asked and we're here today having consulted with counsel to the entities who would be asked to toll and the individuals who would be asked to toll and have worked out a tolling agreement, filed a motion for authority to enter into that tolling agreement, and to answer your Honor's question in the affirmative as to all -- and I want to be clear -- of the claims that would be the subject of any ruling you make about the scope of your derivative standing motion, etc.

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

MR. RAYBURN: We would toll all the claims that are ripe now. And the reason for that is that, there are a lot of reasons for that, but the principal legal reason for that is that tolling is effective and the grant of derivative standing may not be effective. So you may, in fact, be extinguishing the actions if you don't put the tolling agreements in place.

THE COURT: Okay.

MR. RAYBURN: On the stay, the stay motion and the motion to shorten, etc., to stay is really an answer, really a motion to ask you to control your own docket. It's a motion to ask you to either delay your ruling, the rulings that you would otherwise be announcing this morning, or that you would stay any litigation that survives those rulings. And the reasons are all in the briefs, but essentially, judicial economy and the practical reason, your Honor, is simple.

Ever since this case started all the debtors have done is to pursue the statutorily mandated course of action of a chapter 11 reorganization. We have, we are now at the point where we have a bar date order. We're now at the point where we can enter into estimation -- and estimation is the next stage --- and we believe that as we go through the estimation process it will become clear that the plan proponents are proposing to pay the claimants in full. Should we be proven wrong about that after the estimation process, the stay would, the tolling agreements can expire, the lift the stay -- the --

any litigation that survives could go forward at that time, but we would be certain at that time that whatever litigation is going forward will have been preserved to that point in time. In other words, with tolling in place whatever litigation is viable today would be just as viable after the estimation ruling comes down and we can all hypothesize various numbers that might result from the estimation ruling that might be strictly instructive with respect to the colorability of any claims you might grant standing for or any desirability of granting substantive consolidation.

Put simply, these local debtors in Davidson, North Carolina want to fulfill their obligations pursuant to the path created by Congress, the statutory path, a confirmed plan of reorganization, and further, a plan dictated by 524(g).

What you're being asked to do in your rulings today by the other side is to create two additional paths in the case. You're being asked to grant derivative standing, a concept that does not arise from any congressional act or any statute. It is a judicially created doctrine that may or may not be viable in this Circuit.

Secondly, you're being, you're being asked to continue litigation to consolidate a debtor and a nondebtor. Once again, no language in the Code about that. All we're asking you to do is to keep the path that's dictated by Congress alive and let us go forward through the estimation proceeding, at

least, toward the confirmation of a plan of reorganization. We're confident that the statutory path is the way to resolve the case. We're also confident that perpetual, speculative litigation on other paths you might authorize whose purpose is to prevent the resolution of these cases are the, is the wrong way to go forward.

Thank you, your Honor.

THE COURT: Thank you.

Mr. Mascitti.

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

Your Honor, we are at a crossroads in this case and the question has come up as to where are we going and how are we going to get there. As Mr. Rayburn has just indicated, the debtors, the non-debtor affiliates, and the FCR representing 80 percent of the asbestos claimants would like to go down the path of confirming a 524(g) plan or some alternative plan that would achieve the same result. We believe, your Honor, that we'll get there through the estimation process and either through the negotiation of a plan or the prosecution of an alternative plan.

Where does the Committee want to go? Well, in the first instance I think the Committee would like to go back to the tort system, but the remedy to go back to the tort system is a motion to dismiss the case and that's not before your

Honor and it does not appear that that is a path that the Committee is currently going down with its, at least, stated intentions of the relief that it's seeking. The fraudulent transfer claims and substantive consolidation don't lead this case back to the tort system, at least explicitly.

The Committee -- the alternative to going back to the tort system appears to be this litigation path that the Committee is seeking. The problem with the litigation path is that the Committee hasn't identified any benefit of going down that path today. And we've talked about this. We've argued this, already, but there currently is no gap to be funded. There hasn't been any determination of the liability and the amount of the liability for the asbestos claims. There hasn't been any determination that that liability exceeds the value of the assets that the debtor has and its financial resources nor has the situation arisen where the non-debtor affiliates have been requested to fund any particular gap because no gap exists that we know of.

So, your Honor, the, the typical reason why a committee would pursue a fraudulent transfer claim or a substantive consolidation claim just doesn't exist yet in this case, not today, not with the facts or the allegations that are presently before the Court. Those claims are typically brought, as your Honor knows, to fill a gap where there's liabilities that exceed assets and these remedies are sought to

remedy that gap. That's not where we are.

Well, your Honor, these paths are not necessarily alternative paths. In the context of the litigation path, certainly the amount of the asbestos liabilities is going to be an issue. The solvency or insolvency of the debtors will be an issue. That's instructive as to fraudulent intent. That's instructive as to substantive consolidation and the merits of consolidating two entities.

So, your Honor, you know, the, the estimation of the liabilities is a stop along the way to either the plan or to the litigation and it would make logical sense for us to take that first step before we go any farther. Estimation is the common ground that moves the plan process forward and the Committee's desired path of litigation, but it does it in a logical, common sense manner. It allows the Court to be informed of any potential merits of litigation before we spend the time and exert the resources necessary for that litigation to proceed. It instructs the Court as to any potential benefit to the estate to be derived from the prosecution of that litigation. And third, your Honor, as far as I can tell, the Committee has not identified any prejudice from going down this path.

The Committee in its objection argues against the stay because it says that "this is extraordinary relief without any legitimate justification which would severely prejudice the

Committee and its constituents and which would stymie progress in these cases." Well, I want to, I want to address each one of those.

As to the legitimacy of a stay at this point, I think that's clear, your Honor. There's been no evidence, there's been no allegation that there's a gap between the assets and liabilities in this case. That's the reason, that's the justification for the stay. Because we can answer that question first and if there is a gap that needs to be funded, these claims will be preserved and they're available for the Committee to prosecute if necessary.

As to the prejudice to the Committee and its constituents, the Committee hasn't identified any prejudice, as far as I can tell. I've read the objection multiple times. I can't, I can't figure out where the Committee is identifying prejudice. Paragraph 16 of the objection, the Committee states that the stay motion would "disarm the Committee." No one's seeking to disarm the Committee. We're -- we're -- all this stay does is decock the gun. The bullets, all of the bullets are still in the chamber if and when needed.

Nor does this proposed stay stymie progress in the case. To the contrary, your Honor. A stay would allow -- a stay of litigation to allow estimation to occur first allows the common issues that relate to all of these claims as well as the plan to be resolved before, before proceeding. It makes

sense. It's logical. It's common sense, your Honor.

Therefore, we request that the Court grant the relief requested in the motion.

Thank you.

THE COURT: All right.

Let's hear from this side. Mr. Guy.

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

Your Honor, in Garlock the FCR moved for a fraudulent transfer complaint, the Court will remember, and that was a legitimate complaint and a serious one and we asked for that relief and it was because we didn't know at that time the solvency of the debtor and we were looking to bring more money into the estate and we joined the ACC in doing that. And in that matter the, the Court said, "Well, we'll put that on hold till we have estimation." And I can cite to the Court that that didn't disarm us, didn't prevent us from advocating for our clients, didn't prevent us from getting the maximum recovery we could and, at the end of the day, we confirmed a plan with an amount that was a lot more than the debtors wanted to pay, probably less than what we wanted, but it was a fair result and it was accepted by everybody and it followed from the estimation trial.

Your Honor, I was thinking about, this morning, it was like, well, what is really happening here and I think we have

conflict of two principles. The first is based in an English proverb from the 1670s, "What's sauce for the goose is sauce for the gander." The other is one that's grounded in centuries of jurisprudence, bankruptcy insolvency jurisprudence, the Bankruptcy Code, rulings from the Supreme Court, below, fair and equal treatment for all creditors. This debtor has to pay all creditors, all asbestos creditors, fairly and equally. That's why we're here. And promptly, I would say promptly.

So this case was filed in 2020, your Honor, the middle of 2020. We're now in 2022. In that time hundreds, if not thousands, of mesothelioma claimants have died, including, I suspect, many members of the Committee. That's, that's a really sad statistic and it's one that we take very seriously. Probably members of Mr. Grier's constituency have died, too. I'm sure each one of those individuals would have like to have been paid, compensated while they were alive so they could say to their families, "Here, this is what I got. This is, this can help in the process." Help with the medical bills, whatever it may be. But we're here two years later, 2022.

I submit to the Court, your Honor, that the ACC has had their "sauce" because what they said to the Court was, "Don't do anything. Don't progress this case until we have a ruling on the PI. We think we shouldn't be here. This bankruptcy shouldn't be here. It's wrong," and they made their argument and they made it on the basis of a lot of litigation,

a lot of discovery, a lot of information, a lot of hours, and it took up a lot of everybody's time, including the Court's time.

They also said, "Well, lift the stay." That took up a lot of time, a lot of effort, a lot of hours, a lot of money. And the Court's response to all of that was the appropriate one, which was, "Well, I'll wait to see what you have to say on that and then I'll rule and then we'll see where we go." And in both Aldrich and DBMP -- and I'm, I'm not going to quote the Court, back to the Court, of course, but paraphrasing, "We're not going to let the process where you can have an indirect dismissal if you can't get a direct dismissal. If you can't dismiss the cases, we're in bankruptcy and we're going to move forward." And we're all moving forward here, or should be moving forward here to confirmation.

I disagree a little bit with Mr. Mascitti. I believe the fraudulent transfer and the subcon complaints are effectively constructive dismissal. That's where they would like to take the case. Because it's not like Garlock where we're saying, "Well, we want to bring more money in." There were no funding agreements in Garlock at the beginning of the case. There was no commitment from the parent to put more money into the estate. We had the debtor's estate. That was that. So the creditor constituencies were saying, "Well, we don't know whether that's enough and we want to make sure that

we get the maximum recovery for them." So it was appropriate. But here, what we're aiming for -- and the Court has recognized -- is they would like dismissal. They've been totally candid about it. No one's hiding the ball here.

But we're two years later. We don't, we're not moving forward. It's not helping the creditors. It's not helping our constituency and it's not helping getting us to confirmation.

Your Honor, the other reason I think that the Court should grant the stay motion is a very practical one, which is the Court cannot rule on the fraudulent transfer complaint or the subcon until we've had estimation because it's, one is dependent on the other. It's a predicate.

And the last reason I think it would be helpful, your Honor, is to help the Court. The Court has a lot of work, a lot of cases, incredibly busy, limited time. If we were on a parallel track with the estimation trial and the fraudulent transfer complaint and the subcon complaint, there are going to be dozens and dozens of papers being filed, hearings, arguments going on, all of which could, could be rendered moot by the results of the estimation trial. And I, I don't know why Judge Hodges did what he did, but I think we can glean it was completely practical. Let's find out what the liabilities are and he did that not in the context we have here. We have another gloss on that, which is the nondebtors have said, "We will fund whatever the amount is." And the deal that we have

reached with the debtors, it's not like, well, whatever the number is less than 545, that's going to be it. No. We actually think it's a good deal because it doesn't go down. It can only go up.

So, your Honor, we respectfully submit that the Court grant the motion for the reasons stated.

Thank you.

THE COURT: Okay, very good.

Any other proponent wishing to weigh in?

(No response)

THE COURT: Ready to hear the objections?

Mr. Neier.

MR. NEIER: Good morning, your Honor. David Neier on behalf of the ACC.

Your Honor, because this touches virtually everything that the ACC is doing I'm going to have some remarks, but Mr. Maclay is also going to have some remarks and maybe Mr. Davis will also have some remarks, depending on what the Court rules later on.

MR. MACLAY: But not on this motion,

MR. NEIER: Not on this motion.

THE COURT: Okay.

MR. NEIER: And because of sort of -- my, my handwritten notes now out -- out -- you know, are the majority of what I was going to say instead of my outline. So we're

going to skip around a little bit to, to address all the arguments.

THE COURT: Understood.

MR. NEIER: So from my perspective this is like the movie, Groundhog Day. We're just stuck in an endless cycle that doesn't seem to be going anywhere. If I had to characterize this, we're just repeating things over and over again and expecting a different result which a smart man from Mr. Mascitti's home state of New Jersey said was the definition of insanity.

But in any event, we, I think it's important to review how we got to where we are today, as painful of an exercise --

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

MR. NEIER: -- that is at this point. We had the fraudulent transfer, we had the standing motion for fraudulent transfer. That was fully briefed. It was fully argued. We had a hearing on it and the Court granted the standing motion. It's been reargued today by Mr. Rayburn. We had the clarification motion filed after the standing motion was granted to limit standing to just intentional fraudulent transfer. That was fully briefed. That was fully argued to the case, to the Court. We have the substantive consolidation proceeding. There was a motion to dismiss that proceeding. That was fully briefed. That was fully argued. We had the

2004 discovery motion with respect to the creditor list. That was fully briefed. That wasn't argued before the Court. The Court said, "I know what I'm going to do," but it was, there was a hearing on it to that extent.

And now we're here today to freeze everything. We're here today because the current motion before the Court asks not only to stay the litigation by the ACC, it also asks the Court to stay the Court's rulings on the very motions of the debtors. It's the debtors that moved for clarification. It's the debtors that moved to dismiss and the reason that they want to stay the Court's rulings and the, and the reason the agenda is set up the way it is to have this motion argued before the Court's rulings is so that they can essentially freeze the Court and, therefore, there can be no appeal of those decisions. That's their reason. That's in their briefs. That's their only reason, to prevent an appeal.

And their main argument is one that's already been made to the Court several times, which is they want to go down their path and they want to go down their path and stay our path. They want to go down the estimation litigation path and they make the remarkable -- I'm going to call them the "Trane Gang." The Trane Gang makes the remarkable statement in their pleadings that they simply "reject the idea." There's a quote, "reject the idea that the Court must allow each side to pursue a litigation path." I'm quoting from Paragraph 3 of the reply

of the, on the joint motion by the debtors and the non-debtors affiliates.

