IN THE UNITED STATES BANKRUPTCY COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WESCO AIRCRAFT HOLDINGS, INC., ET AL	§	CASE NO. 23-03091-ADV
	§	HOUSTON, TEXAS
	§	MONDAY,
v	§	JUNE 24, 2024
	§	
SSD INVESTMENTS LTD., ET AL	§	8:58 A.M. TO 7:10 P.M.

TRIAL DAY 31

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: SEE NEXT PAGE

(RECORDED VIA COURTSPEAK; NO LOG NOTES PROVIDED)

(AUDIO ISSUES NOTED)

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(Please also see Electronic Appearances.)

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HOUSTON, TEXAS; MONDAY, JUNE 24, 2024; 8:58 A.M.

THE COURT: All right. We are here for closing arguments, phase one, on Adversary Proceeding 23-3091, which is Wesco, the Wesco dispute, the Wesco trial.

Who's going to go first? Mr. Kirpalani?

MR. KIRPALANI: Good morning, Your Honor. Susheel Kirpalani of Quinn Emanuel Urquhart & Sullivan, special counsel to the Debtor.

Before we begin with the adversary proceeding, my colleague, Mr. Leblanc from the Milbank firm, lead counsel for the Debtors, had wanted to address the Court briefly if that's okay. He's on Zoom.

THE COURT: Mr. Leblanc, good morning.

MR. LEBLANC: Good morning, Your Honor. Andrew Leblanc, Milbank, on behalf of Incora. Your Honor, I'll be exceedingly brief. I had hoped to be there. I had two different airlines cancel flights yesterday, and so I'm stuck back on the East Coast.

But Your Honor, I just wanted to say on behalf of the company we very much look forward, we're happy to be at this point, and very much look forward to hearing colloquy between Your Honor and counsel. And but we're very focused. the company continues to be very focused on finding a pathway out of bankruptcy.

And so, we're going to continue to engage with all

the parties in an effort to get us to a Plan as soon as possible, including, you know, immediately after there's a decision from the Court.

So we're not sitting back, Your Honor, although we're not there present in court with you today. But I just wanted to make that point and apologize for not being there in person. It was just unavoidable.

THE COURT: Were you bringing something illegal on the flights? Was that the problem, Mr. Leblanc?

(Laughter.)

MR. LEBLANC: Not -- it was certainly not me, Your Honor. I was flying from Boston trying to get there. And two different airlines -- American and United both cancelled their flights.

THE COURT: All right. Well, why don't you just pitch in whenever you need to today.

Thank you for the opening statement.

MR. LEBLANC: Thank you, Your Honor.

THE COURT: Thank you. I'm going to mute your line just so you can go about your business.

MR. LEBLANC: Please do, Your Honor. And I'll go off camera as well.

THE COURT: All right. Mr. Kirpalani?

MR. KIRPALANI: Thank you, Your Honor.

So just in terms of a preview for the Court, we have

conferred with the other parties. And as you can see, it was agreed that the Debtors and the other counterclaim defendants or the defense group would go first but by topic.

So, the first issue based on the Court's last conference, we understand we want to get through the contract issues for the 2024/2026 holders; the additional secured notes; all arguments about those; the third amendment; the fourth amendment; sacred rights, things of that nature.

And then after our side concludes on those issues, the counterclaim plaintiffs would take issue and join issue on that so the Court would have a coherent back and forth on those.

And then after that, we obviously will address the equitable remedies issues that the Court has asked about, and we'll go in that same cadence.

And then the Langur Maize issues as well would be taken up either after the equitable remedies or before depending on what the Court thinks is the best way.

THE COURT: All right. Thank you.

MR. KIRPALANI: We do have a bunch of slides to hang out if we can approach the Court and the clerks, as well as the other side.

MR. NOSKOV: Your Honor, may I approach?

THE COURT: Yes, sir.

So before you all actually start, let me just say to

everyone that the briefing was absolutely amazing, and that I congratulate everybody on the quality of that briefing.

Thank you.

MR. KIRPALANI: Thank you, Judge. Very kind.

CLOSING ARGUMENTS BY THE DEBTORS

MR. KIRPALANI: Okay. Let's get started. If we could turn to Slide 2 just to give you a preview, Your Honor. We thought about how best to present this orally as opposed to just a rehash of the briefs which obviously, we wouldn't want to do.

And I think the way we'd like to begin is first by giving a very brief one or two minutes on the nature of indentures and why it matters. Then we're going to talk again very briefly -- because the Court has sat through months of testimony about the 2022 transaction -- we just want to highlight a couple of important things that may have gotten lost through all the testimony about the 2022 transaction.

From the company's perspective, we think this whole case turns on the question of what notes are considered outstanding. Under whatever doctrine you want to use, whether it's that's not what the contract says exactly, or maybe it is what the contract says exactly, or there's some other doctrine from outside the contract that should change that outcome, we think that's a central issue in the case -- what notes were outstanding for purposes of the voting.

And then in segment three, Your Honor, I might take a pause there and ask the Court what you would like me to do. Because I am prepared and happy to go through the five-plus alternative arguments raised by the 2024/2026 holders on why the March 22 transaction was not done correctly, was invalid, et cetera, but I can also jump around through that depending on what the Court wants me to focus on at that time.

And then the last segment is really I'll call it the signature issue. You know, were the notes that were issued valid and outstanding under the terms of the indenture and under applicable law? And that would conclude kind of the contract issues as we conceive them.

So let's turn to Slide 4. So what's an indenture? And I don't mean this is any tongue-in-cheek way. I mean it because this is the New Yorker cartoon that's from the model indenture commentaries from 1971 because it really is a specific type of contract; and the type of contract it is also informs the way in which courts interpret them.

It's not a typical contract where we say we need to know what the intent of the parties were at the time they signed because as Your Honor knows very well, and from the testimony, a lot of the provisions in indentures are boilerplate.

And so what courts do consistently and prudently is look to model commentaries. What's that provision supposed to

do? What's the other provision supposed to do if it wasn't specifically negotiated?

Of course, if it was negotiated, we need to look at what the parties are trying to accomplish. And if it's unambiguous, we just apply the words; if it's ambiguous, we look to what's the course of conduct of the parties. It's called practical construction under New York law. We discuss that in our briefs as well.

Let's flip the page.

One of the most important issues that will come up later, but I want to, you know, kind of put a marker down now is who are the parties to this contract? There's the issuer. that's my client, Incora and/or affiliates, the guarantors. And the other party is the trustee, WSFS or its predecessor who serves as the indenture trustee as well as the notes' collateral agent.

And that's what it says right in the recital -- these are the parties. No doubt bondholders are third-party beneficiaries. Your Honor held that at summary judgment. That's absolutely correct. And the commentaries say that as well, but it does matter for certain provisions, and I'll explain when -- not, of course, for all of it, but I'll explain when I come back to it.

Let's turn to the next.

So these are the commentaries. We actually have

created a compendium of all of the relevant commentaries to the model indenture that might apply to any provision in dispute in this case. If it would be helpful for the Court or for any of the parties, we can hand that around. I'll go through the relevant ones as we see it throughout the presentation.

But boilerplate provisions in indentures are not a bad thing; they're actually a good thing. They promote uniformity. People are not going to sit and read through a 200-page indenture every time. They look for select things.

They look at cheat sheets. They look at -- I think JPMorgan's Mr. Cook had called it the extract publication to say, well, what's the provisions that are in play here. So that when a market participant, whether it's my client, an issuer of notes, or a buyer of notes sees it, boom, they know what it means. They know what they're talking about.

And that concept comes from the case law. Uniformity and interpretation is important to the efficiency of capital markets. And that case appears in the 2024/2026 holders' brief, as well as the one that we cite on the side.

Quote, "Courts enhance stability and uniformity of interpretation by looking to the multi-decade efforts of leading practitioners to develop model indenture provisions." And there are several that are important here, and we've got the model commentaries to help illuminate what this was

supposed to be doing. And that's important with -- type of contract.

Let's look to Slide 7. Okay. So this is an indenture dispute at bottom, this case. We know there's tort arguments, et cetera, but before we get to the courts, we have to figure out whether the contract was breached.

And the central provision in this case is Section 902, which is can the issuer or did the issuer properly amend its indentures with the consent of holders of the 2026 secured notes; and if so, what amount was needed to do that amendment.

So here we have Section 9.02, and you can see that except as provided below, so the general rule is as follows: with the consent of holders of at least a majority in aggregate principal amount of the then-outstanding 2026 secured notes, other than the 2026 secured notes beneficially owned by the issuer or its affiliates, including, without limitation, additional secured notes, if any, voting as a single class -- and this part is very important -- including, without limitation, consents obtained in connection with a tender offer or an exchange offer for or purchase of the 2026 secured notes.

And we highlight this, and I'm stressing it to you now, Your Honor, because this provision is central to the dispute as I've said. But it also works like an owner's manual or an instruction manual.

So when my client says I've got various pieces of my capital structure, I need to understand what the rules are, I'm trying to raise more capital, they can do only one thing, nothing else. They can't call around and ask brokers, what do you think of this? What do you think of that? How does this work? How does that work? No.

What they can do is they pick up their indenture, and they look at the instruction manual. How does it work? What can I do? How can I do it? Before I try to hard wire something, I've got to make sure I'm not going to cause some sort of an electric short.

Let's turn the page.

Okay. So, what is the general rule? The majority can make amendments. And what else in Section 9.02? If you keep reading down the page, it says, "Subject to Section 604 and 607 hereof," and you can read that but then forget it because it has nothing to do with this case; it has to do with basically waiving payment defaults after they happen; okay, so subject to that -- "holders of a majority in aggregate principal amount of the 2026 secured notes then-outstanding, voting as a single class may waive compliance in a particular instance by the issuer."

That phrase is important to me as I read it, when I'm looking at the owner's manual and trying to figure out which provision governs which fact pattern. Waiving

compliance. And the reason it's important because a lot to do in this case is whether or not my client was restricted through leverage tests, permitted lien tests, permitted debt tests, or whether it had to comply with those caps.

Waiving compliance, that phrase, is another majority consent; not just amending -- waiving compliance. And that's important because it's the flip side of the coin of trying to ascertain what level of support do you need if you're going to blow through a debt basket.

If you want to either amend it or if you violated it and you need to waive compliance with it, it's majority either way. And we think that's very important. It's tidy, and it comes full circle.

Let's turn the page to 10.

Now 902 has, of course, specific amendment requirements where two-thirds, a super majority, is required. And those three, there's three prongs, are very similar. They cover the same subject matter.

And the first one is it has the effect -- if an amendment would have the effect of releasing all or substantially all of the collateral from the liens. Okay. That's going to require two-thirds.

The second one is if the issuer is going to make any change in the security documents, the inter creditor, or the provisions of this indenture dealing with the application of

proceeds of collateral, okay, so that's subordination from liens, if we're going to change the waterfall.

And three, if the issuer were to modify the security documents or the provisions of this indenture dealing with collateral in any manner adverse to the holders in any material respect, other than in accordance with this indenture. That's sort of the last one. That's certainly at issue in this case, as well as the first one, and we'll come back. But those are the three things that have super majority consent requirements.

Let's flip.

Sacred rights. In addition to the general rule of majority can amend the indenture and can waive compliance with anything that the company had agreed to, there's the two-thirds. And in addition to the two-thirds, there are what I would call, Your Honor, the 11 commandments.

And I call them that because there's 11 of them in this indenture. It says without the consent of each holder affected -- so it would be unanimous consent if it's an amendment that would affect everyone equally -- an amendment or supplement or waiver under Section 902 may not without the consent of that individual holder, ten, make any change to or modify the ranking of the 2026 secured notes in respect of right of payment that would adversely affect the holders. And we're going to come back to this because it's one of the

arguments that the holders make as well.

And just when you think about sacred rights, the best way I remember them is it's the essence of the creditor-Debtor bargain. How do I know? We're not supposed to gloss some natural law onto a contract, right? So it's not -- well, that was the whole purpose of the investment. We can't. What's the purpose of the investment is contained in the four corners.

So where in the four corners do we look to, to figure out what's the essence of the bargain? We look to what's sacred. And so, how do I know that? Because, of course, number one -- we'll show you later -- talks about changing some of the rules.

You can't rewrite the instruction manual. That's one. That's an important one. Elsewhere, you can't change the principal amount that's due. You can't change the interest payment that someone is owed. Those are sacred rights. And this is one here, and it deals with ranking of -- in respect of right of payment.

Okay. Let's flip to the next section.

As I promised, I'm going to try to go through this part quickly because I know Your Honor understand the 2022 transaction. But when we talked --

THE COURT: Can we go back up? Let's go back up about three slides. Up again, please. Right there. No, down

one. Sorry. Down one more. There you go.

In the briefing, there's heavy engagement on the use of the terms "have the effect of releasing."

MR. KIRPALANI: Yes.

THE COURT: And essentially, your opposition says that you take out the words "have the effect of" in making your argument. There's a huge amount of focus in the briefing on what the parties' intent was in doing things, to which you respond, "Intent doesn't matter. The question is, is did it do it?"

I guess I come away from that thinking intent may inform how to read the documents if they're ambiguous. But, in fact, I think generally, you're correct that it must have that effect.

They argue the effect comes in two ways: one, in the specific performance provision; and two, in the closing agreement that was the meeting of the parties that took place at 8:00 in the morning on the closing date.

You respond that the first one makes no sense because the specific performance wasn't in the issuance of the new notes; it doesn't come until -- I'm trying to go through all of this; you'll know why --

MR. KIRPALANI: You've got it.

THE COURT: -- I'm asking the question.

MR. KIRPALANI: Yeah. Um-hum.

THE COURT: But I don't really get an explanation in your brief that I'm fully appreciating as to why the agreements reached on the closing conference call didn't bind everyone. I'm not trying to in this question collapse what I'll call the step transactions.

But did that agreement made on the record or on the transcript have the same effect as a specific performance agreement where the parties irrevocably committed themselves to do the whole transaction and not just part of it?

I'm not sure I get a satisfactory answer in your brief to that. Maybe you're going to get to that in a minute, which is fine. But I will tell you that's the number one question I'm walking out here with.

MR. KIRPALANI: I will get to it in greater detail, but I want to answer it briefly now. You said it, I think, correctly that your impression was at 8:15, 8:17 in the morning on March 28th, 2022, the parties reached an agreement or understanding as to what would happen that day at the closing.

This provision we can look at, it's right in front of us, doesn't say no agreements may have the effect of releasing all or substantially all. What it says is no amendment, supplement, or waiver.

THE COURT: Right, right. So the addition --

MR. KIRPALANI: So the issue is what did the

amendment do --

THE COURT: But the issuance of the additional notes was step one. We want to call it a legitimate step transaction.

MR. KIRPALANI: Sure.

THE COURT: I'm not trying to get into that issue right now. It was step one in a but for where everyone agreed you would do them all. It wasn't a step transaction where after step one, people could quit and never get to the exchange agreement.

So if it was a necessary but-for step to get to the exchange agreement, why did it not have that effect? Because everybody committed to everything at least orally at that meeting.

MR. KIRPALANI: I think the answer is because this is testing amendments. This provision right in front of us is testing amendments. The third amendment did not have the effect of releasing liens. It may well be. The third amendment didn't have that effect.

THE COURT: No. If doing the third amendment irrevocably committed everyone to doing the exchange agreement because of the statements made that morning, maybe it did have that effect. And telling me it didn't doesn't really answer the question of whether there was some binding agreement made on that day that made this not a step transaction which we can

-- that's a separate question as to whether it was a step transaction, and we'll have to deal with that.

MR. KIRPALANI: No, but --

THE COURT: But it made it a non-step transaction, if you will, whether everything in fact, all the signatures were there, everything was there, and everybody agreed to do it a certain order.

Forget whether you can collapse a step transaction or not; it was that agreement to do step six if you do step one, if I have the count right, that may have had that effect. I need an explanation for that.

MR. KIRPALANI: Yeah. I'm going to -- I would like to do it with the benefit of the cases in front of you.

THE COURT: That's fine.

MR. KIRPALANI: But I will preview that this was the issue that the Murray Energy Bankruptcy Court wrestled with and quickly dispensed of it because committing to do something is not the same as doing it.

Having an agreement to complete a transaction in a series of steps --

THE COURT: But no that --

MR. KIRPALANI: -- doesn't eliminate --

THE COURT: -- but that's your argument --

MR. KIRPALANI: -- the distinction between those steps.

THE COURT: -- that takes out the words "have the effect of." I agree that it didn't release them, but it may have had the effect of releasing them. And I want to focus on those words. They matter to me.

MR. KIRPALANI: I understand that. I think there it would depend on whether the third amendment or the note purchase agreement, which Your Honor had asked about during Mr. Dostart's testimony. Remember, I came over running from across the street.

You said I want to see does the note purchase agreement, does the third amendment, is there a condition in there that they're not going to issue those notes, they're not going to buy those notes unless they're also getting an uptier. They're also getting --

THE COURT: Right.

MR. KIRPALANI: -- an exchange.

THE COURT: That's right.

MR. KIRPALANI: It's not -- I'm going to take you through that contract because Your Honor asked the question. Folks tried to answer it on the fly and no one could; I will, and you'll see it's not in there.

THE COURT: But you'll notice my question doesn't focus on that. My question is whether having made maybe that exact agreement, the one I asked about, occurred at the closing. That's the question.

MR. KIRPALANI: Well, I guess the other way I could answer your question, Your Honor, if you could look at the parenthetical. Do you see where it says, "including without limitation consent obtained in connection with a purchase of, a tender offer, or an exchange for the 2026 secured notes"? Do you see it?

THE COURT: Yeah.

MR. KIRPALANI: That's a reference to exit consents. Exit consents, Judge, are -- they go back at least four decades, the Katz case against Oak Industries, 1986, Delaware Chancery, and subsequent cases, and we'll get to them in my presentation.

They all ask the follow question, and it's an important one, I think, for Your Honor to reflect on. It's away from this case for a minute, but it's directly -- relevant.

If I'm going to out -- I'm an issuer of bonds, I go out to get consent. And let's say the consent threshold is 50 percent, two-thirds, doesn't matter. There's some threshold of bondholders that have to agree what I'm asking for is a good thing for them.

What exit consents are is where the company says I'm going to ask for your consent, and I have a binding contract that I'm going to buy your bond right after you vote. In the now second after you take, I'm taking you off the risk

completely.

How could that possibly be right, Your Honor would probably say. The whole purpose -- the whole purpose of having the vote is to make sure those with economic skin in the game agree with the issuer that we should make this amendment. And if what I'm saying is right, it would mean that the issuer can manipulate those rules.

They could ask for the vote, and have a binding agreement to buy the bond in the second later, and the only people who suffer the cost, the consequence of that amendment are the people who didn't exchange -- those who were left out there or didn't vote.

THE COURT: Weren't allowed -- no --

MR. KIRPALANI: And that's --

THE COURT: -- weren't allowed to exchange.

MR. KIRPALANI: Right. Weren't allowed to exchange. And you know what the case law says? That's absolutely appropriate. And the only way to interpret an indenture, even if it doesn't have this language -- but we have it -- this is the only way.

If Your Honor were right or if the 2024/2026 holders were right that the "have the effect of" language means if you enter into an agreement to do something that takes away the, you know, the bona fides of the vote that was being cast, then we're not going to count the vote. You can't reconcile that

--

THE COURT: Just --

MR. KIRPALANI: -- principle with that language.

THE COURT: -- but to back up a minute, your argument is arguing that there were 66 and two-thirds vote.

MR. KIRPALANI: Right.

THE COURT: That's not my question. I want to -- that's a different, completely different question. Assuming there was not a two-thirds vote, did this have the effect of releasing because of what occurred at the closing meeting? That's the question I'm asking.

I have it that there's a completely different argument that you did, in fact, have the two-thirds vote.

MR. KIRPALANI: Right.

THE COURT: And they can deal with that.

MR. KIRPALANI: Right. No, no. I --

THE COURT: But that's not my question.

MR. KIRPALANI: We -- if we don't have the two-thirds vote, we release their liens. We needed the two-thirds vote, and we're not going to suggest that we didn't.

THE COURT: No. You're talking about at the time of the exchange agreement.

MR. KIRPALANI: Right.

THE COURT: Right. That's not my question. My question is could you have issued the notes --

MR. KIRPALANI: Um-hum.

THE COURT: -- assuming that you didn't have the two-thirds vote if the issuance was subject to the agreements made at 8:15 in the morning on the closing day.

MR. KIRPALANI: And I'm saying that the intent, the purpose, what people were going to do with those bonds once they got them, all of that's irrelevant --

THE COURT: That takes out the words "have the effect of," though is their point.

MR. KIRPALANI: It doesn't say, "have the purpose," "with the purpose of."

THE COURT: No, but it --

MR. KIRPALANI: It says "have the effect of."

THE COURT: Yeah, but I understand that. But their argument that I'm asking you to directly confront is that because of the closing meeting, it did have that effect under a but-for test. That's their specific argument.

MR. KIRPALANI: Sure. And --

THE COURT: What is your answer to that but-for test?

MR. KIRPALANI: My answer, Your Honor, perhaps I'm not being clear enough, is that argument, that assertion cannot be reconciled with the parenthetical that we just went through. If whether or not to say a particular act had the effect of something else turns on whether there was an

agreement binding or not of what would happen immediately after the vote was cast, you can't have this language.

My client had the expectation and right to read the agreement and say what are the rules that govern voting, and actually the rules when they cover them, they're in separate sections. They're in what's outstanding. That's what that says, and it's in Section 208, and we'll cover it.

But here this expressly says, "Consents obtained in connection with a purchase," would just as easily have the effect of doing whatever it is that is prohibited, but our contract says you have to count those votes. There's no way around it. There's no way to undo that, other than ignoring those words, which other indentures don't have. Ours does.

THE COURT: Okay.

MR. KIRPALANI: Maybe I'll be able to answer it better when we get --

THE COURT: Yeah.

MR. KIRPALANI: -- to the entire --

THE COURT: Well, wait. I'm just -- I'm trying to tell you and them how critical this question is.

MR. KIRPALANI: Understood. Thank you, Your Honor. It's helpful.

Let's flip to Slide 13.

Okay. So as I said a few minutes ago, Your Honor, I know the Court is very familiar with the overall aspects of

the 2022 transaction, but this was two different amendments. There was a third amendment that had a certain purpose, which was to amend the definition of permitted indebtedness and permitted liens to allow -- the company already had the ability to issue up to 75 million. Make that 75,250. And I'm going to come back to why, but let's talk about it right now.

This is also important. That number, the $250 million, that was set by the company's financing meetings. It wasn't set for some improper purpose. It wasn't set in order to come up with a fake sham amount of votes.

The company needed 250. The original offer that came in from Silver Point and PIMCO in December of 2021 was for 200. And very quickly in January, the company went back and said, you know, we really need 250 long before any of the plumbing of how this transaction would be structured was even conceived.

And I think that's important because it is the accusation of our friends across the aisle that the third amendment was a sham, it was not for a legitimate purpose. It had a very real purpose, which was to issue $250 million of additional notes, and that money came in, and the money came in.

The fourth amendment is where the real action was. The real, quote, injury that we're dealing with here has to do in the fourth amendment. Through that exchange agreement, the

company was able to redo its capital structure.

It took previously first-lien debt, made it unsecured. New money that came in, money that was rolled up became first-lien debt. And the unsecured bonds who had consented to or permitted to consent to the transaction rolled into the lower bond, lower cash coupon from 13 percent down to 4 percent -- pretty significant, but they got 1.25 liens in exchange.

That's what changed the capital structure of Incora, and that was in the fourth amendment which had different players, different parties, different contracts, and did different work frankly.

Let's turn the page.

And this is just another way to say the same thing. The third supplemental indenture, you know, we can look at them, but I think it's undisputed that that's what changed the definition of permitted liens to include the 2025 -- I'm sorry, 2026 additional secured notes.

The note purchase agreement is the agreement pursuant to which Silver Point and PIMCO purchased the 250 million of new notes, and the company got 250 million in new cash netted expenses.

Let's turn the page.

THE COURT: No, it got 250 million in new cash before expenses, not netted.

MR. KIRPALANI: I'm sorry. Yes.

THE COURT: It only got -- it got about 200 --

MR. KIRPALANI: Gross of expenses.

THE COURT: -- million in cash.

MR. KIRPALANI: Thank you. Thanks for correcting it -- gross of expenses. The -- yeah. And then the fourth supplemental indenture, Your Honor, this is the one where the sum notes, outside notes were swapped for new notes that are now at the top of the capital structure in the Debtors' view, and that's where the unsecured bondholders who were participating gave up the 13 percent cash pay in order to give the company liquidity.

This was an important, separate event for the company. It wasn't just that the company needed $250 million. That wasn't going to cut it. The modeling that was done, the analysis that was done, again before even setting the quantum of additional new notes was we need two things. We need cash on the barrelhead, plus we need to do something with our 2024 maturity wall. And this is what did it. This is what enabled the company to do that.

Let's turn the page.

Okay. So you remember Mr. O'Connell from PJT, Your Honor. He testified a very long time over the course of two days, and he identified what were their reasons. He testified that it was a very, very serious situation at this point in

time.

There was the UK audit that was looming by the end of March. The timing of that was immovable for the company. They needed to address the issues. It was important to the company that they announce the liquidity infusion to the customer and vendor communities, and they needed to make a decision and make it quickly and move on.

And we asked Mr. O'Connell if he thought that the 250 million would stave off the need for a bankruptcy, and he said yeah; that's what gave them substantial financial analysis about. And we have a reminder to the Court of all the things that were going on at the time.

And Your Honor knows if you lived through the pandemic, and for a company like this which is in the secondary market of the aerospace industry, that pandemic was definitely long COVID.

Let's flip the page.

THE COURT: So I want to be sure that everybody's on the same wavelength on this. You-all spent substantial time, and you're spending substantial time now, talking about the great need for the money. I think that's one of the most important things that's going to get argued over the next couple of days.

But it also has a limited functionality, and I want to be sure we're not disagreeing about the limited

functionality. The importance of the money may go towards the company's good faith, it may go towards necessity. It goes towards a lot of things.

But in a couple of instances, particularly when you're dealing with the 2027 notes, it's almost used as, well, even if the agreement said we couldn't do this, there was an absolute necessity that we had to do this.

Are you in any way arguing that necessity could overcome a documentary requirement, for example, in the 2027 exchange? Or are you saying, no, you still have to comply with the documents, but all these allegations about bad faith, and all these allegations about it was all artificial are just ridiculous? And you could be saying both things, and it's not entirely clear in the briefing.

MR. KIRPALANI: No. I want to be very clear with the Court -- it's the latter. We're not arguing that even if we would have violated our contract we were justified in doing so because of the economic necessity. That's not our position at all.

Our position is we did have a need. It does inform the intentions, bona fides, good faith of all the participants in it. And we did comply in our view with the contract. And the reason why I'm stressing heavily here the distinction between just getting the cash and also doing the work of the fourth supplemental indenture and the exchange agreement is

because it's important to understand for purposes of a lot of their arguments about collapsing and integration and all of those things, that there were different things going on.

And it wasn't just all one thing. And I actually think that the plaintiffs disagreed amongst themselves between that very issue. But no, we're not suggesting that the economic necessity or compulsion of the company justified or excused it to breach contracts. We don't believe we breached any contracts. Thank you.

THE COURT: Thank you.

MR. KIRPALANI: And then Malik Vorderwuelbecke, one of the Incora directors, also testified at length before the Court early in the trial. So just to remind Your Honor, you know, he gave very compelling testimony that it was getting very pressing because outside of even these immediate liquidity concerns where maybe we could've seen through careful stretching to extend the runway even further, he testified what we were also running up to is the deadline of the audits as discussed earlier, in particular the full-group audit for which we still had no solution.

And he testified that this was -- meaning the financing offered by Silver Point and PIMCO -- was the best available solution to us at the time to secure the financial well-being of the company.

And I want to focus on that just for a minute. I'm

sure Platinum's counsel will do it for their own client. But this transaction was for the benefit of the company. Everybody also benefitted. Those who participated benefitted, or maybe not in hindsight. But at the time, they thought they were benefitting.

There's nothing wrong with that. As long as the company is benefitting, anybody who derivatively benefits from it, frankly, we think all credits derivatively benefitted from it -- vendors, as well as other extending bondholders, that's not really the question that's at the heart of this case.

The next slide.

Ray Carney. Your Honor, you met Ray Carney. He testified at length as well. You can very much tell non-professional witness. Certainly somebody who sincerely cared about the company, was management at the company for a long time. He said that he was focused on this. The cash situation continued to get tighter and tighter.

The head of supply chain was often in my office asking how we were going to pay for -- pay vendors to keep product moving. The chief administrative officer would be in my office almost daily saying, "Are we going to make it until tomorrow?"

I just want to bring back to reality where we were. We all have short memories when it comes to bad things, but COVID was a very bad thing. And for this business in

particular, it was very, very bad even a year after most of us thought the worst was behind us, and I think that's important to remember.

The next slide.

I talked about the maturity wall, and I thought it's helpful to give Your Honor a picture of it just because I think it helps me understand what the company was facing. We're talking about the company in 2022 looking forward and seeing in 2024, there are $614 million of 2024 notes. Okay.

And what do we know? We know that Silver Point and PIMCO controlled more than two-thirds of them and were willing -- this is a sacred right, sacred right -- to push that maturity out. That was critical for the company.

When they were designing their business plan which PJT testified about, how can they get through this trough. They needed that runway in order to take off. They really needed it.

And only Silver Point and PIMCO could deliver it. We also heard the testimony about the Ad Hoc Group or the Akin Group with their various proposals. They admitted they had no solution for the 2024 holders. In fact, some of them sold off all their 2024s. I believe Golden Gate was a holder of 2024s. They sold -- got rid of them.

They couldn't even offer this type of concession. And again, I'm stressing this because it's separate from the

issuing of the notes, and it's important. We don't want to forget about it. It was critical to the company.

And so through the fourth amendment, the company was able to push out 455 million of the 614, leaving with a small stub that the unrebutted testimony in the record was the company had a good-faith belief they could easily resolve or deal with that stub with cash on hand or through other means if their business plan came to fruition.

Let's turn the slide. Okay.

So Your Honor, I think that this whole dispute turns on the question of what constitutes an outstanding note. The indenture as I've said really does operate as an instruction manual. It doesn't make value judgments. It's enforced as it's written.

That's what the case law in exit consents tells us when they talk of that. That's what the language tells us when it says you must include notes that -- consents rather that are obtained in connection with a multi-step transaction, a tender offer, an exchange offer, or a purchase of. No -- Judge.

It doesn't matter that the person voting has no economic skin in the game. We count the votes if it's deemed outstanding. And how do we know whether it's deemed outstanding? The last sentence of this paragraph in 902 tells us where to look.

It says Sections 208 and 209, and 209's not relevant, Your Honor. That deals with treasury notes. 208 shall determine which 2026 secured notes are considered to be outstanding for purposes of this Section 902. The case lives and dies on that sentence, and we look at Section 208.

Let's flip the slide.

It says, "The 2026 secured notes outstanding at any time" -- at any time -- "are all the 2026 secured notes authenticated by the trustee except the ones that are cancelled and those described in this Section 2.08 as not outstanding."

So it's a full set. It's everything that's been authenticated. And obviously, we know there's an issue or a question about authentication. It's a separate subject. We're going to come to it. But it's everything that's been authenticated at a moment in time except for what's described as not outstanding.

So I asked my team, "Does the model commentaries say anything about exit consents at all?" and it does. It says it here. It says, "Many bondholders object to issuers obtaining a consent to an amendment or a waiver where the securities providing such consent or waiver are substantially simultaneously retired by the company -- that's an exit consent.

If such an exit consent were to be prohibited, this

would be the rational place to do so. Because Section 208 is the instruction manual that tells us what notes are going to be considered outstanding right before I decide whether my amendment is effective or not. That's where it's all contained.

The commentaries say if you don't want to count votes that are cast in connection with a two-step transaction, put that prohibition right here. Not only is it not here in our indenture, but we've looked extensively at the language in 902, it says the actual opposite. It has the exact opposite language that we can't ignore.

THE COURT: Yeah, but I'm not following.

MR. KIRPALANI: Okay.

THE COURT: I'm not. Go back up to 902 --

MR. KIRPALANI: Yes.

THE COURT: -- just one page up.

MR. KIRPALANI: Yeah. One page up. Thanks.

THE COURT: So the amount outstanding at step one --

MR. KIRPALANI: Yes.

THE COURT: -- there were not two-thirds that were voting, correct?

MR. KIRPALANI: Before the third amendment, that's correct.

THE COURT: For the third amendment.

MR. KIRPALANI: It was 51 percent. It was the

majority.

THE COURT: Yeah.

MR. KIRPALANI: Um-hum.

THE COURT: So if -- and I know that you don't agree with the proposition -- but if it had the effect of releasing, then you didn't have the two-thirds, correct?

MR. KIRPALANI: If the third amendment had the effect of, we didn't have the two-thirds.

THE COURT: Okay.

MR. KIRPALANI: Okay. We don't believe that provision had the "effect of" language. Does what --

THE COURT: So you wouldn't count the newly-issued notes that were then going to be exited in the vote to determine whether to allow newly-issued notes?

MR. KIRPALANI: Correct. You've got it. Exactly.

THE COURT: If --

MR. KIRPALANI: Our argument exactly.

Let's turn to --

THE COURT: Do we have a dispute on that issue? Because I'm not sure we do have a dispute.

MR. KIRPALANI: Oh, yes, we do.

THE COURT: What's the dispute?

MR. KIRPALANI: They have a kitchen sink of arguments, Your Honor, that issuing the notes itself, issuing the notes, just issuing 250 diluted their lien, and that that

itself required two-thirds --

THE COURT: Right, right.

MR. KIRPALANI: -- because it violated -- even just issuing.

THE COURT: And I know that, but we don't have any argument that if the new notes -- I don't think we have an argument -- that if the new notes were validly issued, the 250 validly authenticated and validly issued didn't violate anything. No one has then said to me that the fact that they were going to exit later took away their vote. They're simply arguing they weren't validly authenticated or issued or whatever in the --

MR. KIRPALANI: I think that's right.

THE COURT: -- first place.

MR. KIRPALANI: I think that's right.

THE COURT: So I'm not sure. How does this really join --

MR. KIRPALANI: It joins because the argument they're making is you should look through what the purpose of issuing the notes was. You should look through who the holders were, what they were really getting in substance at the end of the day. It goes to the purpose of their collapsing --

THE COURT: Yeah, and as I said in the question I asked you a few minutes ago, I think that looking through to

see what the ultimate result was may inform how to interpret the agreements. But if the agreements didn't have the effect, the fact that somebody had some purpose down the road, I tend to think that you have the better argument on that.

I'm more concerned about whether the effect of issuing the notes itself caused some requirement of two-thirds.

MR. KIRPALANI: Understood, understood.

Well, let's flip forward, if we flip the page.

So I talked about the Katz case. Again, this is almost 40 years ago. It's an important case because it was one of the early ones that talked about exit consents. And it said if you vote the bonds and immediately, the nanosecond after you get a binding agreement to sell your bonds back to the company, and the company agreed it would take it from you at a price, take you out of the equation completely, your vote still counts. That goes back to 1986 in the Katz case.

And we think it does stand for the broad proposition when construing indentures you read the instruction manual carefully. That's it. There's nothing else that you need.

Let's flip it.

The same is true -- now I mentioned the Murray Energy case, Your Honor. There the plaintiffs in the bankruptcy court in Ohio called the votes zombified. They said these were zombified votes and they should not be counted

because they were cast by lenders that had previously already committed to selling those loans back to the issuer.

And the Court held that argument must be rejected as fiction and -- because -- and this goes to the question you asked me earlier -- committing to do something is not, of course, the same as doing it. The question is did it do it? that's the question.

And they used phantom notes, not zombified notes, but frankly, it's just another flavor of the same ice cream.

THE COURT: Well, the committing to something may create an effect, right?

MR. KIRPALANI: I don't believe the committing to something -- again, we're -- I think --

THE COURT: Let's assume in the issuance of the new notes that there was a paragraph, and that paragraph said all provisions in the agreement are waived such that there is now a requirement that there be an exchange this afternoon of the documents.

And it was planned for later, so it was a commitment to do it, but it was in the note purchase agreement. You wouldn't really argue that it didn't have the effect of doing that if it was an obligation within the note purchase agreement itself, would you?

MR. KIRPALANI: I think I probably would still argue that it wouldn't make a difference --

THE COURT: I think you'd probably --

MR. KIRPALANI: -- because committing to do something --

THE COURT: -- I think you'd probably lose, but go ahead.

MR. KIRPALANI: You know, Your Honor --

THE COURT: I mean --

MR. KIRPALANI: -- I think we're rewriting what the parties had in the indenture.

THE COURT: Well, that's why I'm focused --

MR. KIRPALANI: It says --

THE COURT: -- on the meeting. That's why I'm focused on the meeting.

MR. KIRPALANI: But you're only focusing your -- you're only focusing my attention on "have the effect" and not on the word effect. The language says, "no amendment shall have the effect." The third amendment didn't have --

THE COURT: Go --

MR. KIRPALANI: -- the effect.

THE COURT: -- go back up, and let's see it.

MR. KIRPALANI: It's the -- it's what the person did with the notes that had the effect, not the amendment itself. The amendment just authorized the issuance, Judge.

THE COURT: It's actually the next paragraph.

MR. KIRPALANI: It's not this; it's the --

THE COURT: The 902, yeah.

MR. KIRPALANI: -- two-thirds thing.

THE COURT: I can turn to it in my book. Paragraph 10 of the slides. Sorry, Slide 10.

MR. KIRPALANI: Slide 10?

THE COURT: Yeah. So what is your interpretation if it says no amendment --

MR. KIRPALANI: Right. It says --

THE COURT: -- how do you --

MR. KIRPALANI: -- did the third amendment --

THE COURT: -- what do the words "have the effect of," why are those different than crossing them out and say relief?

MR. KIRPALANI: Oh. It's -- we're not crossing it out.

THE COURT: I know. Well, yes, you -- well, you're not using it.

MR. KIRPALANI: Oh, I will --

THE COURT: Those words have no --

MR. KIRPALANI: -- show you some examples of what it means. If you want, we can flip to it.

THE COURT: No, you showed me -- you did -- no, you gave me some examples in a footnote --

MR. KIRPALANI: Flip.

THE COURT: -- of what it means, but that gives it

meaning; it doesn't say what the words "have the effect of."

MR. KIRPALANI: I think it will, Your Honor.

Can we flip to Slide 45?

THE COURT: Right.

MR. KIRPALANI: Okay. So an example underneath here, an example of an amendment that has the effect of releasing liens would be take the second bullet. I like this one better. Expanding the definition of excluded collateral. Okay. The note security agreement says the following are excluded collateral, right, and it has a list of things that don't count.

Could the issuer without releasing liens change the definition of excluded collateral and say it's basically everything that's -- excluded. That is what "have the effect of" means. If an amendment says we're hereby changing the definition of excluded collateral, that has the effect of releasing liens.

THE COURT: Yeah. They went through in their briefing some dictionary definitions of what the word "effect" means.

MR. KIRPALANI: Yeah -- to get and have. I don't think --

THE COURT: All that --

MR. KIRPALANI: -- this is how the English language is understood.

THE COURT: -- all that stuff, yeah.

MR. KIRPALANI: That's not what "have the effect of" means. "Have the effect" --

THE COURT: They say the dictionary says that's what it means. Why do you think it doesn't? Let me agree that your examples fit, but why don't their examples fit as well?

MR. KIRPALANI: Well, for one thing -- and they do this a few times; they do it with facsimile as well -- all they do is look up the word "have." They don't look up the phrase "have the effect of."

THE COURT: Okay.

MR. KIRPALANI: You know, so you can't take a word, you can't cherry pick a word out a sentence, pick a different meaning of it, and put it in, and then say that must be what the sentence means.

THE COURT: Well, no but --

MR. KIRPALANI: Not with a word like "have."

THE COURT: -- to me, the common language of "have the effect of" would mean if you're irrevocably committed to a course of conduct, it has that effect.

MR. KIRPALANI: I see. And I think we do read it differently, Your Honor.

Let's take a look at Slide 114, Anna.

We went through this at summary judgment, Your Honor, where we didn't have the opportunity to present it to

you.

THE COURT: Right.

MR. KIRPALANI: But imagine for a minute that the rules say I can't walk diagonally across from the J.W. Marriott to the courthouse when I come to see you. It doesn't say --

THE COURT: I think --

MR. KIRPALANI: -- I can't cross Rusk.

THE COURT: -- physics says you can't do that but --

MR. KIRPALANI: Well, in Santa Monica, you could.

THE COURT: No. No, I'm saying --

MR. KIRPALANI: In Santa Monica, in fact, --

THE COURT: -- the J.W. Marriott --

MR. KIRPALANI: -- you --

THE COURT: -- is not located at Rusk.

MR. KIRPALANI: Oh, I know. Believe me, I've had a lot of problems with this slide. I'm still unhappy with it. But no, but Your Honor, this is what their argument boils down to. Their argument is crossing Rusk has the effect of crossing -- I'm sorry. Crossing Smith has the effect of crossing Rusk because you intended when you started to cross Smith that you were next going to cross Rusk. That's not "have the effect." That means I crossed Rusk with the purpose of then crossing Smith.

THE COURT: Um-hum. And so long --

MR. KIRPALANI: But that's different language.

THE COURT: -- as you can turn back, I understand your argument. What if you can't turn back?

MR. KIRPALANI: Well, I don't know that -- first of all, I don't think that whether you can't -- what do you mean, "You can't turn back?" Even then --

THE COURT: Well, in this transaction, I thought that as of the time that the $250 million was delivered that you could not turn back from completing the exchange agreement.

MR. KIRPALANI: Well, I mean, I suppose people could have done it, and could have been sued for it, right?

THE COURT: Well, that doesn't mean -- but that says you can't do it, right? If you're saying you could've been sued for it, you would've lost if it was sued because you'd agreed to carry all the way forward, right?

MR. KIRPALANI: I mean, theoretically, the company could've filed that afternoon. Between the time of getting the cash, could've run to court, and filed for Chapter 11.

The same is true for the holders. The holders might have said, you know what, forget this, we're not extending the maturity wall; we're just going to own the company and take the 250 million. We'll band arms --

THE COURT: No, but that's --

MR. KIRPALANI: -- with JPMorgan.

THE COURT: -- why this comes down to that meeting, right? Whether people were then irrevocably committed to doing it.

MR. KIRPALANI: Your Honor, I don't think in its construing indentures we look to the irrevocable commitment because that's the exit consent case law, and that's the language.

It's all about irrevocable commitments. It's all about when I cast the vote --

THE COURT: Right.

MR. KIRPALANI: -- have I already irrevocably committed to sell my debt to the issuer so that I'd be off risk. And those cases and that language says it doesn't matter. We don't make that judgment. That's why I think it's so important to wrap our heads around that.

THE COURT: All right.

MR. KIRPALANI: And by the way, Your Honor, in England, in the UK, there is developing case law on the same concepts. Because exit consents and things of this nature have been around for a few decades.

In England, they say what Your Honor is saying, which is but if you've committed to do it, you're going to wind up having done it, you can't count the vote. That wouldn't make sense, the economic substance behind what you're doing.

THE COURT: No, I'm not saying you can't count the vote. I'm just saying you may have had the effect of doing it.

MR. KIRPALANI: But just the mere issue, the mere -- remember the amendment, the amendment is what that 902 covers -- the amendment, not the purchase of the note.

The amendment authorized a bigger debt basket. That's how that provision reads. Authorizing a bigger debt basket in and of itself does not have the effect of changing anything. That's all we're saying.

Let's move forward to -- by the way, and American courts are quite different from the UK in that regard just -- the next slide, 24. We just did 24. Let's look at 25. Okay.

TriMark and Meehancombs. Meehancombs is a Cesar's case. TriMark is a case that they cite in their brief. They argue TriMark. TriMark was in front of the Supreme Court Commercial Part New York. And the Court found there too in an exit consent, courts have hewn strictly to the chronology required by the contract because the order of operations matters in corporate finance.

What's going to happen first, then next, then next. You look back, just like in an owner manual. Did I do this, did I do that, check, check, check. It's like a punch list, Your Honor.

The Meehancombs case had the same thing. Because

the, quote, "Because the transaction was structured so that the favored noteholders' consents were given before the notes were sold, they were not as a technical matter owned by the company and were not disqualified." Again, same concept that's written into our contract.

Page 26.

Now our friends cite Bombardier, which is a more recent case in New York, also a Supreme Court Commercial part, different judge, Justice Borrok. Bombardier actually helps us because what Bombardier says is you've got to read the indenture very carefully to determine what counts as an outstanding note.

And in Bombardier, the issuer sought to issue more notes in order to undo a default that already happened and get more people to consent to it. And the indenture there says you look to the notes that are outstanding at the time of the default.

Here you look to the notes that are outstanding at the time of an event. So that's -- we think the Bombardier case actually helps us.

Next slide. Okay.

Now we also want to show you, Judge, that if you find anything ambiguous, we can look to what the parties actually did. Because you certainly recognize, you've known me a while now. I'm at the podium. My job is to advocate to

you, try to convince you, but you don't have to take my word for this one.

What the plaintiffs themselves said and did behind closed doors is going to matter. That's the doctrine of practical construction under New York law. If anything's ambiguous, we look to what did the parties themselves do, and how did they interpret, and I want to focus on this different points in time.

First, before anybody had heard anything about issuing new notes, what was their view about how the indenture works. After they heard that there was an attempt potentially to issue diluted notes, what did they say to each other and how did they behave. And then after the deal closed, and they got a copy of the third supplemental indenture and fourth supplemental indenture, what did they tell their own investor clients.

So three different points in time -- consistent view of how the indentures work. Back in January, Your Honor, I gave my opening, and I told you I promised that I was going to show you a few things in the evidence.

One of them was that our counterparts were sophisticated, strategic actors. Their narrative was that they were innocent victims, they didn't understand what was going on or how this could ever have happened. And I believe the evidence convincingly shows you that the story we believe

to be correct is the story that actually happened.

Mr. Cook, the head of JPMorgan Asset Management, told his chief lieutenant in charge of distressed financing, "I favor taking over the company and/or blocking any deal that lets value leak to the sponsor."

Mr. Rosenbaum told you back in January that with his family, he plays Monopoly. And what I told you is that this was a chestnut. What happened here, and we're going to go through it, is these sophisticated actors -- JPMorgan, Golden Gate, BlackRock -- were playing chess, working together on how best to get to checkmate against the company.

They thought they had checkmate. All they had was check because we had one more move. That's what was going on. No value judgments. Everyone's doing what's in their own economic self-interest as I know Your Honor understands.

Let's turn the slide.

So we showed you in the evidence, Your Honor, that the 2024/2026 holders had months of notice of the certainty and the scale of how much money the company is going to need. And why? Because in September of 2021, everyone saw this coming. And this is important too.

The PIMCO and Silver Point noteholders were not insiders. They didn't have greater access to information than JPMorgan, BlackRock, or Golden Gate. Everyone got the same news, and they absorbed it in real time, and they talked about

it internally.

And this is an important point, Your Honor. Distressed investing is not a spectator sport. If they want to be in this business, they have to be active, and they had legions of advisors reaching out to them. We heard Mr. Seketa. We saw the emails. We saw his boss saying, like, remember the decline button.

Nobody wanted to accept the invitation of financial advisors and law firms saying we can be proactive and help this company; they're all going to need -- everyone knows the company's going to need money in the first half of 2022. They chose not to do it. They wanted to play a different strategy.

Let's turn the slide.

What about BlackRock? I just showed you Golden Gate and JPMorgan. Well, it's very interesting what BlackRock did. Largest money manager in the world, very sophisticated, that's where the smart money was. What did they do? They sold all of their 2026 notes' exposure other than 7 million of bonds that were held in passively-managed accounts where the testimony from Mr. Yu was the portfolio managers had not even read the indentures.

For their actively-managed accounts, they sold out. When they saw what was looming, they knew that there is a risk of something negative happening to their investments.

Let's flip the page.

Now not every strategy works out. Not every strategy is where the smart money is. Golden Gate's a prime example. When it first learned that there could be a priming transaction, Golden Gate only held about $11 to $12 million of 2026 notes.

So here they come to your courtroom, Your Honor, ask for equity, ask for fairness, ask to be restored to, you know, a proper place. They only held $11 to $12 million of senior secured notes in 2026 notes when they learned of a potential priming.

But you know what they had? They had a great feature that a lot of hedge funds have -- cheap money. They could borrow money from a lender at a lower coupon than Incora was paying on its 9 percent notes. That's a smart investment. That's an -- and that's what they did.

And they ramped up 18 whole and bought more than 200 million of those bonds becoming the single-largest holder of the 2024/2026 holders. And they did most of that buying before they were ever even in a cooperation agreement. They never had any expectation of being even purported blockers of something. They just thought it was a good investment, and I think that's important as we weigh into everybody's conduct.

Let's look at the next slide.

They knew that the indentures do not prevent dilution of holdings in connection with a consent threshold.

I asked Mr. Seketa, "You specifically planned for the possibility that the company could issue 75 million in additional 2026 notes when calculating how many bonds your group needed in order to constitute an effective one-third block, right?" He said, "Yes."

These sophisticated parties didn't merely look at how many notes were out there, and can they come together and come up with a one-third block. They also included the possibility that they could be diluted, and that's because the market understands companies have that right. They can issue more notes to dilute.

Let's flip the slide.

And the -- this is Mr. Wang again from Golden Gate. He said the exact same thing. He was a little less direct about it. I think one thing about Mr. Seketa I want to say he was a very sincere, thoughtful, credible witness. Every question, every hard question we asked and even that the Court asked, both of him and his colleague, Mr. Cook, direct, straight answer. Absolutely no indirection at all.

As for Mr. Wang, when we asked the same question, he said, "Well, you know, out of completeness, we were already running the math." Completeness for what? It wasn't an academic exercise. He said let me include even before there was any public reporting of a possibility of dilution, what do I need to have what he called a super blocking position.

What does that mean? That means if the company was going to dilute us by 75 million, how many bonds would we have to have. So they actually held -- they purportedly held at least, and they reported to Akin Gump that they held more than a third, not just a third, because they knew they could be diluted. So the only issue is whether there could be an amendment that would increase the size of the debt basket.

Let's turn the slide. Next slide is 34. Okay.

JPMorgan specifically anticipated dilution prior to any public reporting of dilution. I asked, "You were concerned that the issuer might attempt to dilute your group's voting power, right?" Mr. Seketa said, "Right."

"And the first reporting of the liquidity transaction for Incora involving the issuance of additional notes didn't come out until March 1, 2022?" "I think so, yes."

So prior to the public reporting of dilution, Mr. Seketa is writing to his numerous colleagues at JPMorgan. Let's remember this is JPMorgan. You remember I had a Facebook slide of all of the deep experienced professionals that were monitoring the Incora investment for their clients.

Seketa wrote to all of them or to most of them and said, "Hey, everyone, just bear in mind the issuer might attempt to dilute our group's voting power." And the quote he said here in his email was, "That would well serve our

interest in growing the size of the block in order to discourage other shenanigans the issuer might attempt to dilute our group's voting power." Shenanigans.

Well, how would he know what those shenanigans are? Because that's the exact same type of thing he did in the Windstream transaction. They weren't shenanigans when the shoe was on his foot, Your Honor.

Then it was prudent. And why was it prudent? He said, "I want to help the company stay out of bankruptcy." He testified there was a hedge fund trying to put the company into bankruptcy, and so they agreed to do this exchange to change the voting math in Windstream because the contract permitted it, and they thought it made sense to do that for the company. It's no different here, Your Honor. The shoe's just on the other foot.

Let's turn the slide.

Okay. On March 1st is when there's a reorg article that says, "Incora may be able to circumvent the noteholders' 40 percent blocking position" -- wasn't even just a third -- "to pursue a super priority uptier exchange through the issuance of additional secured notes."

Boom. Contemporaneous. Upon reading this, Mr. Seketa sends it to his colleagues, including his boss who he's worked with for over a decade, and what are the first words out of his mouth? Not shock. Not how can this be done.

"It's nothing particularly new. Just the idea that instead of offering 75 million to dilute us, they would raise more."

That's it. That's after he hears of the rumor. So we have before the anticipated dilution. After they hear about it, they say, oh, I guess they can actually do more. Nothing new here. That's what he says on hearing about it.

Let's turn the page.

And as for Golden Gate, okay, Mr. Wang, we saw the testimony from him. He's not as seasoned as Mr. Seketa in the world of distressed investing, but very careful, takes copious notes, spoke to everybody in the industry. Who didn't he speak to? Well, not until after he saw the article, he sends to his senior colleague, Lionel Jolivot, look at what this article is saying.

And what does Mr. Jolivot say? "I have not looked at it in this case, but in a lot of bond structures, you can amend the regular debt incurrence covenant with only a regular majority of holders, but you need two-thirds for super priority incurrence. If it is the case here, could PIMCO amend first, incur the additional debt, then get to the two-thirds?" That's March 1st, and he hadn't even looked at the particulars of this indenture.

In other words, his market understanding is that's how a lot of these boilerplate provisions work. That's important because if it's ambiguous, we can look to this

testimony. If it's unambiguous, of course, we can't. But if it's ambiguous and we're not sure if this is the way it would work, just look at what these -- our own participants who are objecting to it said in real time, not today when they're before you in litigation.

Let's turn the slide.

Now this one. The Court, Your Honor, you yourself noticed this. After learning of the details of the transaction, after receiving the third supplemental indenture, the fourth supplemental indenture, JPMorgan sent out a blast to all of its investment clients.

And in that blast, they said, "After amassing sufficient majorities in each of the respective debt issues," and when Your Honor specifically noted, "We are now externally telling the client on March 28th Wesco announced a recapitalization. And after amassing sufficient majorities, here's what they did. They didn't say that's what the company reported; they told people that's what happened, and it is now their statement."

And Your Honor said at the end of that because Mr. Rosenbaum had a big issue with this, "You'll have an opportunity to bring in someone to impeach your own witness. Bring in Ms. Lindsey, bring in, you know, somebody else, Mr. Klouse. Explain that, oh, no, that's not what we meant." It never happened. The evidentiary record is closed on that

issue, Your Honor.

Next slide.

So we talked about Windstream. Again, this is just a reference. We don't have to belabor the point. I think Your Honor even at one point said to me, "I'm wasting my time with all these financial advisor decks where all of the bankers were telling JPMorgan and others, you know, they could just dilute your vote by amending and issuing more notes. I mean, they did it themselves. So all these bankers are talking about a precedent transaction that involved JPMorgan. So we can move on. They were a participant."

The parties real time understanding of the indenture should be given weight. These are just blurbs from our brief. the most persuasive evidence of the agreed intention of the parties in those circumstances -- that's when agreements are not clear -- is what the parties did when the circumstances arose.

The other quote is "Great weight should be given to the practical construction." That's the phrase, the New York concept -- practical construction of the contract by the defendant. What did they do after the fact? If it was ambiguous, how did they behave? All of that testimony and evidence we just went through tells you exactly that.

Okay. Let's turn the slide. Okay.

This is a good time just to pause for a moment.

Because our position, Your Honor, is that the 2022 transaction did not reach the indentures. They've got a lot of different theories, and I am prepared, and you've seen the size of this PowerPoint deck, to go through all of them.

But I wanted to summarize them quickly. And if Your Honor wants me to dispense with any of them, not interested in that, we can do that just to save time and get to what the Court really cares about. But we can't just ignore it because it's part of their argument, it's part of their briefs.

We're going first so we're anticipating. The first one is they said the additional notes, issuing the additional notes violated permitted indebtedness and permitted liens. We think that misses the mark. We obviously amended those things so issuing the notes, we amended it before we issued the notes, and we only needed 51 percent to amend. That's that argument.

Issuing additional notes required super majority consent. That's one of the points that Your Honor is talking about. Well, if it had the effect of, that's prong one under the two-thirds.

The other one they have is under prong three. They say that issuing additional notes is modifying either the security documents or a provision of the indenture that deals with collateral in an adverse way. That's prong three. We don't think that applies either. I can go through that.

Next one is the release of liens and new debt violated a right of payment sacred right that required unanimous consent. We've been scratching our heads as to how they would be arguing that two-thirds is the requisite majority to release liens. Everyone said that. The Akin Group was formed with that complete understanding, the blocking position.

Your Honor asked Mr. Cook, "Did you actually have this understanding when you bought the bonds in 2019?" And he's, like, "Yeah, that's the market." But nevertheless, the 2024/2026 holders still say that releasing liens and issuing super priority debt violated the right of payment sacred right.

And I think we know why. It's because they have one client, Peasoum (phonetic), who you've never heard from. They didn't come to testify. They only hold 2024 notes. So I think they want at least one argument for that one client.

The next one is -- this is the rules of construction. They say that rules of construction that says singular should be the plural, and that everything that any events that are here apply to successive events. They say that that merges the third and the fourth amendment. I don't think that's the right reading of that either.

And the last one, of course, is the integrated agreement doctrine of the collapsing -- but this kitchen sink

approach is all of the arguments that they've thrown at us as to why the 2022 transaction didn't reach -- I'm sorry -- they believe breached the indenture. And we can go through them. I'm happy to do it.

THE COURT: I actually don't want to give you guidance about that, other than to say you do what you need to do.

MR. KIRPALANI: Fair.

THE COURT: I'll be patient with you as you waste my time if that's what you think you're doing.

MR. KIRPALANI: Sure.

THE COURT: I'll be -- and the other way as well. So you deal with it --

MR. KIRPALANI: Okay.

THE COURT: -- however you want to deal with it.

MR. KIRPALANI: Then I'd like to touch them. I would like to touch them because I think it's important, and I appreciate Your Honor's energy and stamina.

So the next slide.

Section 201(p) authorizes the issuance of additional secured notes up to the debt and lien baskets that are in 409 and 412. Okay. They say issuing the notes, issuing the notes violated 409 and 412. 409 and 412 are the negative covenants against additional debt and additional liens.

They say we violated it because we issued 250

million more. I have just -- we have, like, -- I forget what they call it -- cognitive dissonance with this argument because we amended the indenture to permit us to issue the notes, but they kind of run right over them.

But we have to discuss it. So Section 201 says, "Provided further, the issuer's ability to issue additional secured notes shall be subject to the issuer's compliance with 409 and 412." Remember that phrase -- subject to the issuer's compliance. And we dealt with, with the majority vote, that's how we dealt with it.

Let's flip the page.

The third supplemental indenture increased the debt and lien baskets under 409 and 412 before the additional 2026 notes were issued. On the left, we have the third supplemental indenture. As you can see, it made two changes.

It amended the definition of permitted liens, and then it amended the debt basket in Section 409 to allow the 250 million of secured indebtedness that would be incurred when the notes were issued.

And when Mr. Osornio circulated on the closing day the various documents that were signed and made effective in a particular order, obviously, the execution versions of the third supplemental indenture had to happen before the additional notes were issued.

So the additional notes didn't violate 409 and 412.

They complied with 409 and 412 after they were amended.

Let's flip to 43.

They also have a reference -- I don't think it's in their complaint, but it's in their briefs -- to Section 4.26. They forget that when the issuer committed it wouldn't further pledge collateral as security, it was always subject to permitted liens, and we amended the definition of permitted liens.

And the next sentence says, "The issuer, subject to compliance by the issuer with Section 409 and 412," -- the compliance that we amended with the majority vote -- "has the ability hereunder to issue an unlimited aggregate principal amount of additional secured notes, all of which may be secured by collateral."

That's not even a further pledge. It's already the pledge. It's already the collateral. It's just more notes.

The next.

Amending the indentures and lien baskets didn't require the super majority consent. This is a central issue in the case. We've got to again look to the language that Your Honor has been focused on. Does it have the effect?

This was the slide I showed you earlier. We don't believe that the right reading of "no amendment may have the effect of releasing" means no amendment used for the purpose of issuing notes that would then release. Just don't think

that's the same thing.

Examples of amendments that have the effect. It's the amendment that has the effect. If you change the beneficiaries of a lien, well, you haven't released the collateral, haven't released collateral, I just changed who's entitled to the benefits of the lien. Okay. But that has the effect of releasing the lien.

Expanding the definition of excluded collateral. Right now, it's only, you know, a third of foreign stock subsidiaries or something. We're going to make it all subsidiaries. Okay. Well, we've effectively released the lien, even though we didn't say we were releasing the lien. It's anti-circumvention. You can't not say you're releasing liens, but really, that's what you're doing in the amendment.

Let's flip the page.

Okay. So the third supplemental indentures did not change the application of collateral proceeds. This is the second of the two-thirds requirement. They had this in one of their briefs. I don't think it's in the closing brief, but they incorporated by reference all the prior briefs.

If there was a change in the security documents, the inter creditor, or the provisions in the indenture dealing with the application of proceeds of collateral, lien subordination in other words, that required two-thirds. The third amendment didn't do that. The third amendment just

issued more notes.

Next.

Okay. The third supplemental indentures did not modify the security documents or provisions dealing with collateral in a manner materially adverse. This is the third prong. To trigger this provision, an amendment, we're talking about the third amendment which authorized 250 more of debt, it must change the security documents or provisions in the indenture dealing with collateral.

It must do it in a way that's materially adverse to the 2026 holders, and it must be done other than in accordance with the terms of the indenture, the security documents, or the inter creditor agreement. We don't think it's any of those, let alone all three.

Let's turn the page.

The third supplemental indentures, first of all, did not change the security agreement. They argue this in their brief. The third supplemental indenture just changed the defined term in the indenture of permitted liens.

The note security agreement builds in a floating definition. It already said, "Permitted liens shall mean any lien that constitutes a permitted lien under each indenture then in effect." It builds in the ability of if the indenture is changed, it automatically carries over. We're not -- we don't have to change anything in the security document, and we

didn't. So that doesn't apply.

Next slide.

The definition of permitted liens is not a provision dealing with collateral. And so I figured Your Honor would say take a leap of faith. For myself, well, are there any provisions dealing with collateral? I'd hate to just say, well, it's not a provision dealing with collateral.

Show me a provision that deals with collateral. So I'm doing that for you here, Judge.

In the secured indenture, Section 4.23 says the maintenance of collateral and provides keeping insurance.

Section 501, which is the successive obligations, merger and consolidation, it says, "Collateral only by or sold, assigned, conveyed, must continue to constitute collateral." That's the provision dealing with collateral.

1205, Article 12 is called "Security," Article 5. 1205 says, "So long as the Trustee has not exercised rights and remedies, the Debtor could basically remain in possession."

Okay. So if I were to -- if Incora were to say, I want to amend 1205, it's to say even after an event of default, I can still remain in possession. That's an amendment of a provision dealing with collateral. So are these other ones. Not changing the definition of a preventative lien and I'll prove to you why.

Let's turn this on.

The definition of permitted liens is not -- I'm sorry, the definition of permitted liens is in the unsecured indenture -- unsecured indenture. You know it's not in the unsecured indenture, the maintenance of collateral provision, collateral owned, sold, (indiscernible), possession and use of collateral, that's not in the unsecured indenture either.

Article 12, the whole section dealing with collateral in the secured indenture is reserved under the unsecured indenture. Even the definition, collateral is not included in the unsecured indenture, but the unsecured indenture does have the concept of permitted liens.

So changing the definition of permitted liens clearly kept the provision dealing with collateral. The unsecured indenture has no provisions dealing with collateral, but it has permitted liens. This argument just doesn't hold any water.

Let's turn the slide.

So here you can see, the unsecured indenture, even though it has no provisions dealing with collateral, because unsecured bondholders had no collateral, has an extensive 39 point list of permitted liens. That's the exact same list as the security measure has changing the definition of (indiscernible).

Let's turn the page.

Oh, so they also have to prove -- and again, the evidence is closed and I didn't hear any testimony about this, that the incurrence of the debt and the bringing in of 250. We're talking about the third amendment -- we're talking just about the third amendment -- had a material adverse effect on the bondholders, the secured bondholders. That can't be true. All it did was bring *pari passu* liens along with the concomitant amount of cash, other than, you know, the fees that didn't bear cash just to satisfy (indiscernible) materially adverse.

All their lien wasn't even diluted because they brought in cash in the same amount, roughly as the amount of the new debt, and they continued to have a lien on all cash. So I think there's no wonder why they didn't have any expert get up there and say that the incurrence of the debt was diluted. This wasn't the priming. The priming is something separate and for the priming we agree, you need to have two-thirds. We're just talking about the third supplement here.

Next slide.

Okay. This is the -- I think the argument they're making for the benefit of the 2024 holder. At summary judgment Your Honor held that the term "right of payment" is ambiguous. It could mean different things, depending on the context and it was unclear to the Court at summary judgment

whether right of payment applies to (indiscernible) and rankings of stricken liens. Irrespectively, Your Honor, we don't think it's ambiguous, not when you consider other provisions in the contract and we briefed this extensively, but we can just put --

THE COURT: I do think your brief covered this pretty thoroughly.

MR. KIRPALANI: Okay, great. So we can jump over it.

THE COURT: I'm not going to make you do that, but I read your brief and you can cover that issue --

MR. KIRPALANI: Okay. Thank you, Your Honor.

THE COURT: -- very thoroughly.

MR. KIRPALANI: But you know, fundamentally the one point guestimate on this is it can't be both. If the releasing liens can't be both a sacred right and a supermajority provision. It's one or the other and all of their behavior indicates to the extent there's ambiguity -- and that's what we had the trial about -- that everyone understood it was a two-thirds release provision. That's why they (indiscernible).

That's why in the next slide, 56, that's why the Akin Gump letter says the consent of at least two-thirds is going to be required. It's not a statement. That's 57.

Again, not going to belabor the point, Mr. Seceda

(phonetic) called the two-thirds consent provision the roadmap for the (indiscernible) transaction, not a sacred right for the two-thirds.

Next one.

Even -- again, even JPMorgan and BlackRock, these are the people who negotiated to the extent any provisions of the 2019/2020 indenture was negotiated and negotiated with these market participants and when Your Honor specifically asked Mr. Cook (phonetic), was your belief back in 2019 about what it meant on the liens (indiscernible) with the two-thirds vote? And he said I would assume that you could strip the lien under that lease.

And I think Your Honor wanted to make sure. Do you understand what I'm asking? Do you think they could have stripped them? And this is, again, very credible, very sincere, said that would have been my commercial understanding because that's how these provisions work and he had looked at the extract to see, you know, which option did this instruction manual take?

And the same thing with Mr. Hu (phonetic). He said the same thing, you know, on the next slide.

He backtracked a little live in trial, but then he confirmed at his deposition, he did testify that there was no statement (indiscernible).

So the next?

Again, I think we can just skip this and move on with this (indiscernible). I think we can skip to this one. Oh, no, I'm sorry, stay on that one. My apologies.

So there is one more argument that they make on why the sacred right was violated. They say the springing maturity violated the sacred right because by having new notes issued with an earlier maturity, the first right in time makes that debt senior -- being due earlier makes it senior. That makes absolutely no sense. They cited no case law for the notion that temporal seniority is a right of payment issue that the debt that comes due earlier is senior to debt that comes due later, even their own note security agreement refers to the 2024 secured notes and the 2026 secured notes as *pari passu*.

So it can't really have it any other way, but that's how they handle it for the sake of others.

The next argument they raised is the rules of construction. They say this alters Section 902, very important to read carefully what they write in their brief.

First, what is the rule of construction in the indenture (indiscernible)? It says, "Provisions apply to successive events in (indiscernible)."

What do they assert? They assert in their brief, quote, "The commentary also explains that the series of events and transaction rule of construction underscores the intended

application of provisions like Section 501." That's the merger and sale of substantially all of the assets.

Section 902 of the indenture is thus plainly an awkward provision covered by this rule of construction -- not so fast. The rules of construction doesn't talk about a series of events and transactions. That's a different concept. It's a different concept, but we went and looked.

Let's turn this line.

We look elsewhere in our indenture. Where else is this indenture use series of related transactions, which is really what their argument is? It's in the (indiscernible) control provision. It's in the permitted investments provision. It's in the permitted parent. It's in the reorganization, the contribution or transfer in one or a series of transaction -- and Your Honor, this is near and dear to your heart -- the means for implementing a restructuring.

Okay. In one or a series of transactions, that's the way we do things in corporate finance. Transactions with affiliates, okay? Antenna up. You're doing something with an affiliate, I'm not too trusting of what you're going to possibly do. I'm a creditor. I want to be careful. I want to include all related affiliate transactions are included, as well. That's what our contract provided.

And of course, the merger section, Section 501, which is the one where this usually comes up, says in one or

more related transactions.

And where language is used elsewhere in the agreement -- this is our indenture, not just random indentures.

The only explanation for the exclusion of such language from the relevant provisions was the parties' intent to limit such provisions. But they want to say, no, the rule of construction, which they misquote and call it a series of related transactions rule, doesn't say series of related transactions. It says successive events.

They just misquoted on purpose because they know they have to in order to make this argument that they want to make.

Next slide.

What about other indentures? We had the benefit of Professor Morrison coming in and showing you hundreds and hundreds -- not hundreds -- a lot of indentures that he called benchmarks -- in his words. They include benchmark indenture No. 15 had without the consent of at least 75 percent of holders -- this is a lien release provision -- you can't release collateral in any transaction or series of transactions. That's another benchmark indenture is benchmarks. Benchmark indenture No. 16, without the consent of at least 75 percent, you can't release liens in any transaction or series of transactions.

Benchmark 143, same thing -- actually 143 was even a sacred right. Without the consent of each holder of the notes affected, you can't do it in one or in steps of transactions.

Benchmark 251, supermajority of 75 percent and more importantly for this point, it also included in a series of transactions.

The Debtors filed -- we filed a supplement. Your Honor gave us that right to see if there's other indentures in the market that were not picked by Professor Morrison and we filed that supplemental demonstrate -- the supplement that we filed demonstrated that there's precedent for this type of protection in the lien release dating back at least 21 years.

Next slide.

They talk about *Sharon Steel* in the context of the rule of construction. The commentaries do not refer to *Sharon Steel* when it's talking about the rule of construction because that rule, again, never uses the words "series of related transactions." The series of related transaction language has been used to implement *Sharon Steel*'s ruling that when a company is disposing of assets piecemeal in substantially -- and the prohibition is again selling all or substantially all of the assets, the Court held it could occur in one transaction or a series of transactions.

In the commentary, that's what the provision relates to. It refers first to a series. You're trying to deal with

doing things piecemeal. It has nothing to do with the rule of construction.

Next slide.

Sharon Steel is unrelated to that rule. Again, look at their brief. It says, "Irrespective of any implied covenants, this indenture expressly codifies against circumvention through successive events and transactions as a principle of construction." And then they cite *Sharon Steel*, but when you read *Sharon Steel* and as we just covered, you'll see, it's not dealing with the rule of construction. It's talking about sales of all or substantially all of the assets. In piecemeal there's no intervening events, it's just I'll sell a little bit today, a little bit right after, a little bit more, a little bit more, and lo and behold when we're all done, there's nothing left.

The case law says there is no evidence in the Record that the series language was included for any reason other than to clarify that the successor obligor provision should be interpreted in the same manner as the one at issue in *Sharon Steel*. That's one of their cases.

They can't mix and match rule of construction for something that it's really not. And they cite no cases that actually rely on rule of construction for anything.

Next slide.

So what it is, though, because it is a boilerplate

successive events rule of construction. So we went and we looked at them. What does this thing mean? It must mean something when it says provisions apply to successive events and transactions. Successive successors, occurrences, et cetera, Clause 5 -- I think it's Clause 3 in ours, but whatever, ours plus 7.

Clause 5 is intended to underscore the intended application and re-application of definitional provisions like company and trustee, so if the company is sold to somebody else, the assets are sold to somebody else and now the successor is deemed a company, every time you read company, read it as the NewCo, as well.

Same thing with the trustee or successor trustee. And operating provisions like 501 and 1006, 501 is when you're selling substantially all of the assets and 1006 which doesn't exist in our indenture is the model provision that gives -- that deals with dilution of shareholder consents, or something like that. I can give you the reference. It's slipped my mind.

This rule merely underscores that certain definitions and operating provisions continue to apply notwithstanding subsequent events and must be re-applied for every subsequent event, but every provision that applies to the company also applies to an entity that has now assumed these obligations.

The requirement of Section 501 must be met each time there's a merger. It's a different point. Our indenture is case in point because 501 itself says in a series of related transactions. The rule of construction is dealing with a separate concept. It's not dealing with that issue.

As applied to Section 902, our amendment provision, all it means is that each amendment must be independently tested, i.e., reapplied and approved by the requisite consent thresholds for that amendment based on what notes were outstanding at that time. So an amendment to change the baskets to authorize the issuance of new notes requires 50 percent and a subsequent amendment will need to be supported by 50 percent or more of now what we've got. How many outstanding notes now do we have? That's all it means.

Next slide. (Indiscernible) in this case, I'll save this for rebuttal when we get there.

But the Court is one of the --

THE COURT: So when you get to a breaking point, we'll take a morning break. Then we'll come back and we'll work till lunch, but you decide when you want that.

MR. KIRPALANI: Yes. (Indiscernible). Okay. And we'll be there shortly.

Okay. Economic substance cases. So *Sharon Steel* is an economic substance case. This speaker is prominently in their briefs, *Bank Atlantic, Bancorp*, a case my firm handled,

is also considered -- was also an economic substance case. Both of these cases deal where a company is trying to get around a prohibition that -- prohibition, you can't sell almost substantially all of the assets of a company and not have the successor take on the debt. You can't do that and in those cases, the seller or the issuer was doing it piecemeal, selling, selling, selling. Nothing changed in between and I think that's an important distinction.

New York law teaches that when determining whether a transaction conveys substantially all of the company's assets for purposes of the successor obligor provision, courts consider both quantitative and qualitative factors. In the typical case involving a significant sale, however, a court will need to weigh both quantitative and qualitative factors as a totality. Taken as a whole the evidence at trial establishes that the sale transaction will constitute a transfer of substantially all of the assets.

The facts of that case are completely distinguishable, but even the proposition it stands for is just that when you're looking at whether the company has really moved out all of its assets, it is doing it in a multiple steps, we're going to consider the whole shebang. It would be analogous, Your Honor, is if we had released liens in baby steps like we'll release 10 percent of the assets liens, next 10 percent, next 10 percent, next 10 percent, oh, we

never did substantially all. We're just doing 10 percent in mini-steps. It's a difference concept for what the case cited for.

Next page.

Okay. How do we know this rule of construction is, you know, really just a recycling of the implied covenant? Let's look at the language. In their complaint, they said the 2024/2026 holders were justified in understanding that the governing indentures contained implicit undertakings by the company and others, not to dilute consent rights.

Frankly, I like that phrase because it's an honest assessment of really what this case is about, dilution of votes. That's what the case is.

And created artificial supermajority for the purpose of circumventing the supermajority consent requirement. That was then. Your Honor correctly dismissed the implied covenant at summary judgment as a string of New York cases have done, usually at the motion to dismiss stage.

So now they say, okay, anti-circumvention is not an implied thing. It's actually express. The indenture rules of construction prevent the type of circumvention. This belies the sincerity of the argument. They originally pled it as this is an implied covenant. They got that claim (indiscernible) and said, oh, you know what? It's been there the whole time. It's in the rules of construction.

Next slide.

Okay. I think this is a good time for a break, Your Honor.

THE COURT: You can't leave me hanging.

(Laughter.)

MR. KIRPALANI: The whole -- this case, the pertinent foundational inquiry in this case is, is there a prohibition on both (indiscernible)? That's what we're talking about in this case. The company diluted their votes. We issued -- dilute their votes. Your Honor has so many plans with shareholder agreements in it, anti-diluation protection. Your Honor knows what they mean. I know your background, your educational background, your business background. You know what anti-dilution rights look like.

This indenture doesn't contain anything remote resembling anti-dilution rights. There are indentures that have come out since this case was filed and you have it, but this indenture doesn't have anything like that. So what do we have here, we have the 2024/2026 holders pointing to a bunch of different provisions from rules of construction to emphasis on what three or four words read together mean in different sections.

This is, you know, an elephant hidden in a mouse hole, Your Honor. That's not the way contracts are understood. That's not the way they are written.

If this indenture was designed to prohibit consents that were based on notes just issued, it would have said that. It wouldn't be, you know, hidden in some feature elsewhere.

THE COURT: Got it. Thank you.

MR. KIRPALANI: And we can take a break (indiscernible).

THE COURT: On your very first graphic that you did, what's the debenture? I'll just tell you, my first day in business school, I mispronounced debenture. I think I pronounced it debenture.

MR. KIRPALANI: So did I.

THE COURT: And the --

MR. KIRPALANI: I didn't go to business school, but I said it the same way.

THE COURT: And the professor very politely used the word with the correct emphasis to correct me. That was my first --

MR. KIRPALANI: Voir dire, Your Honor, voir dire.

THE COURT: That was my first point of many business school embarrassments.

So okay, we will go ahead and take about a 15-minute break.

MR. KIRPALANI: Thank you, Your Honor.

THE COURT: We'll come back and we have the two days set aside, so we've got plenty of time to go.

MR. KIRPALANI: Appreciate it.

THE COURT: Thank you. We'll see you in a few minutes.

(Recess taken from 10:41 a.m. to 10:58 a.m.)

THE COURT: Mr. Kirpalani.

MR. KIRPALANI: Thank you, Your Honor.

Okay. We were on the elephant and mouse holes concept.

Let's turn this slide because I want to conclude this point.

I called it the pertinent foundational inquiry, is there a prohibition on vote dilution. That's what I think this whole case is about. That's what I call the elephant and the mouse hole.

And remember I talked to you at the outset about sacred rights. I wanted to come back to the 11 commandments. Look at the very first one.

You cannot -- the issuer cannot reduce the principal amount of 2026 secured notes whose holders must consent to an amendment, supplement, or waiver.

I can't change the amount of votes required by reducing it and get an amendment done with a lower threshold. What this case is about is the obverse of this. It's the counterpart to this.

And what they're saying is that you should imply.

That's what they're saying. Your Honor threw that out because there's no implied covenant.

These are the -- these -- this is the instruction manual. If there was -- I know the model commentaries say if there's going to be a frowning on exit consents, there it should be in Section 208.

And in our indenture we have it in 902. We have the opposite. There's not a frowning, there's an embracing of exit consents.

And Your Honor correctly noted that, well, this case is about slightly different issue. No one's really arguing about whether the votes cast on the fourth amendment should count or not, it's really more about whether you could issue new notes to dilute or whether that's just not appropriate.

This is the obverse of that. And the fact that it's omitted makes all of the cases that they talk about, whether it's integrated agreement cases, the Clockson (phonetic) cases, et cetera, distinguishable because all of those cases deal with situations where the subject matter is just not dealt with.

Voting thresholds, number one commandment, sacred right, is here. There's nothing in there about issuing new notes to dilute existing votes.

And as we were saying before the break, Your Honor has seen antidilution provisions and shareholder agreements

numerous times, and every participant on their side of the beat that thought about it, agreed internally in communications that the company could issue more notes to dilute some of them, even engaged in similar transactions in other circumstances.

I wanted to just conclude that point before we move on.

Now, next slide.

Let's talk about Professor Morrison. Their expert didn't offer any evidence to support that there was a breach. What the gist of his testimony is that the benchmark indentures show that the 2026 indenture was heavy in terms of creditor protections. It was one of the most protected, is uniquely protective provisions.