But, your Honor, we've already fully briefed, fully argued, and the Court has heard all of this and the Court has rejected this. It's rejected this more than once and the reasons that the, the reasons for the stay motion or the ones that the Court has already heard and rejected include the fact that estimation is the only way to confirm a plan. Now Mr. Mascitti's talking about some alternative plan today, but there's only one impaired consenting class in this case and it is the creditors and it, and the impaired consenting class is by their design. They could have had other creditors in this created debtor, but they designed it so that there's only one impaired consenting class.

So there's only one way to confirm a plan in this case. And they call litigation, the, the litigation by the ACC a meaningless exercise. Well, a meaningless exercise is pursuing estimation when all that results in is a plan that will be rejected by the only impaired consenting class.

Now today, Mr. Mascitti says that there's some alternative plan they could pursue. I don't know what that is. I don't know how they get there with only one impaired consenting class. If they had a non-524(g) plan with some kind of plan injunction and plan release, they'll have just as much problems because there's only one impaired consenting class and

third-party releases, you know, seem to be a controversial subject these days, especially in this Circuit with the Ascena Retail decision in the, in Virginia. So I'm not sure that's an easy path, either.

But assuming that they're just sticking on the path of a 524(g) plan, estimation will have the same result as Garlock had, which is until there's a resolution, there's no 524(g) plan 'cause there's only one impaired consenting class that gets to vote on that plan.

Now they also complain about costs. They've made this argument, costs, costs, costs. This is their case. They created this debtor. They violated a Bankruptcy Rule, you know. The Bankruptcy Code begins with 101, but there are unwritten Rules that are Rules 1 through 100 and one of them is thou shalt not create a debtor to, to take advantage of the happenstance of bankruptcy. That's not something you should be able to do, okay? They did it. Well, they have to pay the freight of that cost -- of that -- of that decision. This is their plan. They say they're a solvent debtor. They have to pay the freight.

And they came here with this idea because the cost in this forum is less than the cost of other forums. So not only did they create a debtor, not only is this their design, but they're actually saving money every day that we're in this Court compared to other forums. That's why they filed the

case. They can hardly claim to be an unfortunate debtor that falls into bankruptcy or one that is unable to pay the freight, which this Court hears all the time. This is not that circumstance and they have never said otherwise.

Now if we stay everything and proceed with estimation, they say we can resolve these cases, but, of course, they still need the approval of the only impaired consenting class to do that. And estimation, they call our litigation meaningless, but their litigation is just as meaningless if there has to be a resolution on an impaired consenting class. But there's also what this Court has already pointed out several times or at least implied by its decisions, which is if there's only fear on one side, there's no, there's no, there's no possible resolution. There has to be fear on both sides, okay? That's the only way this case is going to get resolved. If we, if we stay all of the ACC litigation and just go down the estimation litigation path, they'll have no incentive to do anything and no incentive to settle. The only way we're going to have something -- and we're never going to surrender. That should be clear from all the cases this Court and other courts in this District have heard.

So there's only one way to get through this, which is we whack each other up side the head with a two-by-four until one of us decides, "Hey, we've had enough of this exercise."

Now their legal, their legal basis for the stay is

completely nonexistent. Their own cases say that a stay should be granted only in rare circumstances and only in cases where there's clear and convincing evidence outweighing any, any harm to the party that is being stayed. That's what their cases say. Mr. Mascitti shifts the burden and says, well, we have to prove there's no prejudice. No, they have to prove that there's no prejudice and they cannot do so. The debtors are asking for extraordinary relief. They've presented no evidence of that. There's no declarations. There's no testimony. There's only argument and it's the same arguments that the Court has already heard and rejected. This has, in effect, the feeling of somebody throwing things against a wall to see what sticks at this point.

And, you know, Mr., Mr. Erens mentioned the tolling agreements, or Mr. Rayburn -- I'm sorry -- mentioned tolling agreements and he said that there was this agreement on tolling agreements. They asked themselves. They reached an agreement among themselves. They didn't come to the ACC. We don't have an issue with a bargain for a tolling agreement. We don't accept this tolling agreement. We have lots of problems with it. We don't have a problem. We have standing. We don't have a problem negotiating a tolling agreement, but it'll be like all tolling agreements. It'll be our determination as to whether the litigation should proceed or whether it should be tolled. What they're asking for is not a tolling agreement.

They're asking for an injunction and they haven't met the injunction standard. They've asked for an injunction of current litigation, post-petition litigation, not pre=petition litigation and they haven't met that burden. They've just disguised it in something else. It's not a request for a tolling agreement. It's a request for a stealth injunction.

There's been a lot of talk about what remedy are we seeking. What remedy? Oh, there's no remedy that we're seeking. That's not really true. We've made it very clear. We're seeking avoidance of the transaction. We're not seeking constructive dismissal of this case. We want this Court to enforce the rights and remedies that creditors have in a bankruptcy court. That's not dismissal of this case. We want this Court to avoid the transaction, put Humpty Dumpty back together again, and that's the resolution that we're seeking in this Court. That is not dismissing this case. We did not move to dismiss this case.

Now I think when Mr. Guy says there's, that we're seeking constructive dismissal of the case, what he's really saying is, "If we win, if we're successful, then they're going to move to dismiss the case." Well, that's their determination, not our determination. We're simply asking the Court actually to enforce its orders. We don't actually want the Court to dismiss it.

You know, there's been no, there's been nothing said

today about what led us here, which is the, the corporate restructuring, as, as it's politely called, and what, what caused the corporate restructuring. Of course, there's a lot about that in your Honor's Findings of Fact and Conclusions of Law, but what we're here today to do is to stop and freeze any litigation that would question that transaction and that transaction has a lot of issues with it and we should be able to explore those issues and an injunction preventing us from doing so is unfair and prejudicial to the creditors in this case.

I think, I think I've tried to capture all the notes that I hurriedly took, but I can't read my own handwriting. So I may have some additional thoughts later on, but I'm going to cede the podium or cede the desk to Mr., Mr. Maclay for his thoughts on this.

THE COURT: Okay.

Mr. Maclay.

I assume there's no objection to splitting the argument.

(No response)

THE COURT: Okay.

Go ahead, Mr. Maclay.

MR. MACLAY: Thank you, your Honor. And just to be clear, the reason we're splitting the argument is a lot of this argument is a lot like what I told you about on March 3rd and

it didn't make sense for, for Dave to get my 30-page outline from then, although I'm going to try not to read much of it because I really don't think it should be necessary to go through what we've already gone through in extreme detail.

THE COURT: Sure.

MR. MACLAY: So, your Honor, a, a couple of, of comments I'd like to make with respect to what we've heard today and then also address a couple of things in the reply brief that I guess was filed late Tuesday night, if I recall. And so we haven't had a chance, of course, to respond to those yet.

One, your Honor, is one of the very first things that Mr. Rayburn said was they want you to toll all the claims that are ripe now and, of course, just on the face of it, your Honor, tolling claims that are, that are ripe is certainly something that is highly unusual and not, not the typical course of, of events. Normally, when things are ripe, that's almost by definition when they should proceed. And, of course, your Honor has heard from the parties many times, "No, the estimation shouldn't go forward. No, the substantive consolidation and fraudulent transfer action shouldn't go forward," and you've been very clear repeatedly on your views on those points and this really is just a reargument of things that have been reargued several times, including on March 3rd, and that's why I'm standing at the table instead of going over

to the podium 'cause I think I'm going to be very high level about this, your Honor, 'cause you heard it all before.

For example, you heard today that there's no congressional act supporting the existence of substantive consolidation or derivative standing, but your Honor's already ruled on those points and, with respect to derivative standing. With respect to substantive consolidation, you ruled on that point and rejected it in CertainTeed and, of course, it's fully briefed and fully argued and I hope that you'll be issuing a ruling on that today. And so there's really no point to go through all of those arguments again. It's just, it's very ironic, your Honor, that in a motion that purports to seek judicial economy, the entire basis for it is rearguing everything that's been argued before. It's, it's, you know, mutually inconsistent, your Honor, to argue for judicial economy when you're seeking reconsideration and reargument of everything that's come before. It just doesn't make a lot of sense, especially within the realm of judicial economy.

I think that Mr. Neier already made clear that this, you know, constructive dismissal thing is just a strawman argument. Our, our papers say what they say, your Honor, and we're doing what we're seeking to do and that isn't a dismissal of the cases. This analogy that Mr. Mascitti made about, "No, no, no. We're not trying to disarm the Committee. We're just trying to decock their gun," but they're still trying to fire

their gun, your Honor.

So if they're firing their gun and we have to decock our gun, is that really a fair and appropriate process? Of course, it's not and, and, your Honor, of course, what they hope is that their bullet hits and that we never get to fire our gun. But, of course, they might miss and then what? An additional four or six years of additional delay because we couldn't do things in an efficient manner at the same time as your Honor has previously suggested would be appropriate? That's not judicial economy. That's delay and that, of course, is what the Committee has always been very clear to this Court, is what we're trying to avoid. In the Committee's view, the entire Texas two-step process is designed to inflict delay upon claimants and this motion for a stay is exactly a clear indication of, of the goals of that, in, in our view, from, you know, the, the movants.

You heard a lot of arguments, your Honor, or some arguments today from Mr. Guy about the funding agreements. Well, your Honor, I spoke on March 3rd for about 30 minutes about the funding agreements. I don't want to have to redo that argument. Suffice it to say, they're not good as gold, period, you know. They are not equivalent to the assets that were removed from the debtors' predecessor and, and they certainly don't support, in our view, any kind of argument that we should be foreclosed from proceeding on any of our

bankruptcy well-recognized remedies.

You heard Mr. Guy say that you can't rule on subcon or fraudulent transfer without the estimation happening first because it's a predicate. Well, that's great that Mr. Guy thinks that, your Honor, but no cases do. Not a single case that anyone has cited to you says that and, of course, they couldn't because it's not true. Insolvency isn't a predicate. That's already been briefed and argued. And, your Honor, moreover, as we saw from Garlock and as Mr. Neier alluded to, the estimation isn't even going to resolve the debtors' liability. It didn't in Garlock. The settlement was four times larger, as your Honor knows. It's not even going to resolve their own liability, much less all these other trickle-down effects that they would want you to assume will, will occur. It's just, it just doesn't make sense, your Honor. Their argument doesn't make sense. We have seen that an estimation doesn't even definitively resolve the debtor's liability, much less all these other spill-over effects. What they really want to do is to keep the Committee from showing you in the context of substantive consolidation that it's warranted there. They want to keep the Committee from being able to show you that this is a fraudulent transfer, but the Committee should have that right, your Honor. That's what, that's what's provided for under the bankruptcy law and we shouldn't be disempowered from pursuing it because the debtors

think they might be able, be able to develop defenses to those arguments. Well, let them prove it, your Honor. They say they're going to have defenses. Let's see if they really do as those, as those matters proceed. I have my doubts, but they'll get their chance. That's what due process is all about.

THE COURT: While you're having a drink of water, let me ask you. What if we go down the road and have estimation and instead of picking the debtors' methodology and number, I select the ACC's. Where does that put you?

MR. MACLAY: Well, your Honor, that would certainly put us in a better position because, of course, one of the things you have heard very strongly from the Committee, is that this entire structure, the Texas two-step structure, etc., is designed to give the debtors and their controlling affiliate, really, leverage.

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

MR. MACLAY: But, of course, this also goes back to the funding agreements, your Honor. We have severe concerns that no matter what the estimation results in, it's not going to necessarily mean much if the affiliate doesn't have to honor its obligations, comply with its obligations, if the debtor doesn't have to require -- in other words, it's not just about the number, your Honor. It's about is it real or is it fake?

THE COURT: Uh-huh (indicating an affirmative

response).

MR. MACLAY: And we have expressed to you severe concerns that it's fake and the estimation isn't going to solve those problems, but our mechanisms would.

So that's the short answer, your Honor.

THE COURT: Okay.

Proceed with your argument.

MR. MACLAY: Thank you.

And so, your Honor, you know, I don't want to kind of make the obvious points that they already admitted in their papers, that everything they're arguing here today is, is a rehash of arguments that have already been made and briefed to your Honor. That's on Page 2 of their motion, it says that, in the second full paragraph. And the Court's already heard and ruled on the objection to the standing motion. The Court has already heard and your ruling is pending on the reconsideration motion. Your Honor has already heard the debtors' motions to dismiss and your ruling on that is pending. And so, again, this is all just a rehash.

And in terms of the most logical next step, they have said the most logical next step is the estimation, but, your Honor, the most logical next step after the Committee has been granted standing to pursue estate causes of action is to actually let the Committee do so. The most logical next step, assuming this Court denies the motion to dismiss the subcon, is

to move forward with that subcon. Those are the most logical next steps, your Honor. They fall, they follow as night follows day.

I don't want to repeat back to your Honor the, you know, many times you have already ruled that you're not going to let one party go forward with theirs and not the other, including very specifically with respect to the specific argument that the, the adversary should be stayed while we pursue estimation, as you ruled on January 27, 2022, exactly the same point. Of course, none of the cases that you have heard cited to you or that you've read cited to you by the movants have a non-consensual stay of certain claims in favor of others pending before the same court. None of the cases they cited did that. You have cases that were stipulated where people agreed to stay certain claims and then you have cases where proceedings that have overlapping or the same issues are in a different forum.

But not a single case has been cited to you is doing what they want you to do, which is to stop one party's pursuit of their cause of action and allow a different party to pursue theirs in the same, in the same action. Not a single case they've cited to you does that and that's what they're asking you to do. We pointed that out in our opposition. Still, their reply had nothing, not a single case on that point.