But what he doesn't do is look at other provisions in his own benchmark indentures that his counsel -- or that the 2024, 2026 holders' counsel didn't ask him to consider. So we're doing that for the Court.

First, Morrison excluded anything in his benchmark indenture that didn't support his conclusion, such as there are provisions in other benchmark indentures that say an issuer can't release any collateral, not just all or substantially all, any.

That's a lot more protective for a creditor. Didn't consider that in coming up with his marking or grading of how

protective our indentures are.

Next one.

He didn't consider -- we saw a few in my preview that some indentures require 75 percent threshold for releasing liens.

Some of them -- one of them even had it as a sacred right. He can't release any liens, even as a sacred right. Didn't consider the higher consent threshold in his (indiscernible).

What else? He didn't consider the series of transaction language that is contained not just in the merger covenant but also -- and I showed you some of these in the benchmark indentures of his selection where the lien release can't be accomplished through a series of transactions. Not in our indenture, is in his other benchmarks.

Next one.

There are other indentures within his benchmark that says you need a super majority consent to change the definition of permitted indebtedness. Not in our indenture. Certainly more protective than those that (indiscernible).

Next slide.

So he ignored the higher consent thresholds in his benchmarks. There were consent thresholds higher than two-thirds in almost 23 percent of his own benchmarks. Twelve percent had 75 percent. We've given you the numbers of the

benchmarks in the slide.

Ninety percent threshold was in several. And there was a hundred percent threshold actually in more than one -- I thought it was it was only one -- in several here as well. He ignored all of those, didn't help his cause so he just excluded it.

Next slide.

He ignored that benchmark indentures include the series of transaction language in their release provisions. And we showed you this before but for a different purpose, but here they are again.

In benchmark indentures 15, 16, 143, 251, there are -- and we've cited more in our supplement -- many indentures that say you can't release liens in any transaction or series of transactions.

Not in our indenture. Those are certainly more protective. He just ignored them because it didn't fit with his thesis.

Next.

The benchmark indentures demonstrate that our indenture could have but didn't block the 2022 transaction. For example, one of the benchmark indentures applied a two-third consent threshold to modify the definition of permitted indebtedness. That's benchmark 251. We couldn't have done the third amendment without two-thirds

consent from the outside. That's their whole argument. That's their whole argument, that we couldn't do it.

But there are other indentures that expressly do prohibit it because it requires a higher threshold. What we have in our case, Judge, because we've been thinking about this a lot, and I'm sure you have, too, is there's a mismatch in the threshold required to issue new notes and the threshold required to release liens.

That mismatch is what gave the company and gives the company and companies like it the ability to try and issue new notes, see if somebody's willing to put in money to issue new notes.

It won't happen in every case. In our case we needed money, people were willing to put it in, put in the 250 capital. It allowed us to do that.

Very easily can be solved. And a lot of indentures are solving that by saying, we don't want to have that flexibility or we won't permit the company to have that flexibility, we're going to make both permitted indebtedness and release of liens two-thirds requirement.

So now there's no daylight between them, and this type of transaction can't be done. That's just not what our indenture provides.

And, again, indentures don't make value judgments. It's like it's an owner's manual. What can you do, what can't

you do. Simple. No natural laws governing or guiding (indiscernible).

Next one.

The next segment is on integrated agreement doctrine. So the 2024, 2026 holders' integrated transaction collapsing demand is made actually from a bunch of different doctrines.

It's like a Frankenstein doctrine. They've got integrated agreement cases, they've got fraudulent transfer collapsing cases, they've got cases from the tax sham area. And they try to make it sound like this is all a consistent doctrine that New York courts will apply in interpreting contracts. That's just not true.

It's what I would consider engaging in light reading. We can't lightly read cases that are supposedly outcome determinative.

We need to look at them and to see what their facts were, to see what their doctrines were, why they apply, and whether it was appropriate.

We can't just mush them all together to come up with some super doctrine because it toots (phonetic) our goals.

Next slide.

So the integrated agreement doctrine, let's start with that. Nobody's disputing the integrated agreement doctrine is a New York doctrine and an important one. What

we're disputing is what it's used for.

It is a canon of contract interpretation. It's where several instruments constitute part of the same transaction. They must be interpreted together. Contracts may be construed together. And for the purpose of ascertaining what they mean may be read together as if a single agreement.

The integrated agreement principal does not require that the two separate instruments must be deemed consolidated and one for all purposes, or that a separate and independent provision of one is to be deemed incorporated in the other. And the 2024, 2026 holders actually I think acknowledge this.

That's why we just spent the entire morning talking about all the contractual reasons why they think we violated the indenture, because this is really if all of that fails, all right, forget all those contract doctrines then, let's just use integrated agreement, and this is all one big shebang and, you know, we're going to borrow from fraudulent transfer case law, we're going to borrow from tax case law. The inquiry is quite different.

But even first starting with the integrated agreement doctrine, the inquiry is different. It's what did the parties intend.

Respectfully, the parties here intended that there be two separate amendments. Because the first one is the way

they got the notes sufficient to dilute the blocking position in this master game of chess, we were able to avoid what they thought was (indiscernible).

Next slide.

THE COURT: Well, I mean, that -- in fairness, he didn't need to be playing the game of chess if you're right. You're always going to put in the new money. If you're always going to put in the new money, by using the transaction that you moved in, your clients didn't need to worry about owning two-thirds.

But they did worry about that and so it goes -- this same argument goes both ways, right, in terms of the game of chess? Why did they play?

They didn't need to if you're right about your interpretation. They could have just gone right to the issuance of additional notes. But they didn't. They used it as a fallback.

That doesn't give it a death knell. I don't mean it that way. But it's -- it is a two-way street, I think.

MR. KIRPALANI: Well, I think -- I'm fine with two-way streets, as long as that street is governed by the street signs.

So, in other words, I'm fine as long as we're all agreeing that what the speed limit says is what the speed limit says, and the direction in the one way is what it says.

We're fine with that interpretation. And we think that the directions read in our favor.

I wasn't trying to cast an aspersion that they were playing chess because we were certainly playing chess. I completely agree with that if that's what the level-setting comment was for.

We were both trying to figure out within the rules how do we get to the outcome that we need. That's it. And their economic actor (phonetic) is just as much as my client and the investors that helped (indiscernible).

The integrated agreement doctrine, again, this is just by way of summary, it's -- you use it to enforce the parties' intent, and only in the absence of anything to indicate a contrary intention.

Evidence -- where agreements evidence clear intent to be read as one, where the agreements are inextricably intertwined, the rule, it should be observed, is couched in contingent terms that is several contracts may be construed as one dependent on the intent of the parties.

So the point of all of this, Judge, is why do we use integrated agreement? It's because we're trying to figure out what did a provision mean.

We need to look at what else was signed around the same time. Maybe it'll help us understand. Just doesn't apply to this case. Here, everyone agrees the intent was to

have a plan.

But having a plan is not a sham. We had a plan. The plan was to first issue new notes, get the cash, have the benefit of that, move forward with the next step in the transaction.

We own it. We own this issue. We absolutely own it. We're not running from it. But it doesn't mean the integrated agreement doctrine can be used to merge two separate amendments, each of which did different things.

And we can read that amendment and see exactly what it did. And, frankly, we have to read the amendment to see what it did because it's -- that is what is governed by the indenture. What does the amendment do? Not what do related agreements to the amend do.

Next slide.

Collapsing and step transactions. Different part of Frankenstein monster but put into one here.

The collapsing and step transaction doctrine, and every case that refers to it, every single case that refers to it, quotes or cites a case from tax or a case from fraudulent transfer. Makes perfect sense. The inquiry is very different.

The inquiry of Your Honor -- and you've done this so many times over the course of your career -- is the what's the economic substance of this deal? Because that's what you want

to understand for tax purposes and, in front of Your Honor, more often for fraudulent transfer purposes.

We're going to collapse all of the steps, find out what the net effect was on the Debtor. And in doing so, Your Honor's going to also consider whether it was reasonably equivalent value. Well what did the Debtor get in exchange? It's just a different inquiry. I have no problem with the doctrine. We've used it ourselves many times. But it's a different inquiry.

And it's often a statutory inquiry because now -- I talked about there's no natural law when it comes to interpreting indentures. What I mean by that is that there's no right and wrong. It's just simply what do the rules say.

With respect to common law and statutory law, there's actually a substance behind it. There's a purpose, something to be -- something that's being administered, some behavior is being administered.

And so we don't allow private participants to do an end-run. Contract law is not like that, other than an implied covenant claim.

But we know with sophisticated agreements, implied covenant claims go out the window, as Your Honor correctly threw it.

So that's the difference why you can't apply statutory -- furthering goals of statutory purposes,

collapsing to a contract dispute, which is just based on what do the words on the -- in the indenture say.

Next slide.

The holders' cases make clear that the collapsing doctrine is applied for equitable purposes. Its inequity substance will not give way to form.

The integrated transaction doctrine, also referred to as the step transaction doctrine -- and understandably that's why people get confused thinking it's the same thing, but it's two separate things -- is most commonly used in tax law.

Collapsing transactions is compatible with fraudulent conveyance principals as both emphasize substance over form. If this were not just a contract dispute, which is what it is, we would be looking at those things.

And, frankly, there are the alleged fraudulent transfer, right, for which they don't have standing yet, but it's been part of the trial.

Clearly there you have to look to at the outset what was the situation. And after the day's events, after all of the steps, what was the situation for the company? Did the company get something in exchange for what it gave for purposes of collapsing? That's a fraudulent transfer inquiry. We don't -- we're never going to say that you shouldn't do that for that claim.

But right now, and for today's purposes, we're talking about breach of contract. It's just a different inquiry. Again, no further goal.

And the reason for that, there's actually a rationale why. Because it's not a one-way street, going back to Your Honor's example. It's not a one-way street.

My client is the borrower with its back against the wall, in financial distress. We have just as much rights in what's not prohibited as we do in what's permitted.

We are entitled to look at it and look through the manual and say, can we do this? No, darn it. Can we do it this way? No, darn it. Can we do it this way? Yes, good idea, that's how we'll do it, because that's how indentures are interpreted, because there are two sides to that bargain. And unless it's in the sacred rights at 11, it's not central.

By contractual choice it's not central and sacred to the bargain if it's not in there.

Next slide.

So their own cases make clear that the step transaction doctrine is a tool of endorsing statutes. There's just some quotes. It's just what I said a few moments ago. We're talking about statutory purposes that are being circumvented by private parties. It has nothing to do with contract law.

Next slide. Okay.

So, you know, in furtherance of the Frankenstein doctrine, there's all of these things. This is just another way to demonstrate it. We think they all miss the mark. The cases on collapsing and fraudulent conveyance don't apply. The cases on collapsing and tax don't apply. The all or substantially all cases, *Sharon Steel* and Bankatlantic deals with series of related transactions.

That also doesn't apply because in those cases there was nothing to indicate in the contract a contrary intent. Here we have Section 2.08, which says what counts as outstanding. You measure it at any given point in time.

And you have 9.02, which says what you count, make no value judgment, it's just what are you counting. You count all notes that are then outstanding as counted under 208, regardless of what the holder is about to do with that note. No judgments.

That's not -- nothing to do with the all or substantially all cases.

And the integrated agreement doctrine, which we covered at the outset of this segment, is really just about trying to figure out what do the parties intend by their words. That has nothing to do with this case.

Next slide.

Oh, TriMark. Again, my favorite. They cite TriMark and they say, oh, TriMark's a perfect example how related

agreements were doing in piecemeal what was prohibited to be done in a single step.

What they don't tell you is the loan agreement in TriMark -- and the Court emphasized this -- said it refers to doing it by agreement or agreements. You can't do something by agreement or agreements in their version of 9.02.

That's similar to the in transaction or series of related transactions. We don't have that language at all.

Let's turn the slide.

The parties intended that the third and fourth supplemental indentures be separate.

Here is the pre-transaction instructions show the order of operations. Order of operations is the phrase from the TriMark court saying the order of operations matters.

On March 19th, 2022, Casey Fleck, partner at Milbank, sends an email to WSFS explaining what the steps are. Incora's going to execute the third supplemental indenture, then Incora's going to issue the additional 2026 notes, then Incora's going to execute the fourth supplemental indenture. Then Incora's going to issue the new 1L 1.25L notes.

The exchange agreement will provide for the exchanging noteholders to then have their custodians do what custodians do.

Those are the pre-transaction instructions. They show the intent of the third and the fourth amendments being

separate.

Now, the Murray Energy case I believe it was didn't even go into this looking behind the recitals. They said the contract itself explains what was going to happen first and what was going to happen second.

I understand that we have a trial and a trial record to explain what the intent was.

The question is not was there intent to plan. Again, having a plan doesn't make it a sham. There was an intent to plan.

But we think the intent to plan proves what the intent of the parties were -- was, which is that the third comes before the fourth. That's the intent of the parties.

Next slide.

The closing call agenda which is in evidence memorialized the order of the releases. The statement that was read out and that everyone who participated assented to said this authorization of releasing signatures will be to release all signature pages in the following order without any further action by any party.

And then the order was one, two, three, four, five, and we went through that, Your Honor, that testimony.

Next slide.

So, first, you see the release of the purchase consent documents. That's to authorize the third supplemental

indenture.

Then, two, the release of the signatures to the note purchase agreement. That was to purchase for $250 million the 2026 notes.

Then, after the notes purchase has been consummated -- and we went through this, Your Honor even made note of the fed reference number I remember -- cashed in.

Now the notes have been issued. Only then did the release of the signatures for permitted *pari passu* notes joinder get released.

And then after that was the signatures for the exchange agreement. That was the order of operations. And the order of operations does matter.

THE COURT: Refresh my recollection. The money that you're referencing with the fed wire, who had possession and under the documents authority to spend that money?

MR. KIRPALANI: Company. The company had the money in its account, and there was nothing restricting the company's use of the money.

THE COURT: So the --

MR. KIRPALANI: Wasn't held in --

THE COURT: -- two-oh-eight or --

MR. KIRPALANI: -- trust or anything like that.

THE COURT: -- whatever the number is, comes to the company, and the company at that moment was free to spend it

without issuing the -- without doing the exchange.

MR. KIRPALANI: Yes. And it wasn't 208, Your Honor. And we can get you the reference cites. Remember, this issue is two twenty something.

THE COURT: Okay.

MR. KIRPLANI: There was a mistake in some testimony. It was two twenty something. There was like two some odd million in fees out of the two fifty.

But, okay, closing call agenda, again, now, this agreed process is common in the industry. You heard from Mr. Healy, 30 plus year veteran indenture trustee, professional.

Question was, have you ever participated in a transaction where a party has authorized the release of a signature page subject to something else happening. Yes.

Okay. Is -- in your experience, is that type of release common or is it not common. I think it's common, yes. Planning happens all the time. That's how these corporate finance transactions get done. There's nothing unique or strange about this one.

Next.

Your Honor asked this question during Mr. Dosart's testimony. This is the one. I remember the day just because I came running over. You said, I heard somewhere that it was a condition of the new money that the notes would be uptiered.

It was a condition of the new money. I think that was the phrase.

The reference is on -- it was on February 28th, ECF 955. It was the Doscart testimony. And Your Honor's questions were at line -- I'm sorry, Page 151, Line 25. And you said, so the argument that was made to me was that the increase in the 2026 notes would only occur with the funding of that increase on the condition that the ultimate uptiering would occur.

So you couldn't have sequential closing that could be interrupted in the middle of it. And I want to see where that argument is coming from because I've heard the argument but I've not focused on the documents.

Your Honor asked exactly the right question. I wasn't focused on the documents, I want to see the documents. So we're showing you the note purchase conditions.

You needed the documents, no purchase documents, reps and warrants, legal opinions, closing certificates, compliance certificate, performance, purchase consent documents, CUSIPs, reimbursing of fees, good-standing issuer, and guarantor closing conditions, purchase consent documents, and performance.

There was -- I'm sorry, that was 4.03 is the -- our side, the company's closing conditions. It's "A" through "K" are the closing conditions for the purchaser to pay or

withhold paying the two fifty.

Those conditions were satisfied. There was no condition that the uptier happened or even that the exchange agreement was effective, nothing like that.

Next slide.

On the other hand, and this makes perfect sense, the exchange was expressly conditioned on the note purchase. The exchange agreement says, prior to the exchange closing, the note purchase consent documents shall have been entered into, the note purchase shall have been consummated.

And even in the exchange consent document section, it says on the closing date, following the note purchase closing and prior to the exchange closing.

This is the best evidence of the intent of the parties. And it's the way that Mr. Osornio followed it throughout the closing day. But it's also the way the parties planned for it, also the way the parties wrote about it in their documents, Your Honor.

Next slide.

Now, they make a big deal about the specific performance issue. This is a red herring, Your Honor, because the specific performance feature is only in one document. It's in the exchange agreement.

But as we just saw, the exchange agreement doesn't become effective. Those signatures are not released until

after the notes are issued.

So it doesn't matter that after the notes were issued there could be a specific performance now that the exchange agreement is binding to force the exchange to occur. Doesn't even make a difference, not to this question. This question is were the notes' issuance conditioned on something, could they be sued to specifically do something else.

And the answer is, no, not as a matter of law, not as a matter of the legal obligations of the parties, which we think has to govern here.

Next slide.

THE COURT: Well, the -- go back up to little three "I" because that's where pretty much 90 percent of the questions I've been asking you today.

Did the closing call obligate the escrow parties, where they already had all the signatures in their possession, to continue through little three "I" as part of the transaction, or were they not obligated to do that in terms of the closing agent?

MR. KIRPALANI: They had all indicated their assent to proceed in accordance with their plan sequence.

THE COURT: Right. But so escrow agent's sitting here, they have the signature documents for the exchange agreement.

Was the escrow agent obligated, once the note purchase agreement had been done, to -- because it says as soon as such note purchase has been consummated. So once it's consummated, was the release mandatory?

MR. KIRPALANI: I think once it was consummated, the next step would occur, unless something happened in between.

THE COURT: So that's -- I'm going to ask it again because I really do think it becomes mandatory.

You're telling me things can happen such that the mandate could get interrupted or whatever. But it looks to me like that it was mandatory to release the exchange signatures. And by the way, I'm not -- you had a slide before that says this is normal and customary for closings. I got it. That's not the -- I'm not saying somebody is doing something --

MR. KIRPALANI: Right.

THE COURT: -- nefarious by this.

But it looks to me like that it was a mandated release, not an optional release by -- the company couldn't have instructed the escrow agent, despite the fact it may have been the company's lawyer, okay, we have this money and it's unsecured, don't do the exchange agreement, you know, let's just hang onto the money as a new unsecured loan from Pimco and Silver Point.

It looks to me they were mandated to carry through with that. But if you think they weren't mandated, tell me

why.

MR. KIRPALANI: Well, I just think I have a problem with the word "mandated" because there's nothing that mandated anything about that. But I don't want to --

THE COURT: Required, --

MR. KIRPALANI: -- dodge your question.

THE COURT: -- is required the better word?

MR. KIRPLANI: I would say required after the note -- after the company indicates to the indentured trustee that the notes have now been issued and --

THE COURT: No, it says --

MR. KIRPALANI: -- we have the cash --

THE COURT: -- as soon as such notes purchase has been consummated.

MR. KIRPALANI: Right.

THE COURT: Was the escrow agent required to release the signatures?

MR. KIRPALANI: Yes.

THE COURT: So this whole issue is going to turn on what effect of -- and you've made an argument about what effect of means. I'm not asking you to remake that.

But if it was required, the issue is, is whether that was then an effect of the issuance.

MR. KIRPALANI: So here's where I want to take (indiscernible) --

THE COURT: Okay.

MR. KIRPALANI: -- on this one. Going back to that had the effect of language, I was thinking about this during the break because obviously I wanted to talk about what's important to you. Otherwise, I'm not doing my job.

The effect of language follows other words. Those other words are an amendment. So we have to ask the question, we have to, we can't just push it to the side. We have to ask the question, what amendment are we talking about? Does that amendment have the effect?

The amendment, not a side agreement to do a purchase. That's a different question. That's not what the indenture talks about.

THE COURT: I actually don't think that's a different question. I've thought a lot about this. You can't have a side agreement that obviates the agreement because then the side agreement creates lots of results.

MR. KIRPALANI: But the thing is, the amendment doesn't obligate anyone to do anything. The amendment, which is what's governed --

THE COURT: The side -- but --

MR. KIRPALANI: Your Honor, the amendment is governed --

THE COURT: Yeah, but --

MR. KIRPALANI: -- by 902, Your Honor.

THE COURT: Yeah, but you --

MR. KIRPALANI: You're adding words to it.

THE COURT: But, I mean, you're telling me that you can have a side agreement between Silver Point and Pimco and the Debtor and WSFS that says we all understand and we impose now a condition on the issuance of the new notes, that they're only going to be issued if, as soon as it's consummated, we get to uptier.

MR. KIRPALANI: Okay.

THE COURT: And you're telling me that doesn't become part of the amendment.

MR. KIRPALANI: Right.

THE COURT: Of course it becomes part of the amendment.

MR. KIRPALANI: Okay. But I would ask, Your Honor, that we look back at the language of 902 and say, where are we finding that? Where are we finding that it's part of the amendment?

THE COURT: It is part of the amendment --

MR. KIRPALANI: It's not part of the amendment.

THE COURT: -- as a factual matter.

MR. KIRPALANI: It's not part of the amendment --

THE COURT: It's not in the words --

MR. KIRPALANI: -- as a factual matter.

THE COURT: -- of the amendment but it's part of the

amendment. If you interpose a requirement on the amendment, it becomes part of the amendment.

MR. KIRPALANI: But it's not a requirement of the amendment.

THE COURT: Yeah, I'm just telling you, I think this is really -- I understand your other arguments, that effect of does not mean the dictionary definition, effect of means other things. And I'm worried about and --

MR. KIRPALANI: I think it does --

THE COURT: -- need to focus on those arguments.

MR. KIRPALANI: -- mean other things. Yeah.

THE COURT: But I'm trying to be, because these arguments are so important to me, really clear that I don't think you can do something that's a side agreement and say, but this isn't part of the amendment, therefore we don't need to comply with it, and get away with it.

MR. KIRPALANI: And --

THE COURT: The company, for example, couldn't have executed a side agreement that wasn't an exchange agreement that says, the company will execute the exchange agreement or pay you a billion dollars.

It is mandated that we execute the exchange agreement. I don't care what the indentured say, we're executing the exchange agreement.

You just can't do that. That's part of the deal.

And you don't get to write it on separate pieces of paper and say it doesn't count. I -- that's a lot different than your purpose argument.

MR. KIRPALANI: Right.

THE COURT: Your purpose argument is to me an intellectually sound argument. Whether I accept it or don't accept it, I certainly understand purpose versus effect. I also understand your argument that effect may not have a common law -- a common meaning or a dictionary meaning.

But to say that you could issue a -- execute a different agreement and say, King's "X," it's not -- this is not part of the amendment, even though we amend the amendment to do it in advance, doesn't work.

MR. KIRPALANI: But we're not amending the amendment.

THE COURT: Yeah, you are. If -- with that argument you are.

You didn't do that of course. You didn't have that agreement. But that would --

MR. KIRPALANI: One, there was no actual agreement that anybody can point to. There's no mandatory agreement to do anything.

THE COURT: Well, I'm not so sure. And that's why I'm focused on the closing call.

MR. KIRPALANI: Right.

THE COURT: Because it seems to be the closing call may be that. But it may not be that.

MR. KIRPALANI: I understand. I mean, look, there was hours between the time the cash hit the account and the authorization to move forward with the fourth amendment and the consents to facilitate the exchange happened.

The company could have rescinded its authorization. It didn't happen. Not going to tell you that that happened. But there was nothing that would have stopped them from doing it.

And it doesn't change what did the third amendment do. And --

THE COURT: But if the company had --

MR. KIRPALANI: -- that's the only question.

THE COURT: -- rescinded it, the escrow agent already had the signature pages, right?

MR. KIRPALANI: Subject to being instructed --

THE COURT: No.

MR. KIRPALANI: -- to do something.

THE COURT: Show me that in that --

MR. KIRPALANI: Subject to being instructed --

THE COURT: Go back to three "I." All they needed to know was it was consummated. As soon as it's been consummated, they're supposed to release the signatures.

MR. KIRPALANI: Okay. You're right. It doesn't

expressly say, you know, unless the party rescinded it. It doesn't say that. Doesn't --

THE COURT: Okay. Look, but --

MR. KIRPALANI: -- there's nothing here that irrevocably requires parties not to rescind things.

But -- I agree with what Your Honor is saying is that if this was automatic, which I think has been their argument from the beginning, then you want to look at or they think they can look at whether starting it had the effect of finishing it.

THE COURT: Yeah, the problem is you --

MR. KIRPALANI: I think that's the argument.

THE COURT: -- don't need an escrow agreement if it's not really in escrow, right?

MR. KIRPALANI: Escrow agreement only applied to the cash. I'm not sure I understand what you're referring to an escrow agreement --

THE COURT: You don't need a closing agreement if you didn't need to have an agreement.

MR. KIRPALANI: Right. But, Your Honor, again, even in situations --

THE COURT: Because by escrow, the signatures were held in escrow.

MR. KIRPALANI: Held in escrow. I thought you meant when you say agreement, --

THE COURT: I didn't mean the cash.

MR. KIRPALANI: -- I just (indiscernible).

THE COURT: The signatures are held in escrow by the closing parties.

MR. KIRPALANI: That's correct. Yeah, it was an --

THE COURT: Yeah.

MR. KIRPALANI: -- oral understanding or agreement as to hold them in escrow.

THE COURT: Yeah.

MR. KIRPALANI: But, Your Honor, again, if we go back to the exit consent cases for a minute, I want to ask the Court to think about that because those cases and the language of our indenture, 902, expressly says, you count the votes of the bond holders who have even entered into binding, written contracts to sell their notes to the company such that they won't be outstanding anymore --

THE COURT: Yeah, but --

MR. KIRPALANI: -- once they sold.

It's already in motion, --

THE COURT: No, but that's --

MR. KIRPALANI: -- it's already bound.

THE COURT: -- part of the initial 50 percent you would still count their notes. That's a different question.

MR. KIRPALANI: But why is it a different question? We're all just talking about how you count notes. What notes

are outstanding is the only question. And it's the same question, whether it's for the 51 or the two-thirds.

THE COURT: Well you're not telling me -- and maybe you are telling me that the two fifty was outstanding before it was issued.

MR. KIRPALANI: No. I'm not saying it was outstanding before it was issued. I'm saying that you're going to -- our colleagues are going to what is the motivation behind the amendment? What's about to happen next? That's not what our indenture says we're supposed to do.

THE COURT: And I've said I think that's an --

MR. KIRPALANI: That exercise is not supposed to happen.

THE COURT: -- argument with a lot of intellectual capacity to it.

MR. KIRPALANI: Yeah.

THE COURT: Okay.

MR. KIRPALANI: Okay.

THE COURT: Let's move ahead.

MR. KIRPALANI: Let's keep moving. Forget where we were. Okay. I think we were just on the timeline slide, --

THE COURT: Right.

MR. KIRPALANI: -- 104, start there. Okay. I can go through this quickly, Your Honor, because Your Honor remembers it.

I promised to show you this chronology at the opening. We ultimately decided we needed to show it through a lawyer witness, which was not a lot of fun that day. But we got through it.

You know, 8:15 was the closing call.

Next slide.

Eight twenty-seven and 8:30, the supplemental indentures became effective or circulated around to WSFS. At 12:54, the money was transferred. That was the fed reference number email that the Court was focused on during the trial.

At 1:37, the additional 2026 notes were issued and authenticated, scanned, and circulated.

Next.

At 1:43, the email went out saying, here are the execution versions of the 250 million of notes. Keep going. At 2:13 and 2:16, that's when the fourth supplemental indentures became effective.

Two nineteen, the new 1L and 1.25L notes were issued and authenticated.

Two twenty-five was the DWAC instruction given to retire all of the old bonds.

And at 3:08 was the closing email and the cancelation of the additional notes by hand.

And I show this to you only to explain that what was

the plan, what was the announcement actually happened in the real world.

It wasn't just words and recitals or words on a page, which other courts have respected. But here we showed you that actually this is how it was implemented, too. Let's move on to the next segment.

Next segment is about valid and outstanding. I've spent a lot of time trying to convince the Court that all that matters is what Section 208 and 902 say, which is were the 2026 secured notes outstanding at the time of the fourth amendment.

And this is what 208 said. We start -- talked about it at the beginning; 208 includes all notes that are outstanding at any time.

It doesn't say at the closing of any business day. It says at any time, that are authenticated by the trustee, except those that are described in 208 as not being outstanding.

And the big issue here is were they authenticated by the (indiscernible).

Let's turn.

Okay. Section 202 requires that the trustee authenticate the notes by manual signature of an authorized signatory of the trustee.

And it says the signature will be conclusive

evidence that the 2026 secured note has been duly authenticated and delivered under the indenture.

And 202 also requires at least one officer must sign for the issuer by manual or facsimile signature. That's where that phrase comes from.

So 202 recognizes two times of signatures: manual signatures and facsimile signatures.

And 202 explains how the trustee authenticates notes. It says the 2026 secured notes will not be valid until authenticated by the manual signature of an authorized signatory of the trustee.

To level set, Judge, our view is that the additional 2026 notes were authenticated by a "manual signature" of the trustee.

The purpose of the manual signature requirement is to protect the company and the trustee against fraud or counterfeiting.

So that's the purpose of this provision, protect the company and the trustee. And we're going to show you evidence as to why that is the purpose and who is saying. It's not just me saying it is.

This purpose is not furthered by nonparties. At the outset I explained who the parties to this indenture were. There are third party beneficiaries. Those are the bondholders at large.

But these are the nonparties. Nonparties asserting a purported defect to attack a transaction that they don't like is not the purpose of this manual signature requirement.

Even though we believe and we hope to show you that what Mr. McNichol delivered to Milbank, person from WSFS, was a manual signature, as the term is actually understood. But even when there is a defect in the trustee's authentication, courts will look to the parties' intent. Was there an intent to authenticate here? Are we really dealing with fake notes or are we dealing with just a technical defect?

In the absence of fraud, no court has ever invalidated bonds that were issued by the company and purchased for fair value by noteholders.

Next slide.

So McNichols's photocopied manual signature is not a facsimile signature. Facsimile signature is a term of art. It's a "signature that has been prepared and reproduced by mechanical or photographic means." That's Black's Law Dictionary.

Facsimile is one thing. You've got some pictures of them -- we all remember them, some of us remember them -- on the left.

And facsimile signature is a completely separate thing.

What the 2024, 2026 holders are doing is they're cherry-picking the word "facsimile," looking it up in the dictionary, saying it means copy or photocopy, and then saying so, therefore, facsimile signature must mean photocopied signature.

That's not what facsimile signature means. Facsimile signature is a signature that was prepared by mechanical or photographic means.

There's no doubt that Mr. McNichol physically signed one signature and then photocopied it. That doesn't make the photocopies not manual or it doesn't make the photocopies a facsimile signature.

That's when you have an automatic machine that's doing it for you, that anybody can do; not the signer.

Next slide.

They cite a case, Bancinsure, and it was a case that involved an insurance contract that required actual, physical possession of the original bond that was insured. But you know what it also did? It allowed for a facsimile signature on the original bond. How could that be? I thought facsimile signature must mean something other than photocopied signature.

No. I thought facsimile signature meant photocopied signature and that's prohibited.

Not so. An original document can have a facsimile

signature because facsimile signature did not mean a signature on a document that has been transmitted by facsimile machine or that had been photocopied.

Facsimile signature just means signature that is made by a machine and not made by a person. Here as well, beyond the fact that we think we win on the text of facsimile signature, the holders are really trying to enforce a technicality of Section 2.02.

They are not the purchasers of the additional 2026 notes. The manual signature provision is not a provision that exists for their benefit.

Yes, they're third party beneficiaries. But third party beneficiaries, and we agreed to this, do not stand in the same shoes as a party for every provision of an indenture. This is the type of provision that exists for the actual parties. It protects the issuer and the trustee from overissue and counterfeiting. We found one case from Kentucky that explained very close fact pattern.

The holders' challenge was to authentication with a stamp because there was a manual signature requirement. The court held obviously this requirement is inserted to protect the issuer from delivery of unauthorized certificates. Overissue is an issue of securities in excess of the amount that the issuer has corporate power to issue. That's Uniform Commercial Code. And it forms the basis for warranties to the

purchaser for value of the particular note.

That's what this whole section is about. It's whether or not Silver Point and Pimco would get the requisite warranties from the trustee that the note is valid and in accordance with everything that they expected to get.

Being a third party beneficiary of the indenture doesn't give them the right to jump into the shoes of the trustee and the corporate issuer and say, this provision wasn't satisfied, therefore I'm not going to include or count these notes as being valid.

And I think it's important to remember they clearly argue they've been prejudiced. They've been prejudiced by the entirety of the transaction, according to them, at least looking at it today, given where things shook out. Maybe if this company would have survived and thrived and become wildly profitable and the shareholder would have been very happy with that, they would not have been prejudiced at all.

But they say they're prejudiced by certain events dealing with the lien strip. This issue did no prejudice to them. It's a technical defect. And I know Your Honor's always concerned about getting to the right answer. This is one of those situations where we hope the Court will.

A technical defect like this that, by the way, Your Honor -- stay on that slide, go back. Look at that last

phrase. The issuer and the trustee could have waived it. This is a -- this is something I want to just direct your attention to.

We've been talking a lot about 9.02; 9.02 is when can the issuer amend an indenture with the consent of holders. You need 50 percent for some things, you need two-thirds for others, you need sacred right unanimity for yet others. Is there any provision of the indenture that deals with technical defects, you might ask. Yeah, 901. Who needs to consent to cure technical defects? Just the trustee and the issuer.

So the defect we're talking about here is one that, if it's a defect -- again, we think it's a manual signature, a facsimile signature thing is, you know, not a proper, faithful interpretation of what facsimile signature means. But even if it is, this is precisely the type of defect that as between them they could have fixed and would have fixed.

And I raise that because they're arguing for invalidation of the notes. Putting aside the Uniform Commercial Code and all of the case law that talks about the people who gave money, they can't have their invalidated by virtue of a technical defect, that's an equitable remedy, whatever it would be.

I guess it would be rescission, okay. They didn't come up with it, but rescission is the equitable remedy,

right? Something wasn't done right, we'll rescind.

There are other equitable remedies. Reformation, certainly a lot more appropriate for a situation like this where I sign something, send it to you, you thought it was what was required, oops, I signed it and I sent you a photocopy instead of signing it in front of you again. Well, let's just perform it, let's just say this agreement works because we both agreed it works.

That's our situation. That's the kind of technical defect that under our indenture the trustee and the company could have done if -- could have fixed without anybody else's consent. And we think that's important to show how -- what a technicality this was.

Next slide. Okay.

Their key case confirms that this section, the manual signature requirement, is an antifraud provision. They cite the *Moss* case.

Moss was a case where bonds were stolen from the obligor by some unknown persons, a fabricated seal, an imitation of that upon the genuine bonds was forged upon them. The court went on to find that when the bonds were signed, it was intended to sign just such instruments if the -- I'm sorry, if when the bonds were signed it was intended to sign just such instruments, they are good in the hands of a bona fide holder for value. That's their case.

The plaintiff is not entitled to a return of the forged bonds. They were made to appear so by the commission of a crime. That's not our case, okay.

We agree if there was crime or fraud on the people who blocked these notes, of course the lack of a manual signature could be a relevant issue. It's not even relevant to the situation we have here.

Next slide.

In the absence of fraud -- and this is in our brief, and I appreciate Your Honor has read our brief, it's very clear.

Here, all of the cases that have invalidated bonds, they don't do it based on a purported signature defect. They do the exact opposite.

The quote from the Mississippi case from 1897 is, you know, particularly apt. It would be a travesty of justice to permit a defeat of recovery on such a pretense.

Next slide.

And just to say it more technically correct, the prior slide also had model commentaries and articles on the subject, not just case law. But all standing for the same proposition.

So even if there was a technical defect, as I said earlier, reformation is more equitable than invalidation. Here, both parties to the contract do not dispute their

intent. Any failure in the trustee's signature would be a clear mutual mistake.

Courts have reformed agreements to amend defective signatures or even to insert missing signatures. We gave you cases for that proposition as well in our brief. Reformation is retrospective to the moment of the time the contract was formed. And we gave you the case law on that and (indiscernible).

Next slide.

Parties to the additional 2026 notes also ratified as valid outstanding. So in addition to it's not -- no, that we met the requirement of a manual signature, in addition to this, they don't have the right status to challenge this type of a defect, it does -- that provision doesn't exist for their benefit.

In addition to reformation is a more appropriate remedy than invalidation, we also have the parties ratifying. Parties treated the additional 2026 notes as valid and outstanding. The company received the money. The participating noteholders represented that they own those notes when they sent consent letters.

The trustee represented it authenticated the notes when it sent an authentication and delivery letter. Thus, even if there were a technical defect, the parties have ratified the notes through their conduct.

Next slide.

There's allegation in the brief from our friends that, oh, WSFS didn't do anything. They just sent a bunch of signatures in a FedEx and didn't even pay any attention to anything.

That's just counterfactual. They received on March 20th, eight days before the closing, the form of the 2026 definitive notes, an authentication order, an authentication and delivery letter.

They executed and held in escrow on March 26 the authentication order containing Schedule A -- and we're going to talk about that -- identifying each of the 38 additional certificated 2026 notes.

And the authentication and delivery letter containing Schedule A identifying each of the 38 additional 2026 notes.

On March 27th, they got the final draft of each of the 38 additional 2026 notes. And on March 28th, they made -- they executed and made effective their authentication order on each of the 38 additional 2026 notes.

Let's turn the slide.

So this was the authentication order. And it was during his testimony, Mr. Osornio's testimony, which is ECF 1184, Your Honor, at Page 114, Line 1 through 25, started asking questions about one of them.

I think you wanted to double-check, do a random check. I want to look at this schedule and pull out randomly from your stack of certificated notes and see if they match.

And you pulled out D-11.

Let's turn the slide. Oh, that's fine.

D-11, which was a certificated note issued for $826,000 to PCM Fund, Inc.

And then let's turn the slide.

And then the actual note which you pulled out and saw and inspected it, it had exactly the same terms and same references: who's the holder, what's the amount.

You know, this is exactly the process that the indentured trustee went through by authorizing that schedule.

Next slide.

Authentication is required to confirm that a note is genuine. The note's authentication is a warranty to the purchaser of the note, not to others, to the purchaser of the note. That's what article eight of the UCC talks about. Now the 2024, 2026 holders are attempting to use this requirement of authentication against the people who bought it. That's never been done.

They ignore that WSFS's signature became effective, in terms of saying like, oh, they authorized notes before they even knew what it would say. That's not factually correct. They ignore that the signature became effective only upon its

release, which is after WSFS received and reviewed all the relevant materials we just went through.

And there is nothing improper or unusual about providing signature pages to be held in escrow, subject to release. That was Mr. Healy's testimony. They had an opportunity to put in rebuttal testimony; they did not.

Next slide.

WSFS authorized -- issue of cancelation. Another strain of the argument made by the 2024, 2026 holders is these have to have been phantom notes or sham notes because look at the way that they were canceled. They weren't even canceled by the indentured trustee. And only the indentured trustee can cancel. Not true.

WSFS authorized the issuer to cancel. The issuer was the holder of the additional 2026 notes after the exchange. Holder can cancel its notes.

And nothing in the indenture required the issuer to deliver the notes to the Trustee for cancelation. They cite Section 2.11.

All 2.11 says is the issuer may deliver notes to the trustee for cancelation. But 2.08 says the issuer can cancel notes by referring to notes "delivered to the issuer for cancelation."

So clearly it's not only something the trustee can do, or 208's language makes absolutely no sense.

Next slide. I guess I'm done.

(Laughter)

MR. KIRPALANI: We have obviously other slides on separate subjects like equitable remedies and other things. But that's it for our closing on the contract.

THE COURT: On the distinction that you make in your briefing between the 2024 and the 2026 holders, is that later argument or is that part of this argument?

MR. KIRPALANI: No. I mentioned it earlier. Their only argument is sacred rights. So there's no debate, no dispute that the company always had two-thirds of the 2024 noteholders.

THE COURT: Right.

MR. KIRPALANI: So it could release the liens. And so their argument for the 2024 is that, well, then maybe it's a sacred right, which required unanimity, or at least --

THE COURT: But what happens if the money got sent in by Pimco and Silver Point, conditioned on them having a senior lien on everything, and so if somehow that didn't occur because of the 2026 issue, for whatever reason, do you -- if the transaction gets undone, then I guess you undo it as to the 2026 and the 2024s, or do you only undo the 2026 portion?

What occurs if you have that kind of a split?

MR. KIRPALANI: That's a very good unscrambling egg equitable question, Judge, which we'll definitely get into.

I'd like some time to confer with my colleagues on it. I have my own --

THE COURT: That's fine.

MR. KIRPALANI: -- ideas about it. I don't think there's any question that the 2024 lien release occurred. But I take Your Honor's point, which is you want to understand it from the Pimco Silver Point holders' perspective.

THE COURT: Well, if -- I'm trying to --

MR. KIRPALANI: They were the ones releasing.

THE COURT: As everybody says in their briefing, what we're trying to really figure out is what can confirmation look like.

MR. KIRPALANI: Yes.

THE COURT: And so if you win all the arguments, then confirmation looks just like probably the plan you have on file, which I've never read.

But if you were to lose the 2026 argument, and then we need to figure out what confirmation looks like, I think it would have to take into consideration what occurs to the ordering of priorities for the 2024s, you know, what about the 2027s where they're arguing that the exchange was illegal as to the 2027s.

So we have other issues. And I --

MR. KIRPLANI: We have other issues.

THE COURT: -- got it, they're probably that's going

to be more of a Platinum argument than a you argument.

But I'm trying to figure out if there's a 2026 issue where your side does not prevail, how much would that infect the rest of the reordering.

MR. KIRPALANI: Yeah, let me confer with everyone on my side of the room. I think it's a pretty weighty question when we get to the, you know, remedies of what would be done.

THE COURT: That's fine.

MR. KIRPALANI: So I don't want to (indiscernible) --

THE COURT: So who's going to go next on your side? Or are we moving over to them to respond to this --

MR. KIRPALANI: We're staying on our side to finish these -- this subject.

THE COURT: All right. Do you want to take a lunch break or do you want to proceed now, Mr. Heidlage? It's noon.

MR. HEIDLAGE: I think it probably makes sense for us to take a lunch break. I'm probably going to go over half an hour and so (indiscernible).

THE COURT: That's fine. We'll see you at 1:30.

MR. HEIDLAGE: Thank you, Your Honor.

THE COURT: Thank you.

(Recess taken from 11:58 a.m. to 1:27 p.m.)

THE COURT: Please be seated.

Mr. Heidlage, who's going to be doing the exhibits

for you?

MR. HEIDLAGE: I believe it -- I don't know. Is it PIMCO/Silver Point?

(Participants confer.)

THE COURT: Thank you. Thank you. It's as thick as his.

MR. HEIDLAGE: Well, I think I will move through my slides more quickly and --

THE COURT: Oh, yours are single-sided, so it's only half as thick as his.

(Participants confer.)

MR. HEIDLAGE: I -- unfortunately, maybe we didn't have as much concern for the environment as I should have. I did want to make sure that they were easy to flip through.

THE COURT: I'm really not going to rush anybody. Let's take our time and get it done.

Okay. We're going to go back on the Record in the Wesco adversary proceeding.

Mr. Heidlage.

MR. HEIDLAGE: Good afternoon, Your Honor. Benjamin Heidlage for the PIMCO and Silver Point noteholders.

CLOSING ARGUMENTS ON BEHALF OF PIMCO AND SILVER POINT

MR. HEIDLAGE: PIMCO and Silver Point's witnesses came to court and showed that they were and are longstanding supporters of Incora. They invested in the company in the

time of need. They made a proposal using the flexibility in the Incora debt documents to deliver the needed liquidity on favorable terms to the company.

At the beginning of the trial, counsel for the 2024 and 2026 holders said that the 2022 transaction was just about moving deck chairs closer to lifeboats on the Titanic. That's not what the evidence showed.

The evidence is undisputed that, by late 2021, the company needed liquidity because of COVID and the supply chain disruptions that were (indiscernible) the aviation industry. Even the 2024/2026 holders recognized that. The company believed there would be additional liquidity if it could make it through. PIMCO and Silver Point believed that the company could make it through, as well; and that, therefore, it would be a good investment.

It shouldn't be lost the massive commitment that PIMCO and Silver Point have made to Incora. They invested over a billion dollars in Incora before any transaction was even on the table, during the peak of the pandemic and ending in Incora's moment of crisis. They then agreed to strengthen their commitment, providing 250 million of new money, cash, interest, and debt service relief and an extension of maturities.

As Mr. Kirpalani said, that 250 million was set by the company based on undisputed business (indiscernible), it

wasn't just PIKed to meet some consent threshold. And that 250 million is what empowered, under the terms of the indentures, the participating noteholders to consent to the company's proposed fourth amendment.

They believed that the 2022 transaction would allow the company, not only to survive, but thrive as the aircraft industry recovered. In fact, immediately after, Silver Point bought 30 million in unsecured bonds. And at the time,. the 2024/2026 holders agreed that the 2022 transaction provided the company needed financing. There's no real dispute that the 2022 transaction offered the company a lifeline. Of course, we're here today, but that doesn't change the parties earnestly -- that the parties earnestly believed that it was a mutually beneficial path for the company.

The plaintiffs have tried to make this a morality fight. It is not. This is a contract dispute. And the question is: What do the terms of the contract allow?

Each of the 2024/2026 holders acknowledge what is plain in the text of the indentures: That no holder of the 2024 or 2026 notes had a fundamental right to liens for life under the terms. The liens could be released with only two-thirds consent of each tranche then outstanding. Other provisions of the indentures could be amended with only 50 percent of the notes then outstanding.

As Mr. Kirpalani exchanged, that's (indiscernible)

excuse me -- multi-step transactions are expressly permitted by the indentures and New York law. The notes are counted as then outstanding. And in counting the notes --

THE COURT: Wait. Which are notes -- which notes are counted as then outstanding? I went through a little bit of this with Mr. Kirpalani. At the point that we do the issuance of the new two fifty --

MR. HEIDLAGE: Uh-huh.

THE COURT: -- you're not suggesting that you count the new two fifty, right?

MR. HEIDLAGE: Correct.

THE COURT: It's only the --

MR. HEIDLAGE: I'm not.

THE COURT: -- the base.

MR. HEIDLAGE: Yeah, I'm not, and I'm going to get to exactly the question. I know what question you're going to and I want to address it head-on.

But I do think it's important to set the baseline that you do look to the notes then outstanding at any given point in time. And New York law does respect the sequence of events under the conduct -- and Mr. Kirpalani walked through that quite -- in quite a bit of detail, and I think the TriMark case on that point is important.

And to keep things -- these are the rules that everyone agreed to follow. You don't look outside those

rules. You look at the plain text and those are the rules. And there's nothing unfair about them.

Non pro rata uptier transactions are not unique, they're not unusual. The 2024/2026 holders themselves participated in non pro rata uptier transactions, and they continued to do so, even while this trial was ongoing. Nor is using what size in the capital structure (indiscernible) are unusual.

You heard that strategy is right out of Mr. Secada's (indiscernible). It was Golden Gate's entire strategy when it went on a massive buying spree in February of 2022, 11 million to 200 million in notes, in an effort to seize negotiating leverage over the company.

So let me address what I think is the question you were most focused on today. I want to get that right out ahead. I've got a presentation and I'm going to walk through it. But the question, I think, that you asked was: At the start of the day, was there an irrevocable commitment to do every single step of the chain?

THE COURT: Not at the start of the day.

MR. HEIDLAGE: On the closing --

THE COURT: I may have used those words, but I'm going to refine the words a little bit for you. After the 8:15 a.m. meeting, was it then irrevocable?

MR. HEIDLAGE: Right. That -- and thank you for

clarifying. And the answer still is no.

If we can pull up Slide 87.

So I think there's -- I want to walk through some basic facts that I think are really important.

This signatures, as we've all heard, were provided in escrow. And I think you, rightfully, were looking to understand what the agreement was regarding that escrow, and you went and you looked for the escrow agreement where the money was held, and it doesn't have anything to do with (indiscernible) and the fact is, is that there is no specific agreement as to the escrow. It's an informal agreement. Mr. Healy testified that this was common; that you submit them ahead of time for administrative convenience.

But the fact is, if you want to make an escrow agreement irrevocable, if you want to say exactly when you can authorize then un-authorize, you do that in writing. And you do that -- and that's what the parties did here -- in writing, when it came to the money because, with the money, you really want to make sure that all the parties know where it's going to go and when.

But instead, what we have is we have this. And what this says -- and this is what was agreed to on the closing call -- was that the clients authorized the release of all their signature pages in the following order, in accordance with the exchange agreement. And this

authorization will be to release all signature parties in the following order, without any further action by the parties.

But authorization doesn't mean it can't be revoked, it doesn't. When you look at basic agency principles, you can revoke an authorization. And the fact is that there were times --

THE COURT: You can --

MR. HEIDLAGE: -- where things could happen --

THE COURT: I think, under basic agency principles -- and I'm interested in this -- you can revoke an authorization that isn't coupled with an interest, but you can't revoke an authorization that is coupled with an interest. Am I incorrect about that?

MR. HEIDLAGE: I'm not sure that there is anything in here, I haven't seen anything in here that suggests that it could be revoked and --

THE COURT: Well, but you were telling basic agency law, and I guess my --

MR. HEIDLAGE: So --

THE COURT: I haven't studied it lately.

MR. HEIDLAGE: The --

THE COURT: I think my understanding of basic agency law is similar, but slightly different than yours, which is: If you grant someone an agency right that is coupled with an interest, it is not revocable; if you grant

someone an agency right that is not coupled with an interest, it is revocable. I'm not declaring that to be the law, but you declared something to be the law --

MR. HEIDLAGE: Yeah. No, that's --

THE COURT: -- to me that's --

MR. HEIDLAGE: That's fair --

THE COURT: -- inconsistent with --

MR. HEIDLAGE: -- Your Honor.

THE COURT: -- my understanding.

MR. HEIDLAGE: And I have to be honest with you, I'd have to go back and --

THE COURT: Okay.

MR. HEIDLAGE: -- and look. I don't want to get ahead of myself.

THE COURT: Okay.

MR. HEIDLAGE: But I will tell you that -- because I think there was a concern -- well, okay. Well, when, right? When, in this chain of events, could anything, you know, potentially be revoked, or something happened where the exchange agreement wouldn't happen? And the answer is --

THE COURT: Well, where there -- I guess the real question is where there would no longer have been an effect from the --

MR. HEIDLAGE: Sure.

THE COURT: -- sale of --

MR. HEIDLAGE: So, for --

THE COURT: -- the notes.

MR. HEIDLAGE: Right. So, for example, the release of the signatures to the purchase consent documents in the third supplemental indenture, that happened very early. That happened right after the call.

But as you will recall, there was an extended period of time when the money was being sent and notes were being issued. There was nothing, nothing that said that the exchange agreement was contractually necessitated to be effectuated or that the fourth supplemental indenture was -- necessarily had to be released.

And there was some concern, not -- I'll get to the reason why it wasn't a substantial concern, but there was some concern that something could happen. And Mr. Kirpalani referred to, for example, a bankruptcy or some other type of decision, whatever it may be, to no longer move forward.

And the fact is, is that there was a belief that this would go forward because there was strong independent benefits to the exchange. I mean, Mr. Dostart talked about how he got comfortable that the exchange agree -- the company would go forward and execute the exchange agreement because of the independent benefits. And he testified to that at ECF 955, which is the transcript of, I think, the 29th, where he said that, in fact -- excuse me -- that he got comfortable

based on the fact that there were independent benefits to the exchange, he got comfortable that everything would go basically according to what the parties had hoped for.

THE COURT: Let's take a look at that because I don't remember that. Where is that?

MR. HEIDLAGE: Sure. I think we can pull it up, but I just -- maybe --

THE COURT: Okay.

UNIDENTIFIED: Can you say what the cite is?

MR. HEIDLAGE: Sure. It's just -- it's ECF 955.

UNIDENTIFIED: Uh-huh.

MR. HEIDLAGE: Okay. That's the transcript. And then it's 174-18 to 175 dash (indiscernible).

THE COURT: Okay. Thank you.

MR. HEIDLAGE: Okay. Thank you.

So we -- look, as a practical matter, did my parties think the company was going to go through with the exchange? Absolutely, of course. I'm not going to try to say that, you know, we didn't think that they were. Are -- my clients were the largest investors in Incora, they had 50 percent -- well, at this point, the notes were then issued, they would have had two-thirds of both tranches of debt. They were pretty confident the company was not going to do anything to poke them to the eye and to ...

But the question that you were asked was what are

the legal commitments, and the legal commitments kick in when the exchange -- the signatures to the exchange agreement -- well, I guess the notes purchase contemplated the signatures to the fourth supplemental indenture get released or the exchange agreement gets released. That's when the legal effect kicks in.

Now, you know, would my clients have been very upset if the company backed out in the middle of the day? Of course they would have been upset. But at the end of the day, this is what they would have had to rely on to do any type of action to say you should have done the exchange. They would have had to say you authorized your signature to be released at some future point in time. That's just not the same thing as releasing the signature to the amendment or releasing the signature to the agreement. And so I think, to answer your question, which is where we started here, which was: Is there an irrevocable commitment? And I don't think the answer is yes; I think the answer is no.

Now I also want to go to Section 902. Can we go to Slide 16?

So this is the indent -- this is the provision we've all be focused on, right? And as you will see -- now I, hopefully, did not highlight the language I'm about to point to, which is, if you look at the third line, it says "no amendment, supplement, or waiver." That's what the

consent thresholds are put to. And it's the same language, actually, if we had gone to 9.02. Let me make sure that I get it right, the simple majority provision, which I think is the one that you're more focused on.

If we can go to Slide 15. Okay.

The amendment provisions, the voting provisions do not apply to agreements, transactions, they apply to amendments. You look at what the amendment does. And the fact is, is that it cannot be that, if one amendment, written out, would say it's going to do this, this, this, this, and this, it's going to amend the indentures to do this, this, this, and this, requires 50 percent of the vote, but the exact same amendment, written out the exact same way, actually requires two-thirds, if the parties intend, after that amendment is issued, to do something else, including enter into a following amendment. You have to look at the text of the amendment. You don't look to extrinsic evidence to understand what is the effect of that amendment.

THE COURT: You don't look at extrinsic evidence to see the effect?

MR. HEIDLAGE: No.

THE COURT: How can --

MR. HEIDLAGE: You look at the provisions of the amendment.

THE COURT: How can you determine whether there was

an effect?

MR. HEIDLAGE: Well, the amendment would say, for example, changing the def -- the example that Mr. Kirpalani used was changing the definition of "excluded collateral," so that everything was excluded. That would have the effect of releasing a lien.

THE COURT: Sure.

MR. HEIDLAGE: It could be a release to liens, that would have the effect.

THE COURT: But going back to your initial argument, if there had been an irrevocable instruction --

MR. HEIDLAGE: Uh-huh.

THE COURT: -- with the contractor you're talking about --

MR. HEIDLAGE: Uh-huh.

THE COURT: -- so all is in writing, where the signatures had to be released --

MR. HEIDLAGE: Uh-huh.

THE COURT: -- we can't look at that separate agreement where the signatures had to be released to determine if there was an effect of the amendment?

MR. HEIDLAGE: So two things, Your Honor:

First, our position is no, you wouldn't. You look at each step independently and you don't look at the -- even if we had actually done it the way that you have said, what

we argue is you still only apply the 50 percent provision. Now I understand that you may disagree with that and I'm not trying to --

THE COURT: No, I'm asking the question.

MR. HEIDLAGE: Yeah. No --

THE COURT: The word "effect."

MR. HEIDLAGE: Right.

THE COURT: You're telling me I can't look at an externality to see if there was an actual effect, not an intended effect, not a proposed effect. I can't look at anything external to see if there was an effect?

MR. HEIDLAGE: I think you look to the text of the indenture; I don't think that you look to whether or not there were additional agreements. But -- and because -- and the reason is, is that it cannot be that two indentures that are written the same way, depending on what somebody else has agreed to, one requires 50 percent, the other requires 66.

THE COURT: I don't -- we're looking at a single indenture here, right?

MR. HEIDLAGE: Yep.

THE COURT: And so the paragraph you're showing me is what can occur with a majority vote. And then the next paragraph says yeah, but these things require a two-thirds vote, right?

MR. HEIDLAGE: Sorry. So what I'm trying to say is

the third supplemental indenture, not this indenture, but the third supplemental indenture has all sorts of provisions, including amending the definition of "permitted lien," for example, and allowing the issuance of additional notes. If the parties had just agreed to that and agreed to nothing else, I don't think there would be any argument that it had the effect of releasing any liens.

The only way that they get the notion that this would -- has the effect of releasing liens is they're saying well, parties agreed to these other things that had a condition that there would be the third supplemental indenture and, because the third supplemental indenture eventually allowed these other things to take place, it had the effect.

And the answer is no, you look to what the third supplemental indenture does, it amends the definition of "permitted liens." And you say okay, well, does amending the definition of "permitted liens" have the effect of releasing liens. No, it doesn't. The fourth supplemental does. That says we release the liens and it amends the security documents --

THE COURT: I mean, I follow the argument. I don't understand. If you accept -- which is a big if -- but if you accept the plaintiffs' interpretation of what "effect of" means, then I don't understand how you don't look at external

events to determine the environment into which the third supplement was done because it could be done in an environment where it irrevocably led to the liens.

Your argument that it didn't irrevocably lead to the liens is a different issue. But you're now arguing that we can never look to any external fact to determine effect, and that -- this is the first time that I'm at least appreciating that argument. And it's certainly inconsistent with their definition of "effect," and it may even be inconsistent with your definition of "effect."

MR. HEIDLAGE: Well, I think what you do is you look to what the text of the third supplemental indenture says, and it says "allowed for permitted liens," in order to change the definition of "permitted liens" and allows for the addition of additional notes.

THE COURT: Right. But let me just make up a different set of facts.

MR. HEIDLAGE: Okay.

THE COURT: Let's assume that the Debtors had entered into an agreement with your clients that said, if the third supplemental is ever approved, your notes are irrevocably exchanged in accordance with the exchange agreement. We don't need to execute anything, we're going to execute it first, not second.

MR. HEIDLAGE: Uh-huh.

THE COURT: So they execute, first, something that provides for the exchange, but it's conditioned on the third supplemental --

MR. HEIDLAGE: Uh-huh.

THE COURT: -- which means, the minute you sign the third supplemental, the exchanges happen. You're telling me can't look to see that they already did an exchange agreement because it's not within the third supplemental?

MR. HEIDLAGE: I think you wouldn't. I think you look -- I think that would -- what you do is you look at what the third supplemental does.

Now the exchange agreement that you previously, you know, entered into and all of that --

THE COURT: It had no effect --

MR. HEIDLAGE: -- has the effect --

THE COURT: No. It had no effect until you did the third supplemental --

MR. HEIDLAGE: And then once --

THE COURT: -- under my example.

MR. HEIDLAGE: And then once the third supplemental happened, the exchange agreement then had an effect.

THE COURT: So you could have done them in either order is what you're telling me and not violated anything. This whole ordering is ridiculous. You could have started off with the exchange agreement and said but this exchange

agreement has zero effect, it doesn't alter a single lien, unless the third supplemental is done. And you're telling me that, in that sequence, there still wouldn't have been anything to prohibit it.

MR. HEIDLAGE: I -- look, I think that is the case. I -- but the -- you know, obviously, we're trying to make sure that the transaction was as to the letter as possible, and so they did structure it this way. But I do think, under the case law, which says that the steps are respected --

THE COURT: The steps are respected. This doesn't disrespect steps.

MR. HEIDLAGE: No, I --

THE COURT: It looks a the environment -- give me any case that says that, when determining effect, you don't look at the facts on the ground at the date on which this was done, at the moment on which this was done. Is there anything that says that?

MR. HEIDLAGE: I'll have to think --

THE COURT: I don't remember it in the brief.

MR. HEIDLAGE: I'll have to think about it, Your Honor, because I think what you would do -- I still do think you have to look at what specifically the indentures do. And if there's some other event out there -- right? Like the exchange agreement. That may have the effect and --

THE COURT: No, I'm saying but if the exchange

agreement is done in advance and is self-effecting, the minute that the third supplemental is done, so it doesn't require any signatures, no releases, no nothing, but that fact exists out there in the world --

MR. HEIDLAGE: Uh-huh.

THE COURT: -- you're telling me that your client still could have entered into the third supplemental without getting a two-thirds vote.

MR. HEIDLAGE: I think that's right. Look, I --

THE COURT: I think that's unbelievable.

MR. HEIDLAGE: Okay. I -- look, I think that --

THE COURT: I'm not sure --

MR. HEIDLAGE: -- that is --

THE COURT: -- that's what we have here.

MR. HEIDLAGE: No, as I was saying, that isn't what we have here.

THE COURT: But I'm just saying that I think your theory can't be right, that you can't look to externalities. You've got to be able to look to externalities.

MR. HEIDLAGE: I guess what I just want to say is that I think that, in that circumstance, the things that is having the effect of releasing the liens is still the fourth supplemental indenture, that's what does it.

THE COURT: No, because it was already executed. In my hypothetical example, the effect is the third

supplemental, it just doesn't say it anywhere.

MR. HEIDLAGE: Well, but it has to operate through something else. In and of itself, it does not do that.

THE COURT: Correct. And you're telling me that's not --

MR. HEIDLAGE: Well, it --

THE COURT: -- prohibited -- that does --

MR. HEIDLAGE: You know --

THE COURT: -- not require --

MR. HEIDLAGE: -- intervening cause --

THE COURT: -- it to be --

MR. HEIDLAGE: I mean, it's -- when you look at punitive causation, you look at what actually does --

THE COURT: Right. But --

MR. HEIDLAGE: -- the thing.

THE COURT: -- the causation -- no, no, no. You're -- we're going to stick with my hypothetical. In the fourth amendment, it says this is ineffective unless the third supplemental is done, and it is automatically effective the minute the third supplemental is done, and it's executed first. And you're telling me that executing the third supplemental in that environment still has no effect because you can't look at externalities.

MR. HEIDLAGE: Well, it --

THE COURT: That divorces everything from reality.

MR. HEIDLAGE: I guess I would say it does have an effect. It allows the issuance of additional notes or what have you. But I think -- so I just --

THE COURT: Well, but now you're telling me it doesn't affect the liens, even though it is self-effecting a change in the liens.

MR. HEIDLAGE: I -- well, I --

THE COURT: It can't be, it just can't be. There has to be a way to look to external stuff. It may be the external stuff here doesn't do it.

MR. HEIDLAGE: Well, that is --

THE COURT: But I mean --

MR. HEIDLAGE: That I --

THE COURT: But that is --

MR. HEIDLAGE: -- definitely --

THE COURT: -- a different --

MR. HEIDLAGE: Okay.

THE COURT: -- issue from the fact that you can't look to external stuff.

MR. HEIDLAGE: Okay. I understand that.

I think I'm going to move to my next set of slides, unless you want to --

THE COURT: No, that's okay.

MR. HEIDLAGE: -- anything further. Okay.

Can we go back to Slide 4?

And Your Honor, I know that you are well familiar with a lot of these facts, but I think what's important is that -- and why I want to go through them is that the 2024/2026 holders have attempted to argue that the contract was violated because of some sort of bad faith by PIMCO and Silver Point, and I do want to address those allegations and address some of the evidence that they have (indiscernible) and I will try to do it relatively quickly because I do know that you're familiar with a lot of this, but I do think it's important.

So, first, both PIMCO and Silver Point began investing in Incora during the height of the Pandemic. By September of 2021, each firm owned hundred of millions in Incora senior notes, and both firms made these investments because they believed in the company.

You saw this in Silver Point. They thought that the -- there was nothing -- we had not yet uncovered anything that would lead us to believe there was a company-specific issue or a change in industry dynamics under (indiscernible).

And Mr. Prager testified about this. He said that he had a view that Incora was a highly value and necessary company. PIMCO believed the same thing. They pointed not only to the fact that they -- it was the third-largest third-party Class C parts distributer, but they also pointed to the fact that Platinum had come in and provided more money on an

unsecured basis, which made them believe that it was a likely a good investment because Platinum believed in the company, as well.

And Mr. Dostart testified to this. He said that he liked the Incora investment, in part, because they benefitted the rest of the aerospace supply chain. And once a customer moved to Incora, they did tend to find -- they tended to find that Incora valued that.

And this investment, this early investment, it wasn't contingent on this uptier. So this idea that, you know, the entire investment was contingent on this, that's not true. At the time they made their investment and by the time, you know, in December, that they actually had a substantially larger investment, they had not talked to the company, they had not gotten any agreement from (indiscernible) and they didn't know whether or not the company was eventually going to be interested. This -- that's -- it wasn't a play on that.

And now I don't really think I need to tell you that the company was facing an urgent need of liquidity, and this was something that PIMCO and Silver Point observed, and so did Golden Gate, as you saw. They said that the company will be out of liquidity in 2022, and that the company will need new money. Now JPMorgan also understood that the company needed liquidity. They said there will be a

liquidity event, it was probable, in the first half of 2022.

Now they both believed that they had the size and the ability to deliver an amendment to the secured notes to facilitate an investment. They believed that they had a pathway -- this was on November 1 -- to help the company use the flexibility under their debt documents to -- excuse me -- to allow for a new money investment.

(Participants confer.)

MR. HEIDLAGE: Right. And we've gone over this now ad nauseam. Here are the two main provisions:

First, that you were allowed to amend, generally speaking, with 50 percent then outstanding of the 2026 notes. And you count that including, without limitation, consents obtained in connection with a tendered offer now, exchange offer, or purchase. And in particular, that is the case with the two-thirds. When you're talking about amendments that (indiscernible) release the liens, you -- which was what the fourth supplemental indenture did, you can include all of the notes that are then outstanding, even if they were obtained in connection with the purchase or tender offer, exchange offer (indiscernible).

And Mr. Prager testified that he understood the flexibility that was provided under the indentures and PIMCO understood the same thing.

Now you got into a little bit of a discussion with

Mr. Dostart about the risks of an uptier. And he pointed out there was both an upside and a downside to this and that's, I think, an important point. The fact is, is that the fact of a potential for an uptier transaction is a feature of the indentures. It's not something that PIMCO created or Silver Point created. It's built into the structure of the indentures under the amendment provisions and --

THE COURT: Can I ask you a question?

MR. HEIDLAGE: Uh-huh.

THE COURT: Because I've been wondering about this now that you've talked about that.

In the original offering memorandum -- I'm not sure what the right name of it was -- was this risk highlighted in there?

MR. HEIDLAGE: Specifically of an uptier or the amendment provisions?

THE COURT: Of a non pro rata uptier with a 50 percent vote by the sale of additional securities. In other words, was what happened contemplated -- because it's a huge risk, right? It may be -- people can contract for this, I don't have a problem with this. But it's a huge risk if people do contract for it, so you would expect it to be in some sort of a disclosure.

MR. HEIDLAGE: Well, I'm not --

THE COURT: Was it --

MR. HEIDLAGE: I'm not --

THE COURT: Was it there?

MR. HEIDLAGE: I'm not sure that's true. I mean, I think the way that these offering memoranda are put together is they say here are the amendment provisions. And you know, there's a lot of -- you know, these -- we've been focused on this transaction structure. There are countless transaction structures that parties may go into.

For example, the Ad Hoc Group had a drop-down transaction, --

THE COURT: Right.

MR. HEIDLAGE: -- right? There's not going to be something specific in the offering memoranda that says oh, there might be a drop-down.

THE COURT: So the offering --

MR. HEIDLAGE: You look at --

THE COURT: -- memorandum --

MR. HEIDLAGE: -- the terms of the --

THE COURT: -- doesn't really describe sort of risks at how disparate provisions of an agreement might fit together to cause high risk to someone, that's just not part of this kind of an offering memorandum.

MR. HEIDLAGE: I admit I haven't parsed the offering --

THE COURT: But if a typical offering memorandum in

this field -- because it's different than an offering --

MR. HEIDLAGE: They --

THE COURT: -- memorandum --

MR. HEIDLAGE: They tell you --

THE COURT: -- that I'm used --

MR. HEIDLAGE: -- what the --

THE COURT: -- to seeing --

MR. HEIDLAGE: -- provisions say. They don't tell you about, as far as I know, okay, well, you know, the company may be able to use this provision to do X or Y or Z or A --

THE COURT: Like do they say these won't get paid if the company files bankruptcy and the company is -- you know, sort of the typical outline of risks in the purchase of a security. Are those done in this kind of an offering for an indenture?

MR. HEIDLAGE: I have to admit, Your Honor, I'm not sure.

THE COURT: Okay. It would be -- I just --

MR. HEIDLAGE: And the offering --

THE COURT: I --

MR. HEIDLAGE: -- memorandum is --

THE COURT: I wanted to ask --

MR. HEIDLAGE: -- in evidence.

THE COURT: -- somebody this and you're the one who

brought it up --

MR. HEIDLAGE: Yeah.

THE COURT: -- so I'm --

MR. HEIDLAGE: And look --

THE COURT: -- asking you.

MR. HEIDLAGE: -- the offering memorandum is in evidence, so I'm sure that --

THE COURT: Yeah.

MR. HEIDLAGE: I believe it is. And --

THE COURT: Whoever is listening, I've been wondering -- and I've not gone to look it up -- whether there is a risk section that should have disclosed that you could do a non pro rata uptier by selling additional securities with a 50 percent vote because, if that was contemplated, one would have thought it would have been in a risk section. And I may be wrong about that.

MR. HEIDLAGE: Well, I won't push back. I don't think that transactions like this, however they're structured, are -- what they do is they spell out what the amendment provisions are. I don't think any of that -- the drop-down is not going to be in the risk sector -- in the risk section. You know, it's just there's too many potential options as to how --

THE COURT: Okay.

MR. HEIDLAGE: -- provisions -- so I just don't

think that's the case.

THE COURT: And I'm telling you I don't know what it should normally be, so I appreciate that.

MR. HEIDLAGE: Yeah. No, I just don't think it is.

THE COURT: Okay. Go ahead.

MR. HEIDLAGE: And you know, what -- and you know, we've sort of been talking about what is a blocking position, I mean, all -- PIMCO understood that it was 50 percent. And if I'm going to fast at any point --

THE COURT: Can you go back to that statement?

MR. HEIDLAGE: Yep.

THE COURT: One page.

(Pause in the proceedings.)

THE COURT: Okay.

MR. HEIDLAGE: And both PIMCO and Silver Point believed -- and this is, you know, when they're looking at what their investment looked like -- that bankruptcy would not be positively (indiscernible). Silver Point, again, believed the same thing, bankruptcy was not the best option.

And so what did they do? We saw that, in December, they worked together to come to the company with a proposal, and they believed that there was substantial opportunity for the company to bring in new customers and market share by the (indiscernible) capital and they were willing to work with the sponsor. They had a vested interest in the company's

success. Again, they had about a billion dollars, at this point, invested in the company. And --

THE COURT: I don't know what that was.

MR. HEIDLAGE: So you're familiar, very much, with this proposal. This was the initial proposal. It was $200 million in new money, and it was really important because it was structured to be cash, interest-neutral. And that's really critical because the company couldn't just get 250 million at the existing interest rate. It needed liquidity support.

And if you look at it, the rate is 7 and a cash (indiscernible) 25 percent PIK. Remember, prior debt was 8.5 and 9 percent cash, 3 and a -- 13 and a half for the unsecureds. And so this was going to give them something that was beneficial terms that would actually allow the company to deploy that capital, not just pay off interest.

And as PIMCO explained and Mr. Dostart explained, this was their view that the company's interests were aligned. Remember, they had a billion-dollar investment at this -- well, two of them had a billion-dollar investment. And they believed that this was mutually advantageous by letting the company have the runway to get out of where it was.

Now this uptier transaction, we've heard a lot about the uptier, the non pro rata uptier. And the fact is,

is that it allowed that company to issue debt at a lower interest rate. And this was important because, again, you're looking for an ability to -- the company's ability.

What do they have? What is the currency that they have to get additional financing at a favorable term. And so they have to look at their debt documents and they have to see what can they do under the terms of those debt documents? There's nothing in the debt documents that required any sort of pro rata transaction or anything like that. You're not going to hear that, you didn't hear any evidence of that, it's not in the documents.

So what they did is they look at it and they figure out that there's an opportunity for them to release the liens with two-thirds consent, and that creates space in the capital structure to try to issue new debt. That's what, effectively, the Ad Hoc Group did, as well, when it was dropping collateral down into an unsecured -- excuse me -- a subsidiary, that then opened up space in the capital structure for new debt that could be issued, not subject to the prior liens. And again, what they ended up doing is, is this allowed the company to get financing at a better rate. It's the flexibility that the documents provide that gives them the opportunity (indiscernible).

And both Mr. Prager and Mr. Dostart testified that, by doing this and doing a non pro rata uptier, it allowed

them to go and offer financially -- in a financially sound way, new debt at a very -- much lower cash interest rate. Remember, I mean, they -- you have debt that's currently at 8 a half, 9, 13 and a half. If you're going to go then tell your investors, tell your -- you know, your fiduciary, and you have a fiduciary responsibility, and you're going to go invest at a 7 and a half cash interest rate, you got to, you know, explain to them why it makes financial sense. And that's what the company has to offer and that's what they're able to do.

And Mr. Cook actually alluded to this in talking about the (indiscernible) transaction because he said the company believed that, having a non pro rata transaction, it would achieve better economics than a pro rata transaction, and he said that was an assumption that I made. And that's because, again, it allows them to offer an opportunity for debt that is at a lower rate and because it's a non pro rata transaction.

Now the company countered for 250 million, and that was eventually agreed to. And that 250 million, again, came on the basis of substantial financial analysis to that effect. Again, this was not a number that was arrived at in order to juice any vote or to reach a consent threshold. The number came based purely on what the company believed it needed in early February 2022.

The parties then negotiated at arm's length through their advisors. You can see all the counter proposals on the right. You can see the terms that they ended up giving up on the left -- I'm sorry, excuse me, the other way around. Left is the counterproposals and then the terms. And you know, the point here is that there's, you know, real negotiation going on about what the terms will be and it's at an arm's length basis. As Mr. Dostart said, the terms got better for the company and worse for him.

Now there's a document here and I want to address this because the 2024/2026 holders have highlighted this email from February 26th, where they say their proposal, the 2024/2026's proposal, is liquidity neutral versus our proposal. And if you go to that, it's three lines down, you can see that. And they keep harping on this email to say look, we were giving just as good of a proposal as the PIMPCO/Silver Point group.

But I think it's really important to focus on the date. The date was February 26th. They didn't retain a financial advisor until March 3rd. They didn't make a proposal until March 6th. This email doesn't show that their proposal was liquidity neutral versus the PIMCO/Silver Point proposal. What it shows is that the company was playing hardball with PIMCO and Silver Point by saying hey, you know, you better agree to a good, favorable transaction for us

because there's this other proposal out there. But as Mr. Seketa said, no, there wasn't.

So what are the benefits? So, first, the note purchase provided two hundred and fifty of new money. We've already seen this countless times at this point. And the exchange agreement provided a whole host of different, but equally important, benefits. I don't know, I didn't do that specific analysis, but very important benefits. And it's this set of benefits that allowed that -- our clients, as I mentioned, comfort that both -- that the full transaction would be executed.

THE COURT: So I don't know that this is, in any way, a negative towards your client, what I'm about to say. But sort of my view of what was going on was everybody was going to probably be perfectly happy that your client would put in the new money for a first lien. It was the non-prorated treatment of the 2025 and 2026 notes that was causing a heartburn.

From the company's point of view, they should have -- the company should have been indifferent to whose notes got uptiered to get this benefit. PIMCO and Silver Point wanted that benefit for themselves, which is fine, but it's not fine if it breaches the agreement.

So I'm not sure that there's much -- I know there's some dispute. There's not much issue in my mind that this

transaction, at the time, the company thought was beneficial. But it would have had, I think, the same benefits if it had been pro rata as to the uptiering. And I'm wondering: Is there any evidence in the record that indicates that the transaction was superior to the company by having non pro rata.

Now I will identify one superiority, which is PIMCO and Silver Point said we wouldn't do the deal, right? So they had to do this to get the deal. But that had nothing to do with the comparison of pro rata versus non pro rata.

MR. HEIDLAGE: Yeah, so --

THE COURT: Does that question make sense?

MR. HEIDLAGE: Yeah, it does. But let me get -- so you can't hold everything constant and change one thing.

THE COURT: I know.

MR. HEIDLAGE: So would any of the holders necessarily have agreed to a seven and a half cash interest rate and three percent PIK if it had been pro rata? Unclear. I don't --

THE COURT: Well, but what was --

MR. HEIDLAGE: -- necessarily --

THE COURT: -- clear is that your client wouldn't do that.

MR. HEIDLAGE: I think that's -- I'm not -- that is probably right, and I think it's probably right because they

needed to justify -- I mean, they had to go and justify to their investors I'm going to take my nine percent cash notes, I'm going to take my eight and a half cash notes and flip them into something that was --

THE COURT: The reason --

MR. HEIDLAGE: -- seven and a half.

THE COURT: The reason is sort of irrelevant. From the company's point of view, I don't think the company cared, other than the fact that your client says we won't do it that way. And there is a reason for the company to do it, if they're the only ones who were willing to do it. So they may have been -- everyone may have been perfectly legitimate in what their demands and requests were.

I'm simply trying to clarify that, other than the fact that the deal might not have made, the non pro rata nature was of no benefit to the company, they would have been just as happy with pro rata for the same amount of money. And then we have to get down to: Well, then did the agreement permit it?

MR. HEIDLAGE: Right. And I guess, you know, if you -- just for an example, if you look at what the Ad Hoc Group's interest rate was on theirs, right? It started at nine and it could go up.

THE COURT: Right.

MR. HEIDLAGE: Right? So, I mean, the company is

not going to look at this and say pro rata, in and of itself, right? They would have to take the deal as a whole to understand where the economics of the various --

THE COURT: Yeah. The premise is -- the premise of my question is they had to take your deal as a whole; therefore, they took it. But part of your argument is there were benefits to doing the uptiering to the company. But those benefits don't occur because it's with PIMCO/Silver Point, they occur whether it's with exclusively PIMCO/Silver Point or whether it's pro rata.

And again, I don't know that that affects much, other than I think I disagree a bit that you look at the benefits the way that you're describing them because your clients would not make them available pro rata. And the question is: Did everyone decide they had then breach the agreement in order to get it done?

MR. HEIDLAGE: Well, I mean, I think the issue is that you have to look at --

(Participants confer.)

MR. HEIDLAGE: -- the non pro rata aspect of it is what unlocks -- right? The lower interest rate --

THE COURT: Uh-huh.

MR. HEIDLAGE: -- that allows it to be beneficial. So that's why I'm saying you do have to take them together.

THE COURT: Well, but presumably, everyone else

would have done this, too. If PIMCO/Silver Point thought it was worth the trade to uptier in exchange for a lower interest rate, presumably, other market participants would have thought the same or at least would have had the opportunity to think the same. But the way that the transaction was ultimately structured is others didn't get the opportunity.