It's also just a matter of law, your Honor -- and my

colleague has already talked about the standards, which I appreciate hearing since it wasn't even in the original motion what the standards actually were for such a stay -- but, but, your Honor, it's also already clear in the cases cited to you in the briefs that the "rare circumstances necessary for a stay of litigation" cannot be satisfied by the mere existence of litigation. Wilmington Trust says that. The "risks inherent to litigation are not a hardship supporting a stay." The Kadel case says that, "stay denied where the 'harm' to proponents was nothing more than the 'inconvenience' of having to move forward with the litigation." I mean, the only thing they argue has already been clearly ruled on by multiple courts as being an insufficient basis for a stay. And then there's the Jung case, 604 B.R. 773, 789 -- it's the Bankruptcy Court from the Western District of Wisconsin -- which denied a stay of litigation in favor of another proceeding where there was no guarantee that the other proceeding would resolve the litigation. And there's no guarantee here, either, your Honor, far from it.

They tried to distinguish in their reply brief, your Honor, the Wilmington and Kadel cases by saying, "Ah-ha, the, the Committee is reading out the first factor, reading out the judicial economy factor by, by ignoring what those cases said about it." 'Cause those two cases both found that judicial economy would be improved by granting the stay, but what they ignore, your Honor, is that both cases denied the stay. Even

in situations where the court found judicial economy would be satisfied, they still said "but that's not enough for a stay."

So if anything, it, it makes clear that the Committee's position here is even stronger because we think judicial economy is against a stay. But even in cases where it is, that's not enough and courts deny it. What they're seeking, frankly, is extraordinary, your Honor, and unprecedented. It's exactly as your Honor noted before, "Let's do one of those things I'd like to do in the case and not do the things the opponent wants to do." That's your Honor's comment on January 27th. It remains equally true today.

And so, your Honor, I don't, I don't want to rehash all the arguments you've heard before 'cause that's really all we're left with today. That's, frankly, what this whole motion is about. With that, I'll stand on our, on our papers, your Honor.

Thank you.

THE COURT: All right.

Anything else objecting parties?

(No response)

THE COURT: Any rebuttal?

MR. RAYBURN: Your Honor, Mr. Erens and I both would like a couple of minutes, very briefly, if that's okay.

First of all --

THE COURT: We split before. We'll do, again.

MR. RAYBURN: Thank you, your Honor.

The most, the most interesting argument we just heard was the argument that no case has ever done what we've asked you to do and that's exactly what Judge Hodges did in Garlock and it worked, period. Confirmed chapter 11 case after an estimation and I'm sure you remember 'cause you confirmed it the plan involved additional parties obtaining additional releases for non-derivative liability and, therefore, the estimation was not a nullity.

No. 2, you asked a very good question about what would happen if you gave them a high estimate and they, they basically -- I don't think they had an answer, No. 1. But No. 2, the point I'm, we are here to try to make -- and I think Mr. Guy makes it better than I do. So I'm going to try it my way -- if you estimate the liabilities in the, in what I'm going to call the Garlock range. Let's just make it clear.

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

MR. RAYBURN: -- the Garlock range, which is a quarter of the amount of money that is on the table, do you really believe or does anybody in this courtroom believe that the plaintiffs' bar is going to control the votes of their people so strongly that they're going to turn down four times the amount of money that's been estimated to be their liability? I don't believe that. I don't think they'll be, I don't believe

the plaintiffs would be advised to do that by learned counsel on the other side of the table or by the lawyers that are representing them in the tort system.

So it seems to me that, that the arguments you've heard essentially are you have already ruled in our favor on everything you haven't ruled on yet and, therefore, you shouldn't stay your rulings. You should just enter those rulings and having ruled on all of them and giving them everything they wanted, you should then deny our motion to stay. You hadn't ruled yet. The motion is before you to ask you (a) you could stay your rulings, which you clearly have authority to do, or (b) if you authorize the institution of any litigation, you can stay the litigation.

And finally, if you want to go back to your question from the previous hearing, we can enter tolling agreements and all of this doesn't matter until we get through the estimation proceeding.

Thank you.

THE COURT: Mr. Erens.

MR. ERENS: Thank you, your Honor.

Yeah, my comments are similar a little bit to Mr. Rayburn.

So first of all, there were a lot of comments made by Mr. Neier regarding what our plan provides and what can be confirmed under 524(g) and the like. We don't think that's for

today. Obviously, we dispute most of, or maybe all of what he said.

But I do want to pick up on something related to your question, which is, yeah, what if the Court rules in favor of the ACC with respect to the estimation? So Mr. Neier made an interesting point. He said there needs to be fear on both sides and we've heard that a couple times from them. They've said in subcon they want to make this as painful as possible. They want something even worse, more painful that dismissal. Now we're hearing about fear on our side and Mr. Neier, I think, at the end said what we really need is the ACC to be able to take a two-by-four to the debtor and the nondebtors.

Well, you know, that is their approach, I guess. Maybe it's not surprising. That's potentially the MO of the plaintiffs' bar in the tort system as well. So maybe it's not surprising we're hearing it here. But more interesting to us is the idea that we have no fear. This goes back to your Honor's comments. From our standpoint, that's effectively a concession by the ACC that they're going to lose the estimation. If there's no fear on our side, then they're saying, "We believe that the Court's going to rule that the amount of the liability is at or below the amount on the table," okay? But if that's not the case, then, yes, we, we have fear in the sense that your Honor could rule on a number higher than what's on the table.

Our approach is not to take a two-by-four to the other side or have them take a two-by-four to us. Our approach from the beginning of this case is to put in front of a neutral party, your Honor, the question of what the liability is in the case and that's how we proceeded and that's how we still think this case should proceed.

Thank you.

THE COURT: All right.

Mr. Mascitti?

MR. MASCITTI: Thank you, your Honor. Greg Mascitti on behalf of the non-debtor affiliates.

First and least importantly, your Honor, my home state is New York, not New Jersey. No offense to my New Jersey colleagues.

More importantly, your Honor, Mr. Neier claims that there was some Bankruptcy Code violation as part of this proceeding. The remedy for that is a motion to dismiss the bankruptcy case and, obviously, that's not before the Court today. And that would be a remedy available to the Committee should it choose to pursue that path, but it hasn't.

The use of fraudulent transfer claims and substantive consolidation claims to create fear, I'm not aware of any case where a court has justified the prosecution of claims as, on the grounds of creating fear. That's similar to the arguments that were made before, that they wanted to prosecute certain

claims based on principle. Fraudulent transfer claims, substantive consolidation claims, those are claims that solve a problem where there's a gap in the assets and the liabilities. There's nothing before the Court today that suggests such a gap exists and the use of those claims to create fear is not appropriate.

Next, Mr. Neier claimed that the burden was on us with respect to proving the nonexistence of prejudice. What I didn't hear in Mr. Neier's comments was identifying any particular prejudice. I'm not entirely sure how we go about proving the nonexistence of something, but suffice to say, our position is that no prejudice exists and Mr. Neier's comments certainly didn't identify any.

With respect to the remedy, Mr. Neier said, "Well, we want to avoid, we want to avoid the corporate restructuring. We want to avoid the transaction, put Humpty Dumpty back together again." Again, this comes back to the same point. They're not seeking this remedy to fill any identified gap in the assets and liabilities. You know, it's this concept of putting Humpty Dumpty back together again. But what is the point of putting Humpty Dumpty back together again if the assets that currently exist are sufficient to pay all liabilities in full? There isn't any. There's no benefit. It be a waste of the times, of the Court's time and resources as well as all the resources and time of the parties to pursue

that path.

The ACC -- I'm sorry -- the Committee in their, in their papers used the phrase that we were trying to "disarm" them. So, you know, and suggested that, that we would only be allowed to fire our gun and they couldn't fire theirs. Well, I'm assuming the Committee has lots of guns to fire in an estimation proceeding. I mean, you know, the point is the battle, if we're going to fight, is on estimation and what the liability is and, and, you know, no one certainly is holding back any punches in connection with, with that fight.

I believe Mr. Neier took issue with Mr. Guy's comment about estimation being a predicate for the liability and there was something about there's never, we didn't identify any cases where -- where there were -- that, that supported our point. And I would flip that, your Honor. I would say I'm not aware of any case or of any committee that has pursued substantive consolidation of two solvent entities. There'd be no point in that.

So for us to try to find a case where a court has, has made that determination is, is difficult because just as a practical common sense rationale a committee wouldn't generally pursue substantive consolidation, given the solvency of its estate.

Your Honor, then just briefly the question that, that you had posed, your Honor had posed. What if the Court selects

the Committee's estimation number as part of the estimation process? Well, there's a follow-up to that. What if, what if the Court selects that number and what if the assets are sufficient, even on that, that number, to pay all those liabilities in full? And the next step in that analysis, well, what if the assets aren't sufficient, but what if the non-debtor affiliates provide a QSF, another qualified settlement fund in an amount sufficient to make the debtor whole with respect to whatever number the Court estimates as to be the liability?

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

MR. MASCITTI: In that scenario, your Honor, what, would the Committee still pursue this litigation? Would we still be arguing substantive consolidation and fraudulent transfers in that scenario? And that's exactly the point. This is why it's some, somewhat of Groundhog Day because some of these issues relate to the arguments that we've had before. There simply is no reason for this litigation to proceed today. Your Honor, the tolling and staying of these claims preserves those, those claims for a future date if and when they're necessary, but it's just not a path we need to go down today.

Thank you, your Honor.

THE COURT: Okay.

That got it on this one?

Mr. Guy.

MR. GUY: Yes, your Honor. Jonathan Guy for the FCR.

What I didn't hear a'tall was anything about asbestos victims. I heard no response to my comment about people are dying and they're not getting paid. I actually think that is the critical issue here more than anything, prompt payment to the people who deserve it.

Your Honor, your question about why are you worried about estimation I thought was very pertinent and it was something I've been thinking about. Because during Garlock there was a parallel case in Delaware, Judge Fitzgerald --

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

MR. GUY: -- Specialty Products/Bondex case. Caplin & Drysdale were involved in that case, I believe.

MR. MACLAY: Nope.

MR. GUY: Nope. Oh, It was Natalie. Natalie Ramsey was involved in that case.

THE COURT: Okay.

MR. GUY: And Dr. Peterson was the expert. Charlie Bates, Dr. Bates, Dr. Mullins were the experts for the debtors and Mr. Vasquez, Dr. Vasquez was the expert for the FCR. In that case the estimation ruling came down with a number of 1.166 million and a plan was confirmed and a trust was created.

They have all the ammunition to make the arguments

that the number that the FCR has agreed to is too low. They're assuming -- and it, it's a little insulting to the Court -- that the Court's going to rule a certain way. They're clearly worried about estimation. Why are they worried about estimation? That is the vehicle whereby we determine, the Court determines what the liabilities are. That's why we're here and if the nondebtors and the debtors don't put up the money to pay whatever number the Court believes it is, then, yes, they will have the right to say, "We shouldn't be here anymore. There's not enough money on the table." That's the time to make that argument. That's why I say it's a predicate. Until we know what the liabilities are, you can't determine if it's a fraudulent transfer and you can't determine where there's any need for subcon. That's the proof of the pudding.

This Court will tell us. You will tell us, your Honor, what you think the aggregate liabilities are and either these debtors or nondebtors will fund that amount. Everything else --

The COURT: What you're proposing, effectively, is to take the estimation ruling and turn that into an *in limine* trial on insolvency for the adversary.

MR. GUY: Well, it's the debtors' proposal, your Honor.

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

MR. GUY: But I think that's exactly right. That's exactly right. I don't believe there's a fraudulent transfer here because we believe that the amount of money that the debtors have put on the table is enough. If the Court tells me the number is a lot lower, then I'll be like, "Well, we did a great job."

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

MR. GUY: "Thank you very much." If the Court tells me we got it wrong and the nondebtors and the debtors make up the difference, as Mr. Mascitti said, who is then going to go to the asbestos victims and say, "This is a matter of principle. No, I'm not going to take $545 million," or if the Court says, "Oh, we think the number's a billion," and the nondebtors and the debtors put up the difference in a QSF -- and, by the way, Mr. Maclay was talking about the funding agreements. We dealt with that problem with the QSF -- and if the number is greater than 545 million, there will be another QSF. If there isn't one, then, yes, that's the time to say, "Hey, what are we doing here?" I would agree. I would join them. I would say, "Dismiss the cases because they're not doing what they said they were going to do," but we can't get there until your Honor tells us what the number is.

THE COURT: Isn't there a third ground there that if we came up with that, that the number was much higher than the

545, instead of a dismissal that the litigation could then proceed to recover the, the downfall if there's an unwillingness to pay it?

MR. GUY: Yes, absolutely, your Honor. Absolutely. And I think, I think the point would be that the nondebtors and the debtors would have to decide.

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

MR. GUY: Do they want to go back to the tort system -- I'm sorry -- do they want to go back to the tort system or do they want to be substantively consolidated? Do they want to make up the gap for the fraudulent transfer? They would have to decide.

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

MR. GUY: I believe, your Honor, that if you determine that the amount is greater than the 545, they will make up the difference. Why do I believe that?

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

MR. GUY: Because they want to be done with asbestos. Companies file for bankruptcy 'cause they want to be done with asbestos. It's an overhang on their stock price. It's difficult for them. It's problematic. It's cumbersome. It takes up a tremendous amount of time. But most importantly,

from our perspective as the fiduciary for asbestos victims, it's not good for asbestos victims to be in the tort system. The best result for them is an asbestos trust. They get paid quickly. They get paid fairly.

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

MR. GUY: And they get paid in relation to their claim. Everybody is treated substantially the same by relation to the merits of their claim. That's what bankruptcy is about.

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

MR. GUY: And that's why we're here and that's why we're a tad frustrated, your Honor, because we're two years down and we're not giving any money to anyone. And when I hear Mr. Neier say, "Well, fear. We will never surrender. We need a two-by-four so we can whack Brad Erens over the head with it." You won't believe this, your Honor, but I did work in construction. Two-by-fours, if you hit someone over the head with it, it's kind of painful.

THE COURT: I take it that was part of the job.

MR. GUY: Actually, my job -- my job -- my job was in New Jersey and I was so low down the totem pole, my job was to take electrical wire, peel it, take the copper out, and then roll it in a ball so that it could be recycled. It was very comical 'cause the ball got bigger and bigger and bigger and

all the, the real construction workers thought it was very interesting. Anyway, that's by the by.