Not fatal, but it does mean, I think, if that's right, that these things were done, even if beneficial to the company, the feature making it non pro rata was not beneficial to the company, it was beneficial solely to Silver Point and PIMCO, except for the fact that you all wouldn't do the deal at all, right? And they wanted the deal.

MR. HEIDLAGE: I mean, look, any agree -- any transaction -- right? Is going to have give and take for both sides. And so the company has this flexibility, and that's what they're going to use the flexibility to achieve. Now would they have preferred better terms? Yes. But you know, there's going to be some give and take there.

The fact is the indentures don't require a non -- sorry -- a pro rata transaction. And so, you know, the --

THE COURT: I don't think indentures do require a pro rata --

MR. HEIDLAGE: I'm sorry?

THE COURT: -- redemption. They do require a pro

rata redemption, right?

MR. HEIDLAGE: No, sorry. Transaction. I wasn't referring to redemption.

THE COURT: Well, but part of this was to redeem some notes and not all notes, right?

MR. HEIDLAGE: Well, there was an exchange of some notes and not others. I don't think -- I mean, there's a whole argument as to whether or not that qualified as a redemption, and I don't think it did, but.

And what you saw in the evidence was that PIMCO viewed this as a long-term investment in Incora. PIMCO said -- you know, they recommended that all accounts participate and to maintain the exposure going forward. And they specifically told, Mr. Dostart told his colleagues that it provided a meaningful runway and that the company will return to reinvest.

Silver Point also viewed it as a (indiscernible). This is from March 9th, when they were doing the diligence calls with the company, go-forward relationship, we're excited to be their partner.

And this is what Mr. Dostart testified -- I'm sorry -- Prager testified. He said:

"We believe that we had given the company substantial liquidity, so it would last for years through this maturity of our notes. At this time, it would be able

to pay all of its stakeholders in full."

And this is what I was alluding to earlier. They put their money where their mouth was. They bought unsecured notes the day after the transaction. These are the 13.125 notes and they purchased those right after. They ended up selling them in February of 2023 at a substantial discount, but that doesn't mean that they hadn't, at the time, believed that (indiscernible) and Mr. Prager explained this at trial.

JPMorgan agreed. You've seen a lot of these, so I'm going to click through them relatively quickly. Much needed liquidity. JPMorgan said a path to recovery. They obviously, you know, didn't want some parts of it, but still provided the company with cash.

Golden Gate recognized that it created good runway for the company, highlighting all of the elements that we've talked about already today.

Now we talked a little bit about fairness. Mr. Seketa, you know, clear out the fairness, right? He never liked the word "fair," that's what he said. He wasn't trying to (indiscernible), but he was looking out for -- and this is what JPMorgan was doing, what Golden Gate was doing, what BlackRock was doing, and what my clients were doing, as well. They were looking out for their interests and, if you could find a way to do that that would be mutually beneficial, you would do that, but that's what this is about,

whether or not it complies with the agreement. And I've talked about this. Mr. Seketa said (indiscernible) straight out of his playbook. There's nothing wrong with using one's position in the capital structure.

Same thing with Golden Gate. They wanted to drive the restructuring, so they were going to get in large positions in the company. I've already mentioned this. They, themselves, are in non pro rata transactions, *Serta*, *TriMark*, (indiscernible), you heard about those. And that's because uptiers are market practice, it's part of the market. It's part of what currency do companies have under their debt documents, in order to get additional financing at good, positive terms. Mr. Cook recalled that he couldn't recall turning down any other uptier (indiscernible).

Again, we've gone through this, but I think the contours of what the indentures say I think are undisputed. JPMorgan understood that liens could be released with two-thirds, BlackRock understood that liens could be released with two-thirds, Golden Gate understood that liens could be released with two-thirds.

And they also, as you heard from Mr. Kirpalani, understood that there was a risk of dilution. There is no protection in the indentures in dilution. They accounted for it when they were running their math as to whether or not there was a blocking position. And they understood, as

Mr. Kirpalani said, that the debt documents could -- you could amend the current covenant with only 50 percent, and that (indiscernible).

JPMorgan, again, same thing, understood that this was a risk. And you've heard why they understood it was a risk was because they had done it before (indiscernible), particularly with just the idea of that, instead of offering 75 percent to the (indiscernible) they would raise more. As I said, they had done this before.

So we've talked about the fact that JPMorgan told its clients that they had -- that our clients had amassed sufficient majorities in each of the respective debt issuances in order to issue new notes, so that they could then (indiscernible) and that's what they told their clients.

And PSAM, who, again, you haven't heard much from them at all. They are the 2024 holders. They didn't come testify. But they understood that, with 50 percent of the holders, they could have increased the (indiscernible).

Okay. So Mr. Kirpalani went through all of the contractual arguments, I'm not going to hit them again. You know, I thought he did a very good job and I'm just going to adopt his arguments. If there is something specific, at this point in time, that you'd like to talk about, I'm going to -- I don't know how we can do that. Otherwise, I'm going to turn to a couple of the points that they've raised that --

specifically in reference to the PIMCO/Silver Point documents.

So can we --

THE COURT: That's fine with me.

MR. HEIDLAGE: -- flip to Slide 74?

Okay. So they talked a lot about the fact that oh, well, at certain points in time, we were trying to do the co-op path, rather than the acquisition path or the additional notes path.

As Mr. Dostart explained, you know, there were benefits to each of them, different benefits. Some funds may have wanted one thing; some funds may have wanted a different thing. The fact that there was multiple paths doesn't mean anything as to whether or not they happen to be in compliance.

And as early as in December, there would have been an identification that you could open up the debt baskets to reach the threshold. And here is Mr. Prager explaining, where he's saying that was a typo (indiscernible) structure as opening the '26s to achieve two-thirds. As you can see above, we already had in excess of 51 percent at the time, and that could be done by the issuance of additional 2026 notes (indiscernible).

Now why did they do the co-op path? Because we -- there was a lot of talk about oh, we went down this co-op

path, we must have thought that it was (indiscernible). This is -- you heard testimony on this. You know, there's good reasons to do this. It -- I know this may be somewhat surprising, but it's, in fact, a relationship business. And PIMCO and Silver Point had relations at Citadel and Macquarie. And they had attempted, originally, to do it.

Mr. Prager talked about his relationship with Macquarie, and they had been doing it for over a year, they had been talking about a potential deal together. Mr. Dostart had talked about his relationship with a gentleman at Citadel and where they had been working a long time together. The fact that they were attempting to do a deal with their relationships doesn't say one thing or another about whether or not alternative paths may have been available. And then you heard testimony that Macquarie ended up unable to participate.

And I think it's important they -- parties all agreed to move directly to the additional notes path. You didn't see any evidence that said oh, we can't do it, you know, there's nothing from the company that said we can't do this anymore, nothing from any side. The fact is, is that they hadn't yet papered the agreement, they hadn't done it, they just shifted past to what they understood would be permitted under the debt documents.

Now this next thing is -- I'm going to get to the

trading reports very briefly. You've seen filings about this, multiple filings about this. There's a suggestion that, somehow, the internal trading reports of PIMCO indicate that we never purchased additional 2026 notes. The fact is, is that the records show that -- there were multiple days of testimony about the purchase of additional 2026 notes. And here, attached for your records, is the additional 2026 notes that they purchased, from Davis Polk to PIMCO.

So the fact is, is that, you know, that really should end the matter as to whether or not, you know, there's any sort of significance about the use of a box in CUSIP. If you're interested in going into that, if you have any questions about that, I'm happy to do it, other -- to talk about it. Otherwise, I will address it as necessary on any rebuttal that I have.

Now there is one thing I did want to address from the brief on the Silver Point trading report. The brief said that the Silver Point trading report showed that the purchase happened after the exchange.

Now I want to highlight the fact that the record actually has no evidence as to the time stamp of any trades. And this -- I have to correct this because it's just incorrect. The record evidence has nothing about time stamps. It was the subject of discovery. Silver Point does not maintain time stamps for any trades. It's internal

records are intra-day. So, you know, you can find out a trade is made on the first or the second or the third. What you can't do is sort of order them internally as to any specific order.

And this was specifically the subject of discovery. This was subject to an interrogatory. It's --

THE COURT: Hold on.

MR. ROSENBAUM: Your Honor, I just want to interpose an objection for the Record. What Mr. Heidlage has just said about the way Silver Point does or doesn't report trades is not in evidence.

THE COURT: Sus --

MR. ROSENBAUM: The only thing in --

THE COURT: Sustain --

MR. ROSENBAUM: -- evidence is --

THE COURT: -- the objection. I'm not going to allow closing argument to deal with it.

MR. HEIDLAGE: I understand, Your Honor, but neither is the statement in their brief --

THE COURT: I'm not --

MR. HEIDLAGE: -- about the time.

THE COURT: I'm not going to allow you to go into it in closing argument.

MR. HEIDLAGE: Okay. Okay. So now there's a lot of discussions about everything happening in order, and they

point to these things to say look, see, this says at the same time. And it's whether or not signatures were released concurrently. And I want to touch on this because I think it circles back to the thing that we were talking about at the beginning of this, which is that signatures were released in the order on the closing call, and I -- and then concurrently amongst the parties, right? So that PIMCO and Silver Point were not releasing their signatures to, say the fourth supplemental indenture, while the Citadel -- I'm sorry -- Carlyle didn't release them at the same time.

And so that's what "in order, at the same time" means. It doesn't mean that everything -- notwithstanding the very distinct script that we went through, that everything happened at 8:15 in the morning. That's not what the record evidence says. And you can't infer from comments like "at the same time" that what it really meant was, notwithstanding the evidence of what happened at the closing call, everything just happened at the same time. It's in order, at the same time.

And then we saw that, concurrent with the release of all other parties' signature release, again, concurrent, each step would be released all the parties at the same time, so you didn't have one party getting ahead of the other. I know you heard some testimony about that.

And we've already now talked about the signatures

being released and the authorization and the authorization being different from that (indiscernible) release. And as Mr. Healy said, this was common.

Now, again, I think, you know, if you look at the contingency, note purchase not conditioned on the exchange, not purchase agreement closed prior to the effectiveness of the exchange of the notes, and the exchange of specific performance remedy applies only to the various exchanges, not to the note purchase agreement. It doesn't relate back to the note purchase agreement.

And that's all I have for the moment. I will reserve and just put a market down that, for the remedies section, we have a different slide deck; tortious interference, other things, we will deal with that (indiscernible).

THE COURT: Thank you.

Ms. Oberwetter.

(Pause in the proceedings.)

THE COURT: Good afternoon, Ms. Oberwetter.

MS. OBERWETTER: Good afternoon, Your Honor. Ellen Oberwetter from Williams & Connolly on behalf of the Platinum Defendants.

CLOSING ARGUMENTS ON BEHALF OF THE PLATINUM DEFENDANTS

MS. OBERWETTER: You've heard a lot about the contract so far, so I'm not going to repeat those points,

except I'm going to touch on a couple of issues where you had particular questions.

Before I get to that, I just wanted to note, from an order of operations standpoint, we are anticipating, at some point, covering some of the Langur Maize contract arguments, to the extent that they bear on the issues we're talking about today -- excuse me -- today and tomorrow.

I will also note that I will be doing a more substantive presentation on behalf of Platinum when we're talking about equitable issues tomorrow. So this is not that main presentation.

THE COURT: All right.

MS. OBERWETTER: The issue that I wanted to talk about specifically is the "have the effect of" language that you were concerned about in 9.02. And I agree with everything that Mr. Kirpalani and Mr. Heidlage also had made about this point, but I did want to see if I could get at it in a slightly different way, as well.

If we could put up -- I don't think you have (indiscernible) having control of the slides. All I actually wanted to put up is Section 9.02, and the language of the super majority provision that we've been talking about.

THE COURT: He's now the tech.

MS. OBERWETTER: So the point that I wanted to make about this language is that however far the "have the effect

of" language goes, it can't possibly be that an amendment that allows for the issuance of additional notes would fall within that language, and here's why:

The language of 9.02, and so this language that we're looking at right now that has the "then outstanding, including, without limitation" language -- we talked about it some already today -- says that you count all notes then outstanding. And that language expressly doesn't care about how you got the notes or where the notes came from or whether the owner of the notes is about to sell them. All of those things are irrelevant under 9.02.

And so, once -- and so, if you've got an amendment that, in one form or another, enables the issuance of additional notes, it can't -- that can't be an act that itself then runs contrary or headlong to the language that we've just been looking at, which says, on its face, in 9.02, when you're deciding if you can take the actions that are about to follow, whether you can take those actions or not.

And I think, if you do that, and you read the "have the effect of language" that broadly, especially in the context of a paragraph that says you should be looking amendment by amendment, what is it that a given amendment does that you're looking at, you create an internal inconsistency, you know, what you're allowed to do, how you're going to meet "have the effect of" and what you're

clearly allowed to, which is tally up and use all of the votes then outstanding.

And how can it be that you're allowed to vote newly issued notes to do the things that are listed in 9.02, except that, functionally, you then wouldn't be allowed to vote the ones that were issued with the specific purpose in mind? And so that's where I'd like to join in with some of the comments that Mr. Heidlage made about, I think, once you start trying to do this in sort of a proximate cause way or work it down through causation, that causes all sorts of problems, including running headline -- headlong into the express language that tells you, you are allowed to have notes in hand, that you vote a certain way, the votes then outstanding.

The phrase "then outstanding" is critical. It's the language here that has a timing component that tells you, sort of at a snapshot in time, before you take whatever act you're about to take, that's the operative -- that's the operative language.

THE COURT: So -- and just to be sure --

MS. OBERWETTER: Yes, Your Honor.

THE COURT: -- that I'm following you --

MS. OBERWETTER: Yes, Your Honor.

THE COURT: -- in the facts that we have on the ground here, there were around 60 to 62 percent that would

favor this, not 66 and two-thirds. And that included notes that expected to be canceled once this was done. So you would count all 60 to 62 percent, whatever the number is in the record, and count all those votes, right? As well as the other outstanding 39 percent, if that's the right number, to get to 100 percent of the outstanding notes. And you wouldn't exclude any of them. That's what this is saying?

MS. OBERWETTER: Well, that's -- I don't think so, Your Honor. That's not the point I'm --

THE COURT: Okay.

MS. OBERWETTER: That's not actually the point I'm trying to make.

THE COURT: Okay.

MS. OBERWETTER: What I'm trying to -- what I'm trying to say is that the language, on its face, doesn't care how you got to your 66 and two-thirds.

THE COURT: Right. But if you don't have 60 -- so I agree, it doesn't care how you got to your 66 and two-thirds. But at the time that the new notes were issued, you're not suggesting -- and I asked this question of others -- that you would count the new notes to be issued as part of the notes -- the note count. This was only -- this was less than 66 and two-thirds were voting to do the new notes, right?

MS. OBERWETTER: I think I'm following and I think

I agree with what you're saying, Your Honor.

THE COURT: Okay.

MS. OBERWETTER: So the point that I'm making is the focus of this language on amendments, which amendments have to be based on that ties back to amounts then outstanding means you have to look at things on an amendment-by-amendment basis. That's, to me, what the plain import of this language is. And if you do that, you have a requisite amount for the third amendment, you have a requisite amount for the fourth amendment, and that's all this language says.

And you have to measure those at the time -- there's a timing component of this language, which is critical, which is the amount, quote, "then outstanding" --

THE COURT: Uh-huh.

MS. OBERWETTER: -- at the point that you take any of the -- any of the actions that you're interested in.

And if you expand "have the effect of" in that first language as encompassing a type of amendment that may enable, in one form or another, the issuance of additional notes, for example, you're functionally nullifying the fact that all notes then outstanding in connection with a particular amendment, in fact, can vote and should be taken into account.

THE COURT: I'm literally not following you.

MS. OBERWETTER: Let me --

THE COURT: So --

MS. OBERWETTER: Let me try --

THE COURT: -- give me --

MS. OBERWETTER: Let me --

THE COURT: Why don't you give me some examples that I'll follow better.

MS. OBERWETTER: Yes, Your Honor. Let me just try it a different way. And I do think that this ties into the proximate cause sort of arguments that mister --

THE COURT: Right.

MS. OBERWETTER: -- that Mr. Heidlage was making.

But if you take as a given what the first part of Section 9.02 says, which is with the consent of 66 and two-thirds in aggregate principal amount then outstanding; that is, as of a particular point in time, they may vote to do the following things, it makes not sense to say that the language "have the effect of" is a way of nullifying issuance of additional notes when the first part of 9.02 expressly says we don't care when and how you got your notes.

THE COURT: I don't know why -- I don't care when and how they -- I don't care when and how Silver Point and PIMCO got their notes. I don't care a bit.

MS. OBERWETTER: Okay.

THE COURT: So let me not care.

MS. OBERWETTER: Okay.

THE COURT: But let me assume that, no matter how they got them, the entry into this addition -- authorization of the new notes --

MS. OBERWETTER: Yes.

THE COURT: -- had the effect of releasing a lien. I know you don't think it did, but assume that it had the effect of releasing a lien. If it did, then you've got to have two-thirds and not 50 percent, right?

MS. OBERWETTER: So I agree that the language says "have the effect." And I think part of what I'm trying to get at is what concepts do we know for sure that that should -- that language should not include. And it shouldn't --

THE COURT: That what language should not include?

MS. OBERWETTER: The "have the effect of releasing." If you're looking at --

THE COURT: Okay.

MS. OBERWETTER: If you're trying to take "have the effect of releasing" and get at what are the downstream -- I don't agree you should look at downstream consequences at all. I think you look at a snapshot, for example, of the third amendment. What did that do? It didn't release any liens.

THE COURT: Okay.

MS. OBERWETTER: So I don't think we should be in that world. But if we're in a world where you even are

starting to look at downstream consequences, it shouldn't be that issuance of additional notes is the type of act that puts you within "have the effect of releasing" when the first part of 9.02 is specifically agnostic. Expressly --

THE COURT: I'm really missing -- what do you mean -- are we talk -- the first part of 9.02 isn't what's on the page. This is the 66 and two-thirds --

MS. OBERWETTER: Yes, I --

THE COURT: -- percent. The firsts part is the 50 percent.

MS. OBERWETTER: Correct.

THE COURT: Which part --

MS. OBERWETTER: Yes, Your Honor.

THE COURT: So tell me which one we're talking about.

MS. OBERWETTER: We're looking -- this is the part that we're looking at, this is --

THE COURT: The 66 and two-thirds.

MS. OBERWETTER: The 66 and two-thirds. Although, obviously, the same language (indiscernible) it's just at the first -- at the top of the provision, as well.

THE COURT: Well, the 50 percent is an affirmative allowance; this is a negative allowance. This one says, without 66 and two-thirds, you may not --

MS. OBERWETTER: Yes, I --

THE COURT: -- do these things. Okay.

MS. OBERWETTER: I agree with that. But --

THE COURT: So, without 66 and two-thirds, you may not do something that has the effect of releasing liens.

MS. OBERWETTER: Yes. What I --

THE COURT: Okay.

MS. OBERWETTER: What I am suggesting is that "have the effect" can't include something that would effectively nullify, at the beginning of this paragraph, the fact that you have gone and obtained new notes because the beginning of this paragraph says we don't care where you got the notes.

THE COURT: I don't understand.

MS. OBERWETTER: You -- the argument may not be (indiscernible), Your Honor. It does -- it --

THE COURT: Well, no. It's literally --

MS. OBERWETTER: Yes.

THE COURT: -- I don't understand the argument. I'm not trying to be -- I'm not argumentative about it. I'm telling you I don't understand.

MS. OBERWETTER: Yes. Okay.

THE COURT: Okay.

MS. OBERWETTER: I would like to -- let me see if I can find a different way of getting at it and it's by making a related -- it's by making a related point.

I think there is no -- so I -- the amendments, in

fact, have different voting thresholds that are associated with them, if we take the third and the fourth. And I know that what you are getting at is whether the parties had what they needed for the third amendment, and then what they had -- if they had what they needed for the fourth amendment. You look at the amount then outstanding at the time of each amendment. And otherwise, you're directing -- to me, you are ignoring the directive in 9.02, both at the top of the provision and in the super majority provision, that timing matters, that the amount then outstanding matters for each of the amendments that you are looking at.

So that's -- it is not -- it is not convenient --

THE COURT: So I'm not really --

MS. OBERWETTER: Yes.

THE COURT: -- understanding it yet.

So I want to go back --

MS. OBERWETTER: Yes.

THE COURT: -- to the hypothetical that I gave --

MS. OBERWETTER: Yes, Your Honor.

THE COURT: -- to Mr. Heidlage, which I agree is not our hypothetical, but it -- I'm trying to understand the argument better.

So let's assume, for a moment --

MS. OBERWETTER: Okay.

THE COURT: -- that we had a fourth -- what was

called a fourth --

MS. OBERWETTER: Okay.

THE COURT: -- that was executed first, and it was the self-effectuating, automating uptiering. Okay? But it said this fourth amendment will never be effective unless the third amendment is adopted in accordance with its terms.

MS. OBERWETTER: Okay.

THE COURT: So we have a fourth amendment that automatically kicks in, takes no action the minute that the third amendment is approved. Okay? So what kind of vote do I need in the third amendment to get that, 50 percent or two-thirds, without regard to how -- who or how is voting? What do I need, 51 percent, rather than two-thirds?

MS. OBERWETTER: Well, I'm in agreement with the answer that Mr. Heidlage gave on that, which is 50 percent. And obviously, things are sequenced in a different way here to try to avoid --

THE COURT: But why is it 50 percent if it has -- that definitely had the effect of releasing liens when the third amendment was adopted under my hypothetical. So tell me why I care about -- you're arguing about the -- who owns what, and I don't know why I care.

MS. OBERWETTER: Yeah. I guess, Your Honor, what I would say is I think the fact that -- I will say the fact that everything happens as one transaction is not relevant to

the argument that I am trying to advance.

THE COURT: And I'm accepting that you're not, but you've --

MS. OBERWETTER: Yes.

THE COURT: -- but you've got to live with my hypothetical --

MS. OBERWETTER: Yes.

THE COURT: -- that, before you ever do the third amended --

MS. OBERWETTER: Okay.

THE COURT: -- that there is an executed fourth amendment that says this is not effective unless the third amendment is done, and when it is done, the exchange is now automatic. So that's the environment that you're doing this in.

MS. OBERWETTER: Okay.

THE COURT: Are you telling me executing the third amendment in that environment would not have the effect of releasing the liens?

MS. OBERWETTER: I think, you have separate amendments, they would not have the -- then correct, it would not have the effect of --

THE COURT: Even though it's the third amendment that actually is the triggering event for the liens.

MS. OBERWETTER: I think you have to look at what

is being done, each amendment in sequence.

THE COURT: But I'm dealing with the sequence. My hypothetical --

MS. OBERWETTER: Yes.

THE COURT: -- is you've already executed the fourth amendment, but it has --

MS. OBERWETTER: And the --

THE COURT: -- a provision that says it does not become effective until the third amendment is done, and then it becomes effective immediately and simultaneously, without any further action by the parties.

MS. OBERWETTER: That --

THE COURT: So does executing the third amendment have the effect of releasing liens?

MS. OBERWETTER: And I'm sorry. I'm trying to track your hypothetical. So the fourth amendment says what, Your Honor?

THE COURT: The fourth amendment says this amendment has no effect unless the third amendment is done.

MS. OBERWETTER: Okay.

THE COURT: If the third amendment is done, the exchange is effective immediately, without any further action by any party.

MS. OBERWETTER: And the releasing of the liens happens?

THE COURT: In the fourth amendment, which was already executed, but it won't happen unless the third amendment is done, so it's totally conditioned on execution of the third amendment. You can't tell that by reading the third amendment. But the environment that the third amendment is executed in knows that the fourth amendment is sitting there. And all that that fourth amendment is waiting on is somebody to say the third amendment got approved.

MS. OBERWETTER: And --

THE COURT: Do you need a 50 percent or a two-thirds vote?

MS. OBERWETTER: And the third amendment -- the third amendment is going to, as this one, change the definition of "permitted liens."

THE COURT: Yep.

MS. OBERWETTER: Then, yes, it would be at 50 percent, I agree with that.

THE COURT: So even though, the minute that you approve the definition of "permitted liens" to be changed, the exchange occurs.

MS. OBERWETTER: I agree with that because you are taking amendments (indiscernible) and I think that's part of the language that has to be given effect in this paragraph, so -- and I think that's --

THE COURT: Okay.

MS. OBERWETTER: Yes.

THE COURT: I don't understand how, but I got it. Look, the how is to not use "effect of" with its common English meaning. And it may very well be that you don't --

MS. OBERWETTER: Yeah.

THE COURT: -- which is an argument made in the pretrial.

MS. OBERWETTER: And I actually think -- so I'm going to give thought to whether, over the course of today, there's an even better way to (indiscernible) --

THE COURT: That's fine.

MS. OBERWETTER: -- the point that I --

THE COURT: I really do want to understand the argument. And I --

MS. OBERWETTER: Yes.

THE COURT: I know several people are trying to make this argument. I really want to understand it and I'm not.

MS. OBERWETTER: Yes, I agree with that, Your Honor. Thank you. So why don't I -- those were the only things that I wanted to address. I think you shed more light on what I was meaning to answer, so --

THE COURT: Thank you, Ms. Oberwetter.

MS. OBERWETTER: Thank you, Your Honor.

THE COURT: Mr. Clareman.

CLOSING ARGUMENTS ON BEHALF OF CARLYLE AND SPRING CREEK

BY MR. CLAREMAN: Good afternoon, Your Honor. Billy Clareman from Paul Weiss on behalf of Carlyle and Spring Creek. I'm just going to speak for a moment and I wanted to make sure that I was advertising some of the coming attractions.

I also did just want to address a question you actually posed to Mr. Kirpalani about the Langur Maize breach issues very briefly. I'm going to be addressing the breach of contract claims that are the premise for the Langur Maize lawsuit. That's going to happen after the further back and forth between the parties between the '24 and '26 indenture. The position that we have taken is that there was no breach of the unsecured indenture, and I will explain that in more detail.

But I do want to comment because Your Honor observed that perhaps there was more discussion in the post-trial brief about the need for the money, the economic consequences of the transaction, and so on. The claims that Langur Maize is pressing are not breach claims against the Debtors; they're asserted claims against third parties. There's, obviously, a lot to talk about on the standing subject which is not for this phase one closing.

And it's also the case that, even though they have

asserted direct breach claims against the beneficial holders, there -- you know, and we'll discuss this at the appropriate time -- there's no contractual obligations that beneficial holders in the (indiscernible) system have, so, really, they're tortious interference claims.

So what I'm saying is that, in order for Langur Maize to prevail, they do need to both prevail on the underlying (indiscernible) and tortious interference. You know, the tortious interference is not going to be the subject of closing right now, that's for a later discussions.

So the weighting in the brief and the space allocated in the brief, I just don't want Your Honor to draw any conclusions about the belief or the strength of the argument, and actually was going to happen at this closing, phase one closing. It's going to be the exact -- that exact opposite. I'm going to talk a lot about the contract claims and very little about the underlying -- the actual claims for tortious interference and so on.

So, with that, I will sit down, Your Honor. Thank you.

THE COURT: Thank you, Mr. Clareman.

Anyone else from the left side of the room?

(No verbal response)

THE COURT: Okay. Who's going to take lead on the right?

MR. ROSENBAUM: May we take --

THE COURT: Mr. Rosenbaum?

MR. ROSENBAUM: -- a few minutes, Your Honor, for our afternoon break before I get started?

THE COURT: Of course. Who's going to be the presenter on your side?

MR. ROSENBAUM: Good afternoon, Zachary Rosenbaum, Kobre & Kim, for the 2024/2026 holders. We will give 2024/2026 tech, Chris, credentials.

THE COURT: Can I get 2024/2026 to turn on your camera, please? There you go.

All right. I've got them as the presenter.

How long of a break would you like?

(Participants confer.)

MR. ROSENBAUM: We can take our 10 or 15, either is fine with me.

THE COURT: Okay. Let's come back at five after 3:00. Thank you.

(Recess taken from 2:49 p.m. to 3:03 p.m.)

THE COURT: So, just for housekeeping, I have a 5:00 o'clock emergency hearing that I've had to schedule, so I'll let you-all plan the rest of your day. I don't think that'll last that long. We can come back after the 5:00 o'clock. I want to leave you-all with what you expected in the way of time, but you'll have another option at 5:00.

MR. ROSENBAUM: May I approach, Your Honor?

THE COURT: Yes, sir. Thank you. Mr. Rosenbaum.

CLOSING ARGUMENTS ON BEHALF OF 2024/2026 NOTEHOLDERS

MR. ROSENBAUM: Thank you, Your Honor. First of all, I genuinely want to thank Your Honor for the patience and thoroughness exhibited in this courtroom, and I think it's a credit, both, to the Court and to all the participants. I also want to thank the Court for the danish that we got. It feels like many, many moons ago, but for Your Honor's 20th Anniversary on the bench, but I do think I speak for everyone that I mean that sincerely.

THE COURT: Thank you.

MR. ROSENBAUM: Mr. Kirpalani reminded me that I started this discussion with the Court back in January talking about a Monopoly game. It's quite a long Monopoly game, but the reality is the PIMCO Silver Point Group had Boardwalk, they never had Park Place, and they want to keep the hotel, and that is the simplest form of analogy.

But let's get into the contractual provisions because I think Your Honor had a lot of questions for the other side that I -- that I hopefully can answer and can also answer questions that I have no doubt that (indiscernible).

So, if we turn to Page 3 of (indiscernible). This is what we've called the lien release protection. It is the first in a string of protections. There probably should be

an ellipses. I'll get to the -- to the language altogether eventually, but the operative words here are, "No amendment, supplement, or waiver may have the effect of releasing all or substantially all of the (indiscernible)."

All of the case law interpreting contracts and indentures teaches that courts have to ascribe plain meaning to provisions with undefined language, and in fact, picking up on some of the comments from counsel for the other side, that is particularly, if not extraordinarily, important in interpreting bond indentures, because as the case law teaches, for the most part -- and this bond indenture has some provisions that were heavily negotiated -- they are relied upon by the market, and the market must rely on what the plain meaning is ascribed by the words on the page.

I've never heard of a contract principle where you would ignore or set aside what the plain words mean and try to impose something else. So what we did is, is three things, perhaps four. We started with Black's Law Dictionary, and Black's Law Dictionary -- and if you look at the bottom -- cites an "effect" as "Something produced by an agent or cause, a result, outcome, or consequence." And we double check that because one of the cases that we've heard about -- Mr. Kirpalani mentioned it -- principally for the exit consent principle that I will get to further dealt with language that is substantially similar to this.

And, in Murray Energy, the Court ultimately found that the amendment there did not have the effect of releasing liens because all it did was subordinate. It didn't actually release. Those aren't our facts. But I think what's most important about what that Court said, and it's also in quotes, the phrase, "The effect thereof signals a causal relationship in which the amendment is the cause, and the release is the effect." That is, no amendment will be effective if it causes a release of collateral.

So, if you accept Black's Law Dictionary, and we could look to Webster's and other similar sources to get very similar meanings of what effect means -- and we've also dealt with what "have" means because you have a verb-noun combination. "Have" means -- it's an interesting word to look up because it means lots of things, but I think, here, it means allow or beget.

So the the ultimate import of those words is that there has to be a causal analysis, and I've heard now many, many times from counsel for all of the parties that the Court shouldn't undertake a causal analysis. I don't -- I don't know how you can apply the words on the page without doing it. And any time you look at causation, you look at --

THE COURT: Well, let me -- let me repeat their argument to you then. Their argument is, you have to look within the four corners of the document to determine the

effect, and that you cannot leave the four corners of the document to determine if there is an effect. That's what -- my summary of their argument.

There's also an argument they're making I don't understand and --

MR. ROSENBAUM: Uh-huh.

THE COURT: -- I think I will get a better understanding of it tomorrow, but Line one of defense is, don't leave the four corners of the document. If you read it, does it release a lien?

MR. ROSENBAUM: Well, you mean the --

THE COURT: Directly or indirectly, does it release a lien?

MR. ROSENBAUM: I got you. And -- but what I was confused about is, which document, and I think what they're saying is the amendment, right? Because -- is whether the amendment releases the lien.

THE COURT: Does the amendment have the effect of releasing the lien limited with -- for review within the four corners of the document is their interpretation.

MR. ROSENBAUM: Of -- because I'm struggling with --

THE COURT: Of the third --

MR. ROSENBAUM: -- their interpretation.

THE COURT: -- of the third supplement.

MR. ROSENBAUM: (Speakers talk at the same time) which document? The amendment or the indenture? Because I think the indenture is clear that you have to look for the causal relationship between the amendment and the release, right? You -- that's what it teaches, and it -- and it doesn't say -- and you know, amendment release where release is the verb. It says, "have the effect of releasing." That's a very different --

THE COURT: Well --

MR. ROSENBAUM: -- phrase.

THE COURT: -- but -- so, to expand on their answer -- and I'm not really hearing you respond to this -- have the effect of releasing may not mean a release of the lien. It could, for example, in one of their examples, mean you change the name of the beneficiary, which in effect, has a release of your rights in the collateral, even if the collateral still stays there for the next beneficiary --

MR. ROSENBAUM: Uh-huh.

THE COURT: -- so you can't do that. But that is all discernible within the four corners of the document. And their argument is, if you can look at the four corners of the document, and it has the effect of releasing liens, it's prohibited.

If you look within the four corners of the document, and it does not have the effect of releasing all or

substantially all the collateral from the liens, then it's permitted with only a 50 percent vote. So that argument I understand.

MR. ROSENBAUM: Uh-huh.

THE COURT: Why am I -- why am I limited or not limited to the four corners of the document?

MR. ROSENBAUM: I think you're limited to the four corners of the document to ascertain -- right -- context, but I don't think you're limited to the four corners of the document in terms of ascertaining what something -- right -- what the causal relationship is between one thing and the next thing. I don't see how --

THE COURT: So interpreting the document -- interpreting the document, I'm limited to the four corners, but the effect of the document isn't a four corners question.

MR. ROSENBAUM: Correct. Because, I mean, we'll --

THE COURT: Okay.

MR. ROSENBAUM: -- and we'll get through it in this --

THE COURT: So let me accept --

MR. ROSENBAUM: Uh-huh.

THE COURT: -- that for a moment. Is this a more likely than not test? Is it a certainty test? Once I leave the document, and if I look at your definitions, what if, because of this change, there's a very high probability, but

not a certainty, that the lien will be released?

Do I look at the consequences and see whether it was released? Do I measure the probability and see if it meets a 51 percent probability test? Do I -- does it need to be a hundred percent probability? What am I supposed to do once I leave the four corners?

MR. ROSENBAUM: So I think the Supreme Court in at least interpreting analogous language -- right -- because how does -- how does the Court apply in any case, right? Courts do it every day all the time. They assess causation. Did one thing cause the other?

And so we looked for cases applying analogous language, and that led us to Justice Scalia's decision in Burrage v. United States. Now, this was interpreting a criminal statute, and the criminal statute has -- it's worded in the inverse, but it means essentially the same thing, which is, in that instance, if a distributor of narcotics did so in a way, or distributed narcotics, and doing so, a death resulted from that criminal activity, the penalties were enhanced, which makes sense. And in -- there was no definition within the statute of the phrase "results from."

So Justice Scalia went to, as Courts always do, dictionary definition and found -- and this is early in the decision -- "A thing results when it arises as as an effect." So here's Justice Scalia using a fact to define the word

"result." "A thing results when it arises as an effect, issue, or outcome from some action, process, or design." And that is how the Court looked at that language; and as a consequence, it applied a but-for causation test.

Now, in the criminal context, a but-for causation was a higher burden for the Government than what the Government was asking for, which was some contributing cause. And so, here, I think, if the Court just applies the plain language of this indenture, has the effect, and looks to the facts, which I'll get to shortly, I don't think there's any type of causation, frankly, that's been recognized --

THE COURT: No.

MR. ROSENBAUM: -- in law.

THE COURT: Yeah. But I -- so let's say they do this amendment.

MR. ROSENBAUM: Uh-huh.

THE COURT: -- which issues new notes, and a year later, they decide to release liens, they wouldn't be able to release them if they hadn't issued the new notes because they wouldn't have had the votes. Do I go back and retroactively --

MR. ROSENBAUM: I don't think so.

THE COURT: -- vacate them?

MR. ROSENBAUM: I don't think so.

THE COURT: Okay. So what's -- how certain does

the -- how certain and immediate does the consequence have to be?

MR. ROSENBAUM: I'll give you -- I'll give you -- I can't do this better than Justice Scalia did. When that Court was assessing but for and describing it in a criminal context, which is a -- which is a more onerous standard than what the Government wanted -- here was the analogy the Court gave.

It's a baseball game. If the leadoff hitter in the first inning of a baseball game on the visiting team -- so the first person at bat -- hits a home run, and that team wins one/nothing, the next day -- and this is Justice Scalia, not me -- the next day, people reading the newspapers who read that, that player hit that home run, and the team won one/nothing, that would be the but-for cause of the win. And he said, notwithstanding the fact that there might have been good fielding, there might have been a lot of other things that happened that helped contribute to the win, and they distinguished that. And he said, but if the final score was 5 to 2, I don't think anyone would read the but-for causation being that leadoff home run.

So I think that, when you -- in the -- in the example that Your Honor gives, which obviously aren't our facts, and I think our facts matter, and I think this case can easily be limited to facts -- and you know, what many of

these bond indenture cases teach is that the facts do matter, and there are trials, and the facts came out of here.

But, if this was a situation where there was -- let's suspend one of my arguments because I don't think, under this indenture, that these notes could have been issued without two-thirds consent. If that were to happen, and a year later, there would be a lot of intervening causes, I have no doubt.

The -- if those notes vote to strip liens, I don't think there would be a credible argument that qualifies for have the effect. But there has to be meaning to have the effect. And --

THE COURT: Does the effect need to be certain?

MR. ROSENBAUM: I don't think so, because again, if you look at the -- and here, I think it was, and I'll explain why -- but I don't think the effect has to be certain. I think it has to be, you know, just like -- I mean, if you think about -- again, I'll come back to this example. When the guy hit the one run home run, it wasn't certain it was going to win the game, but it ends up it was the but-for clause.

So, here, on our facts -- and when you're talking about contracts, and you're talking about sophisticated parties -- right -- I don't think there's any credible discussion that we can have that in even the most strict

reading of what "causation" means and "have the effect" means, that, here -- right -- when you pull the string -- right -- when you use less than two-thirds, and it was 59 percent to vote for a third amendment whose intent it is to issue notes, whose intent it is to strip liens, that is causation. And so I --

THE COURT: Well, let me -- let me back up because I talked to the other side about this, and I want to be sure to get your answer to this. I don't think their intent matters. Their intent may guide whether an effect is but-for effect.

MR. ROSENBAUM: Uh-huh.

THE COURT: But, if all that you have is intent without more, then I don't think you win, right? You have to have an actual effect, right? Not an intended effect.

MR. ROSENBAUM: I think intent here, especially given the proximity of one to the other to the other or -- and we actually I think will show that it all happened on the closing call -- then I think intent forms your analysis or informs, but I don't -- I don't -- so I don't think it's irrelevant. We spent a lot of time showing --

THE COURT: I don't think it's -- I don't think it's irrelevant either --

MR. ROSENBAUM: But I don't think it's --

THE COURT: -- but I don't think it sufficiently --

MR. ROSENBAUM: -- (speakers talk at the same time) term.

THE COURT: -- I don't think it's sufficient without more.

MR. ROSENBAUM: I actually do, but I -- but I'm willing to -- I'm willing to go in that -- right -- because I think, here, it's so obvious -- right -- that -- what happened. I --

THE COURT: Well, let's assume that everybody thought these were standard indentures, thought two-thirds was required.

MR. ROSENBAUM: Uh-huh.