Your Honor, the best test of why that's not true is Paddock.

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

MR. GUY: They got a deal done in Paddock. They didn't need fraudulent transfer. They didn't need subcon. And no, the, the parent was not financially beleaguered. It's a 1, $2 billion company left with $1.4 billion. They put up -- they put up -- they paid up. They're done in that case. That should be this case.

Thank you, your Honor.

THE COURT: Okay.

Let me go back to the ACC on that question I asked.

It's not automatic that the debtor gets to dismiss if, if the estimation goes your way and they don't want to pay it. So if -- what is the harm, then -- you know, at that juncture you've got two choices. You can join them if they really want to dismiss the case and go back to the tort system or you could ask to continue the litigation, keep the case open, and do your fraudulent conveyance/substantive consolidation to, effectively, centralize the assets, if it's appropriate, here.

Why is that harmful to do it in that fashion instead of going the way we're doing now? What it sounds to me like,

if you're familiar with military history and the bit about the Sicilian campaign in World War II, sounds like we're Omar Bradley at, at this juncture. We're going over the mountains and through the rough spots instead of around the coast.

Go ahead.

MR. MACLAY: Your Honor, I think Mr. Neier and I will both be addressing this because it relates to, to different portions of the case that we've allocated amongst ourselves.

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

MR. MACLAY: Your Honor, just, just to make an initial point, we have always been very consistent in believing and telling your Honor that the underlying purpose of the Texas two-step system is to impose delay on claimants until they will accept a substantial discount to get out of the black box into which they've been put.

THE COURT: Right.

MR. MACLAY: And to accept the way that the debtors would have you proceed would be to stick the constituents into that black box while they proceeded with what they think will lead to progress.

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

MR. MACLAY: But we don't think that, your Honor. We don't think that, that their proposal would do anything other

than impose additional delay for the reasons I mentioned a minute ago, your Honor, which is it could be at the end of their process. There's no light at the end of that tunnel.

THE COURT: Right.

MR. MACLAY: All we're left with is Garlock, you know, lack of, of a meeting of the minds. As Mr. Neier said, a lack of the only impaired class supportive of whatever plan emerges from that process and then we're supposed to do a fraudulent transfer then seven years later, which is what it took in Garlock? It's not efficient. It's not fair. This, this shouldn't become a 15-year case like Pittsburgh Corning was, mainly because of an objecting insurance company. It shouldn't become that, your Honor. We're trying to avoid unnecessary delay. We're trying to have things go forward at the same time for a more quick resolution. Whatever that resolution will be, your Honor it'll be quicker if we can actually proceed on the dual path. Because our path might actually end up being the right one. Substantive consolidation, your Honor, does not rely upon a showing of insolvency. It relies on some very well-understood and judicially explored findings, which we think we're going to be able to how and, if we do, we'll be entitled to substantive consolidation.

And the same point pertains to that, your Honor. They won't necessarily be entitled to dismiss, then.

THE COURT: Uh-huh (indicating an affirmative

response).

MR. MACLAY: Then we might have what, in our view, would be an actual bankruptcy where the assets and liabilities are together here with appropriate court oversight and then we'll have a real bankruptcy, your Honor, in which the normal incentives applied to all parties and it would be more reasonable to expect a resolution either consensually or through the normal bankruptcy process leading up to a, a plan. You know, if we're not constrained by their funding agreement deficiencies, if we actually have the assets that were, in our view, inappropriately stripped away, we think that would make, make a better process, a more appropriate process, one that would lead to a confirmable plan one way or the other, whether it's Committee proposed or otherwise.

And so to sort of simplify what I've said down to a, to a more pithy statement, your Honor. What they're proposing, the problem with it, ultimately, is it will lead to a substantial amount of delay.

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

MR. MACLAY: And we think that's harmful to our constituency who, as, as we have heard from the FCR, they're dying right now. That is true. Delay is their enemy and we think our path will have less delay baked into it when we have an opportunity to actually achieve something for our

constituency that would be very valuable to them, which is to undo the inappropriate transaction and to bring those assets back into the estate where we think they should have been all along. That's not a constructive dismissal. That's an actual bankruptcy case of the traditional kind where the assets and the liabilities came into this Court's jurisdiction where they should be, in our view.

THE COURT: If we don't do it through estimation -- and presumably, the, the ACC is going to bring constructive fraudulent conveyance claims in this -- how do we determine insolvency and when?

MR. MACLAY: Well, your Honor, I'm going to, if I could, defer to Mr. Neier on, on whether we'll be bringing constructive -- I'm not so sure it's a given we will be, your Honor, but it's possible.

THE COURT: Okay.

MR. MACLAY: I mean -- but that would be something done within the confines of the fraudulent transfer action. We should do it in those confines. That's what the law provides, not in this other, frankly, kind of artificial process that they've set up which doesn't have a whole lot of non-consensual precedent and non-consensual estimation is not something that's known to the law, your Honor, and I think there's a reason for that. It's not something that really existed until very recently. 'Cause it doesn't do anything. A non-consensual

estimation, if one party rejects it, well, where are you, then? You're nowhere. You've accomplished nothing. That's why our process goes within well-recognized legal doctrines that actually results in, in concrete decisions which will move the case forward and we view that as a positive thing.

And I'll let Mr. Neier talk more about sort of nuances of, of the fraudulent transfer doctrine.

THE COURT: My fear is that sounds like we're going to try, effectively, what the liabilities are twice, once in estimation and once in the litigation.

MR. MACLAY: Well, your Honor, if everything is happening at once, presumably, we could coordinate and make that a more efficient process --

THE COURT: Right.

MR. MACLAY: -- than having to do it twice --

THE COURT: Right.

MR. MACLAY: -- right? Because one of those times would have legal precedent and would be binding and the other one very much less clear that it would have any effect whatsoever --

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

MR. MACLAY: -- their approach, as we saw from Garlock. Anyway.

You, you heard from, from counsel for the debtors

that, oh, they do have a case that supports a non-consensual stay in front of this same Court. It was Garlock. Your Honor, there was no motion to stay in Garlock. There was no grant of authority to pursue a fraudulent transfer in Garlock and there was no substantive consolidation motion in Garlock. Garlock didn't address any of these issues. That's just is, is, unfortunately, not, not accurate.

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

MR. MACLAY: It's not true.

You heard that, oh, no matter what the plaintiffs' bar wants -- and I don't know why the plaintiffs' bar continually gets demonized by people who say they just want to talk and, and work things out and, you know, and then they attack, you know, the lawyers selected by these victims to represent their interests. It's very strange to me that that is an appropriate mechanism in the eyes of the debtors to try to get this case to be more consensual. In fact, as I told you at the very first day hearing in this case, your Honor, I stood up, you may recall, and I said, "Your Honor, I don't understand why in a case that they -- we just heard them say they want to work out consensually -- they filed an information brief before talking to a single representative of plaintiffs, before talking to a single victim, and then they attack the plaintiffs' bar and their, and their client victims throughout."

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

MR. MACLAY: Why did they do that? That is the aggressive litigation tactic that's counterproductive and that is very inconsistent with, with their general suggestions to you that they just want to work things out and be reasonable. They started off, you know, swinging their two-by-four, your Honor, the first day of this case. And Mr. Neier, I'm going to leave it to him to address what I view as, frankly, an unfair characterization of his remarks.

But suffice it to say that for them to, to suggest that the asbestos victims might believe the debtors over the lawyers they've chosen to represent them would be ridiculous, even if you were to accept the premise that there's some distance between the victims and their lawyers, which is unsupported by the record and, frankly, offensive.

You know, people choose lawyers they trust to represent them. That's the way our system works, your Honor, just as all the lawyers here have been chosen by their clients to represent them in front of you. To suggest that they don't have their clients' interests at heart or their clients might be swayed by the debtors, you heard that before, your Honor. You heard it in Garlock and 99 percent of the asbestos victims voted against that plan after you heard the exact same argument. And you said, your Honor, 'cause I was in your

courtroom when you said it, "This shouldn't be a surprise to anyone," you know, and it shouldn't be a surprise to you, your Honor, that what they're saying has no factual basis.

And it kind of emphasizes another point, which is a lot of what you've heard in their attempt to meet the clear and convincing evidence standard, which is what they have to meet to get a stay, is a bunch of what ifs. What if this, what if that? Your Honor, that, on its face, is insufficient. They can't get a stay on a series of what ifs. The law is clearly to the contrary.

And this sort of Lucy and the football proposition, your Honor, they're going to keep tweaking things. They keep coming up with more QSFs. Again, that's just another what if, your Honor, but the reality is we have certain legal rights on behalf of our constituents and we're just seeking to push those forward. We think your Honor has already ruled that we should be entitled to and we don't think that they should be entitled to shut your, your Honor's court processes down for their preferred path. That's not the way the law is supposed to work.

Thank you, your Honor.

THE COURT: Okay.

Anything else?

MR. NEIER: I think, I think Mr. Maclay stole most of my thunder, but I'll start with the Court, answering the

Court's question about constructive fraudulent transfer. That's not our main argument, but we think that a, the date that you measure things by is the date of the corporate restructuring.

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

MR. NEIER: So the constructive fraudulent transfer would say if the debtor was rendered insolvent and the pre-petition debtor was rendered insolvent as a result of the transaction because the funding agreement is a what if --

THE COURT: Okay.

MR. NEIER: -- then it's a constructive fraudulent transfer. That may be an argument for, more of a legal argument, more of a technical argument, more of --

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

MR. NEIER: -- an argument subject to expertise, but it's not really dependent upon the amount of liability in the estimation, *per se*. It's really based on whether as a result of the corporate transaction the debtor as opposed to the non-debtor affiliates, the debtor alone was rendered insolvent as of that date, which we think it was as a result of the transaction. But that's more of a -- it's not really dependent upon what you would find in estimation. Because in their, in their belief, okay, the debtor remained solvent as a result of

the funding agreement.

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

MR. NEIER: And the constructive fraudulent transfer as an alternative remedy is really to address that issue, okay?

And I was going to address mostly what Mr. Maclay just addressed, which is the what ifs, okay?

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

MR. NEIER: What if we go down this entire approach? The -- the -- your Honor finds in favor of the ACC in terms of the amount of liabilities in the estimation proceeding, what if? They could move to dismiss that case. They could move to dismiss that case. That's another what if.

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

MR. NEIER: But the real answer is there's been substantial prejudice. They say we haven't alleged prejudice. We don't have to. They have to prove there's no prejudice. The burden's on them, not us. The prejudice is delay. Because we go through this, as Mr. Maclay just explained, we go through this entire exercise. It takes years. Everybody is delayed. Victims are not getting compensated, okay? And then we're supposed to go and have a, a litigation as to whether or not the corporate restructuring was a proper transaction. No. We

can do it all at once. There's no reason why we shouldn't do it once. It's more efficient.

And the comment about mutual fear, okay? The comment about mutual fear was to show that I think, as, as the Court has remarked, one side shouldn't get to go forward, the other side being stayed. Both sides should go forward and maybe that will result in something productive. Staying one side, I think, will not result in anything productive and I think everyone here knows that.

THE COURT: Is there not fear already existent on this side of the room? I mean, this has not only gotten the attention of the financial press nationally, but also of Congress and the majority party seems to be fairly disinclined towards what's the Texas twostep so far. Is there not fear of that, already, that -- is there some need to impose another fear before the parties can negotiate?

MR. NEIER: I -- I hope -- I hope it has instilled some fear in them, your Honor, but I think that going forward on both sides to see where we're going --

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

MR. NEIER: -- is the best foot forward for the Court. A stay, a stay of one side is substantial prejudice and it does not result in effective resolution. Maybe I was a bit glib when I said attack each other with a two-by-four and see what

happens, but my point is that allowing both sides to go forward is usually --

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

MR. NEIER: -- usually how the ad, the adversary system works and usually results in a resolution in 99 percent of the cases.

So to me, staying one side and letting the other side go forward, forget about what happens in Congress -- rarely anything happens in Congress -- but, you know --

THE COURT: Your words, not mine.

MR. NEIER: Yes, your Honor.

And I wasn't going to quote Omar Bradley. I was going to quote a different general who said, "When you," "When you're going through hell, keep going."

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

MR. NEIER: So that's, I think, where we are.

MR. GUY: That was Winston Churchill. He was never a general.

MR. MACLAY: And, your Honor, just to address your, your question in a, in a, in a similar way. Your, your Honor, the fact that Congress views what the debtor did here as being so egregious it may require congressional action -- and it's unclear whether it will or won't, your Honor. I mean, who

knows, you know, the timetable in which Congress moves in and how things work when they've got so many other issues on their plate -- but the fact that it is, at least in the view of some people, such an egregious abuse of the bankruptcy system that Congress is considering amending it, that's no reason to let them go ahead and do what they want, your Honor.

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

MR. MACLAY: That, you know -- see what I'm saying? The fact that -- that it -- that some people view it as very inappropriate doesn't mean they should just get to go ahead and do it more easily.

THE COURT: Right.

MR. MACLAY: It, it means that things should be done, we would argue, in the traditional bankruptcy way where both sides get to make their case.

THE COURT: Well, I was asking that question to lead into the next one, which is for those of you who are a participant in, in the LTL case at this point in New Jersey, can somebody tell me how Judge Kaplan came to appoint mediators at this point? Similar circumstances start of the case. Obviously, we had a few hearings and -- and -- down here with them. I was just -- was that at the request of the parties or did he decide to do that on his own? And can anyone tell me what he expressed about it?

MR. ERENS: Your Honor, again Brad Erens. I am involved in that case. Our firm, obviously, is debtor's counsel in that case.

I don't recall all the details, but I'm pretty confident from the first day of the case Mr. Gordon said to Judge Kaplan, once the case was in --

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

MR. ERENS: -- in New Jersey, that the debtor would like to go to mediation. I think that was done not pursuant to a formal mediation motion, but pursuant to, probably, the first day presentation, first day of the case in New Jersey. And I think Judge Kaplan indicated from the beginning that he found that to be a desirable result.

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

MR. ERENS: Once the decisions on the dismissal and PI came out, there was a hearing --

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

MR. ERENS: -- and the mediation process moved forward. Mediators were appointed by the court. It wasn't like the FCR process in that case or even this case where names --

THE COURT: Uh-huh (indicating an affirmative

response).

MR. ERENS: -- were proposed. I don't recall exactly. If I had more time, I could probably look through some notes. But mediators were appointed and the mediators came up with the mediation order submitted to the court after review of some parties, but I think, in general, the mediators drafted the mediation order. It went to the court and was approved.

THE COURT: Okay. So effectively, everyone agree with that, more or less?

MR. MACLAY: Your Honor, we, we are at a disadvantage here because none of the counsel on this side of the aisle are in LTL.

THE COURT: Right.

MR. MACLAY: I would just note that every case is different. We would argue a more similar case to this one is Bestwall and we saw what happened in Bestwall.

THE COURT: Right.

MR. MACLAY: That's actually what's informed the Committee's views in this case.

THE COURT: Yeah. Well, that -- I'm asking that question wondering whether this was the court's idea or whether the parties' idea to, to mediate in that case. Obviously, you've got an appeal that, or an interlocutory appeal that looks like he's going to try to send to the Third Circuit.

My point simply there was I had not tried to impose

mediation in these cases, this and DBMP, because of the experience in Bestwall, but I was wondering whether enough had changed in the world that the parties might be able to have fear on both sides, if you will, proper negotiating perspective and that we might avoid all of the cost and angst that it's going to take to get us to, to a resolution on the merits if we don't get guidance from Congress, if we don't get some circuit-level authority either here or in Bestwall that, about what works.

I, I hate to see us, to borrow my own analogy, slogging it over the mountains of Sicily and finding out at the end that we end up with no victory at all, that there's, that we find ourselves after we do all of that still at Square 1 where one side or the other just is not willing to accept the outcomes here and either seeks dismissal, or, on the other hand, votes against whatever the estimated plan is.

So that -- what I'm trying to figure out is is there any prospect that fruitful negotiations might occur here as we all agree that we're at a, a turning point in the road?

MR. MACLAY: Your Honor, I would just say that from the Committee's perspective the likelihood of successful negotiations would be increased by allowing the parties to each go forward with their own paths at this point.

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

MR. MACLAY: Beyond that, I don't think it would be appropriate for me to comment --

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

MR. MACLAY: -- right now.

THE COURT: Okay.

Mr. Erens?

MR. ERENS: Your Honor, from the debtors' side I think I know where we stand, but I'd like to have a moment to talk to --

THE COURT: Well, well, let me ask, then, what -- if -- are we through with the arguments on this?

My next question is what else do we have to talk about before I have to start making decisions?

Mr. Guy?

MR. GUY: Your Honor, I'd just like to respond to your question on mediation.

THE COURT: Please.

MR. GUY: The FCR in his response to the debtors' tolling motion was -- you probably saw it -- we would support mediation. I understand it was a failure in Bestwall --

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

MR. GUY: -- but this case isn't Bestwall.

THE COURT: Uh-huh (indicating an affirmative

response).

MR. GUY: This case has an FCR who represents the majority of creditors who wants to confirm a plan.

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

MR. GUY: And the plan's on file. We, we spent a year of due diligence and negotiating to get a plan that gets money to asbestos victims.

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

MR. GUY: Can you imagine, your Honor, a regular bankruptcy case where 80 percent of the creditors have agreed with the debtors for a plan, but we can't move it forward absent letting what the ACC counsel has characterized a tiny little population saying, "No, we don't like it. We want fear. We want a two-by-four"? When they're also saying to the Court, "You can't confirm a plan without us." Isn't that fear enough?

Your Honor, Winston Churchill was never a general, but he also was -- in many -- fantastic leader, but appalling military person. Like he had a terrible record.

THE COURT: He thought the Gallipoli campaign was well worth the, the risk.

MR. GUY: I don't want to see Gallipoli, your Honor. I want to see the soft underbelly going up through France in the Second World War --

THE COURT: Okay.

MR. GUY: -- your Honor.

MR. NEIER: Your Honor?

MR. GUY: There's fear enough.

THE COURT: Gotcha.

MR. GUY: Thank you, your Honor.

THE COURT: Mr. Neier, what do you want to say?

MR. NEIER: Your Honor, I was just going to add that whatever happens in LTL, in Congress, etc., etc., we have to be in this Court --

THE COURT: Right.

MR. NEIER: -- proving the facts and circumstances of these cases before your Honor. I know that's a heavy burden and we can look to other courts and other cases, but we have to, we have to do what's proper here. We have to look at the corporate restructuring that happened in these cases --

THE COURT: Right.

MR. NEIER: -- and the way these cases worked and to allow both sides to go forward will allow the Court to make, ultimately, the proper resolution of the cases if the parties can't agree otherwise.

THE COURT: Well, this all goes back to the Court's shifting questions of whether this case is about money or whether this case is about principles and if it's totally about whether adjudicating the Texas twostep, it just occurs to me in

this particular case we've got insurance, we've got money, we've got an assertion that they'll put up whatever's necessary, and, more importantly than that, not only do you have Congress, you have Bestwall and LTL that are likely to get to a circuit court before this case. And I'm just wondering, again out loud, is there some way here that we could do this with everyone keeping their precedent and their problems with the twostep in tow to talk dollars before we, we have all of these wars.

Now you've heard what I've said previously about letting one side go forward on their side without the other, but I'm talking right now about whether there is a, a path for mediation or some other resolution before we have to undergo the expense of either one of those endeavors.

MR. NEIER: Well, this case is about both. It's about both principle and money.

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

MR. NEIER: But allowing the parties to go forward until there's the proper incentive, if I could put it that way --

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

MR. NEIER: -- for a resolution is the only way to proceed at this point, from our perspective.

THE COURT: So you don't think that this, those other factors provide the proper incentive, if you will?

MR. MACLAY: Your Honor, just --

THE COURT: But.

MR. MACLAY: -- just to clarify one thing -- and I can see Mr. Erens standing, too, and, and he probably has something similar to say or, or, or maybe not quite similar, but maybe in some ways similar -- which is you have made observations of this type a couple of times and I can promise you --

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

MR. MACLAY: -- every time you've said something along these lines the Committee has taken it to heart --

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

MR. MACLAY: -- has had internal conversations about it, the details of which I'm not free to share, and suffice it to say that if there is an opportunity for, for productive discussions, they will occur and I have already said and I'll just repeat it so the record is clear it is the Committee's view that the likelihood of a successful outcome to any such discussions would be advanced by ruling on the issues that are presented to you before that were scheduled and I hope we'll, in fact, we'll get a ruling on today. Because it shouldn't be delay, right? We should -- it should not be the case from the

Committee's perspective that the negotiations are at the barrel of a gun. Negotiations should be where, where each party is getting to advance its legal case.

But your point has been heard --

THE COURT: Okay.

MR. MACLAY: -- that the parties should try to see what they can do and, and, and we've heard you. I think that's --

THE COURT: There's no --

Go ahead, Mr. Erens. You wanted to say something?

MR. ERENS: Yes. Two things, I think. No. 1, the idea that the debtor and the nondebtors haven't had sufficient incentive to, to get this case resolved is simply belied by the record and what Mr. Guy described as the history of the case.

With respect to mediation, though, I really would like to confer with the, the company and I think your Honor would be benefited by having that official answer before we go to the next step.

So it's probably about breaktime, anyway. If, if it's acceptable to the Court, we'd ask for at least 15 minutes to confer.

THE COURT: Let me ask the parties. Do you have anything else that we need to argue? I did -- I think we're at the point of where I start making and announcing decisions unless y'all've got something else you want to --

MR. MACLAY: Your Honor, if I could make a procedural point.

I'm sorry, Brad. I don't mean to interrupt.

THE COURT: Right.

MR. ERENS: Just -- in response to your question.

So as Mr. Neier indicated, the, the creditor list motion was briefed, but it wasn't argued.

THE COURT: Right.

MR. ERENS: So we are prepared to argue that today.

MR. MACLAY: Your Honor, we're prepared to argue it, too, but we also heard what you said last time. So we have our oral argument from last time. We've dusted it off. We reviewed the authorities. My colleague, Mr. Davis, is prepared to argue it.

But what we would suggest is that we rest on the papers unless your Honor has any questions.

THE COURT: Okay.

MR. MACLAY: Because why waste time about something you've made clear that you looked into quite thoroughly?

MR. ERENS: If they would like to rest on the papers, that's fine with us. We, we would like to make some arguments, your Honor.

MR. MACLAY: In which case we'll have rebuttal, your Honor. We tried. We tried. Judicial economy is on this side of the aisle today.

THE COURT: I was not encouraging anyone to rest on their papers. I'm happy to hear you. I was trying to decide whether we were at the point where I need to call a lunch recess, gather my thoughts, and start making decisions. And if you want to argue some more, let's go ahead and use the time and talk about that particular motion and we'll, we'll go ahead and -- then I can have everything.

But there's no other matters that I've -- Clark, we've moved over. That's, that's got it for today.

MR. ERENS: Uh-huh (indicating an affirmative response).

THE COURT: Okay, very good.

All right. Well, do you need a break before we, we launch into that? Anyone --

MR. ERENS: Yes, your Honor. And again, it's our preference to caucus on the mediation question. 'Cause I don't think on our side we fully answered that question.

THE COURT: Okay, very good.

Well, let's take 15 minutes, then, and we'll come back and, and hear the arguments that pertain to that last matter and the, the 2004 motion, okay?

MR. ERENS: Thank you.

(Recess from 10:59 a.m., until 11:16 a.m.)

AFTER RECESS

(Call to Order of the Court)

THE COURT: Okay. Have a seat, everyone.

Mr. Erens, you had been asking for time to consult with your client. Anything to report there?

MR. ERENS: Yes. First of all, your Honor, just -- Mr. Rayburn had to leave for a family emergency. Just want to let you know.

THE COURT: I'm sorry to hear that. Hope nothing serious, but if you'll go ahead and tell me where you are.

MR. ERENS: Yeah. So we talked on the company side. Your Honor, we are in favor of mediation. We would, we would ask for mediation. We think -- and we've said this from the, from the beginning -- our desire is to cut a deal here, is to get a resolution, not to be litigating all the time.

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

MR. ERENS: So we would be in favor of mediation, for sure.

THE COURT: Okay.

MR. MASCITTI: The non-debtor affiliates also support mediation, your Honor.

THE COURT: Okay.

MR. MACLAY: Your Honor, just to kind of reiterate what I said before. There's a distinction between mediation and discussions.

THE COURT: Uh-huh (indicating an affirmative

response).

MR. MACLAY: Discussions might be productive. I don't think that mediation would be.

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

MR. MACLAY: I think that, in particular, an imposed mediation would be counterproductive. I would ask that your Honor not order mediation at this time.

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

MR. MACLAY: And if there were going to be a future motion for mediation, we can see, you know, how it sits in that kind of appropriate procedural context. But we, again, we've been listening.

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

MR. MACLAY: We've been hearing your Honor's comments, we've taken them into account, and I can promise you we're acting upon them and we'll just have to see how things play out. But we don't think a mediation would be helpful.

THE COURT: Well, we'll, we'll factor all that in with everything else. I, I generally -- and the local lawyers will tell you -- I generally am of the viewpoint that I trust the attorneys normally to be able to negotiate their problems away if they're negotiable and generally don't impose mediation over

objections of parties. It's my job to see if I can find opportunities where y'all can find common ground, but it's not to require you to settle, either. So we'll, we'll go ahead and hear the last motion.

What I would give some suggestion to -- and maybe this is just there's no magic here -- as a bankruptcy judge we're used to monetizing disputes and when you get one that, that has as much principle as it does money it creates some obstacles to that. And I appreciate the, the hard-fought views of, of the parties as to the propriety of the pre-petition restructuring and whether filing a bankruptcy with, in these circumstances is appropriate. But it strikes me that that may well get decided for us at another level or in another place. And in any event, we've got it teed up in two other cases in this court and one in New Jersey and it -- if -- it might offer the opportunity here to say, well, the parties, which are generally the same parties in terms of attorneys and, and claimant constituencies, might well be able to make their principles in another forum and, and get money here. I am most concerned about getting timely payment out to these claimants.

I heard you loud and clear, Mr. Guy, about the needs of those parties and their families, so.

But we'll go ahead and move on to the other, to the last matter and let you hear arguments on the 2004 and then I'll try to decide what I'm going to do with all of this, so.

All right?

Who wants to go first? ACC motion.

MR. DAVIS: Good morning, your Honor. Kevin Davis from Caplin & Drysdale on behalf of the Committee. As you heard from Mr. Maclay, we'd been willing to stand on the papers here. And so for that reason I'll be brief.

In looking at places where there might have been common ground here, we thought that this would be one respecting the due process rights of third parties.

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

MR. DAVIS: But here we are. Essentially, when we put together our substantive consolidation complaint we made sure that everything that we were doing was legally sound and made sure that everything that we were doing was, was the way that it has been under the law and the heavy weight of authority, including at the circuit level, is that when substantive consolidation is sought of a nondebtor, that notice and opportunity to be heard has to be extended to the non-debtors' creditors. And so in order to comport with that due process requirement we have sought to have the information made available to us in order to provide that notice.

Here, we're seeing a lot of resistance to that and a lot of that resistance seems to be based on allegations of, of sort of ulterior motives or, or that we're somehow --

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

MR. DAVIS: -- attempting to punish or, or, you know, the non-debtor affiliates simply by making their creditors aware of litigation that we're required to give them notice of under due process and, and that is in a public proceeding, in, in a public court.

So we're a little nonplussed by the, the vehemence of the reaction here. We understand the, the arguments from the other side about how there's a lot of creditors and how, you know, there's a lot of names and, you know, it might be, might be difficult to, to provide notice, but the difficulty of notice is, is not part and parcel of due process. These are, these are known creditors. The Fourth Circuit has held on multiple occasions that actual notice has to be provided to actual creditors. We're not making this up. We didn't come up with this plan. This is, this is due process. This is the constitutional rights of those third parties. We're attempting to respect those and do what is necessary in order to, to, to fulfill them. That's all that we're asking to do.