THE COURT: Turns out 75 percent was required. And so you go through all this, and they only have enough votes to get a two-thirds. So they intended for two-thirds vote to do something. They got the two-thirds vote. But wait, we finally read it, and it's 75 percent. It didn't happen no matter what their intent --

MR. ROSENBAUM: Sure.

THE COURT: -- was.

MR. ROSENBAUM: Yeah. I --

THE COURT: So I don't think that intent is sufficient.

MR. ROSENBAUM: I don't think it's dispositive.

THE COURT: It may be probative.

MR. ROSENBAUM: But I do think, when we get into the testimony, which we will, it is -- it is a guideline for the Court -- right -- as to -- as to whether, when the -- when the call began, whether there was any real possibility, whether commercial or legal, that the end, it would not happen.

And I think the intent matters to inform what the Court is looking at, which is, did the third amendment that no one disputes had less than two-thirds then outstanding. Any formulation you want to put on it, it didn't have two-thirds had the effect of releasing the lien.

On these facts -- so what I'm suggesting is the intent is highly relevant, but it might not be, in Your Honor's mind, dispositive, and I think I can show with evidence why it really doesn't matter because there's really no way to look at this without concluding that one happened because of the other, and there was nothing intervening in between that would stop a causal chain by any sense of the causation.

Because I do think the Court has to apply the plain meaning. And, while it's constrained to interpret the indenture based on the terms of the indenture, it is -- when an indenture or any contract implicates factual issues that are outside the four corners of the indenture, then the Court -- it happens literally every day -- when -- in contract

interpretation. We're not asking for the Court to find an ambiguity. We're just simply asking that the Court apply the words on the page to the facts in this case --

THE COURT: So --

MR. ROSENBAUM: -- and maybe I can give --

THE COURT: -- do I need to collapse the transaction to get there or not?

MR. ROSENBAUM: I don't think so. I don't -- I think --

THE COURT: Do I need to --

MR. ROSENBAUM: -- collapsing is a word --

THE COURT: -- do I need to view it as a single transaction?

MR. ROSENBAUM: It is a single transaction, but I don't -- I -- so I think it is a single transaction. I don't -- I think, if the Court is hesitant to grapple with, you know, what the Court of Appeals would do -- and I -- and I think I can show you as I go why this is very much a single transaction, and there is -- you're under New York law in the cases applying indentures, it fits well within that rubric.

But the Court doesn't have to. That's my main point because the plain language of the indenture is the first place to look, and I'll say it yet again. The Court has to give meaning to the plain language. And so here's, you know, a couple of guiding principles because I -- I'll

bounce around a little bit, but let's go to slide -- it's -- should be Slide 15.

And, again, I want to outline with the case law and recent case law just guiding principles for the Court to assess the words on the page and how to apply it to our facts.

In *U.S. Bank v. Windstream*, which is a 2019 case, it's notable for two reasons. One, because the Debtor's counsel made a point several times on cross-examination to demonstrate that one of our clients, JP Morgan, was involved in this transaction. Interestingly, two things came out of that decision that I think are relevant to you.

One, the Court found -- Judge Furman -- that the new notes issued in connection with the 2017 transaction were not valid additional notes within the meaning of the indenture because their issuance violated Section 409.

So, in that case, the Court didn't count the notes because they were issued in violation of one of the provisions. I'll get to why that matches with our facts when I talk about the adverse effect language.

But the Court went on -- and citing to what's been described as a seminal case for bond indenture interpretation from the Second Circuit, *Sharon Steel*, it says, "As the interpretation of, in that case, a sale and leaseback transaction, the court refused to elevate form over

substance, which it described as contrary to New York law."

That's -- this was an indenture, Your Honor, and it then referenced *Sharon Steel* from 1982 and described its holding in reference to an indenture agreement that a literal reading of the words is not helpful, apart from reference the underlying purpose to be served.

And so, if the Court exercise here is to ascribe meaning to the words on the page, the words on the page say, "With less than a two-thirds supermajority, no amendment can have the effect of releasing liens." And it's in that rubric that I think the Court has to look at the facts.

And, if there's any question, as a matter of what the Court of Appeals would do, the Court -- and I -- and I'll get to *Sharon Steel* in a moment because I think it's a useful guidepost. I won't say that the facts are exactly the same, but there are actually a lot of principles from that case that I think have guided and should guide courts in how to review and apply indentures.

But, in 2014, the New York Court of Appeals, in Quadrant Structured Products, cited that page of *Sharon Steel* for guidance as to how courts are to interpret bond indentures. And that case is notable, because in it, the Court was assessing on two different variations of no action clauses. One was narrow; one was broad.

The narrow version limited the note -- the ability

of bondholders to sue only -- it precluded bondholders from suing without going through the strictures of the no-action provision on claims arising from the indentures. And there was another variation of bond indentures that didn't just say, "claims arising under the indenture." They said, "claims arising under the indenture or the security."

And the Court of Appeals has looked to those terms and gave them meaning. One meant only claims arising under the four corners of that indenture, and the other included breach of fiduciary duty claims, and on that basis, it applied the broader language to that particular set of facts.

We're asking the Court to do something very similar -- is simply to look at have the effect and apply it to the facts (indiscernible) in this case with a framework that's guided by legal principles of causation. So I'll go back.

THE COURT: Just -- before you go much further. And what are you asking me to do on the 2024 notes? They don't have the same -- the same situation, right?

MR. ROSENBAUM: They don't. The 2024 notes have the two contract-based arguments. One is the pro-rata argument based on redemption that is substantially the same -- excuse me -- as Langur Maize, and the other is based on sacred --

THE COURT: They're not -- I don't think they are

substantially the same as Langur Maize. Langur Maize's argument is hinged on the fact that Platinum was not a third party. I mean, are you arguing that Silver Point and PIMCO weren't third parties?

MR. ROSENBAUM: We're arguing that, because this was a purchase --

THE COURT: Right.

MR. ROSENBAUM: -- that, if -- the same provision exists in our indenture and therefore --

THE COURT: But there's the -- I forget -- what is it -- 307(h) or something -- that says there's an exception here. If you do a third-party private transaction, you don't have to do a pro-rata.

MR. ROSENBAUM: We wouldn't have -- well -- but Platinum was a -- was a participant in this transaction.

THE COURT: Well, they --

MR. ROSENBAUM: So whether or not it held --

THE COURT: -- they didn't -- they were not a participant in the 2024 portion of the transaction.

MR. ROSENBAUM: If you -- if you view it as different transactions. But, you know, I think that portion of the indenture -- and we can get to this because we really -- it's not part of my presentation today, frankly --

THE COURT: Okay.

MR. ROSENBAUM: -- Your Honor, but I'm -- I know

the Court's interested in it. But I will --

THE COURT: Well, what was your second argument just so I know what --

MR. ROSENBAUM: The second is the springing maturity, and I -- and I think there's a distinction between reading the -- you know, ranking the payment as a sacred right to equate to the ability to release liens or adversely affect rights relating to collateral.

I don't think those are the same thing, because here, what happened was, as part of this transaction, PIMCO and Silver Point required that, if there was 50 million or more of the 2024 outstanding --

THE COURT: Right.

MR. ROSENBAUM: -- then they would leapfrog ahead -- right -- of everyone. That --

THE COURT: Only in time, not in legal.

MR. ROSENBAUM: In time. And I --

THE COURT: But not in the (speakers talk at the same time).

MR. ROSENBAUM: -- I heard that argument, but I don't -- I don't -- I don't see how you can think of it purely in time in the following sense. It -- and this applies to 2026s also because these are to jump ahead of both.

THE COURT: Uh-huh.

MR. ROSENBAUM: Where you have one issuance -- right -- you have a 2024 and 2026, and one group -- right -- within each splinters off -- splinters off -- right -- exchanges and then puts a provision in place that takes all the collateral rights -- we'll put that to the side -- and then springs their maturity ahead of you -- right -- I don't see how you can interpret that as anything but changing the ranking in respect of a right of payment because those bonds are going to come due before you.

It's no different than if they're ahead of you in the waterfall. It's the same thing, and it doesn't -- if it --

THE COURT: I don't --

MR. ROSENBAUM: -- if it --

THE COURT: In this one, it may have a similar effect, but it's a completely different thing, right? In the sense of, in a bankruptcy case or in a state law liquidation case or in a state law receivership case, the priority would be the same no matter what the maturity was. Their ranking would be the same.

I have a difficult -- I am having a difficult time figuring out whether the 2024s have a similar problem to the 2026s. If you want to do that another time, that's fine, but I'm telling you, I understand the 2026 argument reasonably well. I'm not sure I'm understanding the 2024 argument with

this much --

MR. ROSENBAUM: But you said a similar problem to 2026s or -- I just want to make sure I'm hearing the --

THE COURT: I don't think that what occurred to the 2024 noteholders was very similar to what occurred with the --

MR. ROSENBAUM: I see.

THE COURT: -- 2026 noteholders.

MR. ROSENBAUM: Look, I don't disagree with that because there is no dispute that PIMCO and Silver Point got over two-thirds for the 2024s, but I don't think -- I don't know how you can disassemble, you know, the -- because this was -- this was an all-or-nothing deal.

So -- and it's not to suggest that there should just be tagalong, but what they did was, they ginned up consent on one that ultimately caused the release of the other. And I -- and I do understand why Your Honor would struggle with that, but I think if you're grounded --

THE COURT: Well, look, I mean, there are ways to deal with it under 510 if you want to group it all together. But, if you deal only with the 2026s -- I mean, let's assume for a minute they still have a first lien, for example.

MR. ROSENBAUM: I'm sorry. I didn't hear you.

THE COURT: Assume for a moment that the 2026 first lien remains.

MR. ROSENBAUM: Uh-huh.

THE COURT: Well, that would be a solution.

MR. ROSENBAUM: It very well might be, and I -- and you know, I'm close --

THE COURT: Might not be the right solution, but it's a solution that is divorced from the 2024s.

MR. ROSENBAUM: And I think, if Your Honor is exercising equitable powers and whether it's as a function of the Bankruptcy Code or state law, which is specific performance, the Court can shape a remedy that fits the breaches, assuming the Court finds breaches, the breaches of contract that were found during the proceedings.

So -- but my main focus at least as part of my presentation today, that -- one, is do both the 2024s and the 2026s as a matter of pure contract, is that the springing maturity changed the ranking in respect of a right of payment by pulling 1.2 billion ahead as a contractual right in the event of a -- of a condition, but it nonetheless changed the ranking by virtue of the springing majority.

So there are, as has been previewed, additional arguments that we've asserted, and I want to be clear on this because there is -- I know, you know, lawyers do this -- is reference to kitchen sink and things like that. Your Honor, our view, just to be very clear, particularly on these arguments as to what gave rise to the 2026 claims and the

two-thirds are independent of one another.

This -- and I think that's because this indenture affords a number of protections, not just one, that have to be read in the context of the entire agreement. So the second one -- in no particular order, but I'll go with it because I think at least analytically there are some similarities to have the effect -- is the -- if you go to Section 2.01E, which is among the provisions that give rise to the issuer's ability to issue additional secured notes, and that provision contemplates additional power to pursue secured notes.

And, to take a step back and think about this, when the offering memo came out and the -- and the indenture was printed, no one knew what -- the exact basket. There was substantial reduction of the basket capacity, but there were a lot of different ways that basket capacity could be at any, you know, number of different -- right -- permissive thresholds.

And, consequently -- right -- the indenture can only speak to what might be the facts going forward. It can't speak to what they are. So it affords pretty broad protection here, because while it contemplates the issuer's ability to issue additional secured notes, it ends that provision by saying, "Provided further that the issuer's ability to issue additional secured notes shall be subject to

the issuer's compliance with 409 and 412."

And we've been particularly focused on 412 here because one of the things that the issuer undertook to do was attempt to issue new notes, but that's not where the story ends. The function of those notes, the purpose of those notes, was to allow for new unpermitted liens, not the intermediate, what we'll call phantom liens, that if you accept the world the Debtors want to live in might have existed.

We say they really never existed, but it's the ultimate means that were a function of stripping one and creating the other. And why do I pause on this section? Because -- and I looked, Your Honor -- and you can go to the next slide, 7 -- at this Court's decision in iHeartMedia, and obviously, a much different fact pattern, but the Court was applying in that case, as I'm sure Your Honor remembers, Section 1006, which is a limitation on mortgages, which reads very similar to the lien protection in the 2006 indenture, with one very, very important difference, which is, it uses the words "create, assume, incur, or suffer to exist," which means allow.

So it starts with broad protection, and this Court found that, that is protection, not a grant, or it's a prohibition. But this indenture goes further and says, "directly or indirectly," and I don't think if you -- and I

don't think that's, you know, the same type of causation as have the effect.

If anything, it's broader, because if you look at how the courts in New York have applied the term "indirectly" -- and we'll go to the next slide, 8 -- indirectly signifies the doing by an obscure, circuitous method, something which is prohibited from being done directly and includes all methods of doing the thing prohibited except the direct one.

And here, again, if the Court is looking at these facts, what the ultimate result of this without collapsing, just by applying the plain terms of this indenture, the purpose for those secured notes, whether direct or indirect, was to allow for or create -- but allow is even broader -- allow for the new lien securing the new 1Ls, which no one here would suggest could be done without a two-thirds supermajority.

So, when you read that provision and the breath of it --

THE COURT: Goto to go back to 412? Because their argument is -- I think -- that they have the right to change the definition of what a permitted lien was.

MR. ROSENBAUM: Yeah. But I think that doesn't -- that doesn't actually give any life to the indirect, the word "indirect." Even if they did -- and I'll try to explain why they didn't -- but even if they did, it doesn't give any

life to the word "indirectly." Because indirectly -- right -- what -- we know no one here -- right -- everyone is a sensible commercial actor. We'll get to why this was -- this was a binding commitment at the moment that call -- no later than when the call ended.

But put that to the side. I don't think there's any legitimate dispute that no one was stripping the liens from their own bonds without creating new ones. That was -- is the -- is the quintessential essence of the exchange, which was -- so this -- the word indirectly -- right -- if you go back to what it means --

THE COURT: Take me -- take me back -- can I see the provision, though? Not the case cite. Let's go back to 412.

MR. ROSENBAUM: It's Slide 7.

THE COURT: So the issuer will not -- it will not permit any subsidiary guarantor, if any, to directly or indirectly create, incur, assume, or suffer to exist any lien of any kind other than permitted liens. So why can't they change the definition of permitted liens?

MR. ROSENBAUM: I don't think they can -- if they can change the definition of permitted liens with a simple majority, I think they all agree that they cannot -- they cannot strip liens with a simple majority and create new liens. And, at least my reading of this, when you look at

the breadth of what indirect means is, you can't just stop at this weigh station that they say they created of changing the definition of permitted liens.

You have to -- you have to look at what they were attempting to do --

THE COURT: Right.

MR. ROSENBAUM: -- by the transaction.

THE COURT: No. But it looks to me like that what we're doing is, we're taking two different provisions and trying to -- with different functions -- and trying to apply them to the same function. 902 deals with the heart of this case, right?

MR. ROSENBAUM: I agree.

THE COURT: Okay. 412 is saying that, once you change permitted liens, a company won't allow there to be anything other than a permitted lien. But it -- that is a provision that has a different functional effect than the one that you're complaining about. It seems to me, if you win 902, 412 is irrelevant. If you lose 902, you lose 412.

MR. ROSENBAUM: That's where I would -- I could move on because I -- because I think -- but I don't -- I don't agree with that because the essence of the argument that we're making is, it's not just what 412 says. It's that the ability -- it says -- the indenture says the ability of the company to issue -- right -- additional secured notes is

subject to -- right -- which means that that 412 is superior to. It takes precedent over the company's ability to issue new notes.

THE COURT: Sure.

MR. ROSENBAUM: And --

THE COURT: If it's not a permitted lien, they can't do it.

MR. ROSENBAUM: If it's not a permitted lien. But what they're saying -- right -- is -- and it goes further because it's not just directly. If it just said, "directly," I would agree with Your Honor. I think, then, if they could change permitted liens -- and I'm going to explain to you why they couldn't -- but if they could change permitted liens, and it just said, "directly," or it was silent, as in iHeart, then I think my argument probably wouldn't work.

But it -- this is very broad -- it says, "allow," "suffer to exist, allow, directly or indirectly." And what they did was, they created phantom notes, as we call them, right? Even if they could do that, the purpose of those could not be to create otherwise unpermitted liens.

And the new 1L liens, under any reading -- right -- were not permitted without a two-thirds supermajority. So all we're saying is that the idea of creating notes for that indirect purpose, it runs into a problem with the broad phrasing of 412, especially, when you look at what indirectly

means as a matter of New York law, which is quite broad, and it actually says something to the effect it's all inclusive.

So -- and again, I'm not advocating for collapse. I'm really not. Collapsing is a legal doctrine that we would say applies here, but that's not what this is. This is looking at the purpose for which they could issue additional secured notes. And, if the indirect -- if it's indirectly to allow for liens that could only get there with a two-thirds supermajority, you can't do it, because otherwise, what does indirectly mean in that context? It has to mean something.

So I'll move past this because it's a mouthful, but Your Honor, I really don't -- I stand by this argument. I don't think you can look at what indirectly means and look at what they did and --

THE COURT: Can you -- can you tell me, though, if there's a scenario in which you win 412 and lose 902?

MR. ROSENBAUM: No. I think -- because I think --

THE COURT: Is there a scenario in which you lose 902 -- I'm sorry -- win 902 and you care about) 412?

MR. ROSENBAUM: No.

THE COURT: Then why are we doing this?

MR. ROSENBAUM: It's just -- look --

THE COURT: I think we've made this irrelevant is all.

MR. ROSENBAUM: If nothing else, Your Honor, I do

think -- and it's one of our overriding themes -- there were a lot -- right - this was a first of its kind, right? There was no precedence. No one ever did it. Every single one of the counterclaim defendants (indiscernible). No one in the history of uptiers or lien strips or what -- we'll get to exit consents -- ever attempted to issue new notes, vote them, and cancel them at once -- right -- or even in the same day, or probably in the course of, right?

So okay. How do you then look at an indenture -- right -- as to something that's unprecedented? You look at the breadth of the language. Does it -- does it bake in protections of the liens to avoid these scenarios? And I think it does. And now I promise you, I'll move on.

So the last of the plain language protections that we rely upon is what we've called the "adverse effect protection." That's among those that Professor Morrison closely analyzed. And this is where, Your Honor, the argument that they could not amend the definition of permitted liens to include 250 million of additional secured notes lives.

So, putting aside the have the effect and why is that? And, again, I use ellipses, but we all know the language. "No amendment, supplement, or waiver may modify the security documents or the provisions of this indenture dealing with collateral in any manner" -- so it's extremely

broad -- "adverse to the holders of 2026 secured notes and any material respect."

Again, this is sweepingly broad language -- and what I'll get to later in the presentation because I want to turn back to the facts giving rise to the effect -- the amendment to the definition of "permitted liens" modified the notes security agreement because it's the same -- and I'll get to that -- and also the amendment to the definition of permitted liens modified, for example, Section 426, which is a negative pledge against further encumbering the collateral.

So, for multiple reasons, the two of which I just previewed, there is no way to read this language, right? And it doesn't say, "amend." It says, "modify," to mean anything, but if you change the definition of permitted liens, which they attempted to do -- and I'll get to why that was adverse and material -- then it modifies every provision in the indenture and in the -- in the other security instruments, here, the security documents, that use the same term and refer back to the same definition.

I don't think there's a sensible way that a court can see otherwise. That's exactly what the Court in Tri-Mar did.

THE COURT: Was this a security document?

MR. ROSENBAUM: It is. So the definition of security documents is quite broad -- right -- and it includes

a number of UCC 1s and kind of just general things that would actually go from -- right -- the Court probably knows much better than me.

It's one thing to promise security interests. It's another thing to then execute them and perfect them. And so the indenture is the means of raising money, but there are other agreements that are the means of actually creating the security interest. And one of the more important ones -- and I'll get to it because it's in our presentation -- is the notes security agreement which is, in effect, the agreement that requires a first lien, a perfected first lien in the collateral.

THE COURT: Right. But I think what you're telling me is that the definition of permitted liens didn't modify the security documents. Nor did it modify the provisions of the indenture dealing with collateral. But it did have an adverse effect on those provisions. Is --

MR. ROSENBAUM: I don't think -- I don't know how I can separate the two. If -- and here's the clearest example. The Tri-Mar case, which counsel likes a lot, the Court said (indiscernible) in that case modifying one defined term -- I mean, amending one defined term effectively modifies that term in every other provision using it.

So this indenture says -- it says, "No amendment, supplement, or waiver may modify." So it's a different word,

right? It --

THE COURT: May modify the security documents or the collateral provisions of the indenture. But it can modify other things, right? It can have an effect on those other documents. It just can't --

MR. ROSENBAUM: I think -- I view it differently, Your Honor.

THE COURT: Okay.

MR. ROSENBAUM: I think that there are -- there are two requirements that we have to show. One, is that the amendment modified a security document or any provision or the provisions of this indenture dealing with collateral.

THE COURT: Okay. And --

MR. ROSENBAUM: And --

THE COURT: -- what are -- and what are you alleging got modified?

MR. ROSENBAUM: By changing the definition of permitted liens.

THE COURT: Within the indenture?

MR. ROSENBAUM: Within the indenture.

THE COURT: Okay.

MR. ROSENBAUM: Right? Well, I'll jump to it. I'm going out of order, but let's go to Slide 53, 54 -- you can land on Slide 55. So Slide 55 is operative language from the third supplemental indenture, and it says, or it creates a

new defined term, "additional 2026 secured notes." And it defines that to mean 250 million in principal amount of additional secured notes.

So, now -- right -- this amendment attempts -- and if you look down -- to amend the definition of permitted liens to include that extra $250 million. And so -- right -- now, we need to consider, did it modify a security document or a provision of the indenture dealing with collateral?

I'll start with security documents, Section 2.1 -- next Slide, 56 -- Section 2.1 of the Notes Security Agreement, which no one disputes, is a security document, says, "As of the date -- as of any date on which additional secured notes are issued, the notes collateral (indiscernible) for the benefit of the secured parties has a perfected security interest in all of the collateral, subject to no other liens other than permitted liens."

And it continues. It says, "Such security interest will be superior to and prior to all other liens of all other persons other than permitted liens." So by -- and this document incorporates by reference the definition of permitted liens from the indenture.

So I don't think there's any, like, reasonable way -- and this is not just me, it's what Tri-Mar teaches -- I don't think there's any reasonable way to read the -- this

provision and the definition of permitted liens, if it's amended, to mean that it modified what permitted liens means here, and that then brings it within the ambit of the adverse effect provision just by virtue of the security document.

Now, it wasn't just me saying this. I asked Kevin Smith on cross-examination, and I think that's important, because as the Court heard, the -- Mr. Smith was among the architects or at least was among the people for the company who negotiated the LVL (phonetic) financing and the indenture.

And I asked him -- and I'm on 57 -- go to 57 -- "So you would also agree with me that a change to the indentures definition of permitted liens would also be a change to the note security agreement, correct?" "That's right." So who better to understand how these agreements interact than him?

And I asked him then, "And as we established, the note security agreement is a security document?" "Correct." So I think just by virtue of the modification to a security document, we meet the first leg. But I'll go further because I think these are fairly dense but important arguments from our perspective.

If you go to the note purchase agreement, and now, I'm talking about the note purchase agreement that if you flip two slides back is -- to Slide 55 -- is actually defined. It's -- somehow our highlighting (indiscernible).

But can you -- Chris, can you go to 55 for a minute? Then I'm going to bring it forward. We meant to highlight no purchase agreement, but "no purchase agreement" is actually now a new defined term in the indenture by virtue of this purported amendment that we say was unauthorized.

And, if you then roll forward to Slide 56, and this is a direct quote from the Note Purchase Agreement that was part of the 2022 transaction, "The issuer confirms that, upon the issuance of the additional 2026 notes, those notes will be secured by security interests created by the security documents as such term is defined."

So it holds together that they had -- by amending the definition of permitted liens, it modified that security document such that -- such that they could attempt to do this. And I'm going to explain, and I think it's going to be pretty clear why, that was adverse in any manner to holders.

THE COURT: So, if you want to back up for a minute, I can tell you where I am on this right now, and I'm --

MR. ROSENBAUM: Uh-huh.

THE COURT: -- I'm not telling you can't persuade me differently, but if you go back to 902, I don't understand why a change to permitted liens is not an amendment dealing with collateral. The very essence of collateral is what can it be?

But I don't understand why amending permitted liens is what is referenced as an amendment to the security agreements. It has an effect on the security agreements. So sort of half of what you're arguing, I don't think -- I think you're --

MR. ROSENBAUM: (Indiscernible).

THE COURT: -- going too far. The fact that it has an --

MR. ROSENBAUM: Could be.

THE COURT: -- effect on those doesn't mean you're amending them. But I do think --

MR. ROSENBAUM: I thought it was the act --

THE COURT: -- that the change in the definition of permitted liens is something that may require a two-thirds vote.

MR. ROSENBAUM: Then, Your Honor, I would -- I would accept that as well, because frankly, that's where I was going next, but I -- and, again, everyone's analytical tools are a little bit different. I actually felt that it was such a clean -- it was so clean that, if you amend permitted liens, the security document as defined uses that term, right then and there you've modified it. And so I -- whether or not the Court --

THE COURT: Take me back --

MR. ROSENBAUM: -- I get the Court --

THE COURT: -- to the prohibition because I don't think that you did do that. Go back to Section 902, Sub 3; I think, 902 second paragraph, Sub 3. It says you can't modify the security documents. Well, this is not a modification of the security documents. This definitely carries through to the security documents.

That doesn't make it a modification of them. People are using terms that we have an understanding of meaning on. In other ones, we're saying it might have an effect on them, stuff like that. This is a modification of it. I don't see that.

But it does seem to me to say provision of the indenture dealing with collateral --

MR. ROSENBAUM: Right.

THE COURT: -- because it's -- what can the collateral be? Who's going to share in the collateral? Permitted liens, you know, deals with collateral, and therefore, if it is adverse, may invoke the two-thirds provision.

MR. ROSENBAUM: And so, I will skip over the various reasons why I agree with the Court, but I don't think there's a way to read permitted liens or means without it also referring to collateral. Liens have no function without collateral, and vice-versa. And in fact, the definition of collateral includes not only liens, but purported liens.

And so, I want to -- just to kind of bring that home for a moment, we can go to Slide 59, which is the negative pledge. Among the provisions that permitted liens -- it says the issuer in each guarantor will not, an issuer will not permit restricted subsidiaries to further pledge the collateral as security or otherwise subject to permitted liens. So, that's just one very tangible, easy example as to how amending the definition of permitted liens had to have modified a provision dealing with collateral.

Now, if you look at my blue text. I'm on Slide 59. Underneath, because this is an argument that was made in the briefs from the JDG, that somehow you have to look -- I don't quite understand how you get there, but you have to look to the unsecured indenture to figure out what it means under this indenture for a provision to deal with collateral. I don't think that holds, but I can tell you two things.

THE COURT: Well, let me explain it to you. I mean, I do understand the argument. I don't know that that takes it away from being a provision that does deal with collateral. I think it does deal with collateral. But their argument is that you can have a fully unsecured that wants to leave collateral unencumbered. And you, therefore, could have and do have, in this particular unsecured, a limitation on how much of the assets that are going to serve as an asset base in an unsecured loan would be available and not pledged

to a secured loan. So, permitted lien is useful in an unsecured document, tut that, to me, doesn't mean that it doesn't also affect collateral because it allows collateral.

MR. ROSENBAUM: I agree with that.

THE COURT: But I do think that's their argument and I don't think it's an illogical argument. I think they just go too far.

MR. ROSENBAUM: I think -- I get the logic of it, and I certainly understand why an unsecured indenture would have a reference to permitted liens, right? Because anything that's above the unsecured is going to dilute that, right? And that actually goes to why this has an adverse effect on us, but I'll get to that in a moment. But the unsecured bond adventure, first of all, has only a simple majority and it really just is otherwise irrelevant because it doesn't have the two-thirds supermajority provision that protects against adverse effects on collateral.

THE COURT: Yeah. No, he's trying to make that argument to show me that permitted liens aren't a provision that are restricted by the third clause of 9.02, 2nd Paragraph, and I'm not sure it proves that.

MR. ROSENBAUM: So, I'll go with that even though I don't agree with it because I think on this point these indentures have to stand apart because this is the -- but there is no negative pledge, not surprisingly, in the

unsecured bonding indenture. Or you could look high and low. There's nothing like 4.26. There's no prohibition on further encumbering the collateral, big C, in the unsecured bond indenture, nor is there a provision that deals with impairment of security interests like 4.24.

So, just because the unsecured bond indenture has a definition of limited meaning for its own purposes, I don't think has much bearing. I understand the argument and why they made it, but I don't think it provides any real guidance as to whether modifying or amending the definition of permitted lien to stack 250 million more on top of a $900 million bond issuance when everyone negotiated heavily for no more than 75 million, I don't think one has much to do with the other in the Court's analysis of how this provision operates on our facts, and I'll keep going through this because I'll go where the Court takes me.

But, you know, on Slide 60, this is just another example. And we talked about the offering memo. The offering memo has a section called Certain Covenants with Respect to the Collateral, and of course, one of them is the negative pledge.

And now, let's go to Slide 62 because this starts to inform the Court, even though I have a whole bunch of slides, this starts to inform the Court as to why increasing the permitted lien basket was adverse in any manner and

(indiscernible) any manner to holders in any material respect. The Court heard a fair amount of testimony on this, and it was very important to the market. We had some market participants who were involved and commented on the offer memo. Interestingly enough, Carlyle, who's on the other side of the table, was also commenting on the offering memo for this very purpose, which was to narrow or tighten considerably the permitted lien debt. And when the company went to market -- and if you look, this is their document and this is, you know, them kind of promoting to the market how attractive this offering should be and how much they've moved off of their original basket capacity provisions. The company started under its general credit facility basket at the greater of 260 million or 75 million of, I'm sorry, 75 percent of EBITDA, and if you look down to permitted liens, the greater of 100 million or 30 percent of EBITDA.

And I can take the Court through the permitted liens definition, or the Court can just trust me on this. What became the general basket capacity is picked up in the permitted rate. So, Subsection 1 of the permitted liens definition captures both the general basket capacity and then it's cumulative, not concurrent, it's cumulative. It then adds that to the permitted lien basket to then determine at any point in time how much permitted lien capacity there is. And so, what the company wanted was 360 million of total

permitted lien capacity.

What the market, including Carlyle -- in fact, I think it was Carlyle who prevailed on the company with this change -- negotiated that all the way down to -- I actually think we highlighted the wrong part but under credit facilities basket, other, the greater of 50 million or 15 percent. So, it knocked the 260 all the way down to 50 and knocked 100 all the way down to 25. And that's how when we get to March of 2022, there's 70 -- because the EBITDA test was, you know, were not going to ever be higher than at that point, the 75. So, when we've been talking throughout this case about the 75 million, that's how we get there, and that was after the company wanted 3660.

What'd they do? They gave themselves 325, right? And now, we'd want to say without getting our consent and accepting that changing permitted liens modifies provisions dealing with collateral, then the Courts only exercise is was it adverse in any manner, any. And that is again extremely broad and material.

So, how do we do that analysis? I'll start with Slide 65 and then we'll continue. And I think there's some interesting use of language I'm hearing from the JDG that -- they use dilution, which clearly is not, you know, is generally a negative, right? I'm not saying it's always a negative, but dilution of your collateral is exactly why you

protect yourself by limiting the baskets. And what I'm hearing is there was no dilution protection in this indenture. There very much was dilution protection. That's the whole point of negotiating these baskets down to what became 75 million instead of 360 million was so that holders of the secured bonds wouldn't get their -- put aside what actually they did with it -- wouldn't get their collateral diluted. So, how do we know that? I mean, I think that's intuitive and this Court would easily understand that.

THE COURT: I'm sorry, but I thought there was a provision that said that you couldn't issue an unlimited amount of additional audits that would share the collateral.

MR. ROSENBAUM: It's subject -- it's 426. It is subject permitted lien. So, that --

THE COURT: What?

MR. ROSENBAUM: We can go back to 426 because it's -- Section 4.26. So, we can look at 559. So, the first sentence says the issuer and each guarantor will not, the issuer will not permit any of its restricted subsidiaries to further pledge the collateral as security or otherwise subject to permitted lien. The second sentence then says the issuer, however, subject to compliance with 409 and 412 -- 409 and 412 are the provisions I just showed the Court -- has the ability to hereunder to issue unlimited aggregate principle. So, I think all that, it's all subject to what I

just showed the Court, and that was 75 million.

THE COURT: Can we go back up to 412, again?

MR. ROSENBAUM: Excuse me?

THE COURT: Let's go back to 412 again. I think that's the one that I thought was irrelevant and now it's becoming relevant.

MR. ROSENBAUM: It's in a number of places, but we can look at -- the place that we did a direct quote is alongside iHeart Media. So, it's (indiscernible).

THE COURT: This isn't a new lien. This is new borrowers. So, new borrowing secured by the same lien. Was explicitly permitted, right?

MR. ROSENBAUM: No, I don't think so. I really don't think you can read the indenture that way. It was permitted up 75 million, but anything above 75 million required an amendment.

THE COURT: That's for something new, right?

MR. ROSENBAUM: No. No, no, no. No. Sorry, I don't mean to interrupt, but I don't think that's the right way.

THE COURT: No, no, it's -- but I'm reading the second sentence under 426. The issuer, subject to 412, can issue an unlimited aggregate principle amount of additional secured notes. 412 doesn't talk about the amount of, if you will, claims that are subject to the lien. It talks about

new liens.

MR. ROSENBAUM: Well, it's 409 and 412. 409 tells you how much -- like I don't think you could read it that way, Your Honor, because --

THE COURT: Well, how do you read the -- the second sentence of 426, I mean, it is subject to 412 but eliminate that "subject to" just for a minute. It says you can issue an unlimited amount of additional secured notes.

MR. ROSENBAUM: Correct.

THE COURT: Right? So, you can do so, but under 412, which is the only restriction that governs it, you can't establish liens on new collateral to secure the additional secured notes, but they can still be secured by the existing collateral, right?

MR. ROSENBAUM: I don't -- I hear what the Court is saying, but I'm having trouble absorbing it because if you look at what permitted liens means, right, it means the capacity for -- the company cannot without an amendment -- I don't think anyone would disagree with this -- cannot without -- in fact, that's why they did the Third Amendment. We said it was -- right? That's one of the reasons.

The company cannot issue a dollar over 75 million, right? Maybe it can because maybe that wouldn't be material, but it certainly can issue 250 million without changing the definition of permitted liens. So, there is no, the

company's ability to issue anything that's extra 250 million required both an amendment to the definition of permitted liens and the definition of 409, because those are the provisions that are captured by that summary chart, and the subject, too, is to both 409 and 412.

So, it I don't think the logic holds together. I think the only reason this is unlimited is because you don't know how many bonds you might have capacity for when you write the indenture, right? So, I don't see any other way to read it because otherwise, you're reading out of it all the restrictions on permitted liens and indebtedness that were the subject of, you know, not only have these negotiations, but are what give rise to the vast capacity. And I don't think they would have needed an amendment, right? They are the ones who did the amendment. So, I think they acknowledged it.

Look, we can go back to their Third Amendment, which is Slide 55. Again, this is before we get into "have the effect" and indirect, but they saw the need to amend the indenture to, and actually cut some of it off because they also amend 409. So, they amend the definition of permitted liens and they amend 409 to stack on top of the 75 another 250, and what we're saying is that was an amendment that modified a provision dealing with collateral, which was 426 and 424 that require supermajority consent if it was adverse

in any matter, in any material respect.

THE COURT: Okay.

MR. ROSENBAUM: Because if they thought they could just go to 250 without, right, without amending, they would have, but they couldn't. What we're saying is that by doing that, that invokes what we've been calling the adverse effect protections because they're broad. So, one of the things I heard is, well, 250 million came in and somehow that wasn't averse to holders. Yeah.

First of all, it, you know, it goes to that deluding point. I think there is general agreement because when I'm listening to them say, talk about the 75 million, they acknowledge that every dollar up to 75 dilutes any holder's security interest in collateral and every dollar above it dilutes, but you know, this goes a lot further in terms of what they did here. And I also don't think this requires collapsing, but I think it does require the Court to look at what the company was doing before it did it.

So, Slide 67, this was my cross-examination of Malik we'll go with because I'm never good at his last name. But I asked, "You knew as a board member that this transaction," -- the context was before he approved it -- "You knew as a board member that this transaction would harm the excluded holders' security interests in the plan, correct?" "Correct." So, again, I don't think under any

rubric, the Court, especially the way that the adverse effect protection is worded, that the Court has to pretend it doesn't know what they were doing, right? I don't think there's any principle of contract application, right? It's not construction, it's application that would cause the Court, especially in the way they did it here, right, to cause the Court to pretend that's not what they were doing.

It actually was their preconceived understanding and it was the basis on which they approved.

The next slide, this is also from Malik. And this is a March 8th presentation to the board. So, this is weeks before the board approved the transaction, but they knew exactly what it was intended to do. It says there "excluded holders net attach increases from 2.4 to 12.8," right? And this report, you may remember this, we were talking about when you're in the money and when you're out of the money, you know, as a multiple of EBITDA.

And that's what, you know, the finance professionals will call attached, detached. And he agreed as he had to that increasing attachment point is not a positive, right? And so, if you look at what they were doing, right, but the board approved by this transaction and it was to take the 2026 secured bonds that had an attachment point of 2.4, which is in the money, and bring them out of the money. And again, I don't think the Court can or should pretend that

that wasn't what was approved by the board before the transaction and assessing whether, if you accept that it modified a provision dealing with collateral, which I think Court has to do, then whether it was averse to holders and material. If the Court wants to suspend disbelief and, you know, accept that there was a metaphysical pretend moment in time, which I'll get to, that there was perry bonds and then they immediately became, you know, exchanged into super senior and that 250 came in. It was still very much adverse to 2026 secured holders, and this goes to Slide 69.

We have a $250 million issuance as we hear, right? On top of that, pick amendment fees. And if you want to consider them on top of that, we're indemnification obligations, and if you want to consider them on top of it, special litigation counsel just for this case. But whether or not you do, you can you can stop your line at the pick amendment fees, although I think all should be considered. And then if you look over to the right side, you take out the net of transaction fees.

This 250 elevated unsecured creditors because there was interest payment that was paid out to unsecureds from the 250. That was one of the reasons, and there was interest payment paid to others, but in terms of elevating. There is catch up payments to vendors. Those are, you know, quintessentially unsecured at 50 million. And then, there

was new inventory at 70 million. And remember, Your Honor. The senior secured 2024 and 2026 bonds had a first lien on fixed and a second lien on current. So, they were second. They weren't even first, right? Once cash came in and even if it sat there in cash, which it didn't, they only had a second lien on it. But it was deployed and it was it was actually elevating unsecureds.

Again, if you if you pretend for the moment, which I don't think the Court can and should which I'll get to why, that it wasn't just, you know, stripping us altogether but this was adverse in any manner, right, in the very broad sense of that and clearly material. I don't think you can look at stacking 250 million on top of 75, $900 million issuance. So, increasing your, or diluting your collateral by 27 percent of the total issuance and saying that that doesn't qualify as material or adverse in any way.

This might be a good -- I think I've been going about an hour and a half. I do have more, but it can --

THE COURT: If you need a break, we can take on. If you want to go another 30 minutes, I'm going to force a break at that point

MR. ROSENBAUM: Let's do that.

So, and I hope this is helpful to the Court because I'm going where the Court is taking me and I do think, right, we've all been living this for a long time. There are

intricacies of these indentures that we actually haven't talked about. The Court heard a lot of evidence, but because we weren't all here speaking, Your Honor, at the summary judgment stage, we might not have kind of expressed a lot of these, you know --

THE COURT: Right.