The debtors and the non-debtor affiliates argue that there's a couple -- first of all, they argue that, well, the due process clause doesn't actually require this. But again, the weight of authority is, is explicitly to the contrary and a couple of cases that they, they cite for saying that, that

notice isn't necessary or that notice can be put off indefinitely or until after you've already made a decision on substantive consolidation are, are all distinguishable as, as we'll, as we'll come to.

But the issue that we're having is, essentially, by not giving us the information to provide the notice it allows the, the nondebtors, the debtors, and their creditors to essentially and potentially hide behind the log and then collaterally attack any order that this Court might have on substantive consolidation down the line. Any difficulty that there might be or inconvenience that there might be with notice now is going to pale in comparison to having those creditors come in and say, "Wait a minute. Wait a minute. We didn't have a chance to say what would happen to us if this substantive consolidation thing went through. You can't bind us with this order and collaterally attack it." And again, the weight of authority is that those collateral attacks would be valid.

The debtors and the nondebtors also argue that debtor, that notice would be confusing. I'm not exactly sure how, how notice would be confusing. It would say exactly what the circumstances are. Insofar as that's confusing, you know, the form of notice is not before the Court today, but, rather, whether we can actually just get the discovery necessary to propound notice in the first place.

Moreover, there are a number of courts that have considered this, this issue, including -- these are cited in our brief -- but the Eastern District of Pennsylvania Bankruptcy Court in Morse Operations and the Mukamal or -- sorry -- the In re Kodsi case with the Southern District of Florida Bankruptcy which made clear that the notice concern here is the paramount concern. The idea that it might be confusing is not a reason to not provide notice. And, of course, as I said, the form of notice is not actually before you.

I recognize that this, that this argument might be mooted, inevitably, but the argument that's made from the debtors and nondebtors is that this is all premature 'cause there hasn't been a ruling on the motion to dismiss substantive consolidation. I'll say that it wouldn't be premature after today sensibly, given that you would come to a decision on that. But even if granting notice were premature here -- we submit that it's not -- the earlier notice can be served the better and, in fact, a number of courts have talked about having notice at the time of the complaint. The, the, the discovery that we're seeking to get the information has no need for being stayed until, until, really, any point.

And in, in response to that argument or -- I'm sorry -- in propounding that argument about delay they talk about a couple of cases, S & G Financial Services --

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

MR. DAVIS: -- as well as Stewart where the, they claim that the court delayed the notice issue, but in S & G Financial Services the issue that was delayed was not whether notice was necessary, but, rather, whether the notice that had been provided was sufficient or whether notice had already been --

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

MR. DAVIS: -- achieved.

And in the Stewart case the motion to dismiss substantive consolidation had already been granted. So it mooted the notice issue.

I would say that the, a large portion of the remainder of the arguments are really about the merits of substantive consolidation. The, the Court has already heard all of that numerous times, including some more this morning. You've also ruled on a number of those issues in, in the DBMP case and I don't think that we need to rehash them here except to say that one of the, the issues raised is the debtors' and nondebtors' solvency and how because they're solvent there's no need to provide notice. Well, we're not aware of any sort of solvency exception and I don't think that if those who didn't receive notice came in and collaterally attacked these orders, that it

would be much of a salve to say, "Well, we thought that they had the money. They told us they had the money. So we didn't give you any notice." There's no, there's no exception in due process for, for solvency. Solvency is an issue to be determined, although it's not determinative in, in substantive consolidation. But if solvent, if they prove to be solvent or insolvent, those are still arguments that the, the creditors of the nondebtors and the debtors should be able to, to raise.

So essentially, with that, I'd -- I -- I -- again, we, we thought that this would, would be relatively noncontroversial. The weight of authority is that we've got to do this. We'd like the, the debtor to, to give us the information and the non-debtor affiliates to give us the information in order to do it. They complain that we're trying to be one-sided by, by not saying notice needs to go to the creditors in this bankruptcy. We're happy to give notice to the creditors in this bankruptcy, but, the case law concerns what you need to do with the non-debtor creditors who are not already in the bankruptcy in which the proceedings take place.

So with that, we'll reserve time for rebuttal --

THE COURT: All right.

MR. DAVIS: -- but we ask that the motion be granted.

THE COURT: All right.

Mr. Mascitti.

MR. MASCITTI: Good morning again, your Honor. Greg

Mascitti on behalf of the non-debtor affiliates.

Although framed as a 2004 motion, the Committee effectively asks this Court to approve a notice procedure pursuant to which the Committee would notify "any and all current and potential creditors of the non-debtor affiliates," numbering, potentially, more than 90,000 trade creditors, business partners, employees, of the Committee's request to substantively consolidate the debtors and the non-debtor affiliates.

For the reasons we've discussed multiple times and at the last hearing, no such notice is required at this time, your Honor. The Committee's substantive consolidation complaint does not allege or do the facts before the Court present a scenario where the debtors' assets are in any way insufficient to pay its liabilities. To the contrary, the debtors' assets, including the $270 million qualified settlement fund and hundreds of millions of dollars of insurance assets, together with other assets that the debtors have, make it highly unlikely that the debtors' assets alone would be insufficient to pay creditors in full.

The limited allegations in the Committee's complaint and the undisputed facts before this Court are important to the analysis of due process. This substantive consolidation complaint has not been brought to fill any gap, identified gap between the assets and the liabilities of the debtors. This

complaint was brought for the purpose of subjecting the non-debtor affiliates and their creditors to the bankruptcy process. Unsurprisingly, the Committee struggles to articulate the benefit of substantive consolidation of two solvent entities and this need for a notice at this time.

And Page 11 of its brief the Committee states that, "If the Court were to grant substantive consolidation, the Affiliates' creditors would be treated *pari passu* with the Debtors' existing creditors." But, but so what? Why does that require a notice to a creditor of a non-debtor affiliate at this point? That, that's two creditors receiving a hundred percent of their claims. The, the consolidation, *pari passu* of two solvent entities is not a basis for requiring notice.

In addition, in response to our argument that sufficient, sufficient assets exist to pay all creditors in full and that no notice is required at this time Committee argues that substantive consolidation would subject the affiliates' creditors to the absolute priority rule and bring them *pari passu* with asbestos claimants. Thus, any unsecured creditors of the affiliates would, could no longer be paid ahead of asbestos claimants in the ordinary course of business.

Two things on that. The absolute priority rule only applies in a cramdown scenario. So I'm not entirely sure how that would immediately apply to creditors in, in the context of a consolidation. But secondly, the idea that substantive

consolidation is a remedy to prevent a solvent entity from paying creditors in the ordinary course of business just doesn't align with the law. Substantive consolidation, again, is a remedy to fill gaps between assets and liabilities.

The Committee's desire to subject the non-debtor affiliates and its creditors to bankruptcy does not mean that those creditors' claims are at risk of dilution. To the contrary. Again, based on the allegations and the facts before the Court, creditors of the non-debtor affiliates are not at risk with having their claims diluted in any way. Substantive consolidation of two solvent entities with claimants being paid a hundred percent of their claims in either scenario does not require notice to those creditors certainly at this time.

Committee has not articulated any reason why notice is required now other than its cite to numerous cases which, I believe, Mr. Davis has quoted as the "heavy weight of authority" where due process requires notice and an opportunity to be heard be granted to the creditors of nondebtors. But in all those cases, your Honor, that's where substantive consolidation was used in the traditional way where there was some change in the asset and liability ratio where there would be some potential impact on the creditors of the nondebtors because they'd be at risk of then having to share a limited pool of assets with other liabilities. Those cases are not this case. It's clearly within the Court's power here, your

Honor, to determine what notice, if any, is appropriate and when. Neither the allegations of the complaint nor the facts before the Court today suggest that the debtors' assets are insufficient or that any notice is required at this time.

Substantive consolidation of the debtors and the non-debtor affiliates in this case would have no impact on the asset-liability ratios of either entity and, therefore, without any impact on the risk of payment to those creditors, without any risk of dilution, there's simply no need for any notice. What is at issue today, though, your Honor, is this is not just simply sending out a notice to creditors. There is substantial, well, there's no risk of dilution to the creditors. There is clearly substantial risk to the non-debtor affiliates' business operations if such a notice were to go, go out. It would clearly cause immediate and substantial harm and disruption to those business operations.

Contrary to Mr. Davis' description that, that he didn't know why such a notice would be confusing, having dealt with clients over the years I'm, I'm fairly confident that a client receiving this notice suggesting that one entity was going to be substantively consolidated with another entity in bankruptcy would have no idea what that meant. There would clearly be a lot of confusion arising from such notice. There'd be the substantial risk to the, to the non-debtor affiliates that creditors may try to change the current credit

terms that they have with the non-debtor affiliates. Suppliers and customers may think that the non-debtor affiliates are going into bankruptcy and choose not to do business with the non-debtor affiliates. Counter, counterparties to contracts, financing agreements may use this notice as an opportunity to exercise some contractual rights that they think they have to the disadvantage of the non-debtor affiliates and the parties in interest. And there'd be certainly concern raised among the employees of the non-debtor affiliates who would receive such a notice. Such a notice would require substantial efforts on behalf of not just the parties, but most likely the Court to, to explain what this meant and to mitigate the damages that could arise from such a notice.

All of this, your Honor, these risks, these harms, for what purpose? As we've talked about, the possibility exists that even if this case goes forward in terms of substantive consolidation, it may not change and it likely would not change the outcome for any party in the sense that the creditors of both entities will be paid a hundred percent on their claims at the end of the day.

Finally, your Honor, again, this is just simply not a decision that has to be made today. This case, there will be a lot of -- if, if your Honor doesn't grant the motion to dismiss the substantive consolidation complaint or, it's clearly a long, winding path of litigation that will follow and there

would certainly be a day in the future if and when appropriate that the Court could decide that notice would be appropriate at that time, but that's not today based on the allegations that were in the complaint and based on the facts before the Court.

And finally, your Honor, just as a matter of reservation of rights, to the extent that at some point your Honor decides there is a notice that's required, we certainly would reserve our rights to address the form of that notice and the means of providing any such notice.

Thank you, your Honor.

THE COURT: Thank you.

Anyone else? Mr. Erens.

MR. ERENS: Thank you, your Honor. Brad Erens again on behalf of the debtors. I'll try not to duplicate much, if any, of what Mr. Mascitti indicated in his argument.

There was a lot of discussion, I think, on both sides about, you know, whether this is a today issue or not, the timing. And yes, we obviously agree with the, the nondebtors that, at the very least, this is not a today issue. But having said that, the primary argument we're making is notice is not required, period, and I'm going to focus on that.

We start with due process. That's what's being alleged. Due process requires this notice. As Mr. Mascitti indicated, the nondebtors are unquestionably solvent. I'm not focusing on the debtors. I'm focusing on the nondebtors.

So the non-debtors' creditors absolutely will be paid in full no matter what happens. As a result, as Mr. Mascitti indicated, we do not believe under the facts of this case due process requires notice. They'll be paid in full and I think your Honor noted this in October at the October hearing where your Honor said, "Given the solvency -- I don't know if we're referring to the debtor or the nondebtors or both -- but certainly with respect to the nondebtors, is it really necessary to bring in all these parties?" And I think you indicated you could understand from a "tactical" reason -- that was the term I think you used why the ACC would --

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

MR. ERENS: -- want to try to do that -- but is it really necessary under the law? We agree, your Honor. It's not necessary.

But let's focus more generally not even on the facts of this case, but on civil procedure generally, which civil procedure is a matter of due process. Your Honor, we have an adversary complaint, okay? The defendants to that adversary complaint are indicating in the complaint they have been noticed. Lots of parties in civil litigation may be affected directly or indirectly by a piece of litigation, but that doesn't mean that they're required to be noticed.

The ACC does not cite and we're not aware of any

situation where the Rules of Procedure provide that parties other than the defendants on a complaint to be noticed and we think for good reason, your Honor. That would spawn litigation, lots of litigation as to who those parties are, when they should be noticed, why they should be noticed. It would be endless, your Honor. Civil litigation is such that the defendants are the ones entitled to notice. Nobody else.

Now the ACC may say, "Well, this is bankruptcy. This is different," you know, some sort of general notions of, you know, a different type of proceeding. But luckily, your Honor, we have the exact analogy in bankruptcy to this situation, an involuntary petition. It's the case that what the ACC is seeking here is, effectively, an involuntary bankruptcy of the non-debtor entities and this is why Trane argued -- we agree with this -- that a substantive consolidation of a non-debtor entity should not be permitted. Your Honor hasn't ruled on that yet.

But the point here is we have the exact same factual situation. There are rules. What happens in an involuntary case? A petition is filed and what does not happen is the putative debtor's creditors are not required to be noticed. But why is that? Well, I guess the answer, in part, is, well, that's what the Rules say, but it makes sense for all the same reasons it makes sense here. Your Honor, the list, among other things, the list changes. There's not a line in the sand who

the creditors are of the debtor. Until there's an order for relief, it's going to change.

So you'd be in a situation constantly of saying, "Well, today the creditors have changed. So is there a new notice going out? Do we tell the old creditors, 'Don't worry about it? You're no longer a creditor,'" all that kind of stuff. But the point is, your Honor, the rules in bankruptcy address this in the exact same factual circumstance, an involuntary petition, and the creditors of the putative debtor are not required to be noticed until the order for relief is entered.

So for that reason, in bankruptcy the rule should be no notice is required to the non-debtors' creditors in a substantive consolidation complaint with respect to non-debtor entities.

The other point we'd make, your Honor, is, again, the nondebtors are fighting against this litigation, their best position to do so. They're well funded to do so, more so, obviously, than any individual creditor could. So the, the party, the notice party, the defendant actually fighting against the, the complaint. So it's not like no one's pushing back on it.

I want to return to the civil procedure point a little bit more. This is the perfect example of why the Rule is in civil procedure only defendants of the complaints are the ones

who are actually noticed. Look at the facts of this particular case. Where would it end? Okay. So No. 1, Trane has indicated the parties who are creditors, who are clearly asked to be noticed, are 90,000. All right. So we have at least 90,000 creditors. But it goes well beyond that, your Honor. The request is for potential creditors of, of the Trane entities. I don't know who "potential creditors" are, but that could be tens of thousands of more creditors.

. The ACC has sought *nunc pro tunc* relief here. We haven't even started talking about that, but what they're basically saying is we want to go all the way back to the time of, I don't know if it's the divisional merger or, or petition date, probably, our petition date, and bring all those parties in. So we have to notice parties who are no longer creditors, but would under the ACC's viewpoint become creditors because they, I guess, give all the money back or something of that nature. So that could be tens of thousands of more creditors. And again, we don't even know, but there's a lot more parties involved here and a problem of not actually knowing who they are.

And then the other point is what about future creditors? So again, this is not a voluntary petition. There's no line in the sand. Parties who are not creditors today but who become creditors tomorrow, the month after, the month after, from the ACC's "due process" standpoint are

equally affected by substantive consolidation or potential substantive consolidation. So under their theory those creditors would have to be noticed as well. So should we do a daily notice? Every time a new creditor of Trane comes around we say, "Thank you for becoming a creditor. Here's our W-9. And, by the way, here's our notice of potential substantive consolidation of the Trane entities." This is why in civil litigation the defendants are noticed and that's it. Nobody else, because it would be never ending and this is the exact type of case that shows exactly why.

And why -- and finally, why even stop at creditors? If the issue is parties who might be affected, okay, well, that's primarily creditors. But what about the shareholders? What about the customers? What about other counterparties? Again, those are unanswered questions. And it's even worse in this case, your Honor, because as, as is the case, this is an adversary proceeding. Again, it's a complaint. So to have those parties become involved, I believe, requires a motion for intervention.

So the prospect of what they're proposing is, I don't know after notice, but hundreds, thousands, tens of motions for intervention into the substantive consolidation adversary. Your Honor, this is exactly what the debtors have sought to avoid in this proceeding. This is why the debtors care. From the beginning, we indicated the reason for this bankruptcy

structure is, is to simplify the proceeding, to focus only on the one issue, what is the amount of the asbestos liability? In LTL, this came up as well. Judge Kaplan indicated not only is that permitted, but, in his view, it is the desire -- and we agree with this -- this is the desired way to approach a mass tort bankruptcy of this type. There's no reason to bring in all the other parties, all the other assets, and the like. It just makes the bankruptcy infinitely more expensive, infinitely more complicated, and it would be infinitely longer, again contrary to the interests of the asbestos claimants 'cause it would only slow down the case, at the very least, and extend the time before they would get paid.

Again, bringing in all those other assets and operations wouldn't change the assets available, from our standpoint. We believe all those, all that value is already available through the funding agreement. The creditors, the asbestos creditors would be stayed, in any case. It doesn't change that. And again, the primary issue in the case -- and this is what Judge Kaplan also held -- would not change the amount of the asbestos liability. That's the issue in the case.

So let's turn to the case law a little bit. So the ACC would say, "Well, that's all fine and good, but the case law provides otherwise." Well, your Honor, our position is that's actually not the case. There is scant case law on this

issue, not surprisingly. There's scant case law on substantive consolidation of a nondebtor, to begin with. Happens almost never. As a result, the issue of whether notice is required in those cases, there's even less cases. There's nothing in the Fourth Circuit. I don't believe there's anything in North Carolina that either party has cited and there's zero case law, as Mr. Mascitti indicated, as to whether notice is required where both parties, both debtor and the non-debtor entities, are solvent, which is, we would say, a reason there shouldn't be substantive consolidation at all and why the motions to dismiss should be granted. But there's certainly no case law.

So, your Honor, we would say you write on a clean slate on this issue and absolutely can and we would say should rule that based on the notions of civil procedure that I just laid out and specifically in bankruptcy based on the analogy of the involuntary petition that no notice of the non-debtors' creditors is required, period.

Let's look, actually, at their case law. Because -- and I'm looking at Paragraphs 3 and 4 of the reply. They list a whole bunch of cases and it sort of creates the illusion that there's all this case law in support. Well, that's just not the case, certainly not on the facts or anywhere near the facts of our situation.

So they've, they noted the Ninth Circuit case, Mihranian or Mihrania.

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

MR. ERENS: That's kind of their lead case. The debtor was a chapter 7 individual. The nondebtor was mostly the ex-wife and sons of the individual chapter 7 debtor. We don't have operating entities both on the debtor and non-debtor side. The bankruptcy court -- not the Ninth Circuit -- the bankruptcy court denied substantive consolidation on other grounds. So if substantive consolidation was denied to begin with, the BAP took up the issue of notice, but ultimately, substantive consolidation was denied notwithstanding the, the notice issue.

The Stewart case, Western District of Oklahoma, again the debtor was a husband and wife individual chapter 7 debtor. The nondebtors were individual trusts or trusts that the individuals owned and maybe some entities in which they had interests. The motion to dismiss was granted and again, Stewart held that the notice was premature. So again, at the very least, that case stands for the proposition this is not a today issue.

Ark Capital, Southern District of Florida, debtor was an individual chapter 7 debtor. The nondebtor, an entity owned by the debtor's sister and mother. Again, totally different set of facts from the potentially hundreds of thousands of entities that the ACC is suggesting be noticed here.

S & G, Southern District of Florida, the debtor, again chapter 7 LLC. The judge, the court there found notice premature, at least at this stage.

E'Lite, Eastern District of Texas, there's not a holding that a notice is required. It was just done. There's no holding that it's required.

Clearview, Middle District of Pennsylvania, I don't think that's even a substantive consolidation case at all.

NM Holdings -- unfortunately, I didn't write down the, the jurisdiction -- the debtor's a chapter 7 corporation. It's not a holding that notice is required. It was, basically, notice was discussed in the context of whether there should be a ruling that substantive consolidation of a non-debtor entity is even proper, to begin with.

Tremont, District of Massachusetts, again chapter 7 debtor. It did not order notice. Notice was not the reason that substantive consolidation was denied. It was denied in that. It was just a footnote. It was denied based on laches.

Lease-A-Fleet, Eastern District of Pennsylvania, that actually was a chapter 11 case. So that's the first chapter 11 case they even can cite. The nondebtor didn't even object to the substantive consolidation of the nondebtor, okay? Well, you might say, well, if the debtor is not going to object, maybe you should notice the non-debtor's creditors. Again, I'd say that's maybe not required, but that is a different factual

circumstance. But at least in that case, again, the court said as to notice, prior to trial. So not today and they never got there because substantive consolidation, I believe, was denied on a summary judgment basis.

Concepts, Northern District of, Northern District of Illinois, where I come from.

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

MR. ERENS: This is one of my favorite, your Honor. The, the quote in the brief is -- let me get to it -- "granting a motion to dismiss substantive consolidation because, *inter alia*, 'it is not clear that every creditor of Defendant received notice of the Trustee's request, and had an opportunity to be heard.'" Judge Hollis found that in the Seventh Circuit there's no basis to substantively consolidate a non-debtor entity with the debtor. That's *inter alia*, okay? So the court found there's no basis to have a cause of action at all in the Seventh Circuit. The court happened to note that there was no notice to the non-debtor creditors, but the court held that substantive consolidation of the non-debtor entity was completely impermissible, to begin with.

Ward, Northern District of Texas, again, debtor is an individual chapter 7 debtor. Nondebtor was the wife or maybe some companies of the wife. Again, substantive consolidation was denied on a motion for summary judgment and creditor notice

was not the reason.

AAPC, this one, again, chapter 11 debtor. So we have a second chapter 11 debtor. The nondebtors were mostly dissolved corporations, okay? A little bit different than the publicly-traded Trane entities.

Ira Davis, Eastern District of Pennsylvania, the debtor was a chapter 7 entity. The nondebtor owned one parcel of land, as far as I can tell from the opinion, again much different.

The, the only case or a, from a factual standpoint that bears any resemblance to this case is the New Ctr. case, the Eastern District of Michigan, where you had operating chapter 11 hospitals in chapter 11 and the nondebtors were also operating hospital companies and that's the one case where the court found notice was actually not required at all. We would, we would say, your Honor -- the bankruptcy court didn't give its rationale. It is a published opinion, but we can surmise that, perhaps, one of the reasons would be all the, all the impracticalities and all the issues we raise as to why notice is not required here.

So the ACC response might be, "Well, due process is not a function of the size of the debtor or which chapter the debtor is in in bankruptcy." Okay, but the point of going through the facts of each of those cases is, by and large, they were all chapter 7 individual debtors where, okay, it probably

was easy when the issue came up for the court to say, "You know what? Okay. For the dissolved non-debtor entity, yeah, let's give notice to the eight potential creditors of that dissolved entity," okay? It's not like the nondebtor was an operating company and the credit list was changing all the time and there are 200,000 creditors to notice, okay? Also, it's a small case. There's probably no money to fight about the issue, right? Just, just get it done, okay? There was no incentive to focus on the issues and no money to pay for the issues that I'm raising, which what actually is required is a due process matter. And, your Honor, for the reasons I indicated, we would say that your Honor can hold and should hold that based on civil procedure -- and again, the involuntary petition analogy -- no, no notice is required, period. And, of course, certainly not on the facts of this case where the non-debtors' creditors are going to be paid in full because the nondebtors are fully solvent.

Now I'll just finish with the issue of this is not a today issue, okay? Yes, clearly, that's probably the easiest to answer. This is not a today issue, but I don't want that to dilute the fact that the debtors' argument is that no notice is required, period, and not on the facts of this case. It's not just maybe notice is required later and we'll deal with it later. But even again, the, the case law support that the ACC proffers shows it's not a today issue.

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

MR. ERENS: And we would say, your Honor, that's not a bad resolution from our standpoint because we think the idea there'll be substantive consolidation in this case at all is -- is -- is -- I won't -- I don't want to use this term, is sort of a "fantasy." We don't see this ever happening. So if the decisions are delayed, there'll be more dispositive motions and we can get rid of this substantive consolidation complaint, if it's not gotten rid of today, and the issue will be moot. So at the very least, it's not a today issue.

And, your Honor, it's interesting to us. We would think if the ACC were really just focused on due process, they would be fine with the result of deferring the decision, okay? So as long as due process is such that, okay, a decision later on is sufficient, they should be fine with that. In fact, they should support that. Think about what they're saying, your Honor. Okay. They're saying they want the notice to go out immediately. Okay. So what they're saying is they want to invite hundreds of thousands of people as early as possible to try to defeat what they're doing. That's not normally what litigants do, right, if it's not required by due process. They want to put out a list of creditors that's the most inaccurate possible. The earlier the list, the most inaccurate it is because, again, the creditor list changes all the time and it's

going to be changing up until, if this ever happened, a trial on substantive consolidation.

So from the ACC's standpoint, at the very least they should be supportive of a, of a delay on a decision of this, but they're not doing that. And again, we think that goes to motive. As we indicate in our papers, they also haven't noticed the debtors' creditors, which the same case law they cite says is required from a due process standpoint. We raise that in our papers. They still haven't done that.

And the final issue I'll point out, your Honor, again, why we think what's really going here is different than a due process argument. They say this in their papers in the last paragraph before the conclusion, Page 13 of the reply, they say, well, if your Honor would simply grant the motion, "The Defendants," meaning the debtors and the nondebtors, "would finally have the incentive to negotiate in good faith to reach a fair resolution of their asbestos liabilities." Well, we talked a lot about that earlier in the day. You know, the ACC cuts and pastes from different pleadings and we're fine with that because that may save the estate money, but that statement in this case is not borne out by the facts. We have been willing to negotiate. We have an incentive to negotiate. As your Honor heard, we're willing to go to mediation.

So we think that argument shows that the motives here and what they're trying to do here is different than a due

process argument.

So finally, your Honor, in summation, I would just say we think you, your Honor can and should find as a matter of general civil procedure no notice is required, period, not only on the facts of this case, but on any case that involves a potential request for substantive consolidation of a non-debtor entity, especially because we have the involuntary petition analogy. We have Rules in bankruptcy that govern this kind of situation. Certainly, on the facts of this case where the non-debtor entities are solvent, notice is not required, period. And then, of course, the easiest situation is it's certainly not a today issue. We can deal with this down the road.

So we would ask, your Honor, either you hold that notice is not required either generally or on the facts of this case or that you defer ruling until this issue, if ever, is really ripe for decision.

Thank you.

THE COURT: Thank you.

Anything else?

Mr. Guy.

MR. GUY: Your Honor, I'm not going to argue 'cause we didn't file any papers.

THE COURT: Okay.

MR. GUY: But we do agree with the debtors and the nondebtors. And so I'll leave it at that.

And, your Honor, at an appropriate time I'd like to supplement following discussions we've had with the ACC and the FCR our comments about the mediation whenever the Court thinks is appropriate. We can do it now. I think --

THE COURT: Let's go ahead and finish this argument and then we'll come back to that --

MR. GUY: Perfect. Thank you, your Honor.

THE COURT: -- all right?

Anything else on this?

Mr. Davis.

MR. DAVIS: Yes, your Honor. Just, just briefly.

We've heard a lot about the merits of substantive consolidation, about the potential benefits of substantive consolidation. It's not what this is about. This is about 2004 discovery and the benefits of due process.

I appreciate the time and care that Mr. Erens put into going through our case list, but -- and he was right about one thing. I will say that due process is not dependent on the circumstances that he claims are different here. And I can be brief in going through all of the cases they cite saying that no notice is required 'cause they don't exist. The only cases where they have said that you don't have to send out notice are cases where the case, were the court said that you effect -- the -- the non-debtor's creditors effectively were already on notice. They were already involved in the proceeding. They

were already attending hearings or they already had such dealings with the nondebtor that they were aware of what was going on.