MR. ROSENBAUM: -- kind of hyper-technical -- well, I don't know if it's hyper-technical, but it's an indenture and requires some level of navigation.

So, let's go to this "have the effect," and I want to start with -- and I'm going to bounce around a little bit because since I'm going second, it's easier to respond to some of the arguments. But in thinking about what it means to have the effect -- and I'm going to jump right to this single closing, even though I have a whole other presentation about what the intent was. So, starting on 32, this is Slide 32 for Chris. This is Mr. Carney. "So, to your knowledge, your signature was affixed to order and cancel the notes on or before March 23rd, 2023?" "Yes." And so, he affixed his signature on both the order for and cancellation at the same time.

Now, I will get to, you know, what may or may not have been in escrow and when, but if you're thinking about how to apply "have the effect," this is why I think when we look at the evidence in this case -- it might not be as

simple in other cases -- it's quite easy. He then testified -- and I'll go back to what he understood to mean -- "So, your understanding," -- and I'm on 33 -- "on behalf of Wesco, is that both the third supplemental indenture and the fourth supplemental indenture were executed prior to the closing?" "Yes, I think so." So, he signs both before the closing.

Now, let's go back to some of the other admissions, and I want to go to Slide 21 because I agree, Your Honor, you know, if I'm in this world where intent is a guidepost but it may not be dispositive -- but let's look at what Mr. Carney was doing, right? I asked him, "So the company viewed that transaction as a singular transaction?" "Yes." "A transaction? All the parts were negotiated?" "Yes." "So, it was negotiated in its totality as a transaction?" Now, I just was talking about issue and cancel, third and fourth, right? That was -- he's the signatory. That's how he viewed it.

Let's go to the next slide, and then I'll come back to the closing date. And this is the other side of the transaction. This is Slide 22. Mr. Shah, who PIMCO and Silver Point presented as their designated representative -- so, this is binding testimony on PIMCO and Silver Point. Witness: "The exchange in the new money were all part of a single unified transaction." Okay.

So, now, let me go back to the closing. Why does

that matter? Because I think that that gives life to Slide 34, and these are different emails that have come out in the case and I think the Court has to read them in the context of what the parties were attempting to do here. And I'll take them in order.

So, let's go to 35, which is previewed on 36. This is an email from Ms. Libby at Davis Polk where she writes -- again, remember, the 30B6 rep said it was one unified transaction, and then the lawyer says -- I'm sorry -- "We are funding new money and need to know that all the consents get delivered and the exchange actually happens. Having certainty that everyone performs under each document once this thing gets started has been a fundamental point for us from Day 1." That was the lawyer presenting to the other lawyer.

Next slide, this then gives some life or context for the specific performance remedy in the exchange rate, which we'll get to, because PIMCO and Silver Point didn't want to specifically perform anything but the exchange agreement. "We are never going to be okay removing specific performance." Why? Because if you go back to the slide before, "Having certainty that everyone performs under each document once this thing gets started was a fundamental point from Day 1," and PIMCO and Silver Point admit that the new money and the exchange were one thing.

Keep going. This then informs what happens next.

There's a discussion between counsel on how they're going to close this and give PIMCO and Silver Point the certainty that they require. This isn't want, require, and they come up with everything happens in order and at the same time. I think we're reading -- again, I don't know, in my view of physics, whether everything can ever happen in order and at the same time, but that's what they say, and at the same time.

So, that to me is simultaneous and the law firms confirmed.

THE COURT: So, back on the specific performance issue. One of the issues raised by the issuer is that the specific performance wasn't included in the note purchase agreement. It was included in the exchange agreement. So, you couldn't specifically enforce performance of the exchange agreement, which hadn't been signed yet, because basically, the specific performance provision, if you accept its argument at face value, got put the wrong document.

MR. ROSENBAUM: I don't --

THE COURT: What's your response to that?

MR. ROSENBAUM: My response is, and I'll get to like -- that's not what happened, right? It just isn't, and --

THE COURT: What do you mean -- the closing all occurred without a hitch --

MR. ROSENBAUM: Right.

THE COURT: -- sequentially, but what do you mean, it's not what happened?

MR. ROSENBAUM: Because if you look at the contemporaneous evidence, right? Well, even if you go back to the closing script, right, the closing -- and I think you can harmonize all this with the closing script. And remember, like the closing script was prepared knowing there was going to be litigation on this. So, if you look at then the authorizations that were given and the contemporaneous communications when this was happening between parties internally, between them and their lawyers --

THE COURT: Right.

MR. ROSENBAUM: I think that presents the real picture, and I think what they tried to do on this closing call is not actually release anything after the call. Nothing was released. And I'll get to why, to me, that is --

THE COURT: Yeah, but go to the -- this is a pretty narrow question. He's saying specific performances in the exchange document. If you're worried about specific performance as proving your case, what good did it do to have it in the exchange document?

MR. ROSENBAUM: But why would anyone -- to me, that makes the point. They don't want the no purchase. They want the exchange. The thing that they want is --

THE COURT: But the exchange wasn't executed.

MR. ROSENBAUM: Huh?

THE COURT: So, by the time they send their money, the exchange agreement hasn't been executed. So, there is no specific performance to do the exchange agreement because it hadn't been signed yet.

MR. ROSENBAUM: I disagree with that, Your Honor.

THE COURT: Okay, why?

MR. ROSENBAUM: Okay. So, let's go to (indiscernible) 40, and we'll continue. This is an email from Milbank just prior to the call, and it says, "Please, let us know if you're all set to release (indiscernible) at 8:00 a.m.," in the closing call, right? And what's on that -- what's there? The exchange agreement. There wasn't some metaphysical release after the call. It was released on the call.

THE COURT: Yeah, but that's not the point. The point is that in the closing call, it listed the sequence of the release of signatures. I got it that there's this email that you and Mr. Heidlage are giving different meanings to as to what it means "at the same time" and "sequentially," but when the money gets sent, according to the closing agreement, the exchange signature pages have not yet been released. And if they haven't yet been released, I don't see how I give any import to specific performance, because the agreement you're

trying to get specific performance of is the one that has the specific performance agreement in it. So, it doesn't exist at that point.

MR. ROSENBAUM: I hear the Court's issue.

THE COURT: So, why do you care about this?

MR. ROSENBAUM: I don't I don't think that the Court can look at the facts that way.

THE COURT: Okay.

MR. ROSENBAUM: Let's go to the next (indiscernible) the next (indiscernible), 42. This is, right, this is Davis Polk reporting to its clients. "The signature pages," pages, "have now been released." Maybe after the break we can pull up the full document. The underpinning of this document was Davis Polk sending both the no purchase and the exchange agreement to its clients. This is how -- we never got the internal emails. We weren't permitted to.

We got the closing script and a witness who really had very little to do with the back and forth that led to this, Your Honor, but these signature pages were released before the money went. That was the whole point. And then, right, that's the whole point of having specific performance. It's kind of interesting to me because, Mr. Kirpalani, I think, candidly, on Your Honor's questions, admitted that it was required, right?

Once they hung up the phone, everything had to

happen, right? Required, I think, was where the Court got Mr. Kirpalani to agree, but we have PIMCO and Silver Point, who actually insisted on this protection, are the ones who are saying, "Yeah, Your Honor, don't believe what your eyes are telling you, even though we reported to our clients when we hung up the phone signature pages were released."

Next, if you look down (indiscernible) this is also a -- I think, in this context, Citadel was a client of Davis Polk, who was putting in far less money than PIMCO and Silver Point, but he writes, "Transaction has officially closed." Okay, right. You know, that might be a business person understanding, but I think it's an important one, right? The transaction has closed.

Now, go down to Carlyle. This is, you know, at 8:53 a.m. "Closed this morning. All sig pages released." Let me say it again. "Closed this morning. All sig pages released." Past tense. And he goes further, "Wires released. Wires should hit this afternoon, then press release, cleansing materials, final docs all to be posted simultaneously." This is done, right?

I think the contemporaneous record is so much more revealing, especially when you go back to the purpose that I -- that's why I think it's important.

THE COURT: I mean, I think I need to compare these emails where there's another series of emails where Milbank

is saying, as various things occur, "We've now released these signature pages," then later, "We've now released those signature pages." And so, there are a series of emails that are sent by people at the closing telling me something different than what these say, right?

MR. ROSENBAUM: Yeah. No, because what there is -- and this is -- I'll go to -- they really don't because I think Your Honor should believe his eyes and ears.

THE COURT: No, look, there's no question in my mind that at the closing call, everyone said, "We're releasing our signature pages in the order in which we have designated."

MR. ROSENBAUM: With no further action.

THE COURT: So, A has to occur, and then B, and then C, and once C occurs, you can then do d, but I don't -- the fact that somebody, you know, at Citadel took that to mean that the transaction had officially closed, everyone agrees that was the business deal that once it started, it was going to conclude, but to take these as saying the signature pages were released out to the parties as opposed to released by the parties into escrow, I think, is stretching the way that I read.

MR. ROSENBAUM: I don't. I mean, look, let's go to the Debtor's opening, the opening from the Debtors, right, which it's (indiscernible) 40. Citing the same email that I

cited, you know, where Davis -- I'm sorry, 43 -- 8:25 a.m., "Signature pages and the cash held in escrow, pursuant to the agreement, are released." There is no other -- everything else after that is delivery of things. Everything got released on the call.

And Your Honor, I think, we're very much handicapped here because we only ever got the business understanding. The business understanding couldn't be clearer, right? We asked the Court because, I think, I could imagine, right, what lawyers would be telling their clients about when things became binding, right, when their clients are insisting that the exchange actually happens. And I think it was, I think putting too much credence in a hyper carefully worded script, right, that is contrary to the documentary record -- and I don't think it matters because I think I could reconcile the two. I mean, once you -- there was no escrow agent here. Once Milbank, who's counsel for the Debtors, right, once everyone said, "Release without further action.," the escrow was over. The escrow ended.

THE COURT: I've got to tell you. I think you're going too far. First of all, I do think Milbank, who may have been counsel to a party, that everyone in the transaction accepted that escrow would be an honest escrow agent. I mean, they may have had a conflict in some sense, but no one in their right mind dreamed that Milbank wouldn't

comply with the escrow instructions, I don't think.

MR. ROSENBAUM: That's not what we're suggesting.

THE COURT: But then, for parties to say, "It's now all released to Millbank as escrow agent," is the way to read these.

MR. ROSENBAUM: Well, that's not what the --

THE COURT: Well, it doesn't say it's released to the parties. None of these say they've been released to the parties. It says they've been released. We don't know to whom. So, we then have a documentary record that's very clear, that says that the parties were intending to release things to the escrow agent, and the escrow agent would then apply them sequentially. I don't know that that -- this still leaves you with most of your argument, but the argument that says it literally got released all in advance out to the parties, I think that is pretty inconsistent with my understanding of the factual record.

So, to the extent that I'm making a fact call, I think I probably would not make the factual call the way that you are arguing it. This shows the parties intended that once the money went into escrow, I'm sorry, once the signatures went into escrow, they were released to the escrow agent. I accept that fully.

MR. ROSENBAUM: Uh-huh.

THE COURT: And that the escrow agent was then

required to release them sequentially. I think Mr. Kirpalani agrees with that. The legal effect of the requirement to release them sequentially is what people are arguing about, and I don't really think you're going to win an argument unless there's something else here that shows people literally got their signature pages.

I interpret the evidence relatively unambiguously to say that an escrow gets established with Milbank as the escrow agent, and Milbank then released documents as things progressed. Was it a step transaction? Yeah. Was it a planned transaction? Yeah, but the dispute is whether you collapse those into a single transaction. And then the secondary dispute, and the one that we're having almost all of today's discussion about, is was the effect to cause of the lease, right?

MR. ROSENBAUM: Yeah.

THE COURT: But they didn't get released at Day 1, and I don't want a reviewing Court to think I'm making that factual finding because my factual finding is the opposite of that.

MR. ROSENBAUM: So, I'll keep going on this because the -- and perhaps -- I don't know if I can pull it up, but I -- and I'll move past this, but it it's hard for me to conceptualize, Your Honor, in that if you write a closing script that says everything is going to happen in accordance

with the exchange agree --

THE COURT: Right.

MR. ROSENBAUM: "In accordance with" which, to me, at least, signifies that there is something that binds -- we use "in accordance with" the signifying agreement that you're going to follow. And that was inserted into the closing clause script. It didn't say that, and then it said that. So, you have the ends, right, which is the exchange then dictating whether we call it steps, whether we call in order and at the same time, whether we call it concurrent, because the authority that was given to the Counsel to do it concurrently, I think that, I'll just submit that I think -- and this isn't.

THE COURT: Do I have any evidence that Ms. Massman was at the closing? I think she wasn't, right? The closing was just Milbank in attendance, right? Everybody else was dealing with it remotely.

MR. ROSENBAUM: I don't recall. We can find that.

THE COURT: I don't think we have evidence that Ms. Massman was physically there --

MR. ROSENBAUM: I'm not sure.

THE COURT: -- to where she could have taken possession of the signature page.

MR. STEIN: Yeah, that's correct. She wasn't there.

Your Honor, Darryl Stein from Kobre & Kim on behalf of the 2024, 2026 holders.

The evidence at trial was that there were two Davis Polk associates in the closing room at Milbank's office. I think that Ms. Massman dialed into a telephone call.

THE COURT: Right, thank you.

MR. ROSENBAUM: So, why don't I just finish up on this point? What Mr. Osornio testified to as to the exchange agreement, he said, there was never an email. He acknowledged that the company has entered into the exchange agreement in connection with the (indiscernible) transaction. And then, he was asked, "But did you email anyone," you know, "in this sequence that it had been release?" and the answer was no. I understand what Your Honor is saying, but I actually think, I think that if this thing stopped -- let's put ourselves in that position, then it's probably a good time for a break.

If this thing stopped, right, if PIMCO and Silver Point funded the money and the company said, "This is great. Now, we have (indiscernible) and never mind," I assure you that they would have run to court and they would have prevailed. And I think that was one of the questions that the Court asked Mr. Kirpalani, and I think he candidly agreed that that was the design. That was the design.

THE COURT: He didn't say they would prevail. He

candidly agreed they would get sued.

MR. ROSENBAUM: Yeah, I guess so, but I think -- okay, I think that's a good time for a break, Your Honor, since it's a few minutes to 5:00.

THE COURT: So, I've got about 7 or 8 minutes. Tell me what the plan is for the rest of today in terms of what your side's going to be doing.

MR. ROSENBAUM: How long is this hearing that Your Honor has now at 5:00?

THE COURT: It's a grab law hearing. I'm guessing it's a 30 minute hearing. I don't know for sure. It's an emergency. I don't know if the facts are disputed or not.

MR. ROSENBAUM: Why don't I confer with my team and see? Look, I think everyone's desire would be for me to at least complete the first leg today, meaning the contract --

THE COURT: So, do you think you have roughly an hour left to go?

MR. ROSENBAUM: I feel like it. Mr. Stein has, you know, some part --

THE COURT: Can he keep you quiet after an hour?

(Laughter.)

MR. ROSENBAUM: I know it's difficult, but I've been waiting six months for this. Yeah, we'll --

THE COURT: I'm actually wanting to do -- the parties worked really hard to organize this hearing, and I'm

really trying to respect what you all organized. So, if you're getting more questions from me than you expected, some people are taking longer, I'd rather work later tonight so that we still finish tomorrow on forecast, because I don't want to keep this going. So, I'm trying to really honor where you all thought you would be.

MR. ROSENBAUM: That's fine with -- our expectations would be to finish this leg today so we can we can plug in --

THE COURT: And that would leave you on time then if you finish your presentation today?

MR. ROSENBAUM: Yeah, yeah.

THE COURT: Why don't we set a target of finishing by 7:00?

MR. ROSENBAUM: Okay.

THE COURT: And if we don't finish by 7:00, maybe we revisit it but let's set that as a target. Why don't you all take a break until -- if you could have somebody monitoring starting around 5:15, because the hearing may be very short. They may have it resolved by now. So, if you'll take a break, monitor starting around 5:15, I'm predicting closer to 5:30. We'll see where we go.

Thank you

(Recess taken from 4:55 p.m. to 5:17 p.m.)

THE COURT: We'll go back on the Record in Wesco.

MR. ROSENBAUM: Good afternoon again, Your Honor.

THE COURT: Good afternoon.

MR. ROSENBAUM: Mr. Stein is going to take the podium for a few moments to walk through some of the post call sequencing if you think it is -- we hear what Your Honor's saying, but we have to (indiscernible) matters at least like the Court --

THE COURT: Go ahead, sure.

MR. STEIN: Thank you, Your Honor. And we've got some additional slides. I can promise I'm not going through all of them. It's going to be just 10, because there's three points that I'd like to make.

If I may, Your Honor, approach?

THE COURT: Yes, please.

BY MR. STEIN: Thank you, Your Honor.

So what we were just discussing before the break, and this is Darryl Stein, for the 2024/2026 holders, is the closing calls agenda that was read on the morning of March 20th.

And there are five things that supposedly happened in sequence on that agenda. And I'd like to point to just a couple of them, walk the Court through some of the documents which I think show that this agenda is inconsistent with the documentary record.

And I'm not talking about here the emails before

and after. I'm talking about, first of all, the release of the escrow components; second of all, the security documents; and third, the release of the exchange agreement signatures.

So starting first with the release of the escrow agreements. Your Honor will remember that there was an escrow agreement not with respect to the signatures, but with respect to the release of the funds that were the settlement escrow.

And if we could put up Slide 38 of my deck, and then turn to it in your -- so you heard this morning, that the Debtors sequence starts at 8:27 a.m., with the entry into the third supplemental indenture.

But what that doesn't address is what happened between the closing call and when that supposedly became effective because immediately after the closing call, Milbank sends an email to WSFS and Davis Polk with the release certificate to release the funds from escrow.

And we know that Davis Polk responds at 8:27 -- sorry, let's go to Page 37. The email from Davis Polk comes at 8:25 a.m., 12:25 Universal Coordinated Time, confirming the release from escrow. Pryor Cashman -- this is Slide 28.

THE COURT: Can I see that without the blow outs?

MR. STEIN: Yeah, we can just pull up ECF 1150-7. Can you do that, Chris?

THE COURT: I can pull it up if that's easier, but

thank you. All right.

MR. STEIN: And so this is the first place that the closing call sequence that was read by Mr. Osornio doesn't match up to reality because here what you have is the release of funds.

And as Your Honor asked Mr. Kirpalani earlier this morning, the release of those funds was subject to no further conditions. The money was released and it was the company's to do with it what they wanted.

THE COURT: Okay.

MR. STEIN: And under the interpretation that they're offering, the agreement by which they purchased the notes didn't close at the time this was sent, but it hadn't even been entered in to. Those signatures were not effective under the theory of timing that they're giving you.

What we would submit, Your Honor, is it's, as a matter of understanding the parties' agreements and what they were doing at the time that it's far more consistent to understand that at the time of the release here, the note purchase agreement was at the very least signed, if not closed.

The Court can also look at the escrow agreement which sets forth the conditions under which Davis Polk would send the confirmation of the release of funds. And if the Court wants to look at that, I believe that's ECF 604-42.

The second thing --

THE COURT: I'm sorry. You told me there's an inconsistency.

MR. STEIN: Sure.

THE COURT: Where? I don't see it.

MR. STEIN: So that the funds were released, that Davis Polk authorized the release of PIMCO's and Silver Point's money.

THE COURT: Right.

MR. STEIN: At 8:25, before the third supplemental indenture, before any agreements were entered.

THE COURT: Okay. Now take me back and show me that?

MR. STEIN: Sure. So if we go --

THE COURT: I missed the time.

MR. STEIN: -- to slide -- this will be Slide 39. What you'll see here is the time of the email in which the third supplemental indenture was sent. You'll see that at the top, 8:27:16 UCT. That was 12:27:16. That's after Davis Polk releases the funds at 12:25.

THE COURT: 12:25 p.m., is 8:25 a.m., right?

MR. STEIN: Correct.

THE COURT: So at 8:25 a.m., the release of funds gets confirmed. And now tell me what's the next thing that happened?

MR. STEIN: The next -- well, so Davis Polk confirms the release of funds at 8:25.

THE COURT: Okay.

MR. STEIN: Pryor Cashman then sends the email saying that the funds are being -- have been released. I think that's the email that we saw from David Smith, where he says release confirmed on Page 38.

And then that was 8:27:04 a.m., and then 8:27:16 a.m., you have the entry into the third supplemental indenture. Now there is no email that -- and Mr. Osornio testified to this. There is no email by which --

THE COURT: Hold on. You said 8:27 a.m., there's entry into the third supplemental indenture. Show me that?

MR. STEIN: I'm sorry, Your Honor?

THE COURT: I don't see that. Show me that?

MR. STEIN: Oh, where it says 8:27 a.m., they entered into the third supplemental indenture?

THE COURT: Yeah, I just -- I don't see anything on my screen that says that?

MR. STEIN: Yeah. So we can show 1150-4. We can also look at the Debtors' slides. Can you hand me the -- so again, this is the theory that they're advocating. Our contention is that all of this became effective at the same time, but I wanted to address this just from the perspective of what their contention is as to what happened.

And so if you look at Page 106, of their deck, this is where that they contend that the third supplemental indenture became effective.

THE COURT: Okay. Can we go back to that page that just gotten taken off.

MR. STEIN: Sure. Chris, can you bring that back up?

THE COURT: The one that was up there and it's -- yeah, thank you. So the execution versions, not signatures, right, which were sent at 8:27:16, what does that mean that's inconsistent with anything so far?

MR. STEIN: So what this mean is that under the Debtors' interpretations, the funds were released before there was any agreement to purchase the new notes because their theory is the note purchase agreement happened at some time after 12:27, in the morning -- or 8:27, in the morning.

THE COURT: So can you take me back and show me where they said all that then?

MR. STEIN: Sure. So we have to look at two things in order to understand that.

THE COURT: Okay.

MR. STEIN: The first thing is the closing call agenda, and what the closing call agenda says is that first, that it released where they entered into the third supplemental indentures, and then -- we don't know when this

happened. But then --

THE COURT: Can I wait till that comes up, because I --

MR. STEIN: Oh, sure.

THE COURT: If you're trying to show me inconsistency, I actually wanted to read the inconsistency and not just hear the argument about it so --

MR. STEIN: It's 1152-2, which is the black line -- and if you could bring that up, Chris. That's the black line of the closing call agenda. And so here under Arabic numeral one, we have the text of the agenda for the call --

THE COURT: Okay.

MR. STEIN: -- and we have the romanettes, the first one being the release of signatures. These are the purchase consent documents which include the third supplemental indentures. And after that, we have the release of signatures in general purchase agreement.

THE COURT: Show me -- where does the money come in?

MR. STEIN: So the money isn't discussed on this, in this list. The money is --

THE COURT: Okay. So you started with that as being the inconsistent event though, so --

MR. STEIN: And what we submit is that under their theory, the money was released before the third supplemental

indentures were released which means that at the time those funds were released and became the property of the company, that no agreements had been entered into under the Debtors' theory.

And we think that's inconsistent with the expectations of the parties, and we think that that shows that -- and this is just one of the examples. I'll address the others shortly, but this shows that the most reasonable reading of the parties' agreement was that they entered into these -- that all the signature pages were released at the same time on --

THE COURT: I don't understand it to say that. So --

MR. STEIN: Okay.

THE COURT: -- if all the signatures are placed in a signature escrow, and someone sends the money, then the signatures get released, how is that inconsistent with this?

MR. STEIN: It wouldn't be. And under that interpretation, the company could have walked away from the table at 8:25, in the morning without any binding agreement to provide the notes to the --

THE COURT: No, because they had agreed to release those signatures without any further action by any party.

MR. STEIN: Understood, Your Honor.

THE COURT: So tell me -- I'm just not -- I got it

that this may not be what you thought was going to happen but how does this prove an inconsistency which is your point to me?

MR. STEIN: So what we think this shows is that the -- and I think we're looking at this also in the context -- because the question before the Court is what happened and what was the intent of the parties. And this was -- I think this was, by the way Your Honor wrote -- what was the intent of the parties as they entered into this agreement.

And we think that the release of the funds prior to the entry into the written agreement whereby they agreed to purchase the funds is inconsistent with what the expectations of the parties were.

And if Your Honor doesn't agree with us on this, I can move onto the next one because I think -- I understand Your Honor's point which is that if there was a --

THE COURT: I have it that that may not have been what was expected but it's not inconsistent, and I think you're going to show me something that occurred inconsistent with this agreement.

MR. STEIN: Sure. So let's move there. So I want you to look at number four here which is the release of signatures for permitted party *pari passu* secured joinder, and the amended restated notes security agreement.

So you can see, this was added at some point. We don't know who added it, we don't know why. This is part of the communications that were withheld. But under the Debtors theory of sequencing and this was in the Debtors opening slides as well, but this is what the agenda says, that this supposedly happened.

These new security agreements supposedly those signatures were released before the exchange consent documents and the new one-L and 1.25-L indenture. So their theory, you had release of signatures for the security documents, and only later did you enter into the exchange agreement and the new one-L indentures. But let's take a look at what those -- let's start with just the amended restated notes --

THE COURT: So three is release of signatures to the exchange consent documents?

MR. STEIN: Correct.

THE COURT: Okay. Four is release of signatures to the permitted *pari passu* secured joinder, and the amended and restated notes security agreement. And third is the release of signatures to the exchange agreement. So you're telling me those didn't happen in that order?

MR. STEIN: Well, it says the exhibits to the exchange agreement including the first lien and 1.25 indentures. So if the signature pages for the first one-L

indentures had not been released, WSFS wasn't acting in its capacity as the one-L notes trustee.

But if we look at the amended and restated notes security agreement, and this is on Page 46 of my deck, what you'll see here is the signature pages to -- I'm sorry, to the amended and restated notes security agreement which contain on Page 48, signatures from WSFS in its capacity as the new one-L trustee --

THE COURT: Okay.

MR. STEIN: -- which if under their theory, then one-L indenture didn't become effective until after this document was signed, then this document was released where the signature wasn't effective at that moment.

THE COURT: But you're telling me things were released inconsistent with the plan. Is this inconsistent with the plan?

MR. STEIN: I think it is because this is WSFS releasing -- or under their theory, this is -- a WSFS signature as one-L indenture trustee being released before the signature pages that may the new one-L indenture effective.

THE COURT: Is that different than the plan?

MR. STEIN: I believe so because what the plan says, and we can go back to 1152-2, is that the amended and restated notes security agreement happened before the one-L

indentures were entered into. And if the one-L indenture wasn't entered into, then how is it that WSFS can sign this as the one-L notes trustee.

THE COURT: You're telling me that the plan was inconsistent with what it should have been, but not that they implemented it consistently with the plan, right?

MR. STEIN: Well, this is I suppose where we're at a bit of a disadvantage because there is no document, there is no point in which these were exchanged, or at least for some of them. There are for the new -- for the third supplemental indenture.

But the notes security agreement, there's no email memorializing the exchange of that. This is just something that happened somewhere. Their theory is that that happened, or if you were to accept the closing call agenda, that that happened before the new one-L indenture became effective.

Now again, I'm not -- the issue that we have here is these things are not necessarily explainable which is why I think the Court can't necessarily accept it as face value what the agenda says because you have inconsistency in these documents. I'd like to take you to another one if I may.

THE COURT: Okay.

MR. STEIN: And so the next place I'd like to go to is the -- let's go to the exchange agreement. And so if we can look at Page 50 here. This is Section 2.1 of the consent

closing, or sorry, 2.1 of the exchange agreement which says what happens after they consent?

And it says on closing date, promptly following the consummation of purchase and closing, the 2024 holders shall execute their counterpart signature pages to the exchange consent letter, and the 2026 holders will do the same.

And so this document, under their theory, the exchange agreement was only entered into at the end of this sequence. This was one of the last things that happened other than the release of the one-L and 1.25-L indenture.

But -- and under their theory, this exchange agreement, the signature pages of this agreement were only released well after the exchange or the release of the consents for the fourth supplemental indenture.

But what we have here is a part of this agreement that contemplates the agreement of the parties that they will release the fourth supplemental indenture consents. Not that it's already happened, but that's part of what they're agreeing to do under this exchange agreement.

Their contention though is that these fourth supplemental indentures were already in effect before this agreement even became effective. But I think that's also --

THE COURT: I'm sorry. Already in effect before what became effective?

MR. STEIN: That the fourth supplemental

indentures, under the closing call agenda, that was number three. The closing call agenda has at number three the exchange -- or sorry, the consents to the fourth supplemental indenture.

And it has at the end, number five, the release of the signatures to the exchange. But if we look at the fourth supplemental indentures themselves, and this is on Page 51, these fourth supplemental indentures which they contend were released prior to the exchange agreement being entered into, these consents to the fourth supplemental indenture itself refers to the issuer having already entered into that certain exchange agreement which again we think is inconsistent with the idea that the exchange agreement did not become effective until after everything else because this indicates, in the fourth supplemental indenture, that the issuer has already entered into that exchange agreement.

And I think we -- as we talked about the exchange agreement and when it became effective, it's important to remember also that the terms of the exchange agreement say when it became effective. And this is 9.03 of the exchange agreement, and this is Page 53 of the slide deck.

And it says this agreement shall become effective when it shall have been executed by the issuer, the guarantors and each of the holders, and when each person shall have received counterparts hereof, including delivery

of the (indiscernible) or by electronic mail and PDF, (indiscernible), which when taken together bear the signatures of each of the other party's herewith.

And if we go to the next slide, we have the testimony from Mr. Osornio, who confirmed that following the closing call, there was no email that was sent conveying to the other parties the exchange agreement.

But what we do have in the record, and this is on the next slide, is at 12:53 a.m., Eastern time, Milbank sends to all the parties the exchange agreement, the note purchase agreement -- this is -- sorry, 12:53 a.m., this is the night before the call because the call started at 8:00 a.m., on the 28th.

The exchange agreement and the note purchase agreement and the (indiscernible), and attached to that document sent via Mimecast, and this is on Slide 56, is a PDF of the Incora exchange agreement. It's got the number 23.

Now because it's a Mimecast, we don't actually have that document in front of us, but we know what it looks like because that document was attached to an email sent at 7:18 a.m., that morning. This is again before the closing call.

And this is the email that's on Slide 57, where Stella Li, of Davis Polk writes, please see attached execution versions of the exchange agreement and the note

purchaser agreement. We now have executed versions for all documents.

And if you look at the attachments, you'll see again that number 23, Incora exchange agreement document, PDF. And if we look at that document, and we can go to Slide 59, that document for the counterparties signatures, all of them were included in that document.

And so we have here an agreement, and if you agree with the agreement that specifies by its terms when it becomes effective which is upon delivery of a PDF containing the executed signature pages of the parties.

And here at 7:18 a.m., we have exactly that. And again we don't think this can be reconciled with the sequence that's laid out in the closing call. There are too many facts, we think that --

THE COURT: Can I see the document that you're talking about, not the blow ups of it, but I want to see the document?

MR. STEIN: Sure. This is --

THE COURT: PDF 23.

MR. STEIN: -- ECF 710-49.

THE COURT: Okay.

MR. STEIN: This is a document that was filed over several ECF numbers given the size, but all the relevant pages are within that.

And Chris, if we can bring that up. And the exchange agreement itself starts at Page 243.

THE COURT: Let's go down to the signature pages on this.

MR. STEIN: Sorry, Your Honor?

THE COURT: Can I see the signature pages that are part of this execution version that --

MR. STEIN: Yeah, those signature pages begin at Page 285, ECF number.

THE COURT: Can I go up a page, please? So this is the document itself. And let's go down, and let's page through the signature pages. Keep going, please. So isn't there a place for the trustee to sign it, for WSFS?

MR. STEIN: I believe not. I think this is the agreement that Mr. Dilley (phonetic) testified WSFS was not a party to.

THE COURT: Can we go back up to the top of it, please, Page 1, of the agreement? And let's go to the next page, please. Next page. One more page, I think. One more. Thank you. All right.

MR. STEIN: And that's we have -- that's our (indiscernible) on this, Your Honor. Going back to the closing call script, again you'll see the markup that we showed you, the language in accordance with the exchange agreement was added after the fact.

Between that addition and what we saw in the other documents, you know, I think this -- we think this shows that the sequence set out on the closing call agenda is at the very least incomplete, and we would (indiscernible).

THE COURT: Okay. Can we do one more thing? I'd like to search that document for specific performance.

MR. STEIN: Oh, I can -- it's in section -- it's 9.05, Your Honor, and so that's a few pages after the binding effect -- or sorry, the effectiveness (indiscernible). I think we look at Page 40, of this document (indiscernible).

THE COURT: Thank you.

MR. STEIN: Just one other I'd note is that as the -- as Mr. Kirpalani discussed the conditions being set forth in the document, I think it's important to look at those conditions carefully because those are closing conditions, not conditions to the effectiveness of the agreement.

And so it doesn't necessarily mean that those things had to happen before the agreement had been entered into. It simply means that the closing of that document didn't happen until (indiscernible), which again, this all happened at the same time at the end of closing.

THE COURT: All right. I think what you're trying to demonstrate here is that the exchange agreement was binding first which would explain the specific performance

issue differently, and that's why I want to see that provision.

MR. STEIN: Have we gotten there? Chris, could you go to Page 40 of this document. Oh, just scroll up, two or three pages. Go to Page 29.

Sorry, it's not on -- I think there's a remedy for the (indiscernible). Hold on. Sorry, we were looking at the purchase agreement. That's why it's not there.

THE COURT: What do you mean?

MR. STEIN: Sorry. This is the document that the -- two attachments, one for (indiscernible), one for the exchange agreement. We were looking at the part of the document that related to the purchase agreement, and that's why (indiscernible) was in that draft.

So if we look at Page 281, that's where 9.056. We can zoom out here, and we can take together -- go through that agreement. We can scroll down from here and we'll show the signature pages then. I just wanted to make sure --

THE COURT: What I'm looking for is the specific performance provision. There it is. We were there before, back up at 905.

MR. STEIN: I'm sorry. Chris, can you go back up to 9.05.

THE COURT: Okay. Now let's go down to the signature pages. Thank you.

MR. STEIN: Sorry, I couldn't hear Your Honor?

THE COURT: It's hard stuff. I'm just trying to keep up.

MR. STEIN: And so, Chris, if we could go down a few pages to the start of the signature pages. There we go. So we can -- go down. For the Record, this is ECF Page 285.

THE COURT: Okay. I got it.

MR. STEIN: Thank you, Your Honor.

THE COURT: Thank you.

BY MR. ROSENBAUM: Good afternoon, again, Your Honor.

Chris, I'd like to pull up -- and I just have one more point to make on the subject. It is document in evidence. It has a demonstrative because it's a redline of the closing script, 1152-2.

It's got blue lines -- so Your Honor, for the record, if the Court recalls, there were two versions of the closing script that we received during the trial.

THE COURT: Right.

MR. ROSENBAUM: And we ran a comparison and then put the comparison in a demonstrative. So what the Court's looking at is the demonstrative, but there was no objection, then it's an accurate reflection of the changes.

I think just to point out two things that we talked about but I do think they're important which is the -- in

accordance with the exchange agreement was added -- we don't know, you know, how that came to be.

We haven't gotten testimony on it. But it was added after the first version of the closing script. And that is the condition under which everything else happens. That's one. Two, and I think is carefully worded but if the Court looks down at five, numerette five, it says as soon as the foregoing exchange consent documents -- as Mr. Stein pointed out, the exchange consent documents are different than the effectiveness of the exchange agreement -- have been delivered, the release of those signatures to the exchange agreement -- and this is the part that is important -- effectuating the exchange into the new one-L and one and a quarter-L.

So our view, again without having been there and without having seen, you know, a number of the communications is that that exchange agreement by design, and I think this is informed by everyone's communications prior to the closing, was binding such that there was a legal certainty, not just a commercial certainty, that once they hooked the phone and funded the money, there was no possibility of not getting the benefit of the (indiscernible).

And that's really important because the record's overwhelming with the elements of the *pari passu* notes. They weren't going to do *pari passu* transactions. The benefit of

the bargain was the up tiered new one-L's. So with that, we can put that document to the side.

And not to beat the dead horse, but maybe it's something I'm good at, I don't think -- this is, I think, important factual context for the Court, but I genuinely don't think it matters to have --

THE COURT: You don't think it what?

MR. ROSENBAUM: To have the effect of analysis, in other words, the causation. I think that the way this was structured, even if you leave the closing script and don't, you know, credit the inconsistencies which we think the Court has to, what --

THE COURT: The problem -- I mean the real problem is if the exchange agreement was already in effect before the closing began, this goes to the -- that is basically the hypothetical that I posed to everyone, and so I know this isn't what happened.

But you're telling me that in fact my hypothetical is what happened, and that the effect was immediate and automatic once this occurred.

MR. ROSENBAUM: It looks -- Your Honor --

THE COURT: But I want to hear their answer to that because --

MR. ROSENBAUM: It looks to us that that's what happened. And I think it was designed -- and --

THE COURT: It doesn't matter whether --

MR. ROSENBAUM: -- you weren't there.

THE COURT: -- it was by design or not. The briefing tells me pretty explicitly that specific performance didn't come into being until later. If specific performance was already in effect, there's a big issue.

MR. ROSENBAUM: And again, in the analysis, I don't think it matters because everything -- there was no further action except --

THE COURT: It matters, this matters.

MR. ROSENBAUM: So I want to just to back with some of the points that we were talking about. And to finish with the discussion of the adverse effect provision, and we can flip to Slide 70. And I won't go through every single one, but the Court heard, you know, from Mr. Robert Cooke, from JPMorgan who was directly involved in commenting on the offering, as well as William Yu from BlackRock and Will Lang who wasn't involved in inception, but carefully reviewed the indentures as well even as investments.

And Slides 70, 71, and down to 77, just walk the Court through the testimony given by those three witnesses as to materiality to use the legal term for the importance of having a type permitted lien basket, and why that was a central part of their comments to the offering before the issuance.

And the reason for that was that they didn't want value weakened by dilution of their security interest of the collateral above the permitted lien basket. And the reason that this is important to one of our points is that when the Court is assessing what we call the adverse effect permitted in sub three of the 9.02, and determining was this in any -- adverse in any manner in any material respect, I think the answer to that is that, you know, as I said, increasing permitted lien capacity by 250 million on a company of that size, in that condition, notwithstanding what was heavily negotiated into the indentures is very easily both adverse in any way and material.

Now I want to go back unless the Court wants to more of that, it's somewhat cumulative but each of our witnesses was very clear on the importance of the type lien basket. But I want to switch gears and talk about for a moment this concept of exit consent.

And in hearing the Court's colloquy with counsel, I think the Court is spot on in what they are and what they're not. And let's go to tab 16, and we'll talk about some of it, or Slide 16, and talk about some of the cases and the actual language of this indenture.

The exit consent cases and there's four of them, a total of four of them, in district court or trial court level, and we don't quibble with the findings because we

don't think they have any relevance whatsoever to our facts which is under this and many indentures, bonds that are owned by affiliated issuer (indiscernible).

And in each of those cases presumably there was an argument that even if you had the requisite consent, and this is a much different analysis, at the start of the transaction so I think most of them were 51 percent, those votes -- that's what Mr. Kirpalani called the zombie apocalypse -- those votes shouldn't count because the expectation or the understanding was that they would be, you know, owned by the company as a consequence of whatever the transaction was, and therefore you look -- instead of at the beginning.

Those are our facts. We never contended by the Court should look at anything but the fact that the consenting holders in the 2026 bonds, when the day began, or you know, night turned into day, on the 27th into 28th, they had 59 percent.

And they could not convert -- they couldn't waive a magic wand and turn 59 percent into 66 and two-thirds percent. And there's nothing about, in our view, 9.02 that suggests that's what it's meant to address.