So due process is as due process does and the notices, notice is required. What I'm hearing from the other side is, is not necessarily that they -- it's almost as if they want you to order that there's some sort of gag order here, that we can't talk about this proceeding.

It's also interesting to hear about, you know, their, their assertions of solvency, which we claim are completely irrelevant, not proven, but to, to hear in contrast that apparently the, the entire enterprise of the nondebtors is resting on the knife's edge and one whisper of this proceeding is just going to cause it all to crash down and wouldn't that be so, so terrible for everyone. If they are so resolute, then notice shouldn't really, shouldn't be an issue here at all.

Further, Mr. Erens talked about civil procedure, but he's right. Bankruptcy is different and courts have considered these arguments and said that notice is required here because there is, essentially, a, a pending action that will affect property to which those non-debtors' creditors have a right. There is at least one decision I know -- I was, I argued it -- in the Central District of California that said that a substantive consolidation proceeding is enough to give grounds for *lis pendens* on all of the debtor's real property because it

will affect, effectively take property that is now in the hands of a nondebtor and bring it into someone else's possession, the bankruptcy estate.

THE COURT: *Lis pendens* on the affiliates' property, not the debtor's.

MR. DAVIS: Correct.

THE COURT: Okay.

MR. DAVIS: On the non-debtor's property, yes.

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

MR. DAVIS: And effectively, the *lis pendens* actually provides a really good example or counterpoint to what Mr. Erens brought up about like, well, do you have to give notice to every creditor? Well, that's what a *lis pendens* does.

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

MR. DAVIS: Anybody who comes across this thing is given notice, "Hey, these are the facts on the ground. You should be aware." I would submit that most of what Mr. Mascitti and Mr. Erens have said about the creditor body of the nondebtors is essentially, "We don't think they have a reason to come in here. We don't think that they'll want to object to this. We don't think that they'll have any interest in it." Well, that's a different calculus than whether or not

they should be given the notice in order to make that determination themselves.

So I, I just want to put, you know, put down what we're asking for here is the information to provide notice. Whether notice is required or not, the, this proceeding can be made known. So the, the risk that they're talking about is completely devoid from this issue of notice. It's -- it's -- it's completely different, but what they want us to do is take on the risk of collateral attack later. They want us to take on the risk. This is a public proceeding that these people can know about and the cases that we have and the cases that have decided this say that there is a due process right for them to get notice. They say that that's too risky for them. So they want us to risk the possibility of collateral attack later. That's -- that -- that's -- that's -- that's unfair and, and again, would be more deleterious to the estate and to the asbestos creditors than, than simply providing us the information necessary to, to provide notice as has been dictated by, by a number of courts. Again, this proceeding presents a possibility that property to which these creditors, secured or unsecured, may have a right, may shift ownership from the non-debtor affiliates to a bankruptcy estate. That's why they have to get notice. 'Cause their property is at interest.

So with that, your Honor, I think that we'll conclude.

THE COURT: That got everything on this motion?

(No response)

THE COURT: Mr. Guy, you wanted to say something?

MR. GUY: Yes, your Honor.

Your Honor, I just want to give the Court some docket cites in Paddock.

THE COURT: Okay.

MR. GUY: And they go to our point, which is if we have discussions, we can get this done.

So February the 16th, February 16, 2021, there was a Certification of Counsel in Paddock. Many of the same constituencies, many of the same lawyers. I wish I wore my glasses. I apologize, your Honor. And they said on that Certification, I'm going to read it out. They talked about the discussions they had and this is the FCR, the debtors, the parent, the ACC::

"Based on those discussions the mediation parties have agreed that the appointment of mediators ... for the Court is the most efficient and effective mechanism to attempt to facilitate resolution of their disputes."

That's an asbestos bankruptcy that followed a Delaware twostep, okay? The very same day Judge Silverstein entered an order appointing mediators, very same day. That's Docket Entry 721. And the mediators were, mediators agreed to by the parties, Kenneth Feinberg -- everybody knows Mr. Feinberg --

and the Honorable Layn Phillips.

4/26/21, Docket Entry 802, successful mediation, two months. The amount, $610 million, your Honor, for a company that made amosite friable asbestos products.

Here, the ACC, same counsel, same parties, the same (indiscernible). If the Court decides that because the parties cannot agree to mediation, that it doesn't want to order it, and we would respectfully request that the Court order it because it's appropriate and it would, it's the best chance of getting money to asbestos victims quickly. I want the result in Paddock and I don't know why we can't get it here and no one has given me a good reason, no one.

There's a lot of talk about the cases are different. You, you saw our pleading on that. I'm not going to repeat it, your Honor. At a minimum, your Honor -- and I think you're encouraging everybody to do that -- I don't know whether the Court is willing to issue an order that parties should at least confer. Because I can say to the Court on the record there have been no substantive conversations about reaching an agreement on funding in this case between the three parties, none. And in court, everybody litigates. I get it. We're all advocates, very good advocates. I found after doing this for a very long time that if you actually just get the principals in the room -- and I'm not suggesting that the asbestos victims who are on the Committee --

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

MR. GUY: -- come. Of course not. But if you can get their representatives, if you can get the principals for the debtors, the nondebtors, and all these great counsel in the room and they can actually say not in the confines of the Court under 408, "This is why we don't like this. We don't think the number's big enough," da, da, da, whatever it may be, whatever the conversations they had in Paddock. 'Cause there, the conversations in Paddock were just about the money. That's a pre-petition restructuring that is substantively identical to this case. Why can't we get that here?

Thank you, your Honor.

THE COURT: Thank you.

Mr. Maclay.

MR. MACLAY: Your Honor, as the counsel in OI -- I've said this before. I'm going to say it again -- it's always astonishing to me that people not in the case purport to know so much about what supposedly led to what in it and why. It's all speculation, your Honor, and it's contrary to the facts. The facts that are known to me, some of which are confidential I'm not free to disclose, but, but the reality is, your Honor, as I have said before and I'm now forced to repeat again since this issue keeps being brought up again and again and again, in OI, there was no injunction precluding the plaintiffs from

getting compensation from the debtor's affiliates. It was a level playing field and unsurprisingly, when the constituency isn't under constant attack, that provides a more solicitous environment for negotiations.

And yes, that mediation did conclude in two months. It wasn't an ordered imposed mediation. There was a mediation arrived at because the constituency didn't get hammered with a two-by-four on the first day hearing. It's a resolution arrived at for a number of other reasons which all distinguish it from this matter.

I am in, I was in that case. I'm still in that case, your Honor, and if I thought and if the Committee thought that a mediation here would, in fact, improve the posture, would lead to a consensual resolution, we would have filed the motion for mediation ourselves but we, we know more than Mr. Guy does about what happened in OI and why. And, and so it's not what we're doing here and I would just urge the Court to, to, to take as a given the Committee understands its fiduciary responsibilities, it understands what's best for its group that it represents, and it is acting in accordance with those responsibilities.

Mr. Guy said he can represent to the Court that there are no three-way discussions that have happened. Let me, let me address that point this way. At the beginning of this case there were discussions between the FCR and the debtor which,

initially, the Committee wasn't even aware of. We didn't know they were happening and when we found out about them and we inquired about their content, we were told, "Oh, common interest privilege. We can't tell you." So we had, it was a black box to us until later on. At first, we had no idea it was happening and then later, we didn't know what it was about.

So Mr. Guy, no doubt, is saying from his perspective what's truthful, but he doesn't know everything. He doesn't know what's happening behind the scenes and if we thought a mediation would be appropriate, you'd be hearing us say that. But you haven't heard the debtor or the Committee say what Mr. Guy just said and I think that with that I'm going to have to leave it rest.

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

MR. MACLAY: Thank you, your Honor.

THE COURT: Well, let me ask this. You said earlier that there's a difference between a mediation and settlement discussions. I just wonder why not pull out, trot out a number that the Committee likes. Make it a high number and bounce it off of them and see if you can avoid having to go over the mountain as we're all about to go. What would be the harm? You don't have to tell me the number.

MR. MACLAY: Right. Your Honor, two points. One --

THE COURT: Uh-huh (indicating an affirmative

response).

MR. MACLAY: -- I don't have the power to give the Committee a number from the other side. If I did, I'd push that button right now, beep.

THE COURT: Yeah.

MR. MACLAY: But I don't. And so --

THE COURT: What's on the table now.

MR. MACLAY: Right. So two --

THE COURT: Presumably, you want more than that, the 545.

MR. MACLAY: That, that is a very fair assumption, your Honor.

So -- and, and, of course, as you pointed out yourself, it's, it's more complicated than just a number --

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

MR. MACLAY: -- as well. But with that said, one, we don't have the power to give us, you know, what we would call a real number. We don't have that power. We'll see what happens down the road, but what we do believe is that if your Honor rules on the matters that have been presented to you and doesn't sort of encourage additional delay in the process --

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

MR. MACLAY: -- that that forward progress from our

perspective -- and the debtor has their own vision of forward progress, what they've already enunciated and already, to some extent, gotten 'cause their, their side of the case is proceeding -- we believe on the Committee's side that would leave that situation of both parties being able to at this point advance their side of the case would help the conditions for potential discussions, if those were to potentially be fruitful. And again, I'm constrained by what I can say about that other than just saying that.

THE COURT: Uh-huh (indicating an affirmative response). Well, the, the thought I keep having is we are at the point where things are going to change dramatically in the case based on what the rulings are and where we go next. I just wonder whether 60 days of settlement discussions between the parties, never mind mediators. That just adds formality and expense and time. I just wonder whether that would, at least making the effort to see if you're even in the ballpark on, on the two sides' views of the value of the case, whether that might not be a first step before we get into all the, the litigation that, that could ensue.

MR. MACLAY: And -- and --

THE COURT: Just, just a thought.

MR. MACLAY: Sure. And, your Honor, trust me. Every time you, you have a thought --

THE COURT: Yeah.

MR. MACLAY: -- and you enunciate it, we listen --

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

MR. MACLAY: -- and we take it into account. I know my instructions are very clear and so I am relaying those, which is the Committee doesn't believe that sort of a pause of everything would be conducive to negotiations, which is quite different than saying discussions shouldn't happen.

THE COURT: Right.

MR. MACLAY: And I have never said the latter. I've said the opposite of the latter. And, you know, that's really as much as I'm at liberty to say at this time about that topic.

THE COURT: Okay.

Mr. Erens.

MR. ERENS: And, your Honor, from the debtors' perspective, we already said we'd be in favor of mediation.

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

MR. ERENS: So obviously, we'd be okay with a 60-day pause for settlement discussions.

THE COURT: Well, obviously, the -- what I don't want to do is what happened in Bestwall where you, we had a big pause and nothing comes of it. If it starts the negotiations and helps, then I'm all for it. But if we are consigned to just duke it out and go through the litigation, then we, we

will have to consider that. It just strikes me we are right at the tipping point of something changing that's going to affect the, the parties' views of the case and where we're going next. So anyway.

Anything further today?

(No response)

THE COURT: All right. The decision is what to do with this. Now I can try to take a lunch recess and incorporate all that's been said today into my remarks and give you the rulings that were promised from last month. It would probably be better and more likely to achieve a, a well-reasoned result, if that's possible, for me to have just a little bit of time to, to contemplate and work in what's been said today and what I already have here. I've got the rulings on these motions already prescribed. I don't want that to go very far, though, because, for one reason, we've got DBMP next week and some other cases of my own that I have.

But at the same time I'm also not real eager to make you go up and down the street waiting for an extended lunch period when I could have y'all getting your travel done and, and reconvene either tomorrow afternoon or Monday afternoon and do it by telephone and just tell you what I think.

Are there any preferences with the group as to how we approach this?

MR. MACLAY: Just to clarify, your Honor. Is the

question would the parties be amenable to having your Honor enunciate your rulings tomorrow or the next day telephonically as opposed to today? Is that the question?

THE COURT: Right.

MR. MACLAY: From my perspective, your Honor, if that would make it easier for your Honor to, to enunciate the rulings, you know, a day or two would be, would be fine.

THE COURT: How do you folks feel? What, what's your availability? Anyone opposed to do it that way? Everyone wanting a, a ruling this, this afternoon?

MR. GUY: No opposition, your Honor.

THE COURT: Pardon?

MR. GUY: No opposition, your Honor.

THE COURT: Okay.

Well, obviously, we're back at the end of the month, but I'd rather not wait that long. That's, that's four weeks.

So I think we can probably be ready to give you a decision tomorrow afternoon at 2:00 if everyone, 2:00 Eastern, if that works for everyone and while my judicial assistant is out at the moment, we can get the call-in information to them and just allow y'all to participate telephonically.

Has anyone got a problem with doing it then and in that way?

MR. GUY: No, sir.

THE COURT: Okay. That would be helpful to me. You

can imagine after a morning of, being spent being the tug-o-war rope, that getting your thoughts in a comprehensible order can always be a challenge for fear of leaving something out that was argued and then not addressed. So I don't want to do that. 'Cause as we see, sometimes when I say things and they don't come out with clarity, we end up with motions to clarify and reconsider and the like and I would like to minimize that sort of thing.

So what I would propose is that we go ahead and let you folks go home and then call in tomorrow at 2:00. Try to get on the line about 15, 10, 15 minutes early to make sure the technology's working and I'll try to tell you what I think about what we have under consideration now, okay?

Anything else?

(No response)

THE COURT: Well, thank you for your thoughts and your arguments. They're always wonderfully challenging. So we'll, I'll do the best that I can and hopefully, Mr. Guy won't hit anyone with a two-by-four on the way home.

We'll stand in recess.

MR. MACLAY: Thank you, your Honor.

MR. MASCITTI: Thank you, your Honor.

MR. GUY: Thank you, your Honor.

THE COURT: Yeah. When folks reattribute Winston Churchill quotes to Americans, I can see where that would give

rise.

MR. GUY: Thank you, your Honor. I appreciate that.

(Proceedings concluded at 12:14 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* April 8, 2022

Janice Russell, Transcriber Date