And in fact, I think it actually should be read to mean exactly the opposite of what we've been hearing. And so let's take a look at the simple majority mandate for permissive -- as the Court pointed out, the super majority is

framed without the consent where the simple majority attempts to be a catchall.

But in describing what's then outstanding for purposes of the first portion of this document, it includes 2026 notes, and we acknowledge that the definition of 2026 notes says unless context with buyers otherwise, includes both the initial notes and additional notes.

And so here in that -- in the portion of the indenture talking about simple majority consent, in two places, in parentheticals when it's describing who can consent, it says including without limitation, additional secured notes if any.

And if you go to the right hand side, and look at the super majority provision, nowhere in there is in other words additional secured notes. And that brings up a, you know, principal contract construction that is well treaded, which is -- particularly when you're looking at the same provision --

THE COURT: But they're agreeing you don't count the additional secured notes in calculating the vote.

MR. ROSENBAUM: Well, I --

THE COURT: They said that. What they said is that the notes that are being exchanged do count, but they're not counting the new notes that are being sold is their position.

MR. ROSENBAUM: I thought I heard -- but maybe it

was -- I thought I heard Mr. Kirpalani read the parenthetical, and we can look at the right hand side, including without limitation consents of (indiscernible), in connection with the purchase of, tender, offer or exchange offer for the 2026 notes. The purchase of 2026 notes somehow means the purchase of additional --

THE COURT: No, he --

MR. ROSENBAUM: I don't -- that's not what --

THE COURT: My understanding was --

MR. ROSENBAUM: -- I'm saying.

THE COURT: I'll let him stand up and correct me if I heard this wrong. He explicitly disclaimed that theory.

MR. ROSENBAUM: Okay. Then I --

THE COURT: I believe his theory, which I don't think you're disagreeing with is that notes that are going to be subject to a future exchange still count even if the company will own them at the end of the day.

MR. ROSENBAUM: I agree.

THE COURT: They get to vote those, but he's not -- I believe he specifically said, they don't get to vote the ones that are the subject of this current sale.

MR. ROSENBAUM: Then I --

THE COURT: Do I have that wrong, Mr. Kirpalani? I just want to be sure I've got that right?

MR. KIRPLANI: I don't think you have it wrong,

Your Honor. I thought (indiscernible) different point that this parenthetical doesn't say you should include the votes of additional secured notes that were authorized, whereas the other ones you do. And that's -- we do think we count the additional secured notes when you take the two-thirds vote because they've already been issued and they constitute --

THE COURT: If they've already been issued, but not the ones that are to be issued, yeah. Okay. I don't think we have a dispute.

MR. ROSENBAUM: And so, look --

THE COURT: Mr. Heidlage?

MR. HEIDLAGE: Just I made the same -- I just want to make it's clear. I think the difference and where there may be some confusion, if we're talking about the third supplemental indenture --

THE COURT: Correct.

MR. HEIDLAGE: -- or the fourth --

THE COURT: The third.

MR. HEIDLAGE: And I do believe that the additional 2026 notes are counted for the fourth supplemental indenture. I just want to make that --

THE COURT: So I don't think there's a dispute.

MR. HEIDLAGE: I agree.

THE COURT: That if the third -- if the 250 million was purchased as part of the third supplemental, they then

count for the fourth, that we may have a dispute as to whether they should count if they were issued -- if the 250 was issued in violation of the indenture, they're going to argue they shouldn't count.

You may argue they still count. And that really goes to the remedies issue, but I think that's not the current dispute. I'm trying to frame that right.

MR. HEIDLAGE: I think that's right. I just was worried there may be some confusion. I just wanted to make that --

MR. ROSENBAUM: No, look, one of the things we said, and it was more in response to their attempt to phrasing the series of transactions and other parts of the agreements that somehow like give significance to its absence.

Here in the same provision, you actually have one part that specifically identifies additional secured notes as something that can be then outstanding for purposes of the vote. That's on the left.

Now on the right, you don't, you just don't. And I think the Court could find the context, would it mean that the 2026 secured notes actually even included additional secured notes, but I don't think the Court needs to.

And I just wanted to point that out because it is a curious difference, and one that we've noted. And how the

left hand side specifically mentions additional secured notes, and the right hand side just absolutely doesn't.

So -- and as I said, I think the Court may not even make that finding, but I think it actually had. So we could put this to the side. And that brings me to the discussion of the *Sharon Steel* case.

And what I'm going to try to call for the moment, to avoid maybe an overly loaded term, the collapse because I think the context in which the Court -- other courts have looked at this court's simplicity is economic substance.

And Mr. Kirpalani mentioned a *Bank Atlantic* case that is Delaware Chancery court case, I believe it was 2012. And that is one in a fairly long line of cases starting with *Sharon Steel* that is interpreting what all substantially all means in the context of a disposition of assets which I think has some interesting parallels but is not the provision to address on appeal.

But that the court in *Bank Atlantic*, after a trial, so this is, you know, similar to our circumstance. It wasn't based on, you know, well, the face of the document said this, and I'm not going to look behind it.

The court spent the entire factual record looking at what the parties intended as opposed to what their documents in that case purported sequencing was supposed to do. And it found ultimately, there was a -- it was a sale of

assets, and then they were going to give a newly formed subsidiary to the purchaser, and the purchaser was going to be able to get it back.

And the contention of the proponents of the transaction were that we didn't sell all, or substantially all of the assets. This extra, you know, piece of it was devalued the whole. And the court looked at it from an economic substance example, and said yeah, but -- and it used an interesting turn of phrase, and I think it was the life span of the (indiscernible), which was fine, you had to tell me what that is.

But I think it is a very short period where there was supposed to be a sequence of things that would happen, but the court looked it as a matter of fact, and looked at the economic substance, and they explained it's not based upon the structure that the proponents were attempting to promote, but what they were actually trying to do.

And you know, that -- the predicate for that decision in 2012 was the application of *Sharon Steel*. And the principal that *Sharon Steel* stands for, that I think is interesting, and again I don't think (indiscernible). So I want to be crystal clear on this.

I think this indenture, for the reasons that I've outlined has -- it uses phrases like have the effect, adverse and directly (indiscernible), and it does the work of causing

a court to see through what, you know, optically the parties were trying to do, to make it look like.

But putting that to the side, *Sharon Steel* as I mentioned earlier in my closing, *Sharon Steel* is, you know, the seminal pronouncement by the same circuit on how courts just generally are supposed to examine indentures.

And as I also mentioned, the court of appeals in your -- cited it favorably, and actually cited the page of *Sharon Steel* that talks about indenture interpretation and application.

And a couple of things, you know, come out of that. One, in *Sharon Steel*, the question that the court was considering was there was a plan of liquidation, a plan for the company to sell all of its assets over, I think it was almost two years.

But it was not in (indiscernible). And as the sales were taking place, the company was actually making provisions for bond holders by negotiation. And sure enough, when the last sale took place after a planned sequence was held, the buyer said we just bought all or substantially all of the assets so now we're the obligor, not the company, and those provisions that were made for bond holders, they go to the adverse.

So it was protecting, right, bond holders from (indiscernible), right, from their place in the capital

structure being dislodged by the adverse. And what the Second Circuit did in *Sharon Steel* which is -- it then starts to inform the final indenture which I'll get to.

What the Second Circuit said in *Sharon Steel* is if the sequence, and you know, the sale of all or potentially all of the assets is part of a scheme or plan, then you go back to the beginning.

You don't, you know, you look at the third step in isolation and decide whether that was a sale of all or substantially all, you go to the beginning. And that's -- I think again, this is just an interpretative tool. I don't think the Court needs it but I think it's useful value.

And if you look at it in that prism, that's all we've ever asked, is you have to -- if you start at the beginning of the transaction, you'll start at the physical wheel of it to decide whether something is permissible, particularly when you're looking at fundamental rights of holders.

And in *Sharon Steel*, you know, one of the things that the Second Circuit probably -- there was a whole bunch of arguments from the other side, and the argument turned in part on, well, who is the successor obligor provision supposed to protect?

And the new obligor was saying surely for the benefit of the borrower. Therefore the lenders shouldn't --

it should be interpreted our way, not their way. And the court undertook that analysis, and it said -- and I'm paraphrasing, but I do have it in my notes.

It said when you're -- and this was with an indenture. When you're interpreting an indenture which is, you know, can you have uniform application across the market, and there's some competing views.

And this isn't an ambiguity, but competing views as to what provisions mean and how they should interact with each other. You look at which is the more fundamental way to whom. That's the starting point.

And if the rights are equal, then you try to do as much harm to either, right, as possible. And if the fundamental rights are unequal, then that should guide your interpretation.

And here I would submit again, I just want to underscore that these are principles that I think are interesting and useful to the Court. But we don't need to rely on them because the indenture (indiscernible), you know, very broadly.

But if you look at this indenture in that context, and I'll now get to the instruction that we've talked about, and look at the purpose for the super majority had protection on it. But it's a fundamental argument, and there probably are more.

But it certainly, if you're buying secured bonds that are yielding eight and a half, and nine percent, when the unsecured bonds are yielding over 13 percent, a fundamental part of your bargain and your protection is the maintenance of your liens on collateral.

And I think in that context the Court should do as little harm to that fundamental protection as possible as compared to now get to the rule of construction. There is -- there are two rules of construction.

One, you know, that we talked about in the plain terms. So again, this -- we're not even getting to New York law on the single transaction document. But there's one that says -- and it's probably common in virtually every indenture, that words in the singular mean plural, plural means singular.

And I think that's just a general principle that should guide. But there was, you know, a more interesting one, and we can -- you know, if there's any objection to this, you know, then I'm happy to maybe not -- and I -- but you know, we -- in response to the Court's questions, several months ago I think, after Professor Morrison testified, and again, this is not expert opinion.

This is just us countering but we looked at, in the benchmark set of indentures how many had this rule of construction.

MR. KIRPLANI: Objection, Your Honor, this is exactly what Your Honor struck during the hearing, evidentiary hearing so this is just offering expert opinion with no expert.

THE COURT: What's your answer to that?

MR. ROSENBAUM: Oh, we -- at the hearing, we discussed that at closing, right -- we have a thumb drive. Everyone has all the documents. That as a matter, just like -- actually I think it was Mr. Kirpalani talking about indentures going back to 2003, that have, you know, language that isn't the record. And so this is in the record.

THE COURT: Well, let me back up a minute. All of the documents are in the Record.

MR. ROSENBAUM: Yeah.

THE COURT: All of the reference benchmark documents are in the Record. What Mr. Kirpalani talked about was in effect quotations out of some of the benchmark documents. I think you're about to express a legal opinion as to what that means, and I'm going to allow that.

It's not about his expert testimony because we don't allow experts to lecture the Court on law. We do allow the lawyers that are arguing in closing argument to explain how the law works to me. So if what you're about to do is to explain how the law works to me, that's fine, but you don't get to give a testimonial presentation of that to us. But it

may be the objection is a bit premature.

I take it more than you're going to tell me the legal consequence of this. I have to tell you I think that the legal consequence of this indenture saying something different than other indentures is approximately zero because all that I really care about is what this indenture says. And as I said at the time Professor Morrison was speaking -- that you may or may not recall this -- but the only reason you put him up there as a witness so that I would pay attention to what this said.

I got that. But I think paying attention to it is really important. I think differences are, I believe, completely unimportant. But if you want to spend your time on it, go ahead.

MR. ROSENBAUM: No, I don't think I need to. There was a very line of point, but (indiscernible). I will, I will -- this is not material for the analysis.

THE COURT: Okay.

MR. ROSENBAUM: But I do think the inclusion of that rule of construction -- again this is down the line of thinking. But even if you're -- the Court is planning to, as a matter of legal principal and looking to New York law and the Seventh Circuit was probably, other than the Court of Appeals, is the most influential purveyor of what New York law is.

And in fact the Court of Appeals has cited positive -- I do think it's important and in that context I think it's important to, a, talk about that provision in the -- if we could go to the slide for this. It's Slide 14.

(Pause in the proceeding.)

MR. ROSENBAUM: And the orange in -- the orange is simply our attempt to -- if the Court will consider the rules of construction and that this indenture has now provisions, plural, or should be looked at this is (indiscernible).

THE COURT: Can I see this language in context for the rules of construction?

MR. ROSENBAUM: Yes. Let's pull up the indenture. 601-8.

(Pause in the proceeding.)

MR. ROSENBAUM: And it is Section 1.03 -- (indiscernible). It is 50 of 382.

(Pause in the proceeding.)

MR. ROSENBAUM: And the two that we've drawn the Court to and again it says, "unless context otherwise required." So there's a high bar to not apply the rule of construction. It would have to require, right, comments would would have to require. And that takes me back to this *Sharon Steele*, you know, way of looking at indentures and important fundamentals of provisions.

I don't think there's any incredible way to say

that context would require otherwise. And then this rule of construction five, says, "words in the singular, and (indiscernible) singular." And at seven, which is an interesting provision.

It says, "provisions apply to successful events and transactions." Now, our fundamental view here is there's nothing successive about this. There was one unified transaction.

But the -- the JBG, the (indiscernible) a lot of times, a lot of times, in a lot of different ways, trying to convenience the Court that there, -- that there was a series of transaction. I don't think that bears out. But this provision or this rule of construction it says, "provision applies."

So it's clear that it's talking about the provision of the indentures because there's no other way to read the word provisions and it says it in plural. And it says unless the context otherwise require, they apply to successive events and transactions (indiscernible).

I don't see how there's -- there's some debate over the hearing but the series means something different. I'm not sure it matters because I don't think you could possibly say that if you had disagreed with us and say that there were actually, genuine series of anything and it was one transaction (indiscernible). But they weren't successive and

full transactions.

But if now I want to talk about the, you know, the model indenture. Yeah.

(Pause in the proceedings.)

MR. ROSENBAUM: Your Honor, may I approach?

THE COURT: Yes, sir. Thank you.

(Pause in the proceedings.)

MR. ROSENBAUM: So -- and again being up the actual (indiscernible) this is a factor that both parties have cited to an expert and the Debtor's slide deck.

But, the operative -- and I think for context it's also important to know when in times this final indenture came about. This is from 2000.

So there's 24 years since this (indiscernible) indenture. And it -- on Page 46, internal Page 46 --

Chris if you can --

(Pause in the proceedings.)

MR. ROSENBAUM: So this -- again, so going back to 2000 looking at Page 46, under Section 1.03 and there's subsection three that -- if you can go down just to three, Curtis. Successive, Successors.

So first of all in the -- in the title in the italics, it says, "Successive, successors are current." So, yeah, I think that's an important word.

And it continues. "Clause 5 is intended to

underscore the intended application and reapplication of (indiscernible) provisions like the company and trustuee." I don't think that's particularly relevant.

But then it continues. "And operating provision like Section 5.8." And at the time, the model indenture had a 5.01 that talked about release of all or substantially all of (indiscernible) sell of all or substantially all of the (indiscernible).

So if you then turn to 5.1 in the comments it says, "any series of related transactions." So it's tying the rule of construction as essentially a fail safe for that.

And says, "in a context of asset disposition, a transfer or series consideration must be given to a possibility accomplishing pieces in a series of transaction what is specifically precluded and attempted in a single transaction.

And it cites *Sharon Steele* for that proposition. And to be clear, as I mentioned, *Sharon Steele* has been cited as recently as I think it was 2014 by the Court of Appeals in the (indiscernible).

It's been cited many times for many reasons not just for the successor obligations. For example as we noted in (indiscernible). And it is specifically in the context of this -- what I'll call generically -- we put a lot of labels on it.

But you can't do indirectly which maybe prohibited by this or that. Right. And I talked about we have the directly or indirect languages of the indenture. We have had the effect. Those are all ways of clarifying that basic principal.

But this as I mentioned, this indenture goes further and it has a rule of construction that says that. So if -- okay I heard that argument again. This goes back to 2000 and I mentioned *Sharon Steele* which it applies in many ways. But it only -- is if you go back to the rule of construction it says provisions like 501.

And I think there's argument there -- it's an operation -- an operational provision. But if you go back to the time of this indenture or this modeling indenture, now we're looking at Page 24 -- 902.

(Pause in the proceedings.)

MR. ROSENBAUM: The concept of super majority isn't here. I'm going to get to the comments in a moment. This just generically has a list of what our sacred rights.

And I think -- the thing about sacred rights, it doesn't (indiscernible). If any effective holder has to present, then, you know, this (indiscernible) circumvention is the one thing or through two things -- what you (indiscernible) the one thing really isn't read, it's not appreciable.

But again this goes back 24 years. And that's not the current state of the market as we have shown through the benchmark indentures and even through -- if you go to the rule, the comment in this Section 2902 -- and again this goes back to the year 2000 -- and those are on Page 64.

(Pause in the proceedings.)

MR. ROSENBAUM: 902, amendments effecting subordination. That's that. And the ability -- the last sentence that starts with "respect to security holders."

It says, "With respect to security holders, no counter part clause of this section mentioned in the (indiscernible) and commentary." And this is the operative part. "And users' concern is security holders without consent, could someday impede negotiations for restructuring of debt might consider returning to general 66 and two-thirds requirement."

So what we know take all that in and look at our indenture. We had 66 and two-thirds requirement that starts with how the effect of releasing all or substantially all. I'll repeat it. How the effect of releasing all or substantially all the liens.

I think if you could look at this in a context of while indenture evolution of secured bond indentures and they kind of creeping back in, it seems, of 66 and two-thirds. The importance of this rule of construction and the

principals behind it of *Sharon Steele*, I think reflect that 902 in this indenture is an operating provision because it uses very similar language to 501, which is substantially all -- it's a different thing, sale of assets versus release of liens, but think about it.

And those could have devistating effects in different ways the bond holders and I think that's the overriding principal that should be considered. Not what the modeling interest at 24 years, then it's terms reflected that it was essentially sacred rights. It wasn't (indiscernible).

I think as we're seeing here, there's much more opportunity for mischief, as we say it. We don't say it's mischief, but we say for mischief when you have lower than -- less than all than any time you have less than all. And I think it's in that context that this provision.

THE COURT: Let me be sure. You don't disagree that if there was complete clarity in the language that you could have an indenture that says that it is permissible to sell additional securities that would increase the total amount of outstanding securities in a manner that would effect this 66 and two-thirds.

And subsequent to such sale they can all vote. So if it said that, it was sort of clear language. You don't -- that wouldn't violate New York law.

MR. ROSENBAUM: No, no. I think New York law with

respect -- I think if it said it -- and I think we have to spend, you know, a long time trying to visually it says the opposite in multiple ways.

But it said that and of course it would apply to (indiscernible). But it doesn't -- that's why I think -- I think *Sharon Steele*'s --

THE COURT: So I'm not understanding why we're going down the rabbit trail you're taking me because I think I've said I'm going to read this document and do what it says. So unless I get to an ambiguity, why am I doing what you're describing?

MR. ROSENBAUM: It's more for context because there's a long discussion about what the single integrated transaction doctrine in New York. And it simply, the least of it, is that this document without being looking to New York law on the subject, invents itself as a rule of construction, it's an expressed term, with that same concept.

That's the principal that I'm (indiscernible) Court.

THE COURT: But, why would I do that if I haven't -- do you think I have an ambiguous document?

MR. ROSENBAUM: It's not -- I don't think you need to have an -- no I don't think you have an ambiguous document. In fact --

THE COURT: If it's not ambiguous, I don't think I leave the four corners to interpret it. I think the four corners still apply to interpret it. You asked me to interpret it based on principals of -- that are externals that pertain to this kind of a transaction.

But there are externals, the wording of this document.

MR. ROSENBAUM: That maybe where I'm missing, Your Honor. Which is the rules of construction -- and I have (indiscernible).

THE COURT: Right.

MR. ROSENBAUM: All -- this was probably too long a way of trying to --

THE COURT: But you're telling me how to read the rules of construction with reference to some external document from the model -- the model indenture.

MR. ROSENBAUM: I -- when --

THE COURT: And I agree the model indenture has an awful lot of interesting implications if we have something that is ambiguous. But otherwise I don't know why it wouldn't just interpret the supportive to it's written terms.

MR. ROSENBAUM: I think that's --

THE COURT: And not care how it originated.

MR. ROSENBAUM: I think that's the correct way to interpret it. I was probably to long of manner responding

because the argument has been made against action just applying the rule of construction as it's written, was (indiscernible). So I spent a lot of time explaining what the model indenture if you were to look to it. But I don't think you need to because it says, "provisions".

THE COURT: I guess I don't think I can is -- unless somebody can tell me there is an ambiguity here, I don't believe I am allowed to look at the commentary to the model indenture to figure out what this means.

If it is unambiguous I enforce it according to the four corners of the documents.

MR. ROSENBAUM: I think that's fair and we don't know yet. There's been some discussion if the Court finds an ambiguity then what that means. But I don't --

THE COURT: Do you think there's an ambiguity?

MR. ROSENBAUM: Excuse me?

THE COURT: Do you think it's ambiguous?

MR. ROSENBAUM: No, I actually don't. I think that half the effect has a very plain meeting and that's the instruction. I think that adverse in any manner has very clean meaning. I think that dealing with collateral and modification, I think these are very clear terms.

I think though, in directly, is not ambiguous. I think it's very broad. So I don't think that there's any ambiguity in this document. I'm just -- I guess I'm trying

to elucidate all my thoughts of -- about the document and how I think the Court is supposed to review it.

Because indentures, they're not -- every (indiscernible) contract, but I think there's a logic to this. And that's all I am communicating.

So, moving on.

(Pause in the proceedings.)

MR. ROSENBAUM: I want to talk for a moment -- and I'll be brief on this -- without the trading recording and this starts on Page 47 through 48.

I will --

(Pause in the proceedings.)

MR. ROSENBAUM: I won't spend too much time on this because the subject of a lot of testimony and the briefing. But in terms of -- if the Court is looking to intent and I think intent involves really intent now (indiscernible). Even whether there's any point in time where there was those genuine (indiscernible) outstanding of -- think of these trade records tell, you know, it tells a story. And (indiscernible) over things that were done to create a provision record (indiscernible).

And both the trade ticket that was prepared, I think it was on March 18th. So 10 days before the closing. Only in terms of the entire $147 million new money allocation by PIMCO.

So all of what we call phantom notes, all an additional (indiscernible) whatever the easiest term is. But PIMCO recorded them not as the 9.0 percent additional to secured notes. It recorded them very plainly as super senior 10 and half percent bonds.

And I think at least from (indiscernible) of evidence and credibility standpoint, this matters a lot. Particularly to the regulators from -- that actually obligated to keep accurate records. And Mr. Gastar (phonetic) confirmed that this was an accerate reflection of a trade ticket that pre-dated the transaction.

And then if you go to Slide 49, this is actually the trading law. And it's in evidence. And at trial, Mr. Gastar also confirmed that this is the trading log for the all Incora bonds.

And it's dense as small print, but what Your Honor will see, if you examine it as we did, there is not one entry on March 28th, 2022. Not one, of the purchase of the 9.0 the phantom notes, whatever we want to call them. The additional secured notes.

And Mr. Gastar also confirmed that this was accurate. The next exhibit is a (indiscernible) or Silver Point's trade logs which are a little bit different but also I think at least rely, you know, the story of sequencing that we've been hearing because we didn't -- all we said in our

closing brief and all we're staying here is Silver Point's trade log show you (indiscernible) listed before we called the (indiscernible). Right.

And that tells you something because it created logs do go out of their way to have a numerical order.

THE COURT: Hold up.

MR. KIRPALANI: This is exactly the point that I want to object to, which is it does not show any time sequence. It's not in the record their way.

And so I think he is saying that he's implying, at least, that that's exactly what this shows. That it shows a time record. It doesn't show that.

And so that fact is not in the Record. In fact, controverted by information that Mr. Rosenbaum has and I'm just -- I want to make it very clear. I wasn't allowed to refer to stuff that's not in the Record. But he's doing the exact same thing. And I'm (indiscernible).

MR. ROSENBAUM: I'm just showing. I don't think I said time once. Just listed. And I don't think it's controverted by anything. If -- well I don't want to talk about what's not in the Record, but if Silver Point wanted to elicit an explanation from a witness they could have and should have.

All I am showing -- and I'll move pass this -- is that the -- all of the 10.5 notes appear in order with

numbers on the left-hand column before the 9.0. That's simply fact.

Citadel has --

THE COURT: I'm going to overrule the objection because this is in evidence. This does show that. If you're asking me to conclude that those records accurately reflect the sequencing of the time of those trades, I'm not willing to make that conclusion.

This is some evidence is all that it is. Which may or may not support what you're saying.

MR. ROSENBAUM: And Citadel is a little bit different, but there was testimony on this. And if you look at the sequence -- and this is 551. There isn't -- it's not the trading recrod. It's a slap. That a text for (indiscernible) and even the Court have some questions on the subject.

But the -- after there's a communication that the 12.317 million (indiscernible) were received. And these are (indiscernible) so you have to subtract hours.

The next sequence in that is -- and just for a voice of doubt, we won't actually take possession of the new 2.478 of the 2026 notes since those are rolling into the 1L. And the response we should have them for a brief period. But my understanding is we will deliver them to a bank.

And there's no evidence -- this all looks like it's

perfected and Mr. Jordan (phonetic) remember. But the way this is worded it certainly doesn't appear that he had the additional time frame 6 notes at the point at which they recorded. (Indiscernible).

And if you look down -- well.

(Pause in the proceedings.)

MR. ROSENBAUM: So we can go to -- start on Tab 90. But just to orient the Court, we're not advancing as the Court did apply the principal practical construction. All parties (indiscernible) documents were ambiguous.

But I heard that some whiff of attempt to use a couple of emails and I would say out of context statements against us to suggest that we interpreted (indiscernible).

That is anything but true. But maybe that's the way of deflecting because I think there's an overwhelming record. But the other way as to -- and this was mentioned by Mr. Heidlage and also by Mr. Kirpalani -- about the attempt by PIMCO and Silver Point to put a co-op group together that achieved two-thirds.

So if you start on 590, this is Mr. Shah. And if you recall Mr. Shah had testified at his deposition as a designated representative for PIMCO and Silver Point.

And if he stated and disbelieves that his clients understood that in order to effect -- that's an interesting word. In order to effect a transaction involving a super

senior first out position of recorded debt, two-thirds consent is required. His answer was yes.

And then if you -- turn the slide. And this Mr. Dosart to economic motives. His thought process thing testified this was to invest up to but not past the two-thirds, right.

Up to but not past because every dollar you spend has -- you are leaking your own (indiscernible). That was his philosophy. It made sense.

But if there was a fraud that you could do 51 percent then the same logic would apply. And Mr. Dosart admitted that. And Mr. Prager (phonetic) admitted that. That from a pure deal economics standpoint -- and these are economically motivated factors that the most advantageous economic approach would have been to get the 51 percent, not have partners and do the deal.

And they didn't do that until they -- until they had had it because they couldn't do the deal that was economically less advantageous for that.

So that -- if you're just thinking about pure economic motive, and I do think because it wasn't necessarily thinking that today was, you know, stretching (indiscernible), but particularly in a world where, you know, the Court has accepted commercial understanding, but not allowed us to peak behind the curtain.

I think that the commercial understanding as the Court has heard, very, very, very good one.

And the economic actions should be given much more weight as to what they actually understood was the part.

So turning the page -- and this is Mr. Dosart. And we're talking about the co-op ad, right. This is the path the frame thing for the Court that they went down and Citadel and Waddell up until about February 21, were the -- came to a path where they finally learned that there was a blocking commission.

That the Akin group had over one third. And Mr. Dosart spread it admitted that the co-op had, from a pure economic standpoint, was the least attractive. Okay. So they would make the least amount of money during the path that they chose. And regarding the pure economic factor.

And if you continue, right -- and this is Mr. Rashard (phonetic), go to Page 93. Citadel admitted that the need for Citadel to join the PIMCO and Silver Point operation agreement was in order to be part of the two-thirds (indiscernible) transaction. This -- after the fact explanation of relationship and some potential lost over their (indiscernible) is belied by Citadel who's a party of this and (indiscernible).

The other thing is it a counter factual or counter intuitive, but really counter factual is that PIMCO and

Silver Point have two-thirds (indiscernible). They had two-thirds plus maybe a little bit over of the '24 bonds for awhile.

There's this lower issuance and I think by the end of 2021 they had two-thirds. But -- so the record has been clear on this. They were never inviting anyone into the 2024 camp. Over and over again you see Prager and Dostar saying we just want the 2026 -- 2026s.

And the reasons was because they need to get over the two-thirds threshold for the (indiscernible). So if it was anything, but, you know, again we're understanding, as I said, there should be (indiscernible). I think that's worth it.

So, go to Page 94 -- I'm sorry, 94.

(Pause in the proceedings.)

MR. ROSENBAUM: So this is internal and the Court heard testimony on tis. This is a document that's in evidence. So this is on February 9th and he actually started to get paranoid. Just the beginning.

And there's an internal communication between Mr. Prager and Mr. Zimmerman who is this colleague that was involved in this transaction with him and the question is we're over 66 and two-thirds percent? It was the full 20 percent position. We're only talking about '26. And the next slide on the 6th, which is of the same date, quite

revealing.

They think we're exactly at 67.1 percent with that 25 million. It's only violating (indiscernible). And they thought (indiscernible) and with Senator they're at 67.1 this is Mr. Prager admitted, that was of 2026 notes. They thought they were there and felt like they could do the deal, right. The way that the indenture would allow them to put the spring in maturities aside that the way the indenture would allow them to do it. Not the way that it doesn't pull out. And it continues.

In the next slide it's talking about Mr. Dostar and saying he's enough worried -- and I'm Slide 96. He's enough worried where he wants to be a bit over.

So now you have Mr. Dostar not only wanting to get to the threshold of being over (indiscernible). But he's definitely much more stressed than we are about this. He called me every five minutes up to 11:00 o'clock, it says. And then I asked Mr. Prager on cross-examination what that meant.

And that's on Slide 97.

And the question was, "You're impression given you by Mr. Dostart was that he was expressed or worried that there would not be the ability of the co-op members to vote 66 and two-thirds of the 2026 bonds, correct? Yeah."

"He was worried that they would not be able to

(indiscernible) notes for the bonds back. More (indiscernible) two-thirds of the 2026 bonds, right? Yes."

So clearly this was the word that they wouldn't get over the threshold that we said all along was the only way, that they do this. It -- it gets more intense.

Now they're talking about another co-op member, Wadell, in the Slide 98. And Mr. Prager talking about them and we have in brackets co-op members -- needs to rip back their bars. This was a point at which -- and now, Your Honor, the market -- you think about reasonable expectations on what market really believed and what actually the participants here really mean.

The -- I don't think it was a short squeeze. I think that's the term used. But it was certainly an attempt by a variety of market participants to get the bonds in the box, right. And what we learned in this case -- I think Your Honor was quite interested in this -- that if your bonds are our on loan to a dealer, they could sell.

And until they're back in your possession, you can't vote. And the dealers are interested in selling them at the highest price possible unless and until they can. And what was happening is the pause -- because everyone understood the indenture was 9i 6:57:04). That there was this effort in the market to either get your bonds in your box or get ready to try and sell it.

And so that's what's explained here. And when Mr. Prager, contemporaneously not in this expost world where people are just buying the means -- was speaking his mind, he said his co-op partner has the whip back -- he's got to get these things back. We've got to get over that percentage.

That's what's happening. That's what was happening here. And the next slide then reflects when they didn't get there and I think that the Court is going to have to think about this carefully in the context of equities versus interference and, you know, obviously assuming that we prevail on liability.

But I think this is a real inflection point. It's very important. And I heard the Court ask-- I think it was Mr. Heidlage, about what, you know, benefits the company versus, you know, benefits or requirements of PIMCO and Silver Point and whether more participation was more beneficial.

It was. I don't know that I have the testimony here. But I asked Valick (phonetic), who's a board member, and he acknowledge that, I think -- remember if you participated you kept. And the company was in, you know, was concerned about cashflow. And he acknowledged, that the more participants in a transaction, the more picking there would have been.

And in the inverse, more free cashflow for the

company. He admitted that. And so what flips is now PMCo and Silver Point maybe they will internally solve it and I think the documents certainly bare that out and perhaps the PIMCO trading record bare that out.

But they sold it with a rateof return and they rather than do the deal that complies with the indenture, by their own, at least economic factions. But we say, you know, there have been true feelings of -- that's really flip and I think they induce the company to breach.

And there's -- you know, a number of data points that reflect that. First of all --

THE COURT: So why don't we go ahead and break for the night and let you move to -- I think that's a good transition for in the morning. Are you okay with that?

MR. ROSENBAUM: That's fine.

THE COURT: I do want to ask, Mr. Kirpalani, Mr. Heidlage that information regarding the exchange agreement, is that something you're prepared to tell me right now about or is that something you-all want to wait for tomorrow? Because it's going to be something I'm going to worry about all night.

MR. KIRPLANI: Yeah, I was actually worried that you might say something like that. I'm prepared -- it may take me a little while without my notes. I can do it right now. It may take me a little bit of me talking because

(indiscernible).

THE COURT: Can you just tell me, was a fully executed exchange agreement exchanged prior to closing?

MR. KIRPLANI: So let me explain and I can show you tomorrow the documents. Prior --

MR. ROSENBAUM: Do you want to come up here?

MR. KIRPLANI: Yes. And I actually have a couple of responses about that point, but I'm going to give you the one that I think you're most concerned about right now.

So if you look at ECF 710-56. This is the one that Mr. Stein first showed you. Oh yeah --

THE COURT: Hold on, I get this up. Just a minute.

(Pause in the proceedings.)

MR. KIRPALANI: Can you scroll down? Oops I'm sorry. Scroll back up.

So if you look it says, "Please find attached the following documents circulated in escrow pending express release."

So that was the document that was sent at 12:53 a.m. where Milbank sent it to the parties and said it's subject to express release of signatures.

Now I want to show you the next email which was the one that contained the attachments that you looked at.

THE COURT: Okay.

MR. KIRPALANI: So if you can go to 710-49.

(Pause in the proceedings.)

MR. KIRPALANI: This is very large. It's got the four ECF numbers.

(Pause in the proceedings.)

MR. KIRPALANI: If you can scroll down to the first page. Now this is the email that you were directed to. I'm sorry I think -- if you could just go down a little further.

It says, "Please see attached execution." That's just to be clear, it's a key word it's not executed, it's execution word. Now if you scroll down further, further. Okay stop.

So here what it says is this is the email -- this is an email chain. It's going to the various clients from Davis Polk. And Davis Polk is saying, "As a reminder tomorrow morning's closing call will begin at 8:00. You should have all received a calendar event with the dial -- you're welcome to dial in, but you don't need to. At your earliest convenience, please confirm that Davis Polk is authorized to release signature pages on your behalf concurrent with release of all other signature parties here -- parties on tomorrow morning's call."

And so the point is that this a continuation of exactly what we've already seen. Documents were circulated in advance, they were circulated in escrow. That doesn't mean that they were effective. It means that they were going

to be released in accordance with the agreements or the authorization, excuse me, that were made on the closing call -- on the closing call.

And then we walked through that pretty significantly.

THE COURT: Okay. So where's the email that says here's signed documents?

MR. KIRPALANI: So you scroll up. So this is just -- all this is and I think it's important, again, this is just to the clients. That says hey we have now.

THE COURT: It's not their own clients. It's to everybody in the transaction.

MR. KIRPALANI: No, no. It's just to their own clients saying we happen to have these now and we're ready to now be ready close up that's going to happen on the next day.

THE COURT: So they have the parties to the exchange agreement, have executed copies of the exchange agreement by all other parties?

MR. KIRPALANI: In escrow. So they're still not released. The signature pages are not released -- released in the sense of a legal.

THE COURT: No, they got everyone elses signature. They're not holding their own signatures. They have executed documents with everyone elses signature before the closing started?

MR. KIRPALANI: That's my understanding as to how this works. So they do -- they circulate the executed versions. It's not released until there is an agreement to release the signatures. It's in escrow.

And it becomes authorized to release the signatures, te become effective.

(Pause in the proceedings.)

MR. KIRPALANI: And I do have -- I don't know what the --

THE COURT: No, go ahead. We're at the exchange agreement, but go ahead.

MR. KIRPALANI: As you have -- this is a very large ECF.

THE COURT: Right it may be different.

MR. KIRPALANI: I do have one other point that I will want to make on this.

THE COURT: I mean, it can all wait until tomorrow. I just wanted to know that there was an explanation. I'll wait and evaluate the explanation when I hear all of that. I'm not trying to take things out.

I wanted to worry about the problem.

MR. KIRPALANI: Right and so --

THE COURT: And so you're answer in short is that yes our clients fully signed document but it was transmitted to them telling them that it wasn't going to be effect until

signatures were released.

MR. KIRPALANI: Correct. And just to be clear, right, that the email says, you know, we basically done the same, right. We circulated our signatures in escrow and they're not going to be effective --

THE COURT: So up until now, I understood the signature pages were held by Milbank who was then going to release things sequentially. I had not understood up until now that a fully executed copy of the exchange agreement was in Silver Point and PIMCO's hands.

This is the first time I've hard that, I think, in the whole trial. I don't know what to do with that. But that's what I why I wanted to ask about it because that's a major event if, in fact, they had an enforceable agreement in their hands at that point.

MR. KIRPALANI: Right. And I think that's were I want to push back. Because I don't think it's enforceable.

THE COURT: I understand that. I'll let you make all that argument tomorrow. I didn't want to go to sleep tonight --

MR. KIRPALANI: I understand.

THE COURT: -- without giving you that chance.

MR. KIRPALANI: And I do want to preview one other point before we go this evening. I don't think it was teased out and I think it's really critical.

The exchange agreement does not mandate that the Trustee or the issuer can (indiscernible). It doesn't and it's not something that's part of that agreement. There is no agreement at this point in time that the Trustee or the issuer has to enter into a supplemental (indiscernible).

THE COURT: I'm not sure the impact of all that. You can make that argument tomorrow. That's not what I'm going to lose sleep over tonight.

MR. KIRPALANI: Okay.

THE COURT: I was going to lose sleep over the other one.

MR. KIRPALANI: Understood.

THE COURT: I may still lose sleep over it, but it'll be a different issue. Okay.

MR. KIRPALANI: Thank you.

THE COURT: Thank you-all. We'll see you-all in the morning at 9:00.

MR. ROSENBAUM: Just to make sure that Your Honor understands, we do have an agreement about who would go first, who would go second. Both sides would have short opportunity for rebuttal. And so (indiscernible). We would have something to say. And we'll try to keep it as short as possible and I'm sure that's (indiscernible).

THE COURT: As I said, I'm letting you-all control the sequencing of events. And it sounds like the parties are

in agreement on everything. But if we have a dispute, we'll have a dispute and deal with that.

But I'm not going to try to control that.

MR. KIRPALANI: So the other thing -- so there were some arguments at the end that I thought might be touching on tortious interference which I understood we would discuss later.

THE COURT: First of all he's not finished. I've said --

MR. KIRPALANI: No, no that actually was my concern. I just wanted to put this note. We have separate agruments. I specifically didn't find out because my understanding is that we'll deal with it at a different time.

THE COURT: I'll let you-all sort through that. I don't know what your deal is and I just going to try and respect your deal.

Okay. Thank you.

(The parties thank the Court.)

(Proceedings adjourned at 7:10 p.m.)

* * * * *

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

/S./ MARY D. HENRY

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JUDICIAL TRANSCRIBERS OF TEXAS, LLC

JTT TRANSCRIPT #68787

DATE FILED: JUNE 29, 2024

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS

In Re:	Wesco Aircraft Holdings, Inc. and Official Committee Of Unsecured Creditors Debtor	Case No.: 23−90611 Chapter: 11

Wesco Aircraft Holdings, Inc.,
Plaintiff(s),
vs.
SSD Investments Ltd.,
Defendant(s).

Adversary No.: 23−03091

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